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Court of Appeals
Division II
State of Washington
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No. 53724-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

BEAU EDWARD NUGENT,

Appellant.

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

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
tom@washapp.org
(206) 587-2711

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STATUTES

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A. SUMMARY OF ARGUMENT

In attempting to elude the police, Beau Nugent drove along a private trail then onto US 101 before crashing. The two police officers that followed him did not identify any traffic or people on or near the trail or road other than themselves and Mr. Nugent.

Mr. Nugent was charged with attempting to elude the police with a sentence enhancement for endangering physical harm to any person or driver other than the police or Mr. Nugent. In light of the State's failure to prove the sentence enhancement, it should be reversed and stricken. In addition, the interest provision of the legal financial obligations imposed must be stricken as well.

B. ASSIGNMENTS OF ERROR

1. There was not sufficient evidence presented to support the endangerment sentencing enhancement for attempting to elude.

2. The trial court erred in requiring non-restitution legal financial obligations to accrue interest.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State prove all of the essential elements of a sentencing enhancement beyond a reasonable doubt.

Where the State has charged the defendant with endangering persons

other than the defendant or police officers while attempting to elude, the State must prove beyond a reasonable doubt Mr. Nugent threatened any person with physical harm as a result of his attempt to elude.

2. Recent amendments have established that interest does not accrue for non-restitution legal financial obligations. Did the trial court err in ordering the legal financial obligations in Mr. Nugent's case to accrue interest in violation of the statute?

D. STATEMENT OF THE CASE

On January 4, 2018, at approximately 10:00 pm, Mason County Deputy Dylan Heiser was on routine patrol and was driving down a trail that runs parallel to Highway 101:

Well, there's a trail that goes from there, that parallels 101 that goes down through a couple of driveways and I think it's used for either PUD access or something like that to the lines right there. They'd had a ton of -- a ton of traffic through there with vehicles coming to and from the casino traveling to Golden Pheasant Road to Fredson Road to some of those drug houses coming to and from the casino. A lot of garbage dumping.

RP 159. As the officer crested a hill, he saw car headlights coming towards him. RP 160. The two cars came together nose to nose, and stopped. RP 160. According to Deputy Heiser, Beau Nugent was the driver of the other car. RP 161.

Deputy Heiser claimed Mr. Nugent suddenly placed his car in reverse and began speeding away. RP 162. The deputy turned on his emergency lights and siren and followed Mr. Nugent down the trail for approximately one-half mile. RP 163. Mr. Nugent then left the trail and proceeded down Highway 101. RP 164. Deputy Heiser lost sight of Mr. Nugent. RP 165.

Deputy Nathan Anderson saw Mr. Nugent's car as it traveled down Highway 101, and he testified regarding the portion of the pursuit that did not occur on the dirt trail or private property:

As I'm watching the vehicle come, first off, driving recklessly and attempting to elude Deputy Helser, gets on the road and now he's just -- I can't get an accurate speed on it, because I'm not facing him, but I can tell, we can tell when a car is going way too fast and I see the car just blow passed [sic] me and I could hear it. I pull out behind the vehicle and we're in patrol vehicles and I'm pedal to the metal trying to catch it and it's still pulling away from me and so I've got to, you know, try to the best of my abilities to try and catch up to it. I do get, I'm not sure how far of a distance I get behind it, but as we head down towards exhibit 108 I'm finally up behind it to where I can, you know, effectively pursue it. It continues high rate of speed failing to yield to me and then we get to, I believe it's SE Hurley Waldrip Road goes to the left and then West Hurley Waldrip Road goes to the right. But, I watched the vehicle attempt to start to slow down, but it was going way too fast, to either one of two things was gonna occur. It was either gonna go oncoming traffic, so heading the wrong way on 101 or it was gonna turn on SE Hurley Waldrip Road. Regardless, it was going far too fast for these conditions to make that

turn and lost control and tagged the center median guardrail and kind of spun out and ultimately ended up facing the wrong way on 101 and wrecked out into a ditch and slowly started rolling towards traffic.

RP 150-51.

Deputy Heiser joined with Deputy Anderson when Mr. Nugent stopped but provided little additional information about the pursuit:

Yeah, so we traveled doing, I think we were over eighty miles an hour in the posted sixty, traveling southbound 101. As we approached Kennedy Creek Quarry, which is Southeast Hurley Waldrip Road like Deputy Anderson stated, he -- he attempted -- I believe that he attempted to make the corner to turn onto Hurley Waldrip Road and go around towards the quarry. When he did so he spun out. He ended up hitting -- he ended up hitting the median and the cable barrier in the middle and ended up -- his vehicle ended up bouncing back in the wrong way on the northbound side traveling southbound and his vehicle continued at a slow pace. It was pretty banged up and it was -- the vehicle was still rolling southbound on 101.

RP 165.

Once Mr. Nugent's car was stopped, he got out and fled on foot.

RP 151. Inside the abandoned car, the deputies saw a quantity of methamphetamine on the driver's seat. RP 153, 199. As a result, Mr. Nugent was charged with a count of attempting to elude with an endangerment enhancement and possession of methamphetamine. CP 7-8, 23-24.

Following a jury trial, Mr. Nugent was found guilty as charged. CP 49-51. In light of the jury's finding on the special verdict for the enhancement, the court imposed the additional 12 months consecutive to the attempting to elude count. CP 55-57; RP 325, 332.

In imposing the sentence, the trial court, in light of the fact Mr. Nugent was indigent, imposed only the mandatory \$500 victim penalty assessment. CP 59. The Judgment and Sentence also included the following paragraph regarding legal financial obligations:

The *financial obligations* imposed in this judgment shall bear interest from the date of the judgment to payment in full . . . RCW 10.82.090.

CP 60 (emphasis added).

E. ARGUMENT

1. The State failed to prove Mr. Nugent endangered any person(s) while attempting to elude requiring reversal and dismissal of the enhancement.

a. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

The same is true of sentencing enhancements. *State v. Simms*, 171 Wn.2d 244, 250, 250 P.3d 107 (2011); *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

b. The State failed to prove Mr. Nugent threatened harm to anyone during the pursuit.

The only evidence presented at trial was the testimony of the two following police officers who offered no evidence that anyone other than that they and Mr. Nugent were on the road. Accordingly, the State failed to prove the enhancement and it should be reversed.

RCW 9.94A.834 provides that, if a driver who is eluding a police vehicle threatens with physical harm any person other than the driver or the pursuing officer, that driver may be subject to an additional 12 months. RCW 9.94A.834 (“the state shall prove beyond a reasonable doubt that the accused committed the crime while endangering one or more persons other than the defendant or the pursuing law enforcement officer”).

While the testimony establishes Mr. Nugent may have been speeding, there is an absence of anything in the record that established anyone other than he and the deputies was on the road. The initial portion of the pursuit was on a trail that was partially paved, but no testimony that there was anyone on the trail other than Mr. Nugent and Deputy Heiser.

In addition, once Mr. Nugent began traveling on Highway 101, there was no testimony about what traffic was like on an average day at this time, let alone any testimony regarding any cars that may have been present on this specific day and time during this pursuit. There is just nothing that establishes that Mr. Nugent's actions in eluding endangered anyone but himself or the police officers, neither which supports the enhancement. *See State v. Feely*, 192 Wn.App. 751, 761, 368 P.3d 514 (2016) (defining the term "the pursuing law enforcement officer" to mean the "following" police officer).

While Deputy Anderson testified that Mr. Nugent's car wrecked and began rolling towards traffic, this statement does not prove the enhancement. First, the threat of harm must occur during the attempt to elude. RCW 9.94A.834 ("that the accused committed the crime *while* endangering one or more persons") (emphasis added). Second, it is

unclear what the deputy meant by “traffic,” whether he it was a generic term for the lanes of travel, or whether it meant other cars. But without some clarification, the term is meaningless. The enhancement should be reversed with instructions to dismiss.

c. The endangerment enhancement must be reversed with instructions to dismiss.

Since there was insufficient evidence to support the enhancement, this Court must reverse with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Allen*, 192 Wn.2d 526, 544-45, 431 P.2d 117 (2018) (“aggravating circumstances are elements of the offense of aggravated first degree murder for double jeopardy purposes . . . and the State is constitutionally barred from retrying them.”), quoting *Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. The requirement in the Judgment and Sentence that interest accrue on non-restitution legal financial obligations must be stricken.

In 2018, the legislature amended several statutes addressing legal financial obligations. Laws of 2018, ch. 269. The Supreme Court held that these amendments apply prospectively and are applicable to cases pending on direct review. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). Under *Ramirez*, discretionary costs may not be

imposed on indigent defendants. The amendments also prohibit the accrual of interest on non-restitution legal financial obligations. RCW 10.82.090. The trial court erred in requiring the LFOs to accrue interest. This provision should be stricken.

F. CONCLUSION

For the reasons stated, Mr. Nugent asks this Court to reverse the enhancement with instructions to dismiss. Alternatively, Mr. Nugent asks that this Court strike the portion of the Judgment and Sentence requiring the legal financial obligations bear interest.

DATED this 5th of February 2020.

Respectfully submitted,

s/Thomas M. Kummerow

THOMAS M. KUMMEROW (WSBA 21518)

tom@washapp.org

Washington Appellate Project - 91052

Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 53724-9-II
)	
BEAU NUGENT,)	
)	
Appellant.)	

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(ADDRESS OF RECORD)	()	HAND DELIVERY
ON FILE WITH OUR OFFICE)	()	_____

SIGNED IN SEATTLE, WASHINGTON THIS 5TH DAY OF FEBRUARY, 2020.



X _____

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710

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