

FILED
OCTOBER 17, 2016
Court of Appeals
Division III
State of Washington

No. 34232-8-III

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON

V.

GERRIT KOBES

BRIEF OF APPELLANT

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A. Assignment of Errors

Assignment of Errors

1. The term “residence” is unconstitutionally vague as applied and the evidence was insufficient to convict Mr. Kobes of violation of a no contact order.
2. The evidence was insufficient to convict Mr. Kobes of residential burglary.

Issues Pertaining to Assignment of Errors

1. Was the no contact order, which prohibited Garrit Kobes from approaching or entering the residence of Erica Kobes, unconstitutionally vague as applied when Mr. Kobes entered the residence at a time when Ms. Kobes was residing at a detox center in Spokane and Mr. Kobes knew that fact?
2. Was the evidence sufficient to convict Mr. Kobes of residential burglary when the only alleged fact that made his entry into the residence unlawful was the unconstitutionally vague no contact order?

B. Statement of Facts

Gerrit Kobes was convicted by a jury of residential burglary and violation of a no contact order CP, 50-51. He was sentenced to 17 months in prison. CP, 52.

Mr. Kobes is an Army veteran who saw combat in Iraq. RP, 71, 102-03. While in the Army, he received many awards, including the Silver Star and Army Commendation Medal of Valor. RP, 103. Although he was not physically injured in combat, the repeated exposure to close range bombs left him with traumatic brain injury and post-traumatic stress disorder. RP, 104. The Veteran's Administration has classified him as 100% disabled. RP, 104.

Mr. Kobes spent the majority of 2015 in jail. RP, 104. Soon after he got out of jail, his grandmother passed away. RP, 105. He was concerned that his children did not know about the passing of his grandmother. RP, 105. He also needed to go to his house to get some personal things, including his boots and a check so he could attend his grandmother's funeral. RP, 105.

On October 29, 2015, Mr. Kobes went to his house at 1365 Kettle Falls Road in Stevens County. RP, 34. His wife, Erika Kobes, was not present. RP, 44. His mother-in-law, Patty Ringel, heard a knock at the door. RP, 62-63. She opened the door and Mr. Kobes said he "just came to get his wallet." RP, 64. He also mentioned his boots. RP, 64. The kids came out very excited and greeted him with a hug and kiss. RP, 64, 105. Mr. Kobes testified Ms. Ringel invited him into the house while he hugged the kids. RP, 106. According to eleven year old Teunnis Kobes, he was

there for about thirty minutes. RP, 53. He was looking for his boots, license, and wallet. RP, 56. Teunnis helped him look for the items, but the license was not located. RP, 52, 56.

While Mr. Kobes was looking for items, Ms. Ringel heard a crash from the direction of the bedroom. RP, 64. After he left, she noticed the lock on the bedroom door was broken. RP, 69. Police later took photos of the broken hasp. RP, 36-37. Mr. Kobes testified the hasp on the bedroom door was damaged before he got there. RP, 107.

At the time, Mr. Kobes had a no contact order prohibiting him from contacting his wife or going to her residence. Exhibit 1. On October 29, Ms. Kobes was not living at 1365 Kettle Falls Road but was living in a detox center in Spokane. RP, 44, 47. While she was at the detox center, she left the kids in the care of her mother, Patty Ringel. RP, 45. There had been no contact between Mr. Kobes and his wife leading up to October 29. RP, 45. Mr. Kobes knew that his wife was not living there but was in detox. RP, 113. While at the house, Mr. Kobes mentioned to Ms. Ringel that he knew his wife was in detox and not staying there. RP, 73.

C. Argument

1. The term “residence” is unconstitutionally vague as applied and the evidence was insufficient to convict Mr. Kobes of violation of a no contact order.

Mr. Kobes argues he cannot be convicted of violating a no contact order if the terms of the no contact order are unconstitutionally vague as applied. And under the facts of this case, the term “residence” is unconstitutionally vague.

A preliminary issue is whether constitutional principles such as the vagueness doctrine apply to court orders at all. Courts are accustomed to analyzing criminal statutes for vagueness, but analyzing a court order for vagueness is a more novel concept. Washington courts have not hesitated to analyze community custody conditions for vagueness. *State v. Sanchez-Valencia*, 169 Wn2d 782, 239 P.3d 1059 (2010); *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008). Search warrants have also been analyzed for vagueness and overbreadth. *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993). In *Stone v. Godbehere*, 894 F.2d 1131 (9th Cir 1990) the Ninth Circuit reviewed a civil court injunction for vagueness. Although the Court ultimately upheld the injunction, it did not hesitate to review it despite the fact it was a civil court order.

United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), a double jeopardy case, holds that violations of court orders are entitled to the same constitutional protections as statutes. Appellant Dixon was charged with one count of criminal contempt for violating an order on conditions of release that he not violate the law, in this case by

possessing drugs. Appellant Foster was charged with criminal contempt for after he violated a Civil Protection Order prohibiting him from assaulting his wife. Subsequent to the criminal contempt convictions, Appellant Dixon was charged with a drug charge and Appellant Foster was charged with assault. Both moved to dismiss the subsequent charges arguing they violated their right to be free from double jeopardy. The Supreme Court agreed, saying:

[T]he “crime” of violating a condition of release cannot be abstracted from the “element” of the violated condition. The Dixon court order incorporated the entire governing criminal code in the same manner as the Harris felony-murder statute incorporated the several enumerated felonies. . . . The foregoing analysis obviously applies as well to Count I of the indictment against Foster, charging assault in violation of §22-504, based on the same event that was the subject of his prior contempt conviction for violating the provision of the [Civil Protection Order] forbidding him to commit simple assault under §22-504.

Dixon at 698-700, citing *Harris v Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 1Ed.2d 1054 (1977) (*per curiam*). *Dixon* stands for the proposition that when a person is convicted of a criminal offense for violating a court order, the court order incorporates the applicable criminal code. The same constitutional protections that would be afforded a defendant for violating a statute are afforded the defendant for violating the court order.

The United States Supreme Court, in one of the last decisions from Justice Scalia, recently explained the vagueness doctrine as follows:

The Fifth Amendment provides that “[n]o person shall ... be deprived of life, liberty, or property, without due process of law.” Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. The prohibition of vagueness in criminal statutes is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process.

Johnson v United States, ___ U.S. ___, 135 S.Ct. 2551, 2556-57, 192 L.Ed.2d 569 (2015) (citations omitted) The Washington Supreme Court has said the vagueness doctrine serves two important purposes: (1) to provide fair notice to citizens as to what conduct is proscribed; and (2) to protect against arbitrary enforcement of the laws. *Seattle v. Eze*, 111 Wn.2d 22, 759 P.2d 366 (1988).

The term “residence” has proven to be a difficult term to define, depending upon the context. Many of the cases addressing this issue have been in the context of the failure to register statute, RCW 9A.44.130. In *State v. Jenkins*, 100 Wn.App. 85, 995 P.2d 1268 (2000) the Court of Appeals found former RCW 9A.44.130 unconstitutionally vague under the facts of that case because it failed to adequately define “address” and

“residence.” In *Jenkins*, the defendant had registered his address with the sheriff’s office and, although he received his mail at that address and stored some personal items, did not sleep there. The Court reversed his conviction. In doing so, the Court relied on a dictionary definition of “residence,” saying, “Residence as the term is commonly understood is the place where a person lives as either a temporary or permanent dwelling, a place to which one intends to return, as distinguished from a place of temporary sojourn or transient visit.” *Jenkins* at 91, quoting *State v. Pickett*, 95 Wn App. 475, 478, 975 P.2d 584 (1999).

In *State v. Pray*, 96 Wn App 25, 980 P.2d 240 (1999) the defendant was registered in King County and moved to Bellingham. For a ten day period, he stayed at several locations until he was able to find a permanent residence. He then registered in Whatcom County. Citing the same dictionary definition of “residence” used by the *Jenkins* and *Pickett* courts, the Court said, “Under the definitions above, a temporary habitation may be a residence. Pray abandoned his residence in Seattle, and had indefinite though temporary living arrangements.” *Pray* at 29.

In *State v. Stratton*, 130 Wn.App. 760, 124 P.3d 660 (2005) the defendant voluntarily moved out his house after he defaulted on a loan. Living out of his car, the defendant would return to the property each day and sleep in front of the house. The Court determined that under the facts

of that case, the term “residence” is ambiguous and, applying the rule of lenity, determined the defendant’s residence had not changed

Applying these cases to Mr. Kobes’ situation, Mr. Kobes was prohibited from coming to the “residence” of Erica Kobes. On October 29, Ms. Kobes was not residing at 1365 Kettle Falls Road. She was residing at a detox center in Spokane. Mr. Kobes knew she was living in Spokane and told Ms. Ringel that fact. Under the facts of this case, the term residence is ambiguous. Mr. Kobes was not on fair notice that he could not go to 1365 Kettle Falls Road. The term is unconstitutionally vague. Additionally, applying the rule of lenity, the term is ambiguous and the term “residence” should be interpreted in Mr. Kobes’ favor. Mr. Kobes did not go to the residence of Erica Kobes. Count two should be dismissed.

2. The evidence is insufficient to convict Mr. Kobes of residential burglary.

Count one of the Information charges Mr. Kobes with residential burglary for unlawful entry into 1365 Kettle Falls Road. Because Mr. Kobes was not prohibited from entering the residence, as argued above, his conviction for residential burglary must also be dismissed.

Ms. Ringel testified she heard a knock at the door and opened the door. RP, 62-63. The kids immediately came out and greeted their father

with hugs and kisses. Mr. Kobes testified Ms. Ringel invited him into the house while he hugged the kids. RP, 106. Although Ms. Ringel did not testify to this specific point, neither did she testify he was not invited in. Taking the evidence as a whole, the only fact that rendered the entry “unlawful” was the no contact order, which did not apply in this situation because Ms. Kobes was not residing at the residence.

There is a potential argument that Mr. Kobes’ entry into the bedroom constituted an unlawful entry into a dwelling. RCW 9A.04.110(7) defines “dwelling” as a structure used for lodging “or any portion thereof.” The jury instructions omitted this language, however. Instruction number 10 defined dwelling to be “any building or structure that is used or ordinarily used by a person for lodging” RP, 141. This instruction became the rule of the case.

There was disputed evidence that when Mr. Kobes entered the bedroom to retrieve his belongings he broke the hasp on the bedroom door. Arguably, the State could have argued that the entry into bedroom constituted an unlawful entry. But the State never argued the entry into the bedroom was the unlawful entry, choosing instead to limit its argument that the no contact order was what made the entry into the home unlawful. RP, 144. At sentencing, the judge at sentencing even commented he was surprised at the prosecutor’s decision not to argue the bedroom entry. RP,

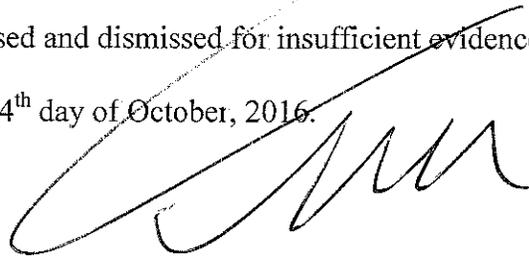
197-98. Regardless of whether the prosecutor could have argued this theory, the prosecutor chose not to make that argument and the jury instruction defining “dwelling” essentially precluded that argument.

Mr. Kobes was not prohibited from entering 1365 Kettle Falls Road in Stevens County because his wife was living in Spokane. Without an unambiguous no contact order, the entry into the home was not “unlawful.” The evidence is insufficient to convict him of residential burglary and count one should be dismissed.

D. Conclusion

Mr. Kobes convictions for residential burglary and violation of a no contact order should be reversed and dismissed for insufficient evidence.

DATED this 14th day of October, 2016.



Thomas E. Weaver, WSBA #22488
Attorney for Defendant/Appellant

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

STATE OF WASHINGTON,)	Court of Appeals No : 342328
)	
Plaintiff/Respondent,)	DECLARATION OF SERVICE OF BRIEF
)	OF APPELLANT
vs.)	
)	
GERRIT KOBES,)	
)	
Defendant/Appellant.)	

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action

On October 14, 2016, I e-filed the Brief of Appellant in the above-captioned case with the Washington State Court of Appeals, Division Three; and designated copies of said document to be transmitted electronically to the following individuals at Stevens County Prosecutor's office: Ken Tyndal, ktyndal@co.stevens.wa.us, Timothy Rasmussen, trasmussen@co.stevens.wa.us, and Michelle Lembcke, mlembcke@co.stevens.wa.us.

On October 14, 2016, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Brief of Appellant to the defendant:

Gerrit Kobes, DOC #389302
Coyote Ridge Corrections Center
1301 N Ephrata Ave
PO Box 769
Connell, WA 99326

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1 I declare under penalty of perjury under the laws of the State of Washington that the foregoing is
2 true and correct

3 DATED: October 14, 2016, at Bremerton, Washington.

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5 _____
6 Alisha Freeman
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