

No. 29553-2-III

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

---

STATE OF WASHINGTON,

Respondent,

v.

DOROTEO V.,

Juvenile Appellant.

---

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

---

BRIEF OF APPELLANT

---

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**A. ASSIGNMENTS OF ERROR**

1. The State presented insufficient evidence to convict Doroteo of first-degree arson.

2. The probation condition prohibiting “possession of gang paraphernalia” is unconstitutionally vague.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. To convict a person of a crime the State must prove beyond a reasonable doubt not only that a crime was committed but that the defendant was the perpetrator. Here, a “Molotov cocktail” (a beer bottle filled with gasoline and lit on fire) was thrown into a home, causing damage. Appellant Doroteo V. and his adult friend fled the scene and were later stopped by police. The adult’s shoes tested positive for gasoline but Doroteo’s shoes and clothing did not. There were no fingerprints collected from the bottle. No one saw who threw the bottle. Did the State fail to prove beyond a reasonable doubt Doroteo committed first-degree arson, requiring reversal of his conviction for the crime?

2. A sentence condition is unconstitutionally vague if it does not provide adequate notice of what conduct is prohibited or allows for arbitrary enforcement. The juvenile court imposed a probation

condition prohibiting Doroteo from possessing “gang paraphernalia.” Is the condition unconstitutionally vague?

C. STATEMENT OF THE CASE

On October 2, 2010, a beer bottle filled with gasoline was lit on fire and thrown through the window of a home. 1 RP 75; 2 RP 11, 17. No one was hurt, but there were scorch marks on the window sill. 1 RP 30. No one saw who threw the bottle. 1 RP 36, 2 RP 11-23. There were no fingerprints collected from the bottle. 1 RP 85.

One person who lived in the home saw two people running away from the house after the incident. 2 RP 12. He could not describe or identify either person. 2 RP 15-16. The two people who were running got in a car and drove away, and another occupant of the house got in his car and followed them while calling 911. 2 RP 12-14, 18.

Eventually a police officer stopped the vehicle. 1 RP 38. An adult male, Luis Gomez, was driving and appellant Doroteo was the passenger. 1 RP 47. The police officer smelled gasoline, and the adult male’s shoes later tested positive for gasoline. 1 RP 40; 2 RP 6-7. Doroteo’s shoes and clothing tested negative for gasoline. 1 RP 39, 76; 2 RP 6-7.

The State charged both the adult, Mr. Gomez, and Doroteo, a juvenile, with first-degree arson. CP 20. Doroteo maintained his innocence, arguing that his adult friend committed the crime without Doroteo's prior knowledge. 1 RP 85-86. The State presented no evidence to the contrary. 1 RP 89-90.

The State ignored the distinction between Doroteo and Mr. Gomez and argued, "What happened here is [Doroteo] and a co-defendant threw a Molotov cocktail at Mr. Cuellar's house." 1 RP 83. The court found Doroteo guilty but did not enter written findings and conclusions as required by JuCR 7.11(d). The court simply stated:

As to the matter at hand, the Court recognizes what elements the State has to prove beyond a reasonable doubt, and is also familiar with the jury instructions that allow me to rely on both circumstantial and direct evidence. The Court finds that based upon the circumstantial evidence and the direct evidence that the Respondent is guilty as charged. Understanding also that while there is not direct evidence that [Doroteo] is the person that threw the cocktail, there is enough circumstantial evidence, based upon the officers who were immediately on the scene of the scent of the gasoline on the clothing of [Doroteo], and then certainly the direct evidence of the vehicle leaving the scene of the accident, and ultimately the Respondent being arrested at the conclusion of the car chase.

1 RP 92-93.

The court sentenced Doroteo to confinement for 103-129 weeks. CP 9. The court also imposed “gang conditions” to apply during probation, including “no possession of gang paraphernalia.” CP 9. At sentencing, Doroteo spoke and continued to maintain his innocence. 1 RP 107.

#### D. ARGUMENT

##### 1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT DOROTEO OF FIRST-DEGREE ARSON.

a. Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt. The State bears the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 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). A criminal defendant’s fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id.; U.S. Const. amend. XIV; Const. art. I, § 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence is sufficient to support a conviction only if, “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, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“The reasonable-doubt standard is indispensable, for it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.” State v. DeVries, 149 Wn.2d 842, 849, 72 P.3d 748 (2003) (internal citations omitted). “[I]t is critical that our criminal law not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned.” Id.

b. The State failed to prove that Doroteo committed arson.

The State charged Doroteo with first-degree arson in violation of RCW 9A.48.020(1)(b). CP 20. That statute provides:

(1) A person is guilty of arson in the first degree if he or she knowingly and maliciously... (b) [c]auses a fire or explosion which damages a dwelling.

Not only was the State required to prove that someone knowingly and maliciously caused a fire or explosion that damaged the victims’ home, they were required to prove that Doroteo was the perpetrator. “It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the

identity of the accused as the person who committed the offense.”  
State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

The State did not present sufficient evidence to prove beyond a reasonable doubt that Doroteo was the perpetrator. No one saw who threw the bottle. Investigators did not find Doroteo's fingerprints on the bottle. Doroteo's adult companion did not testify against him. Doroteo himself adamantly maintained his innocence. Although the State presented sufficient evidence to show that either Doroteo or Mr. Gomez threw the bottle, they did not prove beyond a reasonable doubt that Doroteo was the perpetrator rather than Mr. Gomez.

The State did not proceed under an accomplice liability theory, and the court did not find Doroteo guilty as an accomplice. 1 RP 92-93. Accordingly, the conviction may not be sustained on that basis. Cf. State v. Davenport, 100 Wn.2d 757, 764-65, 675 P.2d 1213 (1984) (“While it is not unconstitutional to charge a person as a principal and convict him as an accomplice, the court must instruct the jury on accomplice liability”).

In any event, the State presented insufficient evidence to convict Doroteo as Mr. Gomez's accomplice. A person is liable as an accomplice if “(a) with knowledge that it will promote or facilitate

the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it.”

RCW 9A.08.020. Presence, knowledge of the crime, and personal acquaintance with active participants is not sufficient to support a finding of accomplice liability. In re the Welfare of Wilson, 91 Wn.2d 487, 490, 588 P.2d 1161 (1979). Even physical presence combined with assent is not enough. Id. at 491; State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). “[O]ne’s presence at the commission of a crime, even coupled with a knowledge that one’s presence would aid in the commission of the crime, will not subject an accused to accomplice liability.” State v. Rotunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981). “Even though a bystander’s presence alone may, in fact, encourage the principal actor in his criminal or delinquent conduct, that does not in itself make the bystander a participant in the guilt.” Wilson, 91 Wn.2d at 492.

In this case, no evidence was presented that Doroteo knew Mr. Gomez was going to commit this crime, let alone that he solicited him to commit it or aided him in doing so. The evidence showed only that Doroteo was with Mr. Gomez at the scene. That is insufficient to support a conviction under an accomplice liability

theory. In sum, the State failed to prove beyond a reasonable doubt that Doroteo committed first-degree arson.

c. The juvenile court failed to enter written findings and conclusions as required by JuCR 7.11(d). The juvenile court rules require written findings following an adjudicatory hearing:

The court shall enter written findings and conclusions in a case that is appealed. 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. The findings and conclusions may be entered after the notice of appeal is filed. The prosecution must submit such findings and conclusions within 21 days after receiving the juvenile's notice of appeal.

JuCR 7.11(d). The language of the rule is mandatory. State v. Avila, 102 Wn. App. 882, 896, 10 P.3d 486 (2000), review denied 143 Wn.2d 1009, 21 P.3d 290.

Doroteo filed his notice of appeal on December 8, 2010. CP 4. Thus, the prosecutor was required to submit findings and conclusions by December 29, 2010. JuCR 7.11(d). Then, the court was required to enter the findings. Id. But as of June 10, 2011, no findings have been filed.

The State must not be allowed to submit late findings which are tailored to the arguments made in Doroteo's appeal. State v. Lopez, 105 Wn. App. 688, 693, 20 P.3d 978 (2001), review denied

144 Wn.2d 1016, 32 P.3d 283. A review of the record reveals the State presented insufficient evidence to support the conviction, and reversal is required.

d. Reversal and dismissal is the appropriate remedy. In the absence of evidence from which a rational trier of fact could find beyond a reasonable doubt Doroteo committed the offense for which he was convicted, the judgment may not stand. State v. Spruell, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits a second prosecution for the same offense after a reversal for lack of sufficient evidence. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969)). The appropriate remedy for the error in this case is dismissal of the conviction based upon the State's failure to prove Doroteo committed first-degree arson.

2. THE SENTENCE CONDITION PROHIBITING GANG PARAPHERNALIA IS UNCONSTITUTIONALLY VAGUE.

a. A sentence condition is unconstitutionally vague if it does not provide adequate notice of what conduct is proscribed or allows for arbitrary enforcement. Due process requires that individuals (1) receive adequate notice of what conduct is proscribed and (2) are protected from arbitrary enforcement. U.S. Const. amend. XIV; State v. Moultrie, 143 Wn. App. 387, 396, 177 P.3d 776 (2008). Ordinary people must be able to “understand what is and is not allowed.” State v. Valencia, 169 Wn.2d 782, 791, 785, 239 P.3d 1059 (2010). A sentencing condition that does not comport with these requirements is unconstitutionally vague. Moultrie, 143 Wn. App. at 396.

On review, this Court does not presume a sentencing condition is constitutional. Valencia, 169 Wn.2d at 793. A condition must be stricken if it is unconstitutionally vague, because a trial court has necessarily abused its discretion in imposing it. Id. at 793, 795.

b. The condition prohibiting “possession of gang paraphernalia” does not provide adequate notice of what conduct is proscribed and allows for arbitrary enforcement. The juvenile court imposed the following condition of probation upon Doroteo: “no possession of gang paraphernalia.” CP 9. This condition should be stricken as unconstitutionally vague.

In Moultrie, this Court held that a condition prohibiting the defendant from contacting “vulnerable, ill, or disabled adults” was unconstitutionally vague. Id. at 397-98. This Court explained that the terms “are ambiguous and thereby fail to provide clear notice” of what would constitute a violation. Id. at 397.

In another case, this Court held that a condition prohibiting a defendant from possessing “pornography” was unconstitutionally vague. State v. Sansone, 127 Wn. App. 630, 634, 111 P.3d 1251 (2005). The Court reasoned, “The term has not been defined with sufficient definiteness such that ordinary people can understand what it encompasses.” Id. at 639. Furthermore, “[t]he condition does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” Id.

Even more recently in Valencia, our Supreme Court struck the following community custody condition as unconstitutionally vague:

Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices.

Valencia, 169 Wn.2d at 785. The Court noted that the dictionary definition of “paraphernalia” broadly includes “personal belongings, articles of equipment, or appurtenances.” Id. at 794 (citing Webster’s Third New International Dictionary 1638 (2002)). The “vague scope of proscribed conduct fails to provide the petitioners with fair notice of what they can and cannot do.” Id.

Moreover, the breadth of potential violations under this condition offends the second prong of the vagueness test, rendering the condition unconstitutionally vague. Because the condition might potentially encompass a wide range of everyday items, it does not provide ascertainable standards of guilt to protect against arbitrary enforcement.

Id. (internal citations omitted).

The same is true here. As noted in Valencia, the dictionary definition of “paraphernalia” is broad and vague. Id. The modifier

“gang” does little to shed light on the scope of the prohibition. The dictionary defines “gang” as:

1. a group or band: *A gang of boys gathered around the winning pitcher.*
2. a group of youngsters or adolescents who associate closely, often exclusively, for social reasons, especially such a group engaging in delinquent behavior.
3. a group of people with compatible tastes or mutual interests who gather together for social reasons: *I'm throwing a party for the gang I bowl with.*<sup>1</sup>

Combining the above definition with the definition of “paraphernalia” does not provide adequate notice of proscribed conduct and allows for arbitrary enforcement. One probation officer might believe possession of an innocuous bandana violates this condition, while another might think bandanas are permissible but baggy pants are not. Still another might believe a t-shirt urging the legalization of marijuana constitutes gang paraphernalia – an interpretation which not only highlights vagueness concerns but also infringes the First Amendment free speech guarantee. U.S. Const. amend. I. Some authorities have apparently construed the phrase “gang

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<sup>1</sup> <http://dictionary.reference.com/browse/gang> (last viewed 6/11/11).

paraphernalia” to extend to religious symbols, in violation of the First Amendment’s free-exercise clause.<sup>2</sup> Id.

An internet search for the definition of “gang paraphernalia” results in a list of extremely broad scope issued by the Texas Youth Commission:

### **Gang Related Clothing and Styles - Boys**

- Shaved, bald head or extremely short hair
- White oversized T-shirt creased in the middle
- White athletic type undershirt
- Polo type knit shirts (oversized) and usually worn buttoned to the top and not tucked in
- Oversized Dickie, Ben Davis or Solos pants
- Pants worn low, or "sagging" and cuffed inside at the bottom or dragging on the ground
- Baseball caps worn backwards (usually black and sometimes with the initials of the gang)
- Cut off under-the-knee, short pants worn with knee-high socks
- A predominance of dark or dull clothing, or clothing of one particular color
- Black oversized jackets, sweatshirts, jerseys, etc.
- Black stretch belt with chrome or silver gang initial belt buckle
- Oversized shirts
- Clothing a mixture of gang colors, black and silver or white.<sup>3</sup>

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<sup>2</sup> See, e.g., [http://www.usatoday.com/news/religion/2008-03-16-rosaries-gangs\\_N.htm](http://www.usatoday.com/news/religion/2008-03-16-rosaries-gangs_N.htm) (last viewed 6/11/11) (children suspended because school officials considered crucifixes and rosary beads to be gang paraphernalia; one judge overturned a suspension because prohibition was unconstitutionally vague).

<sup>3</sup> <http://www.tyc.state.tx.us/prevention/clothing.html> (last viewed 6/13/11).

A condition that is so broad and leaves so much to the discretion of individual community corrections officers is unconstitutionally vague. Valencia, 169 Wn.2d at 795.

In a concurring opinion in Valencia, Justice Johnson intimated that a condition prohibiting possession of “drug paraphernalia” would satisfy due process because that phrase is defined by statute. Id. (J.M. Johnson, J., concurring) (citing RCW 69.50.102(a), .4121(1)). But “gang paraphernalia” is defined nowhere in the Revised Code of Washington. Thus, Doroteo remains without adequate notice of what conduct is proscribed, and he is subject to arbitrary enforcement. This violates due process.

The Ninth Circuit struck a similar condition in United States v. Brown, 223 Fed.Appx. 722 (9<sup>th</sup> Cir. 2007).<sup>4</sup> The condition in that case required that the defendant:

Not wear, display, use or possess any insignia, emblem, button, badge, cap, hat, scarf, bandana, jewelry, paraphernalia, or any article of clothing which may connote affiliation with, or membership in, the Rollin 30's Piru Blood, Bloodstone Piru, or Bloods gang.

Id. at 724. The court noted the condition was “vague and open to interpretation depending on who the observer is. For example,

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<sup>4</sup> Citation to this unpublished opinion is permissible pursuant to RAP 10.4(h), GR 14.1(b), and FRAP 32.1.

baseball caps, gloves, and bandanas as well as clothing bearing college logos may be deemed gang attire by high schools around the country.” Id. The condition “sweeps too broadly and indiscriminately” and “fails to adequately define or provide notice of precisely what apparel [the defendant] should refrain from wearing.” Id.

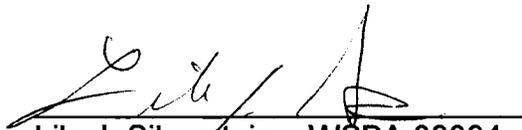
As in the above cases, the condition at issue here fails to provide notice of precisely what conduct Doroteo must avoid, and allows for arbitrary enforcement. Accordingly the condition prohibiting “possession of gang paraphernalia” is unconstitutionally vague, and should be stricken.

E. CONCLUSION

Because the State failed to prove that Doroteo committed arson, Doroteo respectfully requests that this Court reverse his conviction and dismiss his case with prejudice. In the alternative, the condition prohibiting gang paraphernalia should be stricken because it is unconstitutionally vague.

DATED this 13<sup>th</sup> day of June , 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lila J. Silverstein", written over a horizontal line.

Lila J. Silverstein – WSBA 38394  
Washington Appellate Project  
Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 29553-2-III
	)	
DOROTEO VILLANO, JR.,	)	
	)	
JUVENILE APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 13<sup>TH</sup> DAY OF JUNE, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- |      |   |                   |                                     |
|------|---|-------------------|-------------------------------------|
| [X ] | KIM KREMER, DPA<br>FRANKLIN COUNTY PROSECUTOR'S OFFICE<br>1016 N 4 <sup>TH</sup> AVE<br>PASCO, WA 99301 | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |
| [X ] | D. V. (JUVENILE)<br>MAPLE LANE SCHOOL<br>20311 OLD HIGHWAY 9 SW<br>CENTRALIA, WA 98531                  | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 13<sup>TH</sup> DAY OF JUNE, 2011.

X \_\_\_\_\_ 