FILED
DECEMBER 19, 2014
Court of Appeals
Division III
State of Washington

NO. 31908-3-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

ROMAN BUSEV

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

SHAWN P. SANT
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A. COUNTERSTATEMENT OF THE ISSUES

1. DOES A COURT IMPLICATE THE SEPARATION OF POWERS DOCTRINE BY MAKING AN EVIDENTIARY RULING TO ALLOW A JURY TO CONSIDER A JUDGMENT AND SENTENCE AS PROOF OF UNLAWFUL ENTRY?

B. RESPONSE TO STATEMENT OF THE CASE

On October 8, 2012, the State charged the Appellant with Burglary in the Second Degree. CP 35. Prior to the trial, the Appellant made a motion in limine to exclude mention of a judgment and sentence which ordered the Appellant not to enter Wal-Mart in Pasco, Washington. The court denied the motion as untimely. RP 7-13. The case proceeded to trial and the State admitted a certified copy of a Judgment and Sentence from Pasco Municipal Court #XY0596103, which ordered the Appellant not to enter Wal-Mart. RP 58. CP 16. A Wal-Mart employee testified that any individual under such an order would not be welcome in the Wal-Mart store. RP 58. Following the State's case, the Appellant made a motion to dismiss based on the Appellant not being formally trespassed from Wal-Mart. The Court denied that motion. RP 72-76. The jury found the Appellant guilty of the crime of Burglary in the Second Degree. RP 105.

C. RESPONSE TO ARGUMENT

1. THE SEPARATION OF POWERS IS NOT IMPLICATED WHEN THE TRIAL COURT MAKES AN EVIDENTIARY RULING WHICH THE JURY SUBSEQUENTLY FINDS SUFFICIENT TO SATISFY AN ELEMENT OF A CRIMINAL OFFENSE.

The traditional role of a judge in the context of a jury trial is to act as the "arbiter of the law and manager of the trial process." United States v. Evanston, 651 F.3d 1080, 1084 (9th Cir. 2011). In this case, the trial court made an evidentiary ruling by denying the Appellant's Motion in Limine and Motion to Dismiss. By doing this, the trial court acted within is proper role and therefore, did not violate the separation of powers doctrine.

The Supreme Court of Washington acknowledges a separation of power doctrine which is recognized implicitly in our Federal and State Constitutions. Carrick v. Locke, 125 Wash.2d 129, 135, 882 P.2d 173 (1994) citing In re Juvenile Director, 87 Wash.2d 232, 238-40, 552 P.2d 163 (1976). The Court states this doctrine does not require the branches of government "to be hermetically sealed off from one another." Id. "The separation of powers doctrine is grounded in flexibility and practicality, and rarely will offer a definitive boundary beyond which one branch may not

tread." Id. The central inquiry asked when considering if the separation of powers doctrine is violated is not whether two branches of government are engaged in the same activity, "but rather whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another." Id.

The trial court's decision to allow the State to admit evidence of lack of license to enter the premises, and then argue that the Appellant entered unlawfully, was an example of the court properly carrying out its role within the criminal justice system: "It is the role of the trial court to determine questions of law and explain the law of the case to the jury through jury instructions. State v. Huckins, 66 Wash.App. 213, 217, 836 P.2d 230 (1992). Making this traditional decision did not infringe on any other branch of government.

When the legislature criminalized burglary, it did not make trespassing, or any specific crime, synonymous with entering unlawfully. RCW 9A.52.030. It simply used the term "enters or remains unlawfully." It then offered the definition "unlawfully" without specifying the crime of trespassing or any other crime as determining unlawfulness. RCW 9A.52.110. As the statute does

not specify a specific crime as the predicate for entering unlawfully, it is the job of the trial court to make an evidentiary ruling as to what evidence is relevant towards proving unlawfulness. In this case, it found the terms of the Appellant's earlier sentence relevant in proving that element. This is a proper use of judicial power. While one might consider the use of such power an overlap with the legislature's power to define crimes, it is certainly does not threaten the independence of the legislative branch. The legislature is still free to define crimes with more narrow parameters when it chooses, thereby limiting the duty of the judicial branch to interpret those laws.

In any event, even if the one accepts the paradigm of the Appellant's argument, case law has already concluded that the unlawfulness can be determined by court order. In State v. Stinton, the court held that the violation of a protection order provision can serve as the predicate crime in a burglary case. 121 Wash.App. 569, 577, 89 P.3d 717 (2004). The State establishes a prima facia case that an individual entered unlawfully by proving a court order exists and that the defendant knew he entered in violation of the order. Id. at 575. Issuing a court order is an example of one way a privilege that would exist normally can be revoked. In this case, a

court issued an order, pursuant to a judgment and sentence, revoking any privilege the Appellant had to enter the premises of Wal-Mart. Like the defendant in Stinton, the Appellant's entry into that premises became contrary to law the moment he had notice that a court forbid him from entering.

Division Two opined that such a court order, if not specific to the residence, cannot exclude an individual from his own residence. State v. Wilson, 136 Wash.App. 596, 610-11, 150 P.3d 144 (2007). Unlike that instance, the Judgment and Sentence in this case specifically prohibited the Appellant from entering a building in which he had no ownership or habitation interest. Id. Diversion Three acknowledges the unique facts of Wilson, and confirms "the consent of a protected person cannot override a court order excluding a person from the residence. State v. Sanchez, 166 Wash.App. 304, 310, 271 P.3d 264 (2012). It is irrelevant whether Wal-Mart formally trespassed the Appellant; the court order revoked any license he had, and in any event, a Wal-Mart employee confirmed that the Appellant, once ordered away by the court, was not welcome in the building.

The Appellant argues that unlike a no contact order violation, the Appellant's entry into the store in violation of his of his Judgment and Sentence is not a crime, therefore, not technically unlawful. There are two flaws to this argument.

One, the Appellant's argument operates on the assumption that unlawful and criminal mean the same thing for purposes of RCW 9A.52.030 (this is also the Appellant's primary way of distinguishing Stinton from the current case). RCW 9A.52.010(5) defines "enters or remains unlawfully" as having to do with whether or not one is privileged or licensed to enter a building. There is no mention that one must be in specific violation of a law to be at a location unlawfully. The legislature could have chosen to use the term "criminal" in the definition of unlawful, but instead, they chose to base it on privilege to enter. This supports the proposition that this case should be treated the same as the Stinton treated their evidence of unlawfulness.

Two, even if one insists that a crime must be committed for entry to be unlawful, the same logic puts the Appellant's entry in violation of the State's trespass statute. That statute states that it is a gross misdemeanor to enter or remain unlawfully in a building. RCW 9A.52.070. That chapter defines" enters or remains

unlawfully" as when one enters "when he or she is not licensed, invited, otherwise privileged to so enter or remain." RCW 9A.52.010. A court excluded the Appellant from Wal-Mart, based on this exclusion, the Appellant entered without license; therefore, he committed a Trespass in the First Degree, a gross misdemeanor violation. Such a violation is just as unlawful as a No Contact Order violation.

D. CONCLUSION:

Unlike the defendants in Stinton and Wilson, the Appellant relies strictly on the separation of powers issue. The Appellant does not object to the evidence from a relevance standpoint. This position is inconsistent with a separation of powers argument. The only way the evidence can be relevant is if it goes to the unlawfulness of the entry into the premises. Conceding that it is relevant to unlawfulness, concedes to the State's definition of unlawfulness under the statute. A trial court does not invade the province of the legislature by making ruling consistent with the language and purposes of a statute.

On the basis of the arguments set forth herein, it is

respectfully requested that the decision of the Superior Court for Franklin County be affirmed.

Dated this 19th Day of December.

Respectfully submitted,

SHAWN P. SANT
Prosecuting Attorney

By:
Brian V. Hultgrenn
WSBA #34277
Deputy Prosecuting Attorney

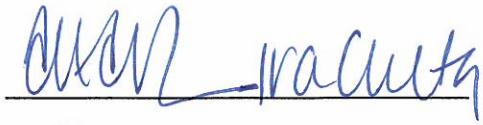
AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

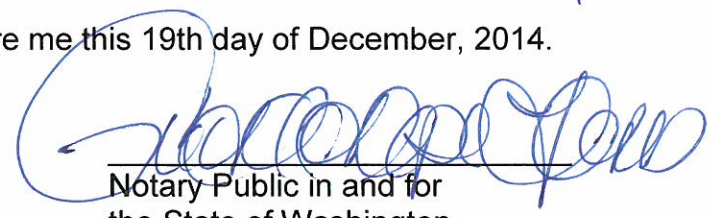
COMES NOW Abigail Iracheta, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity. I hereby certify that on the 19th day of December, 2014, a copy of the foregoing was delivered to Roman Busev, Appellant, 2306 Sourth Gum Street, Kennewick WA 99337 by depositing in the mail of the United States of America a properly stamped and addressed envelope; and to David Gasch

(gaschlaw@msn.com) by email per agreement of the parties pursuant to GR30(b)(4).



Signed and sworn to before me this 19th day of December, 2014.



Notary Public in and for
the State of Washington,
residing at Walla Walla
My appointment expires:
August 24, 2017

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