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MAY 20 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA No. 31222-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS EARL MEYER,

Appellant.

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The court erred by making its conclusion of law 1 on the

CrR 8.3(c) hearing:

The defendant failed to raise a colorable claim regarding the unconstitutionality of the predicate offense and therefore the predicate offense is constitutionally valid.

B. The court erred by making its conclusion of law 2 on the

CrR 8.3(c) hearing:

2. Based upon a review of the uncontested facts, a rational trier of fact could find the essential elements of Failure to Register as a Sex Offender, RCW 9.94A.130(11)(a), beyond a reasonable doubt.

C. The court erred by denying Douglas Earl Meyer's motion to dismiss based on the unconstitutionality of his underlying conviction for ineffective assistance of counsel.

D. The court erred by finding Mr. Meyer guilty of failure to register a sex offender.

Issues Pertaining to Assignments of Error

1. Did the court err by concluding Mr. Meyer failed to raise a colorable claim as to the unconstitutionality of the predicate offense when he did raise colorable claims of ineffective assistance of counsel and a recanting witness? (Assignment of Error A).

2. Did the court err by concluding a rational trier of fact could find the essential elements of Failure to Register as a Sex Offender beyond a reasonable doubt? (Assignment of Error B).

3. Did the court err by denying Mr. Meyer's motion to dismiss based on the unconstitutionality of his underlying conviction for ineffective assistance of counsel? (Assignment of Error C).

4. Did the court err by granting the State's motion in limine precluding the defense from challenging the constitutionality of the underlying conviction? (Assignments of Error A, B, C).

5. Did the court err by finding Mr. Meyer guilty of failure to register as a sex offender when the State did not prove any predicate sexual offense? (Assignment of Error D).

II. STATEMENT OF THE CASE

Mr. Meyer was convicted of failure to register as a sex offender after a stipulated facts trial. (10/24/12 RP 42-44; CP 278-88). He preserved for appeal the denial of his motion to dismiss based on the unconstitutionality of the underlying conviction for a sex offense. (10/22/12 RP 23-24). Another judge had denied the motion to dismiss some six months earlier and found the predicate conviction constitutionally valid. (4/2/12 RP 27). Although not

required by CrR 8.3(c), that judge entered conclusions of law on the dismissal hearing. (CP 206-07).

The trial judge denied the defense's renewed motion to dismiss under CrR 8.3(c) and granted the State's motion in limine precluding the defense from getting into the circumstances of the prior conviction. (10/22/12 RP 22, 23-24). Mr. Meyer waived a jury trial. (CP 261). The stipulated facts were:

STIPULATED FACTS

1. In 1992, the defendant was charged with RAPE IN THE SECOND DEGREE (case # 93-1-00068-0) in Grant County, Washington.
2. On November 24, 1993, the defendant was found guilty by non-jury verdict of RAPE IN THE SECOND DEGREE.
3. The defendant was sentenced on January 11, 1993, and served a 72 month sentence being released from prison on June 27, 2000 (see Exhibit # 1).
4. The defendant moved to the State of Idaho after being released from prison in 2000 and was [s]upervised by the Washington State Department of Corrections until 2002.
5. The defendant returned to Washington and moved to Benton County in approximately 2002.
6. The defendant lived in Benton County Washington for approximately 7 years without registering.
7. On October 13, 2009, Benton County Sheriff Detective Michael Wilson received a telephone call from Grant County Sex Offender Registration Detective Jay Atwood

who inquired about the monitoring status of the defendant.

8. Detective Wilson checked the license status of the defendant and discovered that the defendant's listed address was 223304 E. Main, Kennewick, WA.

9. Detective Wilson checked the defendant's registration status and determined that the defendant had not registered with the Benton County Sheriff's office.

10. Detective Wilson attempted to contact the defendant at his residence on October 13, 2009.

11. Unable to make contact, Detective Wilson left his business card at his residence on October 13, 2009.

12. On October 15, 2009, Detective Wilson received a phone call from the defendant and advised the defendant that he needed to come into the Sheriff's office to register immediately.

13. On October 20, 2009, Detective Wilson learned that the defendant had not yet registered and attempted to contact the defendant at his residence without success.

14. On October 22, 2009, Detective Wilson contacted the defendant at his residence and placed him under arrest for failing to register as a sex offender.

15. Post arrest, the defendant completed his registration requirements while in the Benton County Jail.

16. An Information was filed on October 27, 2009, charging the defendant with Failure to Register – Prior Sex Offense – Felony – Fail to Comply with RCW 9A.44.130(11)(a).

17. The defendant filed a motion to dismiss the charge on the basis that his underlying conviction was unconstitutional based on a claim of ineffective assistance of counsel.

18. The defendant's motion to dismiss was denied by Benton County Superior Court Judge Vic Vanderschoor.

19. The defendant petitioned for interlocutory appeal of this decision to the Washington State Court of Appeals Division III.

20. The petition was denied as was a motion for revision.

21. The defendant renewed his motion to dismiss the charge for the same basis at trial. (CP 262-264),

The court found Mr. Meyer guilty of failure to register as a sex offender. (CP 265). Felony judgment and sentence was entered thereafter. This appeal follows. (CP 290).

III. ARGUMENT

A. The court erred by denying Mr. Meyer's motion to dismiss based on the unconstitutionality of the predicate offense for ineffective assistance of counsel.

Mr. Meyer filed a CrR 8.3(c) motion to dismiss the charge of failure to register as a sex offender because of the unconstitutionality of his prior Grant County conviction for second degree rape, based on ineffective assistance of counsel. (CP 126). At some point in the pretrial proceedings on the rape charge, Mr. Meyer entered into an oral agreement with the Grant County prosecutor and his defense lawyer as to his taking a polygraph examination. It was Mr. Meyer's understanding that he and the

complaining witness would take polygraph examinations, the results of which would be admissible at trial. (CP 127, 161). Mr. Meyer took several tests; the complaining witness apparently did not take any. (CP 161).

One examiner, Earl Maurer, concluded Mr. Meyer was being truthful when he denied the rape and even being in Washington in the relevant time period. (CP 128, 140). A WSP examiner, W.S. Warner, determined the results of the first polygraph test were inconclusive. (CP 141). Mr. Warner then conducted his own test and concluded Mr. Meyer was being deceptive when he denied forcing the complaining witness to have sex with him. The WSP test results were contested by Mr. Maurer. An expert on the administration of polygraph examinations, Theodore Ponticelli, reviewed the data from the polygraph administered by Mr. Maurer and concurred with his conclusion that Mr. Meyer was not practicing deception in answering the relevant questions. (CP 12, 146). At trial, both defense counsel and the prosecutor failed to inform the court that there was an agreement as to the taking of a polygraph examination. (CP 130).

Mr. Meyer had an alibi defense. One witness, Mela Green, was the daughter of Mr. Meyer's former sister-in-law and lived in

Lewiston, Idaho, home shared by Mr. Meyer, his brother Rex, and his wife Heidi. Ms. Green testified at trial that she came home at 2 a.m. and did not see Douglas Meyer's car on January 13, 1992, the date of the incident. (CP 129, 267).

Mr. Meyer was found guilty after a bench trial. (CP 130). His conviction was affirmed on appeal and a subsequent personal restraint petition was denied. (CP 130). Mr. Meyer subsequently obtained defense counsel's affidavit regarding the agreement on taking polygraph examinations and an affidavit from Jerry K. Kytönen, Mela Green's then boyfriend, that she had lied about not seeing Mr. Meyer's car at the Lewiston home on January 13, 1992. (CP 161, 162). Ms. Green signed an affidavit recanting her testimony and admitting she had lied during trial and did not recall whether she had seen Mr. Meyer's car gone on the morning in question. (CP 131, 164).

With this background, Mr. Meyer moved to dismiss the failure to register as a sex offender charge because (1) his predicate offense of second degree rape was constitutionally invalid based on ineffective assistance of counsel who failed to have the oral agreement as to the admissibility of the polygraph examination reduced to writing and (2) his conviction was based on the false

testimony of a recanting witness. (CP 126). In its response to the motion to dismiss, the State did not materially dispute the facts as stated by Mr. Meyer. (CP 177-182).

As for the recanting witness, evidence that Ms. Green had lied at trial, if true, could constitute a material fact supporting the grant of a new trial. *State v. Rolax*, 84 Wn.2d 836, 838, 529 P.2d 1078 (1974), *o'ruled on other grds*, *Wright v. Morris*, 85 Wn.2d 899, 540 P.2d 893 (1975). This evidence discovered after trial could change its results if a new trial were granted and is material, not merely cumulative or impeaching, as the recantation supports Mr. Meyer's alibi defense.

More significantly, a challenge to the constitutional validity of a predicate conviction which serves as an essential element of a charge is not a collateral attack on the prior conviction. *State v. Summers*, 120 Wn.2d 801, 810, 846 P.2d 490 (1993). Such a challenge seeks to foreclose the prior conviction's present use to establish an essential element for the crime. *See State v. Swindell*, 93 Wn.2d 192, 196, 607 P.2d 852 (1980).

Indeed, the State bears the burden of proving a prior conviction beyond a reasonable doubt when it is an essential element of the offense. *State v. Hunley*, 175 Wn.2d 901, 915, 287

P.3d 584 (2012); *Oostra v. Holstine*, 86 Wn. App. 536, 544-45, 937 P.2d 195 (1997), *review denied*, 133 Wn.2d 1034 (1998). The duty to register as a sex offender arises only after a conviction for a previous sex offense and that prior conviction is thus an essential element of the crime that must be proved beyond a reasonable doubt. *State v. Roswell*, 165 Wn.2d 186, 194, 196 P.3d 705 (2008); *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002).

In raising the defense of constitutional invalidity of a predicate conviction, the defendant bears the burden of raising a colorable, fact-specific argument supporting the claim of constitutional error in the prior conviction. *Summers*, 120 Wn.2d at 812. Only after the defendant has made this initial showing does the State's burden arise. *Id.* Contrary to the trial court's ruling, Mr. Meyer has raised a colorable, fact-specific argument in his memorandum that included affidavits supporting his claim of ineffective assistance of counsel, which is of constitutional magnitude, and the recanting witness, who was crucial to the State's discrediting the alibi defense and obtaining a conviction. (CP 126-175).

In Washington, the results of a polygraph examination are inadmissible absent a written stipulation by both parties. *State v.*

Ahlfinger, 50 Wn. App. 466, 468, 749 P.2d 190, *review denied*, 110 Wn.2d 1035 (1988). The failure of defense counsel to ask the State to put such an agreement in writing or in the trial judge's presence is ineffective assistance, prejudicing the defendant's right to a fair trial. *Houston v. Lockhart*, 982 F.2d 1246, 1251 (8th Cr. 1993). Mr. Meyer made a colorable and fact-specific claim of constitutional error.

The State did not rebut those arguments, but rather attempted to distinguish *Summers* by contending Mr. Meyer made no showing of constitutional error in the underlying conviction. But he did make such a showing with affidavits from people involved in the 1992 rape trial that cited specific facts supporting his claims of constitutional error. Mr. Meyer met his initial burden. See *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). The court erred by failing to recognize he had done so. *Summers*, 120 Wn.2d at 812.

The court then failed to follow proper procedure and to recognize the State's burden of proving the constitutional validity of the prior conviction. It just summarily denied the motion to dismiss and granted the State's motion in limine precluding Mr. Meyer from presenting any evidence of the circumstances of the second degree

rape conviction and its constitutional infirmity. (CP 206). The court also improperly relieved the State from its burden of proving beyond a reasonable doubt the predicate conviction, an essential element of the crime of failure to register as a sex offender. *Roswell*, 165 Wn.2d at 194; *Oster*, 147 Wn.2d at 146. The court erred by doing so.

B. The court erred by finding Mr. Meyer guilty of the crime of failure to register as a sex offender when the State failed to prove a prior conviction for a sex offense, an essential element of the crime.

The State must prove beyond a reasonable doubt the essential elements of the crime. *Oster*, 147 Wn.2d at 146. A prior conviction for a sex offense is an essential element of the crime of failure to register as a sex offender. *Roswell*, 165 Wn.2d at 194. *Oostra*, 86 Wn. App. at 544-45. The court relieved the State of its burden and erred.

Because the State failed to prove the essential elements of the crime beyond a reasonable doubt, the evidence was insufficient to support the conviction. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The conviction must be reversed and the charge dismissed with prejudice. *State v. Werneth*, 147 Wn App.

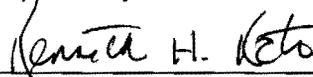
549, 555, 197 P.3d 1195 (2008); *State v. Howe*, 151 Wn. App. 338, 352, 212 P.3d 565 (2009).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Meyer respectfully urges this court to reverse his conviction and dismiss the charge.

DATED this 20th day of May, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on May 20, 2013, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Douglas Earl Meyer, 223304 E. Main St., Kennewick, WA 99337; and Andrew K. Miller, Benton County Prosecutor, 7122 W. Okanogan Pl., Bldg A, Kennewick, WA 99336.

