

No. 47873-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

GARY NOBLE

BRIEF OF APPELLANT

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A Assignments of Error

Assignments of Error

1. Mr. Noble's conviction for Possession of Methamphetamine must be dismissed without prejudice.
2. The trial court erred by refusing Mr. Noble's proffered defense of abandonment for the offense of burglary.
3. Counsel was ineffective for failing to request a jury instruction on abandonment for the charge of Criminal Trespass in the First Degree.

Issues Pertaining to Assignments of Error

1. Must Mr. Noble's conviction for Possession of Methamphetamine be dismissed without prejudice when the last-in-time filed Information fails to charge him with that offense?
2. Did the trial court err by refusing Mr. Noble's proffered defense of abandonment for the offense of burglary?
3. Was defense counsel was ineffective for failing to request a jury instruction on abandonment for the offense of Criminal Trespass in the First Degree?

B. Statement of Facts

Procedural History

Gary Noble was charged in the original Information with Second Degree Burglary and Possession of Methamphetamine. CP, 1. Later, the

State filed a First Amended Information charging him with Residential Burglary, Possession of Methamphetamine, and Possession of Stolen Property in the Third Degree. CP, 7.

The case was called for trial on July 7, 2015. RP, 1. At that time, Mr. Noble announced his intent to plead guilty to the Possession of Methamphetamine charge. RP, 68. The Court went over a Statement of Defendant on Plea of Guilty CP, 13; RP, 71-75. The Statement says he is pleading guilty to Count 2 of the First Amended Information. CP, 13.

After going through the normal plea colloquy, the court found him guilty of Possession of Methamphetamine. RP, 74. At some point later that day, the State filed a Second Amended Information charging Residential Burglary and Possession of Stolen Property in the Third Degree. CP, 10. It does not appear Mr. Noble was ever arraigned on the Second Amended Information

The major disagreement at trial revolved around the use of the word “abandonment.” The State brought a motion to preclude any argument that the property was abandoned. CP, 24, paragraph 11. Defense counsel strenuously objected, arguing that abandonment is a defense to trespassing. RP, 94. The parties noted there is a split of authority in the Court of Appeals on this issue. RP, 93. See *State v Olson*, *infra*, *State v Jensen*, *infra*, *State v J P.*, *infra*. The Court concluded that

because *Jensen* is a Division II case and Kitsap County is in Division II, the Court was required to follow it. RP, 95. The Court prohibited defense counsel from using the word “abandonment” during its presentation of the case. RP, 99.

After the evidentiary portion of the trial, the parties discussed the jury instructions. Defense counsel requested the Court instruct on the lesser included offense of Criminal Trespass in the First Degree. CP, 26. Defense counsel did not request a jury instruction on abandonment. The prosecutor did not object to the lesser included instruction and the trial court instructed on the lesser included offense. RP, 520.

The jury acquitted Mr. Noble of the offense of Residential Burglary, but convicted him of the lesser included offense of Criminal Trespass in the First Degree. RP, 574. They also convicted him of Possession of Stolen Property in the Third Degree. RP, 574.

The Judgment and Sentence reads that Mr. Noble was convicted by plea on Count II (Possession of Methamphetamine) and by jury verdict of Criminal Trespass in the First Degree and Possession of Stolen Property in the Third Degree. CP, 60. The Court imposed 24 months on Count II and 360 each on the two misdemeanor counts. The misdemeanor counts were to be concurrent with each other but consecutive to the felony for a total of 36 months. CP, 62.

A timely Notice of Appeal was filed CP, 155.

Substantive Facts

After his neighbor passed away leaving her property to her son, Ruban Allan purchased the property at 5209 5th Street in Bremerton. RP, 270-71. His intent was to fix the property up and eventually sell it, but the work had been proceeding very slowly. RP, 271. Although he had owned the property for five or six years, it still needed a lot of work. RP, 271-72. The property had remained vacant since the passing of the neighbor. RP, 272. The water was shut off. RP, 277. The gas stove was not hooked up. RP, 280. The carpet had been removed. RP, 272. The property needed ventilation because animals had not been allowed to leave the property by the previous owner. RP, 272. The property had no couch, coffee table, bed, or pictures on the wall. RP, 301-02. The grass was about eighteen inches tall, and although some of the grass may have been mowed at some point, it had been “a while” since the complete yard had been mowed. RP, 303, 330.

One day, possibly in May of 2015¹ Mr. Allan received a call from a neighbor that someone was on his property. RP, 280. Mr. Allan responded and found Mr. Noble. RP, 288, 291. Mr. Allan asked him why he was there and Mr. Noble said he was chasing away a couple of teenage

¹ The exact date of the incident was not established at trial. RP, 279, 343

girls. RP, 288. Mr. Noble then walked away carrying a bundle. RP, 299
After Mr. Noble walked away, Mr. Allan entered the property. Inside, he
found that curtains had been nailed up to the wall and a makeshift bed was
on the floor. RP, 291.

Mr. Allan contacted law enforcement. Officer Trevor Donnelly
responded. RP, 343. He contacted Mr. Allan who gave him a description
of the person and a general direction where he went. RP, 345. Officer
Donnelly then tried to locate the suspect, which he did within
approximately two minutes. RP, 346. Mr. Noble was carrying a variety of
objects, which were inventoried by Officer Donnelly. RP, 351-52. Among
the items were a variety of metal and rusted hand tools. RP, 354. Mr.
Allan later identified the tools as belonging to him. RP, 297.

Mr. Noble testified on his own behalf. He admitted entering the
property without permission. RP, 448-49. He described the property as a
“very dilapidated, condemned place. It smelled bad. There was no
carpets. There was no furniture. There was an old fridge that was not
plugged in in the center of what would have been the living room. . . No
running water, no – I assume the place, like I said, was condemned.” RP,
433.

C. Argument

1. Mr. Noble's conviction for Possession of Methamphetamine must be dismissed without prejudice.

Mr. Noble pleaded guilty to Possession of Methamphetamine as charged in the First Amended Information. The Statement of Defendant on Plea of Guilty references the First Amended Information by saying the elements of the offense are "as contained in the First ~~Second~~ Amended Information charged in Superior Court." CP, 13. He was sentenced to 24 months for this offense. For reasons that are left unexplained in the record, however, the State subsequently filed a Second Amended Information deleting the Possession of Methamphetamine charge. It is unclear when the Second Amended Information was filed as both the First Amended Information and the Second Amended Information are date stamped July 7, 2015. The Second Amended Information also contains an interesting cross out, as it is captioned "~~First~~ Second Amended Information." As it stands, therefore, Mr. Noble was sentenced for a charge that was deleted by the last-in-time filed Information. The issue is what, if any, remedy should be afforded this obvious error.

Washington has a handful of cases addressing this issue and there are two basic approaches. All of the cases, like Mr. Nobles' case, were argued for the first time on appeal after the anomaly was found,

presumably by appellate counsel. Regardless of which approach is employed, however, the remedy is the same: dismissal without prejudice.

The first approach taken was first addressed in *State v. Corrado*, 78 Wn App. 612, 898 P.2d 860 (1995). In *Corrado*, the State dismissed an attempted second degree murder charge after it could not locate a material witness. It then returned the defendant to court for arraignment after the witness was located. A new Information was not filed, however. The Court of Appeals concluded that the failure to refile the Information deprived the trial court of subject matter jurisdiction. The Court ordered the defendant released unless a new Information was promptly filed.

The *Corrado* approach has been criticized for its improper invocation of subject matter jurisdiction. In *State v. Franks*, 105 Wn App. 950, 22 P.3d 269 (2001) the Information charged Malia Franks with robbery. But at trial, the evidence was that the robbery was completed by her sister Dominique Franks. The Court of Appeals criticized the *Corrado* discussion of subject matter jurisdiction. Nevertheless, the Court held that the Information was fatally defective under *State v. Kjosvik*, 117 Wn.2d 93, 812 P.2d 86 (1991). In *Kjosvik*, the Court held that the Information must include all the essential elements of the charged offense. The Court in *Franks* held that the Information charged Malia when the evidence

showed Dominique committed the robbery. The remedy was dismissal without prejudice.

In *State v Barnes*, 146 Wn. 2d 74, 43 P.3d 490 (2002), the Washington Supreme Court reviewed a third fact pattern that simultaneously agreed with, but distinguished, *Corrado*. In *Barnes*, defendant was charged with third degree assault and the prosecutor wanted to file an amended information charging a second count, resisting arrest. The trial judge had an “informal copy” of the Amended Information, which he used to arraign the defendant. For some reason, the Amended Information was not filed with the Court. The defendant argued he was improperly convicted of resisting arrest.

The Court held that the *Corrado* Court had been “correct” for invoking subject matter jurisdiction under the facts of that case, but cautioned against using subject matter jurisdiction in other contexts. Unlike in *Corrado*, where the original Information was dismissed, in *Barnes*, the prosecutor attempted to amend the Information by adding a second count. The Court held that the trial court’s subject matter jurisdiction was properly invoked by the filing of the original Information and the non-filing of the Amended Information did not divest the trial court of subject matter jurisdiction. The Court then concluded the trial

court properly had jurisdiction to hear both charges. In the discussion, the Court also cites *State v Franks* with approval.

While each of these cases is factually distinguishable from Mr. Noble's case, they do provide the analytical framework for addressing it. First, Mr. Noble was originally charged with Second Degree Burglary and Possession of Methamphetamine. The cause number was never dismissed, so the trial court was never divested of subject matter jurisdiction. Later, the State filed a First Amended Information charging him with Residential Burglary, Possession of Methamphetamine, and Possession of Stolen Property in the Third Degree. Mr. Noble pleaded not guilty to the first and third charges, but guilty to the second charge. Had that remained the status quo, there would be no problem. But for reasons that are unclear from the record, the State filed a Second Amended Information charging him with Residential Burglary and Possession of Stolen Property in the Third Degree. At sentencing, the Court sentenced him as if the Second Amended Information did not exist.

Of the three relevant cases, *Franks* is the most analogous. While the trial court retained subject matter jurisdiction, it sentenced him for an offense for which the essential elements were not charged. In fact, none of the elements were charged. The remedy is dismissal without prejudice.

2. The trial court erred by refusing Mr. Noble's proffered defense of abandonment for the offense of burglary.

There are three cases in Washington, one in each Division, discussing whether abandonment is a defense to burglary. The first case, *State v. J.P.*, 130 Wn.App. 887, 125 P.3d 215 (2005) concluded it is, while the other two cases concluded otherwise. *State v. Olson*, 182 Wn.App. 362, 329 P.3d 121 (2014); *State v. Jensen*, 149 Wn.App. 393, 203 P.3d 393 (2009). It does not appear any of these cases were reviewed by the Supreme Court, where this will need to be ultimately resolved.

The *Olson* and *Jensen* cases concentrated on the statutory language. RCW 9A.52.090(1) reads: "In any prosecution under RCW 9A.52.070 and RCW 9A.52.080, it is a defense that a building involved in an offense under RCW 9A.52.070 was abandoned." The *Olson* and *Jensen* Courts noted that the defense is expressly limited to the charge of trespass and, therefore, concluded it was inapplicable to burglary. The Court in *J.P.* disagreed. It said:

RCW 9A.52.090(1) provides that it is a defense to criminal trespass if "[a] building involved in an offense under RCW 9A.52.070 was abandoned." The State properly points out that RCW 9A.52.090 is clearly limited to the crime of criminal trespass by its terms. However, in *City of Bremerton v. Widell*, 146 Wn.2d 561, 570, 51 P.3d 733 (2002), the Washington Supreme Court held:

Statutory defenses to criminal trespass negate the unlawful presence element of criminal trespass and are therefore not affirmative defenses. Further, the burden is on the State to prove the absence of the defense when a defendant asserts his or her entry was permissible ... because that defense “negates the requirement for criminal trespass that the entry be unlawful.” Thus, once a defendant has offered some evidence that his or her entry was permissible [,] the State bears the burden to prove beyond a reasonable doubt that the defendant lacked license to enter.

(Citations omitted.)

Criminal trespass is a lesser included offense of burglary. *State v. Soto*, 45 Wn.App. 839, 841, 727 P.2d 999 (1986). Criminal trespass occurs when a person “knowingly enters or remains unlawfully” in a building. RCW 9A.52.070. Residential burglary is a criminal trespass with the added element of intent to commit a crime against a person or property therein. RCW 9A.52.025. J.P. argues that because the unlawful entry or presence component of the burglary statute is the same as the unlawful entry or presence aspect of the criminal trespass statute it must be equally negated by the criminal trespass defenses. J.P. persuades us that *Widell* permits him to assert an abandonment defense to residential burglary.

JP at 895. The J.P. Court’s analysis is persuasive. Because a person may not be convicted of a crime for unlawfully entering an abandoned building, it stands to reason they may not be convicted of a crime for unlawfully entering an abandoned building with the intent to commit a crime therein.

The facts of Mr. Noble's case illustrate the problem. The trial court prohibited Mr. Noble from arguing the building was abandoned, but then instructed the jury on the lesser included offense of trespass. The jury acquitted of burglary, but convicted of trespass. Had the jury received a proper instruction, they would have known that entry into an abandoned building is not a criminal offense. This Court should reconsider its decision in *Jensen* and overrule it.

3. Counsel was ineffective for failing to request a jury instruction on abandonment for the offense of Criminal Trespass in the First Degree.

The legal standard when a defendant claims ineffective assistance of counsel is well established. The defendant must show that counsel's performance fell below an objective standard and that he or she was prejudiced by the deficient performance. *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

In both *Olson* and *Jensen*, defense counsel asked for and received jury instructions for the lesser included offense of criminal trespass. But they also asked for and received instructions on abandonment to the lesser offenses. Mr. Noble's counsel requested and received a jury instruction for the lesser included offense of criminal trespass, but he did not request an instruction for abandonment to the lesser offense. This constituted deficient performance.

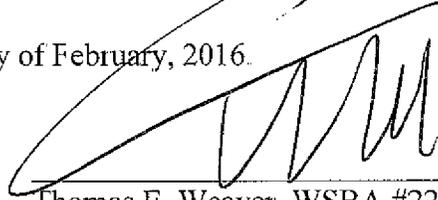
It is possible defense counsel was intimidated by the trial court's strong admonition not to even utter the word "abandonment" during the trial. RP, 99. But that admonition was made at the beginning of trial and not during the jury instruction colloquy. When the trial court instructed counsel not to use the word "abandonment," the court had yet to hear the evidence and was not aware that defense counsel would be requesting a lesser included instruction. Once the decision was made to include the lesser included instruction, the issue was ripe to reconsider the issue of abandonment. In any event, intimidation by the trial judge is not a legitimate trial tactic.

Mr. Noble was also prejudiced by the failure to ask for the lesser included. There was ample evidence in this record that the building was abandoned. Mr. Noble testified the building was a "very dilapidated, condemned place." RP, 433. If believed, the jury could have acquitted him entirely of both the burglary and the trespass charges.

D. Conclusion

The possession of methamphetamine charge should be dismissed without prejudice. The charge of criminal trespass in the first degree should be reversed and remanded for a new trial

DATED this 18th day of February, 2016.

A handwritten signature in black ink, appearing to read 'T. Weaver', written over a horizontal line.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

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

STATE OF WASHINGTON,) Court of Appeals No.: 47873-1-II
)
Plaintiff/Respondent,) DECLARATION OF SERVICE
)
vs.)
)
GARY NOBLE,)
)
Defendant/Appellant.)

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On February 18, 2016, I e-filed the Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated said document to be sent to the Kitsap County Prosecuting Attorney's Office via email to: kcpa@co.kitsap.wa.us through the Court of Appeals transmittal system.

On February 18, 2016, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Brief of Appellant to the defendant:

Gary Noble
Coyote Ridge Corrections Center
1301 N Ephrata Ave • PO Box 769
Connell, WA 99326

////

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

3 DATED: February 18, 2016, at Bremerton, Washington.

4 
5 _____
6 Alisha Freeman

WEAVER LAW FIRM

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