

FILED

SEP 24, 2015

Court of Appeals
Division III
State of Washington

No. 32708-6-III (consolidated)

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JAYME L. RODGERS,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable Harold D. Clarke, III, Judge

REPLY BRIEF OF APPELLANT JAYME L. RODGERS

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A. ARGUMENT IN REPLY TO STATE’S RESPONSE

1. Mr. Rodgers’ convictions for drive-by shooting should be reversed and dismissed because the State was unable to establish beyond a reasonable doubt the location of any motor vehicles that may have been involved in the offenses.

Mr. Rodgers’ primarily relies upon his Brief of Appellant to address this issue. Brief of Appellant at 10–13.

Additionally, the State’s facts and argument misstate the evidence of car location. The State alleges, “They drove the vehicle to the center of the adjoining street. RP 267.” Brief of Respondent at 7. The State argues, “After purchasing gas at the store, the defendants parked their car in the median of the adjacent street next to the gas pumps. ... It can be reasonably inferred that the defendants strategically parked their vehicle in the median of the street next to the gas pumps rather than in the parking lot of the store. Rather than possibly having the car blocked in the parking lot, parking in the median provided easy and immediate access to the vehicle after commission of the crimes” Brief of Respondent, p. 13–14. To the contrary, a customer saw Mr. Rodgers and Mr. Weatherwax return to their car after the encounter in the store and another eyewitness testified they drove out into the center of the street and away. RP 266,

275, 279. No testimony in the transcript at RP 267 or elsewhere concerns the vehicle being parked in the median of an adjoining street next to the gas pumps. Misstatements in an appeal brief must be stricken and are not to be considered by the appellate court. See *Dependency of K.S.C.*, 137 Wn.2d 918, 933, 976 P.2d 113 (1999).

In closing argument the prosecuting attorney acknowledged the two men had driven away and that the whereabouts of the car was unknown. He stated that the car was “parked ... somewhere off in the dark streets.” RP 706. His candid admission is essentially a concession that the State failed to prove every element of the offense of drive-by shooting. Pursuant to *State v. Rodgers*, 146 Wn.2d 55, 61–62, 43 P.3d 1 (2002), insufficient evidence as to the location of the car requires dismissal of the convictions in Counts V, VI and VII.

2. The trial court erred when it imposed mandatory minimum sentences on Mr. Rodgers’ first degree assault convictions.

3. For purposes of the special scoring of multiple current serious violent offenses under RCW 9.94A.589(1)(b), where the crimes arguably have the same seriousness level and the statute is ambiguous, the rule of lenity requires the offender score calculation apply to the anticipatory

offense and the 0-scoring rule apply to the completed crime as this will yield a shorter sentence.

The State appropriately concedes Mr. Rodgers' issues. Brief of Respondent at 14–15, 16–18.

4. The trial court miscalculated the offender score.

Based upon his arguments regarding the drive-by shooting convictions, Mr. Rodgers relies upon his Brief of Appellant to address this issue. Brief of Appellant at 21–22.

5. The sentencing court violated due process and exceeded its statutory authority by imposing certain conditions of community custody that are improper, not crime-related or are unconstitutionally vague.

The State concedes the marijuana prohibition should be modified. Brief of Respondent at 22–23. Mr. Rodgers relies upon his Brief of Appellant to address the prohibition issues related to gangs and motor vehicles. Brief of Appellant at 24–31.

6. Since the directive to pay LFOs was based on an unsupported finding of ability to pay, the matter should be remanded for the sentencing court to make individualized inquiry into Mr. Rodgers' current and future ability to pay before imposing LFOs.

7. RCW 43.43.7541 violates substantive due process and is unconstitutional as applied to defendants who do not have the ability or likely future ability to pay the mandatory \$100 DNA collection fee.

Mr. Rodgers relies upon his Brief of Appellant to address these issues. Brief of Appellant at 31–38, 38–42.

B. CONCLUSION

For the reasons stated here and in the Brief of Appellant, Mr. Rodgers asks this Court to grant relief as previously requested.

Respectfully submitted on September 24, 2015.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on September 24, 2015, 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 reply brief of appellant:

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