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Court of Appeals
Division II
State of Washington
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No. 52824-0-II

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

STATE OF WASHINGTON, Respondent

v.

MICHAEL SCOTT, Appellant

APPEAL FROM THE SUPERIOR COURT OF COWLITZ COUNTY
THE HONORABLE JUDGE ANNE M. CRUSER

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. The Conviction For Bail Jump Must Be Reversed.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A. Where an individual is held in custody in another jurisdiction which precludes his appearance at a hearing, is the absence due to an uncontrollable circumstance, to which he did not contribute in reckless disregard of the requirement to appear?

II. STATEMENT OF FACTS

On October 21, 2016, Cowlitz County prosecutors charged Michael Scott with ten counts of burglary which occurred between September 2013 and March 2014¹. CP 1-3; 64-65. He appeared at hearings between October and January 26, 2017, RP 302, 304. Exh. 17B, 17C, 17D. The court set a scheduled hearing date of February 16, 2017. RP 499.

On February 11, 2017, Mr. Scott, hungry and without money, shoplifted some food. RP 499. A Tualatin police officer arrested him, and he was held in an Oregon jail for approximately 25 days.

¹ The case was originally charged under Cowlitz County no. 16-1-1198-2. (RP 302.)

RP 484-85, 499. He did not appear for the February hearing in Cowlitz County. Exh. 17E, RP 306.

At the expiration of the Oregon jail sentence, Mr. Scott was transported to Clark County, WA. RP 485. He spent two to three weeks in a Clark County Jail before he was transported to Cowlitz County. RP 485. On March 30, 2017, he appeared before a judge to quash the February warrant. RP 475, 486. He was released on bail and for a variety of reasons unrelated to Mr. Scott, the matter was eventually refiled in 2018. RP 29, 117, 486. The matter proceeded to a jury trial.

At trial, Mr. Scott sought to show that uncontrollable circumstances prevented him from personally appearing in court in February 2016, and he did not contribute to the creation of the circumstances in reckless disregard of the requirement to appear. RP 520.

He requested a jury instruction on the affirmative defense to bail jumping, because although he committed the act of shoplifting for food, a jury could find he did not do so with reckless disregard to his requirement to appear. RP 529. With agreement of the State, the court gave the affirmative defense instruction. CP 139; RP 522. The jury found Mr. Scott guilty of nine counts of burglary in the

second degree and one count of bail jumping. CP 144-154. The court entered an order of indigency. CP 170-172. He makes this timely appeal. CP 168-169.

III. ARGUMENT

A. This Court Must Reverse The Conviction For Bail Jumping Because Being Held In Custody In Another Jurisdiction Is Tantamount To An Uncontrollable Circumstance And Mr. Scott Did Not Contribute To It In Reckless Disregard Of His Requirement To Appear In Court.

To convict an individual of bail jumping the State must prove beyond a reasonable doubt that (1) a person having been released by court order or admitted to bail (2) with knowledge of the requirement of a subsequent personal appearance before any court of this state, (2) fails to appear. RCW 9A.76.170(1); *State v. Williams*, 162 Wn.2d 177, 183-84, 170 P.3d 30 (2007).

However, it is an affirmative defense to bail jumping if the defendant can show that (1) uncontrollable circumstances prevented the person from appearing, and (2) that the person did not contribute to the creation of such circumstances *in reckless disregard* of the requirement to appear, and (3) that the person appeared as soon as such circumstances ceased to exist. RCW 9A.170(2). The affirmative defense to bail jumping excuses a

defendant's failure to appear or surrender. *State v. Fredrick*, 123 Wn. App. 347, 353, 97 P.3d 47 (2004).

By statute, uncontrollable circumstances means an act of nature *such as* a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of a human being *such as* an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts. RCW 9A.76.010(4). (Emphasis added).

The words "*such as*" pointedly show the definition of uncontrollable circumstances is not explicitly limited. This must be so because the statute also requires that the person did not contribute to the *creation* of such circumstances in reckless disregard of the requirement to appear.

To date, there are no published opinions determining whether being held in custody in another jurisdiction qualifies as an 'uncontrollable circumstance' and whatever the cause of the incarceration whether it amounts to 'reckless disregard' of the order to appear.

For example, in *O'Brien* the defendant failed to pay his legal financial obligations on four felony convictions and was ordered to report to jail. *State v. O'Brien*, 164 Wn. App. 924, 927, 267 P.3d 422 (2011). Because he was incarcerated elsewhere, he failed to report as ordered and the State charged him with bail jumping. *Id.* There, the Court determined it did not need to reach the question of whether incarceration qualified as an “uncontrollable circumstance” because O'Brien had not surrendered as soon as he was released from custody. *Id.* at 932.

In the unpublished portion of *Livingston*, which is not binding on this Court, the defendant argued the trial court erred in denying an uncontrollable circumstances defense. *State v. Livingston*, 197 Wn. App. 590, 389 P.3d 753 (2017). He missed a court date because he was in custody at the SCORE jail. He argued he had every reason to believe he would be released in time to attend the scheduled hearing. The Court reasoned that because he knew he had to serve a 20-day sanction, he knew he would miss the court date by a day. *Id.* The defendant did not argue, and the Court did not decide if being incarcerated amounted to an uncontrollable circumstance.

Here, once Mr. Scott was handcuffed and jailed, he no longer had control as to whether he would appear at a hearing in another state five days later. The question on appeal is whether he contributed to that uncontrollable circumstance *in reckless disregard* of the requirement to appear in court.

Under caselaw, “reckless disregard” is defined differently in different situations. In a defamation claim it means “a high degree of ...probable falsity ... or that the defendant in fact entertained serious doubts as to the statement’s truth.” *Story v. Shelter Bay Co.*, 52 Wn. App. 334, 344, 760 P.2d 368 (1988). Similarly, in the context of a search warrant affidavit reckless disregard means the affiant had serious doubts shown by “actual deliberation of the affiant”, or “the existence of obvious reasons to doubt the veracity of an informant or the accuracy of his reports.” *State v. Jones*, 55 Wn. App. 343, 346, 777 P.2d 1053 (1989). This means reckless disregard requires more than mere negligence; it requires awareness, and a thoughtful choice.

In tort law, reckless disregard for the safety of others requires an intent to breach a duty of care. *Adkisson v. City of Seattle*, 42 Wn.2d 676, 685, 258 P.2d 461 (1953). And in criminal law, RCW 9A.08.010(1)(c) does not define “reckless disregard, but

does offer: “A person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation.”

To be considered reckless disregard, the individual must have thoughtfully considered and intended to avoid appearing in court as ordered. Here, that is not the case. Mr. Scott was impecunious and shoplifted some food. There was no evidence he contributed to his arrest to avoid another appearance; this is all the more significant because Mr. Scott had not missed a hearing before or after that date.

Generally, a defendant bears no burden to present evidence or proof at trial. *State v. Bennett*, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). However, because generally “affirmative defenses are uniquely within the defendant’s knowledge and ability to establish” the defendant must prove an affirmative defense by a preponderance of the evidence. *State v. Lively*, 130 Wn.2d 1, 13, 921 P.2d 1035 (1996); *State v. Riker*, 123 Wn.2d 351, 367, 869 P.2d 43 (1994).

The standard is whether “considering the evidence in the light most favorable to the State a rational trier of fact could have found that the defendant failed to prove the defense by a preponderance of the evidence.” *Lively*, 130 Wn.2d at 17. A preponderance of the evidence standard means that based on all the evidence, the proposition is “more probably true than not true.” 11 Washington Practice, Pattern Jury Instructions – Criminal, WPIC 19.04 (3d ed.).

A rational jury could not find that Mr. Scott failed to prove his affirmative defense by a preponderance of the evidence. Mr. Scott testified he had not even considered that he would miss his court appearance on the date he was arrested. RP 499-500. He did not contribute to the uncontrollable circumstances in reckless disregard of the requirement to appear. This conviction must be reversed and dismissed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Scott respectfully asks this Court to reverse and dismiss the conviction for bail jumping.

Respectfully submitted this 20th day of June 2019.



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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on June 20, 2019 I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to: Cowlitz County Prosecuting Attorney at appeals@co.cowlitz.wa.us and to Michael Scott, 16335 N.E. Multnomah St. Portland, OR 97230.



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