

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 
DEPUTY

FORM STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

STATE OF WASHINGTON)
)
Respondent,)
)
V.)
)
Steven Pemberton)
)
)
Appellant.)

No. 52468-6-11

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, Steven Pemberton, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

Brady Violation- Key evidence was not received prior to trial, Mr. Pimentel admits he saw text message exhibits at trial for the first time. In Brady, the Supreme Court held that the due process clause under the constitution requires the prosecution to turn over all-exculpatory evidence-i.e. evidence favorable to the defendant. It states in my PRP, which now part of my direct appeal is, that I did not receive evidence that admitted at the trial until 90 days after my trial was over. Also documented in the verbatim report of proceedings of August 20, 2018 on pages 73-74 that my attorney admits that he had only seen these exhibits at trial. This clearly violates the federal rules of evidence, but CRR 4.7(a)(4) the failure to disclose this evidence to my attorney may have affected my entire case, cross-examining witnesses, opening and closing arguments, and motion for dismissal were all effected due to the neglect of the state.

Additional Ground 2

6th amendment violation- right to choose and control my own defense. I made it very clear from the moment I was arrested that I felt entrapped. My attorney was aware of this and chose not to entertain it. I would like to show how the courts violated my 6th amendment right to control my defense. (RP trial 1178-181) here the courts failed to allow me to bring supporting information that would have proven that I thought the factious victim was over 18 years old. I was on an adult chat forum which you have to admit to being over 18 years old to be on. I received photos of the women I was chatting with and the photos I received were of adult women over 18 years old. Although exhibit 4 shows that the detective sent a message saying they were 13 years old, exhibits 5 and 6 prove that that specific message was never received on my phone. I believed the woman I was talking to was an adult. Mr. Pimentel admits to not using the defense I was asking for.

Additional Ground 3

State Failed to provide sufficient evidence to support Count 1 Attempted Rape of a Child

- a. Next I would like to show you that the state failed to provide sufficient evidence to support Count 1 Attempted Rape of a Child in the Second Degree. To provide criminal attempt the state must prove that the defendant has specific intent to commit the attempted offense {RCW 9A.28.020 (1)}. Therefore, the state must prove that I intended to complete the crime AND that I took a substantial step towards its completion.
- b.

Additional Ground 4

State failed to prove I took a substantial step towards the crime

- a. The state argued that driving to Bremerton was the step needed to prove I made a substantial step. RP trial 497. They also provided a power point presentation in closing arguments about me driving to Bremerton.
- b. I am arguing that the state failed to prove I took a substantial step. Travel is not a sine quo non, meaning an indispensable condition or thing, something on which something else necessarily depends. A substantial step is some overt act adapted to, approximating, in which in the ordinary and likely course of things will result in the commission of the particular crime.”(Quoting United States V. Gladish, 536 F.3d 646, 648 7th Cir 208) Generally, a defendant takes a substantial step when his actions make it reasonably clear that had the defendant not been interrupted or made a mistake he would have completed the crime” Sanchez, 615F3d at 844(quoting Gladish, 536.F.3d at 648).
- c. The state failed to prove intent or show that I took a substantial step. In this type of case, police ask for the accused to bring specific items to prove a substantial step was fulfilled (i.e. bring condoms, teddy bears, alcohol, money etc...). It has been documented that I had none of those items. Not only did I recommend a public place, but I also had nothing on my person that shows I was intending to complete the crime. If I had planned on following through with the actions I would have had the items requested by the detective to do so. I also was arrested 22 blocks away from the address given, driving away from the sting operation.

Additional Ground 5

Next I want to challenge the validity of count 3 communicating with a minor for immoral purposes. To be convicted of this a defendant must believe that the other person was a minor

Lastly I would like to address the outrageous police misconduct in this case.

Issue Presented

- A. Law enforcement violated my Fifth and Fourteenth Amendment to the United States Constitution due process right to fundamental fairness with its illegal actions and illegal tactics, which also violates public policy and Washington State Constitution statutes.

Statement of Case

- B. Public policy allows law enforcement to be deceitful and misleading and even violate the law in order to infiltrate ongoing criminal activity initiated by an accused after the accused formulated a criminal plan. That is not what happened in this case.

Law enforcement are not allowed to fabricate a crime out of thin air and prosecute someone for getting caught in their net. The primary focus of this inquiry is to focus on law enforcements actions and not the accused.

Here, law enforcement placed an illegal ad on Craigslist in the casual encounters section, which is a legal adult dating forum which requires those who use it to verify they are over the age of 18. To participate in both posting and responding to ads placed on this forum you must acknowledge you are of legal age. Law enforcement also provided pictures of women over 18 years old and also talk in an adult manner that no 13 year old talk.

After the undercover detective is ignored in conversation she continues in a persistent manner that is sexually explicit and sexually persuasive. The state refuses to look into law enforcements actions and chooses to focus on the accused by referring to the defendant 27 times in its response to my previous motion. Law enforcement are not allowed to create criminal activity with no known criminal intent of the accused. What law enforcement chose to do in this case was illegal and a violation of my fifth and fourteenth amendment right to due process and to fundamental fairness.

Argument

In State V. Lively, the court listed 5 factors the court may consider when deciding on any outrageous misconduct claim

1. Whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity.
2. Whether the defendant's reluctance to commit a crime is overcome by pleas of sympathy, promises of excessive profits, or persistent solicitations.
3. Whether the government controls the criminal activity or simply allows for the criminal activity to occur.
4. Whether the police motive was to prevent crime or protect the public, and
5. Whether the government conduct itself amounted to criminal activity or conduct repugnant to a sense of justice.

- A. First Factor (Focusing on States behavior) The State's main argument is Detective Rodriguez's testimony on how he modeled the undercover operation after real cases he has investigated. So focusing on law enforcements actions Detective Rodriguez took illegal activity that he has previously investigated and mirrored it on a legal dating site for adults. This strengthens my argument of law enforcement instigating a crime by using illegal tactics. Discussing the actions as illegal and placing

them online. This is further instigated by the police when both the prosecutor and Mr. Pimentel made clear on the record that according to my phone I never received the message of their age. Likewise to Lively, Law enforcements generic posting on a lawful adult dating website casts a wide net that was not tailored to catch existing criminal activity. I was not targeted because law enforcement learned of my involvement in criminal activity. Law enforcement initiated the crime by posting a legal ad on a legal adult dating site that you must be over 18 years old to be on and produced pictures of women over 18. First factor weigh in favor of the defendant.

B. Second Factor (Focusing on the States Behavior)

Mrs. Schnepf erroneously states the defendant met up with the undercover detective on the first day they were messaging each other.(attached is the cell phone conversation from the detectives phone that proves her wrong and there is the text about age that the defendant never saw and was not on his phone) Mrs. Schnepf asserts the undercover states she is 13 early on. That message was not on my phone. She also states the undercover tries to end communication with me by stating "gotcha have a nice day" (referring to attached documents) that message was sent by undercover at 829pm on 10-12-17. Prior to that, I message I am not trying to catch criminal charges. Back tracking 6 hours to 215pm the undercover tries to prostitute herself out. At 220pm suggests meeting and solicits herself again. I stop texting at 307pm, I am done with the prostitution attempts. They are aware of this but after 5 hours they start sexually soliciting me again. At 812pm they start to get graphically sexual. Six time they approach me sexually, try to prostitute themselves and are ignored every time, all before they say "have a nice day" Factor two weighs in favor of the defendant. (*see attached)

C. Factor Three (Focusing on States Behavior)

The government controlled the criminal activity and Mrs. Schnepf says so in her own words stating, "An undercover detective proactively placed an online as in the casual encounters of Craigslist."

Proactively "Controlling a situation by making things happen" With that factor three weighs in favor of the defendant.

D. Factor Four (Focusing on the States Behavior)

The governments conduct did not facilitate discovery of ongoing illicit activity. It serves no justifying social objective. Rather it puts law enforcement authorities in the position of creating new crime for the sake of bringing charges against a person they had persuaded to participate in wrong doing. State V. Twigg 588 F.2d at 379. Factor four in favor of the defendant.

E. Factor Five (Focusing on the States Behavior)

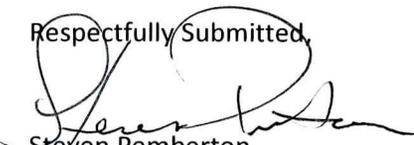
Governments conduct amounted to criminal activity. By soliciting a customer for a sexually explicit act of a minor and engaging in other conduct designed to facilitate a sexually explicit act of a minor, the detective attempted to commit promoting commercial sexual abuse of a minor R.C.W 9.688A.101 , RCW 9A.28.020. As the state recognizes there is no defense for impossibility because the undercover was not actually a minor. Factor five in favor of defendant.

Mrs. Tabbut misstates the location of where I was located and where the detective was located (page 5). Page 6 she states that I had a small container of methamphetamines on my lap, however reading RP trial 2278-279 references a straw. There was never any mention of a container containing illegal drugs.

Conclusion

In conclusion with the multiple violations of my constitutional rights to due process and to a fair trial, the ineffectiveness of defense council, Brady Rule violations, and the lack of sufficient evidence to support the charges in my case I ask to have my case dismissed with prejudice or at the very least a new trial to be granted so that the entrapment defense be asserted to my case.

Respectfully Submitted,



Steven Pemberton

July 27, 2019