

FILED

JUN 28 2010

CLERK OF THE COURT
STATE OF WASHINGTON
JULIO CESAR RODRIGUEZ

No. 289010

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JULIO CESAR RODRIGUEZ, Appellant

APPEAL FROM THE SUPERIOR COURT OF
YAKIMA COUNTY JUVENILE DIVISION
THE HONORABLE SUSAN HAHN

OPENING BRIEF OF APPELLANT

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SUMMARY OF ARGUMENT

Julio Rodriguez appeals his juvenile conviction of criminal trespass in the second degree. He contends the law enforcement officer had no statutory authority to “permanently trespass” him from a city park. His conviction should be reversed and dismissed with prejudice.

I. ASSIGNMENTS OF ERROR

- A. The prosecution did not submit findings and conclusions within 21 days after receiving notice of appeal by Mr. Rodriguez as required by JuCr 7.11(d).
- B. The court erred when it did not enter written findings and conclusions as required under JuCr 7.11 (d).
- C. The court erred when it held the law enforcement officer had the authority to permanently trespass Mr. Rodriguez from the public city park.
- D. The court erred when it held a verbal admonition by a police officer to never return to the city park, without written notice or opportunity to be heard, did not violate due process.

E. The court erred when it found the State's evidence was sufficient to overcome the statutory defense to criminal trespass second degree.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the court and State err in failing to prepare and file written findings and conclusions as required by JuCr 7.11(d)? (Assignment of Error A, B).
2. Did the court err when it held a police officer had the authority to permanently trespass Mr. Rodriguez from the public city park despite the absence of an authorizing city ordinance, law, or specific policy? (Assignment of Error C).
3. Did the court err when it found although there was a trespass form officers had been directed to use by the Grandview police department which was not used in this case, there was no violation of Mr. Rodriguez's due process rights of notice and opportunity to be heard? (Assignment of Error D).
4. Did the court err when it found the State's evidence overcame the statutory defense to criminal trespass second degree, which states that it is a defense to

criminal trespass when the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining on the premises? (Assignment of Error E).

II. STATEMENT OF FACTS

Sixteen-year-old Julio Rodriguez was in Westside Park on June 5, 2009. He had a rose in his hand when Officer Arraj, of the Grandview police department, stopped him. (RP 5). The officer told him the rose was city property and then confiscated it. He told Mr. Rodriguez to leave the park for the rest of the day. (RP 6). A few minutes later the officer observed Mr. Rodriguez and his girlfriend standing under a viaduct, but still within the park. (CP 17; RP 7). According to the officer's testimony, he approached Mr. Rodriguez and questioned whether he understood the earlier admonition to leave the park. Mr. Rodriguez nodded in the affirmative. The officer said, "Okay, at this point and time you're criminally trespassed from the park. If you ever come back I'm going to arrest you." (CP 17; RP 7).

The officer radioed dispatch to inform them Mr. Rodriguez was criminally trespassed from the park. (RP 7). Dispatch generated a "Spillman" record (an internal law enforcement record system) to

reference the incident. (RP 7). The Spillman investigation narrative read as follows:

“Subject advised not to pick flowers in the park and asked to leave. Subject refused to obey a lawful order and was criminally trespassed from Westside Park and Rose Garden.” (State’s Exh. 1).

Approximately six weeks later Officer Arraj was on a routine patrol near Westside Park. He observed Mr. Rodriguez and another young man leaving the park. The officer followed them into an alleyway outside of the park property. He arrested Mr. Rodriguez for criminal trespass. (RP 10).

At the disposition hearing Officer Arraj testified he had the power to permanently trespass anyone from a city park if they committed a violation of criminal law. (RP 10, 12). He further stated that to his knowledge there were no specific guidelines or ordinances granting officers the authority to criminally trespass individuals. (RP 11). Officer Arraj did not provide a trespass citation or notice form to Mr. Rodriguez. (RP 13).

Sgt. Palacios, Officer Arraj’s supervisor, testified that eighteen months previous to this incident he had issued a directive to all officers to use the department trespass form when trespassing

individuals from the park. (RP 22-23). The forms specified the length of duration for trespassing was one year from the date of issuance. (RP 22).

The court found Mr. Rodriguez guilty of criminal trespass second degree. He was fined and continues to be permanently banned from the city park. A notice of appeal was filed in the Superior Court of Yakima County Juvenile Division on May 26, 2010. As of the date of this brief, no written findings or conclusions have been submitted by the prosecution or entered by the court. This appeal follows.

III. ARGUMENT

A. The Prosecution and Court Erred By Failing to Submit and Enter Written Findings of Fact and Conclusions Stating the Ultimate Facts on Each Element of the Alleged Crime.

The prosecuting attorney must submit findings of fact and conclusions within 21 days after receiving the notice of appeal. JuCr 7.11(d). A court must enter its written findings and conclusions in every juvenile case that is appealed. JuCr 7.11(d); *State v. Luna*, 71 Wn.App. 755, 758, 862 P.2d 620 (1993). JuCr 7.11(d) requires “The findings shall state the ultimate facts as to

each element of the crime and the evidence upon which the court relied in reaching its decision.” Written findings allow a reviewing court to examine the basis on which the case was decided and effectively review the issues raised on appeal. *State v Pena*, 65 Wn.App. 711, 829 P.2d 256 (1992).

Here, the notice of appeal was filed on March 26, 2010. As of the date of appellant’s opening brief, no findings and conclusions were submitted by the prosecution or entered by the court. The court entered its oral findings at the time of disposition. (RP 29-30). Mr. Rodriguez argues the appellate court should not be forced to examine an oral ruling to determine whether appropriate findings were made, nor should he be forced to interpret an oral ruling in order to appeal his conviction. *State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998). The complete lack of entry of written findings precludes review and compels either remand for entry of written findings, or dismissal if actual prejudice can be shown. 136 Wn.2d 619 at 624.

B. A Grandview Law Enforcement Officer Does Not Have The Lawful Authority To Permanently Trespass A Citizen From A Public Park.

Mr. Rodriguez was charged with criminal trespass in the second degree for being on the premises of Westside Park in Grandview, WA. He was neither charged nor convicted of the alleged original incident of picking a rose from park property. (RP 6).

Under the Grandview Municipal Code Chapter 12.20.050 the defacing of property, which includes the removal of any plant or flower from park property is defined as a violation of park rules. Anyone found in violation of the Park code or rules made by the parks and recreation department shall be subject to:

“a civil infraction and shall be subject to a fine not exceeding \$500.00. In addition, *anyone found guilty* of a misdemeanor or a gross misdemeanor under GMC Title 9 in a city park shall be subject to being trespassed from the park where the crime occurred *for a period of one year from the date of conviction, and thereafter shall be subject to a charge of criminal trespass* under GMC Title 9 if the person is on that park property during the time specified.” Grandview Municipal Code Chapter 12.20.230. (Emphasis added).

The Grandview Municipal Code defines the removal of a flower from a city park as a civil infraction. It is only after criminal conviction the Code imposes a trespass order. Further, such an order extends for a period of one year. A charge of criminal trespass is authorized only if the convicted individual returns to the

park within that year's time. The court erred when it found the officer had authority to impose a trespass order from the public park based on the taking of the flower. (RP 29).

In stark contrast to the statutory limitations, Officer Arraj testified the city of Grandview vested him with the authority to trespass individuals from the city park when he "deemed it necessary". (RP 11). In his opinion, events that warranted trespassing included such things as gang activity, fights, drinking, drug related incidents, shootings, and the taking of a flower. (RP 9). Officer Arraj's testimony demonstrated his belief that he could permanently ban Mr. Rodriguez from the city park. (RP 10, 12). Remarkably, the permanent trespassing was not because he allegedly took a flower, but rather, because Mr. Rodriguez had not left the park within a few minutes after the officer trespassed him for taking a flower. (RP 7, CP 17, 30).

There is no statutory authority to substantiate the officer's contention that based on his verbal admonition, it was permanently unlawful for Mr. Rodriguez to enter and remain in the public park. Both the department trespass form and the municipal code have a one-year expiration date for trespass.

Further, Mr. Rodriguez was charged and convicted under RCW 9A.52.080, "A person is guilty of criminal trespass in the second degree if he knowingly enters or remains *unlawfully* in or upon the premises of another under circumstances not constituting criminal trespass in the first degree." (Emphasis added).

In *State v. Blair*, 65 Wn.App.64, 827 P.2d 356 (1992), the court considered the question of whether an officer had the authority to arrest for criminal trespass in a Seattle Housing Project. There, the Seattle police department had an agreement with the housing authority authorizing police to warn and arrest anyone trespassing on the premises. 65 Wn.App. at 66. An officer observed Blair engaging in a drug deal and verbally admonished him to not return to the property, that is, trespassed him. Several weeks later Mr. Blair returned to the housing project. Without determining whether Mr. Blair was on the property for a legitimate purpose, the officer arrested him for criminal trespass. The court held the officer's earlier direction that Blair not return to the site was not in itself probable cause to arrest. It did create an articulable suspicion Blair was trespassing; however, because the officer failed to confirm his suspicion by determining whether Mr. Blair was there for a

legitimate reason, there was no probable cause to believe he was trespassing. 65 Wn.App. at 69.

Mr. Rodriguez was not unlawfully in the park because the officer had no authority to permanently ban him from a public place. And, similar to Blair, the officer did not have authority to arrest Mr. Rodriguez for criminal trespass based simply on a verbal admonition.

C. Mr. Rodriguez's Due Process Rights Of Notice And Opportunity To Be Heard Were Violated When He Was Permanently Trespassed From A City Park.

When a government official deprives an individual of an already acquired liberty interest within the meaning of the due process clause of the Fifth or Fourteenth Amendment due process of law must be given. U.S. Const. amend. XIV § 1; Wash. Const. art. 1 § 3; *Mathews v Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893,, 47 L.Ed.2d 18 (1976), *cert. denied*, 535 U.S. 904, 122 S.Ct. 1203, 152 L.Ed.2d 141 (2002); *In re Davis*, 109 Wn.App. 734,743, 37 P.3d 325 (2002). Due process requires an opportunity to be heard "at a meaningful time and in a meaningful manner." 424 U.S. at 333. Minimum constitutional requirements for due process are met when that process provides a citizen with safeguards from the arbitrary

and capricious exercise of government power. *State v. King*, 130 Wn.2d 517, 549, 925 P.2d 606 (1996).

As a citizen of Grandview, Mr. Rodriguez maintained a liberty interest in using the public city park. The first opportunity Mr. Rodriguez had to question the arbitrariness, length, and reason for the ban was at his adjudication hearing for criminal trespass.

Both Officer Arraj and his superior, Sgt. Palacios, testified it was within an individual police officer's discretion whether to trespass someone from the park. Both agreed there was no specific policy or training regarding who could be trespassed from the park or for what reasons. (RP 11,23,24). Further, Officer Arraj did not issue Mr. Rodriguez a copy of a department trespass form, despite a department directive to do so. (RP 12,22). The Spillman record, the only written documentation of the incident stated he "...was criminally trespassed from Westside Park and Rose Garden." (State's Exh. 1). The official police record never stated the trespass was permanent. In its oral ruling, the court stated,

"I think that on July 16th, Julio had been trespassed from the park. As far as it being a permanent one and whether that's too vague and so forth that may in fact be a constitutional challenge. However, given the fact that this happened in such a short period of time I don't find that it requires a dismissal here in any way." (RP 30).

The permanent ban on Mr. Rodriguez from use of the park and his subsequent arrest for criminal trespass was based on the whim and annoyance of a city police officer. Even the Spillman record, a business record, does not indicate Mr. Rodriguez was not allowed in the park some six weeks after his encounter with Officer Arraj. *State v. Ecklund*, 30 Wn. App. 313, 319 n.4, 633 P.2d 933 (1981).

A verbal command revoking his right to enter and remain on public property without adequate notice or opportunity to be heard is a violation of due process. Because the admonition to never again enter Westside Park was void for want of due process, the court erred when it found Mr. Rodriguez guilty of criminal trespass, imposed monetary sanctions, and upheld the permanent trespass.

D. The State's Evidence Was Insufficient To Overcome The Statutory Defense to Criminal Trespass.

The test for determining sufficiency of the evidence is whether, after viewing the evidence and any reasonable inferences in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Conclusions of law are

reviewed de novo. *State v. Martin*, 137 Wn.2d 774, 788, 975 P.2d 1020 (1999).

To convict Mr. Rodriguez of criminal trespass second degree, the State had to prove that he knowingly entered or remained unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree. RCW 9A.52.080(1); *State v. R.H.*, 86 Wn.App. 807, 810, 939 P.2d 217 (1997). A person enters or remains unlawfully when he is not licensed, invited or privileged to enter or remain. RCW 9A.52.010(3); *State v. Kutch*, 90 Wn.App. 244, 246-47, 951 P.2d 1139 (1998).

RCW 9A.52.090 (2), a statutory defense to criminal trespass, provides, "In any prosecution under RCW 9A.52.070 and RCW 9A.52.080, it is a defense that the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining in the premises." Due process demands the State prove every element of an offense beyond a reasonable doubt. If, as here, there is a statutory defense that negates an element of the crime, the State bears the constitutional burden to prove the absence of the defense beyond a reasonable doubt. *R.H.*, 86 Wn.App. at 812.

Here, the park was open to the public and Mr. Rodriguez complied with all lawful conditions, allowing him to enter and remain on the premises. The State produced no evidence of an ordinance, policy, law, or statute to serve as the basis for an officer's authority to permanently trespass a citizen from a public place. The one written piece of evidence contained no time limit for the trespass admonition. The State introduced no evidence to indicate he was engaging in unlawful activities while in or as he left the park the day he was arrested for trespass. The State failed to meet its constitutional burden to establish Mr. Rodriguez's presence in the park that day was unlawful, an essential element of the crime of criminal trespass.

IV. CONCLUSION

Based on the foregoing facts and authorities Mr. Rodriguez requests this court to overturn his conviction and dismiss all charges with prejudice.

Respectfully submitted this 28th day of June 2010.


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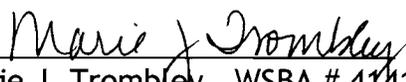
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	Yakima County No.09-8-01201-7
Respondent)	Court of Appeals No.289010-III
)	
Vs.)	PROOF OF SERVICE
)	(RAP 18.5(b))
JULIO CESAR RODRIGUEZ,)	
Appellant)	

I, Marie Trombley, do hereby certify under penalty of perjury that on June 28,2010 I mailed to the following U.S. Postal Service first class mail, the postage prepaid, or personally served, as appropriate, a true and correct copy of Appellant's Opening Brief to:

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