

FILED
Sept 19, 2011
Court of Appeals
Division III
State of Washington

NO. 29303-3-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

CURTIS ALAN PITTS,

Defendant/Appellant.

REPLY BRIEF

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ARGUMENT

The State relies upon *State v. Peterson*, 133 Wn. 2d 885, 948 P. 2d 381 (1997) and *State v. Heidari*, 159 Wn. App. 601, 248 P. 3d 550 (2011) for the proposition that a judge, at a bench trial, can *sua sponte* determine that a criminal defendant is guilty of a inferior degree crime where the original Information charges an offense that is categorized in degrees.

Mr. Pitts contends that the State ignores the requirement of the *Workman* rule. It provides:

...A defendant is entitled to an instruction on a lesser included offense if two conditions are met. First, each of the elements of the lesser offense must be a necessary element of the offense charged. *State v. Bowen*, 12 Wn. App. 604, 531 P. 2d 837 (1975) *See*: RCW 10.61.006. *See also*: 2C Torcia, *Wharton's Criminal Procedure* § 375, 337 (12th ed. 1975). Second, the evidence in the case must support an inference that the lesser crime was committed. *State v. Snider*, 70 Wn. 2d 326, 422 P. 2d 816 (1967).

State v. Workman, 90 Wn. 2d 443, 447-48, 584 P. 2d 382 (1978).

Mr. Pitts asserts that neither of the elements of the *Workman* rule are met in this case.

The *Peterson* case relies upon *State v. Foster*, 91 Wn. 2d 466, 589

P. 2d 789 (1979). The *Foster* Court held at 472:

A crime is an inferior degree of another when (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.

Mr. Pitts concedes that rape is an offense divided into degrees.

The first degree, second degree and third degree rape statutes "proscribe but one offense." The offense can be committed in various ways.

The Information charges Mr. Pitts with second degree rape. The question is whether third degree rape is an inferior degree of second degree rape as defined in RCW 9A.44.050(1)(b).

The case of *State v. Fernandez-Medina*, 141 Wn. 2d 448, 454-55, 6 P. 3d 1150 (2000) emphasizes the distinction between lesser included offenses and inferior degree offenses.

...[U]nder our case law the analysis that the trial court engages in when considering a request for an instruction on an inferior degree offense differs from the analysis it engages in when considering a request for a lesser included offense instruction. ...

...[T]he test for determining if a party is entitled to an instruction on an inferior degree offense differs from the test for entitlement to an instruction on a lesser included offense

only with respect to the legal component of the test. ...

Our focus...of the factual component of the test... is set forth in the *Peterson* and *Workman* cases. The purpose of this test is to ensure that there is evidence to support the giving of the requested instruction. If interpreted too literally, though, the factual test would impose a redundant and unnecessary requirement because all jury instructions must be supported by sufficient evidence.... Necessarily, then, the factual testing includes a requirement that there be a factual showing more particularized than that required for other jury instructions. Specifically, we have held that the evidence must raise an inference that *only* the lesser included/inferior degree offense was committed to the exclusion of the charged offense. [Citations omitted].

The factual component in Mr. Pitts's case revolves around the issue of consent. Non-consent is an element of both second degree rape and third degree rape.

However, under the second degree rape statute non-consent is predicated upon the effect of alcohol or drugs on the ability to consent. Thus, it addresses the complaining witness' mental state.

Under the third degree rape statute the State is not required to establish a mental element as to the complaining witness.

RCW 9A.44.010(7) defines the word "consent." It means

That at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given

agreement to have sexual intercourse or sexual contact.

The trial court determined that neither alcohol nor drugs precluded consent to sexual intercourse when it found Mr. Pitts not guilty of second degree rape. This brings Mr. Pitts's case squarely within the ambit of the cases set forth in his original brief.

Neither the legal nor factual prongs under *Workman*, *Foster* or *Peterson* are met.

Mr. Pitts otherwise relies upon his original brief in support of his request that the case be dismissed.

DATED this 19th day of September, 2011.

Respectfully submitted,

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NO. 29303-3-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)
) YAKIMA COUNTY
 Plaintiff,) NO. 08 1 01782 1
 Respondent,)
) **CERTIFICATE OF SERVICE**
 v.)
)
 CURTIS ALAN PITTS,)
)
 Defendant,)
 Appellant.)
)

I certify under penalty of perjury under the laws of the State of Washington that on this 19th day of September, 2011, I caused a true and correct copy of the *REPLY BRIEF* to be served on:

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