

NO. 43020-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY DEPUTY

STATE OF WASHINGTON,
Respondent,

v.

EMMETT ARTHUR MEADOWS,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable John R. Hickman

BRIEF OF APPELLANT

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pm 10/1/12

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict appellant of domestic violence court order violation as charged in count VII.

2. The trial court erred in sentencing appellant to a total term of confinement and community custody which exceeds the statutory maximum in violation of RCW 9.94A.701(9).

3. The trial court erred in ordering appellant to undergo a substance abuse evaluation and treatment as a condition of community custody.

4. The judgment and sentence contains a provision that erroneously prohibits appellant from contacting the victims.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Must appellant's conviction of domestic violence court order violation as charged in count VII be reversed and dismissed where there was insufficient evidence that the alleged victim was a family or household member?

2. Is a remand required because the trial court erred in imposing a sentence where the total term of confinement and community custody exceeds the statutory maximum in violation of RCW 9.94A.701(9) which requires the court to reduce the term of community custody whenever an offender's standard range term of confinement in

combination with the term of community custody exceeds the statutory maximum for the crime?

3. Did the trial court err in ordering appellant to undergo a substance abuse evaluation and treatment as a condition of community custody where substance abuse did not contribute to the crime?

4. Must the provision in the Judgment and Sentence prohibiting appellant from contacting the victims be stricken where the trial court explicitly declined to enter a no-contact order at sentencing?

C. STATEMENT OF THE CASE¹

The State filed an information on April 25, 2011, an amended information on June 7, 2011, and a second amended information on September 15, 2011. CP 1-11, 15-21. In its second amended information, the State charged appellant, Emmett Arthur Meadows, with seven counts of domestic violence court order violation and one count of violation of a court order by committing an assault or in the alternative domestic violence court order violation. CP 15-21.

The case went to a jury trial before the Honorable John R. Hickman. The State called deputies Buchanan, Laiuppa, and Latour as

¹ There are five volumes of verbatim report of proceedings: 1RP - 11/07/11, 11/08/11; 2RP - 11/09/11; 3RP - 11/14/11; 4RP - 11/15/11; 5RP - 11/16/11, 11/17/11, 12/09/11, 01/13/12. In accordance with RAP 10.3(4), the Statement of the Case contains the facts and procedure relevant to the issues presented for review.

witnesses and Susan Landree and D.G., the complaining witnesses. 2RP 88-199; 3RP 218-257; 4RP 329-50. Emmett Meadows testified in his own defense and called Officer Wilson and Angela Bailey as witnesses. 3RP 259-320; 4RP 368-74. Meadows stipulated that he was served with, and therefore knew of, the protection order. 3RP 257-58.

On November 17, 2011, the jury found Meadows guilty of seven counts of domestic violence court order violation, not guilty of one count of domestic violence court order violation, and could not reach a unanimous special verdict on the alternative means of assault. CP 114-129; 5RP 491-96. The court sentenced Meadows to 60 months in confinement and 12 months of community custody with conditions. CP 138-52; 5RP 518-22.

Meadows filed a timely notice of appeal. CP 153-70.

D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MEADOWS OF DOMESTIC VIOLENCE COURT ORDER VIOLATION AS CHARGED IN COUNT VII.

Reversal and dismissal of Meadows's conviction of domestic violence court order violation as charged in count VII is required because there was insufficient evidence that the alleged victim was a family or household member.

In a criminal prosecution, due process requires that the State prove every element necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. XIV; Wash. Const. art. I, section 3. “[T]he reasonable-doubt standard is indispensable, for it ‘impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.’ ” State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995) (quoting In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (citing State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). A claim of insufficiency admits the truth of the State’s evidence and all inferences that can reasonably be drawn from it. DeVries, 149 Wn.2d at 849.

Dismissal is required following reversal for insufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (the double jeopardy clause of the Fifth Amendment protects against a second prosecution for the same offense after reversal for insufficient evidence) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L.

Ed. 2d 656 (1996), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989)).

“Domestic violence” includes crimes committed by one family or household member against another. RCW 10.99.020(5). “Family or household members” is defined under RCW 26.50.010(2):

[S]pouses, domestic partners, former spouses, former domestic partners, persons who have a child in common regardless of whether they have been married or have lived together at any time, adult persons related by blood or marriage, adult persons who are presently residing together or who have resided together in the past, persons sixteen years of age or older who are presently residing together or who have resided together in the past and who have or have had a dating relationship, persons sixteen years of age or older with whom a person sixteen years of age or older has or has had a dating relationship, and persons who have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

The State charged Meadows with domestic violence court order violation, alleging that Meadows willfully had contact with D.G. when such conduct was prohibited by a court order. CP 18-19 (Count VII). The jury found Meadows guilty “of the crime of Domestic Violence Court Order Violation as charged in Count VII.”² CP 127.

The record establishes that there was insufficient evidence that D.G. was a family or household member. Susan Landree testified that she

² The Judgment and Sentence incorrectly indicates that Meadows was convicted of “Court Order Violation” in count VII. CP 139-40.

has a son named D.G. who is 15 years old and she has no children with Meadows. 2RP 124, 126. Meadows testified that he had no children with Landree. 3RP 275. D.G. testified that he is 15 years old and he knew Meadows because his mother was dating him and he lived with them. 2RP 184,187-88. There was no testimony that Meadows and D.G. had a biological or legal parent-child relationship.

Meadows's conviction of domestic violence court order violation must be reversed and dismissed because the evidence was insufficient to prove beyond a reasonable doubt that he and D.G. were family or household members.

2. A REMAND IS REQUIRED BECAUSE THE TRIAL COURT MADE SEVERAL SENTENCING ERRORS.

- a. The trial court erred by imposing a sentence that exceeds the statutory maximum in violation of RCW 9.94A.701(9).

RCW 9.94A.701(9) provides in relevant part:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime.

In State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012), the Washington Supreme Court held that for defendants sentenced after RCW

9.94A.701(9) became effective, the trial court must reduce the term of community custody to bring the total term within the statutory maximum. Boyd, 174 Wn.2d at 473. The Court recognized that in In re Personal Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009), it held that when the trial court imposes an aggregate term of confinement and community custody that potentially exceeds the statutory maximum, it must include a notation clarifying that the total term may not exceed the statutory maximum. The Court pointed out that it “also noted the then-recent passage of RCW 9.94A.701(9) and indicated that once the statute becomes effective it would likely supersede our decision.” Boyd, 174 Wn.2d at 472. Citing State v. Franklin, 172 Wn.2d 831, 263 P.3d 585 (2011), the Court reaffirmed that the “Brooks notation” procedure no longer complies with statutory requirements. Boyd, 174 Wn.2d at 472.

The Court concluded that when a trial court erroneously imposes a total term of confinement and community custody in excess of the statutory maximum, notwithstanding a Brooks notation, a remand is required for the trial court to either amend the community custody term or resentence the defendant consistent with RCW 9.94A.701(9). Boyd, 174 Wn.2d at 473.

Here, Meadows was sentenced on January 13, 2012, after the statute became effective on July 26, 2009. See Laws of 2009, ch. 375,

section 5. Meadows's standard range was 60 months with a statutory maximum of five years (60 months). CP 142. The trial court sentenced Meadows to 60 months in confinement and 12 months of community custody. CP 145-46. The total term of 72 months exceeds the statutory maximum in violation of RCW 9.94A.701(9). Although the Judgment and Sentence provides that the total term of confinement plus the term of community custody shall not exceed the statutory maximum, under Boyd, such a notation is no longer sufficient. Pursuant to the holding in Boyd, a remand is required for the trial court to correct its error by either amending the community custody term or resentencing Meadows in accordance with RCW 9.94A.701(9).

- b. The trial court erred in ordering Meadows to undergo a substance abuse evaluation and treatment as a condition of community custody.

RCW 9.94A.607(1) governs the authority of a court to order chemical dependency/substance abuse treatment:

Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.

At sentencing, the State recommended a substance abuse evaluation and treatment, “I think if the Court recalls the testimony in this case, there were indications that the defendant does have a substance abuse problem, and his criminal history bears that out as well.” 5RP 512. The court ordered a “substance abuse assessment when he’s released.” 5RP 519. The Judgment and Sentence requires a substance abuse evaluation and treatment. CP 144, 147.

The trial court did not find that Meadows suffered from a chemical dependency/substance abuse that contributed to the offense of domestic violence court order violation. Furthermore, nothing in the record would support any such finding. Susan Landree claimed that Meadows told her he would “stop with all the drugs,” but she did not assert that drugs contributed to the court order violations. 2RP 158-59. Meadows testified that he and Landree never argued about drug use. 3RP 314. No presentence investigation was conducted.

Remand is required to strike the condition and amend the Judgment and Sentence because the court had no authority to order a substance abuse evaluation and treatment where the court did not find, and there was no evidence, that substance abuse contributed to the offense.

- c. The Judgment and Sentence contains a provision that erroneously prohibits appellant from contacting the victims.

At sentencing, the State recommended a five-year no-contact order prohibiting contact with Susan Landree and D.G. 5RP 513. The court declined to enter a no-contact order, stating that Landree and Meadows are “destined to continue to have contact with each other” and “there was nothing in the trial that would indicate” that Meadows was a threat to D.G. 5RP 519-20. The prosecutor told the court that she would prepare an order for the court to terminate the previous no-contact order. 5RP 521-22. Contrary to the court’s ruling, the Judgment and Sentence contains provisions prohibiting Meadows from having contact with Susan Landree and D.G. CP 147, 151.

Given the trial court’s explicit refusal to enter a no-contact order, the provisions in the Judgment and Sentence are clearly erroneous. Consequently, remand is required for the court to amend the Judgment and Sentence.

E. CONCLUSION

For the reasons stated, this Court should reverse and dismiss Meadows's conviction of domestic violence court order violation as charged in count VII and remand to the trial court.

DATED this 1st day of October, 2012.

Respectfully submitted,

A handwritten signature in cursive script that reads "Valerie Marushige". The signature is written in black ink and is positioned above the printed name.

VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Emmett Arthur Meadows

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Emmett Arthur Meadows, DOC # 976111, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Washington 98520.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this October 1, 2012 in Kent, Washington.


VALERIE MARUSHIGE

Attorney at Law
WSBA No. 25851