

FILED
Feb 24, 2016
Court of Appeals
Division III
State of Washington

NO. 325491
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

DAVID R. PRIEST
APPELLANT,
V.
STATE OF WASHINGTON
RESPONDENT

SUPPLEMENTAL BRIEF

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A. IDENTITY OF RESPONDENT

The Respondent is the State of Washington, represented by Karl F. Sloan, Okanogan County Prosecuting Attorney.

B. FACTS

On December 16, 2015, the Court of Appeals requested supplemental briefing regarding an allegation made by Appellant that he is an enrolled member of the Colville Confederated Tribe and not subject to prosecution.

C. ARGUMENT

1. The trial court did not err in finding state court jurisdiction where there was no evidence in the record to support any other finding.

Proof of jurisdiction beyond a reasonable doubt is an integral component of the State's burden in every criminal prosecution. *State v. Svenson*, 104 Wash. 2d 533, 542, 707 P.2d 120 (1985). In most circumstances, proof that the crime was committed in the state of Washington satisfies the jurisdictional element. *State v. L.J.M.*, 129 Wash. 2d 386, 392, 918 P.2d 898 (1996). Ordinarily, it is the State's burden to establish that jurisdiction is appropriate in state court. *L.J.M.*, 129 Wash. 2d at 392.

Where the underlying facts are undisputed, a trial court's decision regarding jurisdiction is reviewed de novo *State v. Squally*, 132 Wash. 2d 333, 340-41, 937 P.2d 1069, 1073 (1997) (*citing Lewis v. Bours*, 119 Wash.2d 667, 669, 835 P.2d 221 (1992)).

When reviewing a trial court's decision de novo, review is limited to the trial court record of the facts that were in front of the trial court; and the reviewing court does not consider evidence outside the record. *State v. Monfort*, 179 Wash. 2d 122, 129, 312 P.3d 637, 641 (2013); *See also, In re Disciplinary Proceedings Against Turco*, 137 Wash. 2d 227, 245–46, 970 P.2d 731 (1999) (de novo review does not mean that the court holds a new evidentiary hearing); *State v. Armenta*, 134 Wash. 2d 1, 9, 948 P.2d 1280 (1997) (de novo review is limited to the legal conclusions the trial court drew from its findings of fact).

In the present case, the facts before the trial court are uncontested. There were no facts before the trial court that raised any question of jurisdiction, or that would support a finding on review that the trial court committed legal error.

The State does not acquire a higher burden of proof on jurisdiction unless the totality of the evidence before the trial court causes it to reasonably question the State's prima facie showing that jurisdiction exists simply because the site of the alleged crime is within the state of Washington. *L.J.M.*, 129 Wash. 2d at 394¹

The amount of evidence that would cause a court to reasonably question whether jurisdiction properly lies in state court is similar to that which a defendant must present when raising an affirmative defense of self-defense. It requires only that the defendant point to evidence that has been produced and presented to the court, which, if true, would be sufficient to defeat state jurisdiction. *L.J.M.*, 129 Wash. 2d at 394-95.

¹ Jurisdiction need not be exclusive and both the State and a tribe may prosecute an Indian for offenses for which each has jurisdiction without violating the constitutional prohibition against double jeopardy or the state statutory prohibition against double jeopardy. *State v. Moses*, 145 Wash. 2d 370, 37 P.3d 1216 (2002).

The burden of proof of for subject matter jurisdiction shifts as follows:

1. The State always has the burden of establishing jurisdiction beyond a reasonable doubt. By alleging that the crime took place in Washington, the State meets this burden.
2. To overcome this presumption, the defendant need only point to evidence of facts, which, if proved, would defeat jurisdiction.
3. The State must then come forward with a prima facie showing of additional jurisdictional facts sufficient to refute the defense's theory and satisfy the court that it has jurisdiction.
4. If the defense fails to convince the court that jurisdiction is questionable, the State can rest on its initial showing that the crimes occurred within the state.
5. If, however, the court remains in doubt as to its jurisdiction, then the jurisdictional facts become an element of the crime to be decided by the finder of fact in the event of a trial. The State must prove the jurisdictional facts by the usual standard of beyond reasonable doubt.

State v. Boyd, 109 Wash. App. 244, 251, 34 P.3d 912, 915 (2001) (internal citations omitted). As in *L.J.M.*, 129 Wash. 2d 386, there was no evidence before the trial court that would cause it to doubt the State's assertion of jurisdiction based on its showing that the site of the alleged crime was within the state. The State made a prima facie showing of jurisdiction. The "burden of contesting" shifted to the defendant to produce evidence sufficient to defeat State jurisdiction. *E.g.*, *State v. Waters*, 93 Wash. App. 969, 978, 971 P.2d 538, 543 (1999); *L.J.M.*, 129 Wash. 2d at 395–96. There was no evidence before the trial court to support a claim of tribal jurisdiction, or to support the contention that the State failed to prove state court jurisdiction.

There is no competent evidence to support the Appellant's claim on appeal (or in the PRP). As in *L.J.M.*, 129 Wash. 2d 386, the defendant's attempt to show Indian status for the purpose of tribal criminal jurisdiction, where he now alleges he is a member of the Colville Indian Tribe, even if true, does not defeat state jurisdiction, because tribal membership alone is not necessarily adequate to establish Indian status

for the purposes of RCW 37.12 and 18 U.S.C.A. § 1151-53 (West). *L.J.M.*, 129 Wash. 2d at 396.

The Appellant's allegation must be denied where the record before the trial court does not support any claim of error by the trial court in finding state court jurisdiction.

2. The PRP cannot be a substitute for issues to be raised on direct appeal. The PRP is not supported by competent evidence.

The Appellant also filed a PRP. A defendant who has not appealed an issue may not use a personal restraint petition to raise issues he could have raised in a direct appeal, except for "grave constitutional errors". See *State v. Hall*, 18 Wash. App. 844, 847, 573 P.2d 802 (1977) (quoting *Koehn v. Pinnock*, 80 Wash. 2d 338, 340, 494 P.2d 987 (1972)). A petitioner in a personal restraint petition is prohibited from renewing an issue that was raised and rejected on direct appeal unless the interests of justice require re-litigation of that issue. *E.g.*, *In re Davis*, 152 Wash. 2d 647, 671, 101 P.3d 1, 15 (2004). A PRP alleging non-constitutional error must show a fundamental defect, which inherently results in a complete miscarriage of justice. *Matter of Cook*, 114 Wash. 2d 802, 812, 792 P.2d 506 (1990).

Contrary to the claim in the PRP, there was "no dispute" as to the facts; the underlying record did not establish any assertion made in the PRP. The underlying record was silent on the defendant's status, as it was regarding the status of the individual property.

The subsequent documentation provided on January 15, 2016, in response to the Court of Appeals request is not competent evidence. If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that

he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify. In short, the petitioner must present evidence showing that his factual allegations are based on more than speculation, conjecture, or inadmissible hearsay. *State v. Roche*, 114 Wash. App. 424, 441, 59 P.3d 682 (2002), *as amended* (Dec. 4, 2002) (citing *In re Rice*, 118 Wash. 2d 876, 886, 828 P.2d 1086 (1992)). On motion of the opposing party, the appellate court will strike incompetent and inadmissible evidence offered by the petitioner in support of the personal restraint petition. *Roche*, 114 Wash. App. at 441 (citing *Matter of Pirtle*, 136 Wash. 2d 467, 473, 965 P.2d 593 (1998), *as amended on denial of reconsideration* (Dec. 7, 1998)).

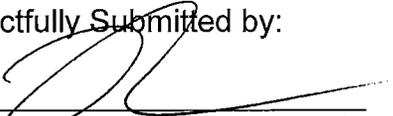
No competent evidence has been submitted in the present case.

D. CONCLUSION

The issue raised by Appellant in his Statement of Additional Grounds should be denied where the defendant has failed to carry his burden to contest jurisdiction, and where the trial court record lacked any evidence to question the trial court's jurisdiction.

Dated this 24 day of Feb 2016.

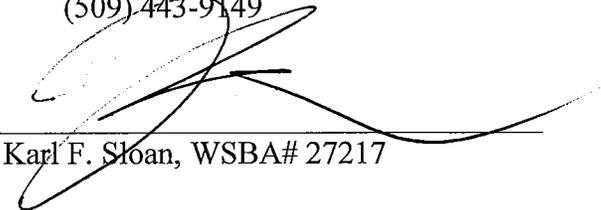
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PROOF OF SERVICE

I, Karl F. Sloan, do hereby certify under penalty of perjury that on February 24, 2016, I provided email service, a true and correct copy of **Supplemental Brief**, to:

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