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Court of Appeals

Division III

State of Washington

No. 31908-3-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ROMAN S. BUSEV,

Defendant/Appellant.

Appellant's Brief

DAVID N. GASCH
WSBA No. 18270
P.O. Box 30339
Spokane, WA 99223-3005
(509) 443-9149
Attorney for Appellant

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A. ASSIGNMENT OF ERROR

The trial court erred in denying Mr. Busev's motion to dismiss and allowing the case to go to the jury where the basis of unlawful entry for the burglary charge was the violation of a court order from a prior shoplifting conviction prohibiting entry into Walmart.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court violate the separation of powers doctrine by allowing the jury to find Mr. Busev guilty of burglary, where the element of unlawful entry was based on a violation of a prior court prohibiting entry into Walmart?

C. STATEMENT OF THE CASE

Mr. Busev was convicted by a jury of second degree burglary based on his violation of a court order from a prior shoplifting conviction prohibiting him from entering Walmart. CP 17, RP 16-58. Prior to trial Mr. Busev moved to dismiss the charge, arguing that the violation of the court order from the previous conviction should be treated as a probation violation and not as a basis for a burglary charge. The Court denied the motion finding it untimely. RP 6-13.

Mr. Busev moved to dismiss again at the close of the State's case in chief. In denying the motion the Court relied on *State v. Wilson*, 136

Wash. App. 596, 150 P.3d 144 (2007) and *State v. Stinton*, 121 Wash.App. 569, 89 P.3d 717 (2004). The court held the jury could find the entry into Walmart was unlawful, based on [a violation of] the court order from a prior shoplifting conviction prohibiting Mr. Busev from entering Walmart. RP 72-76.

This appeal followed. CP 2.

D. ARGUMENT

The trial court violated the separation of powers doctrine by allowing the jury to find Mr. Busev guilty of burglary, where the element of unlawful entry was based on a violation of a court order from a prior shoplifting conviction prohibiting entry into Walmart.

The separation of powers doctrine is not specifically enunciated in either the Washington or federal constitutions, but is universally recognized as deriving from the tripartite system of government established in both constitutions. *See, e.g.*, Wash. Const. arts. II, III, and IV (establishing the legislative department, the executive, and judiciary); U.S. Const. arts. I, II, and III (defining legislative, executive, and judicial branches); *Carrick v. Locke*, 125 Wash.2d 129, 134–35, 882 P.2d 173 (1994). When separation of powers challenges are raised involving different branches of state government, only the state constitution is

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

implicated. *See Carrick*, 125 Wash.2d at 135 n. 1, 882 P.2d 173.

However, appellate courts rely on federal principles regarding the separation of powers doctrine in interpreting and applying the state's separation of powers doctrine. *Carrick*, 125 Wash.2d at 135 n. 1, 882 P.2d 173.

Washington courts have recognized the separation of powers doctrine as a founding, implicit principle of our state and federal constitutions. *State v. Blilie*, 132 Wn.2d 484, 489, 939 P.2d 691 (1997). The doctrine ensures that the fundamental functions of each government branch remain inviolate. *Carrick*, 125 Wn.2d at 135, 882 P.2d 173. The legislature defines crimes and sets punishments. *State v. Wadsworth*, 139 Wn.2d 724, 734, 991 P.2d 80 (2000). But, “the three branches are not hermetically sealed and some overlap must exist.” *City of Fircrest v. Jensen*, 158 Wn.2d 384, 393–94, 143 P.3d 776 (2006). The question to be asked in a separation of powers challenge is not whether two branches of government engage in coinciding activities, but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another. *State v. Chavez*, 163 Wash. 2d 262, 273, 180 P.3d 1250 (2008); *Carrick*, 125 Wash.2d at 135, 882 P.2d 173, citing *Zylstra v. Piva*, 85 Wash.2d 743, 750, 539 P.2d 823 (1975).

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

Here, the trial court violated the separation of powers doctrine when it allowed the jury to base the unlawful entry on a violation of a prior court order from a prior shoplifting conviction. The Court relied on *State v. Wilson*, 136 Wash. App. 596, 150 P.3d 144 (2007) and *State v. Stinton*, 121 Wash.App. 569, 89 P.3d 717 (2004) in holding it was permissible for the jury to find the entry into Walmart was unlawful for purposes of burglary, based on the court order from a prior shoplifting conviction prohibiting Mr. Busev from entering Walmart. RP 72-76. The present case is distinguishable from both *Wilson* and *Stinton*.

Wilson and *Stinton* were both domestic violence cases where the defendant was charged with burglary based on violating a no-contact order. *Wilson*, 136 Wash. App. at 603-04, 150 P.3d 144; *Stinton*, 121 Wash.App. at 571-75, 89 P.3d 717. In *Stinton*, the court found the defendant guilty of residential burglary when he unlawfully entered the residence without permission and with the intent to commit the crime of harassing the victim in violation of the court order expressly excluding him from her residence. *Stinton*, 121 Wash.App. at 575, 89 P.3d 717. The Court further held that “the violation of a provision of a protection order can serve as the predicate crime for residential burglary.” *Id.* at 571, 89 P.3d 717.

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com

In *Wilson*, the Court applied the same legal reasoning as *Stinton*, but found the defendant not guilty of burglary because the no-contact order did not exclude him from the residence. *Wilson*, 136 Wash. App. at 604, 150 P.3d 144.

The feature that distinguishes *Wilson* and *Stinton* from this case is the fact that violating a no-contact order is a crime by statute. See RCW 9A.46.080. By contrast, violating a court order from a previous conviction prohibiting entry into a retail store is not a crime by statute. It is instead, as trial counsel argued, a probation violation. The Legislature has the absolute power, within constitutional limitations, to define any act as a crime and to establish the elements thereof. *State v. Tyson*, 33 Wash.App. 859, 861-62, 658 P.2d 55 (1983), citing *State v. Mundy*, 7 Wash.App. 798, 800, 502 P.2d 1226 (1972). The Legislature has not defined violating a court order from a previous conviction prohibiting entry into a retail store as a crime. Therefore, the trial court violated the separation of powers doctrine by allowing the jury to base the unlawful entry for burglary on a violation of such a court order.¹

¹ Appellant is aware of prior decisions where it was found a person's presence may be unlawful because of a revocation of the privilege to be there even if the property is otherwise open to the public. See *State v. Collins*, 110 Wash.2d 253, 258, 751 P.2d 837 (1988); *State v. Kutch*, 90 Wash. App. 244, 249, 951 P.2d 1139 (1998); *State v.*

E. CONCLUSION

For the reasons stated the conviction should be reversed and the case dismissed.

Respectfully submitted July 7, 2014,

s/David N. Gasch
Attorney for Appellant
WSBA #18270

McDaniels, 39 Wash.App. 236, 240, 692 P.2d 894 (1984). However, a separation of powers challenge was not considered in any of these cases.

PROOF OF SERVICE

I, David N. Gasch, do hereby certify under penalty of perjury that on July 7, 2014, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of Appellant's Brief:

Roman Busev
2306 S Gum St
Kennewick WA 99337

E-mail: Appeals@co.franklin.wa.us
Shawn P Sant
Franklin County Prosecutor's Office
1016 N 4th Ave
Pasco WA 99301-3706

s/David N. Gasch
WSBA #18270

Gasch Law Office, P. O. Box 30339
Spokane WA 99223-3005
(509) 443-9149
FAX - None
gaschlaw@msn.com