

FILED
Dec 29, 2016
Court of Appeals
Division III
State of Washington

NO. 34232-8--III

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

STATE OF WASHINGTON,

RESPONDENT,

vs.

GERRIT JON KOBES,

APPELLANT.

RESPONDENT'S BRIEF

Kenneth Tyndal, WSBA#44031
Attorney for Respondent
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Colville, WA 99114
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I. ISSUES

1. Was the no contact order, which prohibited Gerrit Kobes from approaching or entering the residence of Erica Kobes, unconstitutionally vague as applied when Mr. Kobes entered the residence at a time when Erica Kobes was being treated at a detox center in Spokane?
2. Was the evidence sufficient to convict Gerrit Kobes of residential burglary when the unlawful entry element of the offense was based on Gerrit Kobes' entry in violation of the no contact order?

II. STATEMENT OF FACTS

The Respondent accepts the Appellant's Statement of Facts with the following corrections and/or additions:

1. Gerrit Kobes had not completed the jail sentence ordered following his conviction in another case, but instead was granted a temporary release to attend his grandmother's funeral. Gerrit Kobes was granted release on October 29, 2015, to travel to Yakima, Washington, and ordered to return to jail on November 1, 2015. Agreed Motion And Order For Furlough attached.
2. Erica Kobes was living at the residence at 1365 Kettle Falls Road with her three children. RP 43. When Gerrit Kobes went to the residence on October 29, 2015, Erica Kobes had entered a detox program. RP 47. The program lasted seven days and Erica Kobes returned to the residence

on Sunday, November 2, 2015. RP 46-47. During the time she was away, her children continued to live at the residence with their grandmother providing care. RP 44-45. In addition to her children living at the residence, Erica Kobes' personal property remained at the residence. RP 44.

3. On October 29, 2015, a no contact order prohibited Gerrit Kobes from going to Erica Kobes' residence. Exhibit 1. The order had been issued by Stevens County Superior Court Judge Nielson on October 8, 2015, and was scheduled to expire on October 7, 2017. Exhibit 1. Gerrit Kobes was not to enter, remain or come within 100 yards of Erica Kobes' residence, school, workplace, or any place she arrived first. Exhibit 1. The order also included a civil stand by, in which the appropriate law enforcement agency would assist Gerrit Kobes if he needed to obtain personal belongings located at 1365 Kettle Park Road, in Kettle Falls, Washington. Exhibit 1. The order was signed by Judge Nielson in open court with Gerrit Kobes present. Exhibit 1. Gerrit Kobes signed the order and acknowledged receipt of the order. Exhibit 1.

III. ARGUMENT

1. The no contact order was not unconstitutionally vague and the evidence was sufficient to convict Gerrit Kobes of the offense of violating the no contact order. The definitions of the term "residence" provided in Appellant's brief are satisfied by the facts in this case.

In *Jenkins*, the court defined a residence as "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.” Appellant’s brief at 6, quoting *State v. Jenkins*, 100 Wn.App 85, 995 P.2d 1268 (2000). In this case, Erica Kobes was away from her home for a period of seven days. Her dependent children and personal property remained at the residence. Erica Kobes returned to the residence following the detox program. By the definition provided in *Jenkins*, Erica Kobes’ residence was the house at 1365 Kettle Falls Road and did not change because she was simply away from the residence for a few days, with the intent to return.

The Appellant seems to use *Pray* to argue that a temporary habitation may be a person’s residence. Brief of Appellant at 7, quoting *State v. Pray*, 96 Wn.App 25, 980 P.2d 240 (1999). This is easily distinguishable in that the defendant in that case stayed in several temporary locations while trying to find a permanent residence. Again, Erica Kobes lived at 1365 Kettle Falls Road, a place she returned to after a temporary period away. It was and remained her residence, even during her temporary absence.

If the term “residence” is ambiguous in a situation such as that of Erica Kobes’, when does the ambiguity begin? If such a condition exists after seven days, does an overnight stay create a similar situation? The answer is, of course not, and Appellant has extended the question of what defines a residence far beyond the facts of any of the cases provided. Erica Kobes’ residence was 1365 Kettle Falls Road, a place known to Gerrit Kobes as her residence, and a place he was prohibited from going, even just to gather personal belongings, unless escorted by law enforcement.

The no contact order was not vague or ambiguous. Gerrit Kobes was properly notified of the order in open court on October 8, 2015. RP 111 and Exhibit 1. The conditions were plain with a simple distance requirement and a civil stand by provision to address the need to recover personal property. Gerrit Kobes violated the order when he came within 100 yards of the property on October 29, 2015. In closing argument, defense counsel attempted to argue that Gerrit Kobes did not understand the provisions of the order, but the jury, as finder of fact, rejected the argument, and found him guilty of violating the no contact order. RP 156-162, CP 36.

2. Because the charge of Residential Burglary was based on the violation of the knowing violation of a lawful no contact order, the evidence was sufficient to convict Gerrit Kobes of the offense.

Pursuant to the conditions of the no contact order, Gerrit Kobes was prohibited from coming within 100 yards of Erica Kobes' residence. He admittedly did so when he went to the property on October 29, 2015. RP 104. Unlawfully on the property, he then unlawfully entered a dwelling when he entered the house. RP 106. Erica Kobes lived at the house with her three sons and the house met the definition of dwelling used in the case. Brief of Appellant at 9.

This court in *State v. Sanchez* found that the defendant's entry into a residence in violation of a no contact order was unlawful entry as an element for burglary even if the protected person consented to the entry. *State v. Sanchez*, 166 Wash.App 304, 271 P.3d 264

(2012). Similarly, the violation of a no contact order was not complete when the defendant violated a distance provision of the order. Rather, Division One in *State v. Spencer* found the violation to be continuous, so that when the defendant entered the protected residence, violation of the order satisfied the intent to commit a crime element of the offense of residential burglary. *State v. Spencer*, 128 Wash.App 132, 114 P.3d 1222 (2005) and RCW 9A.52.025.

Violating the terms of a valid no contact order and entering a residence on the property, satisfy the elements necessary to convict for the crime of Residential Burglary. The evidence in this case was sufficient for the jury to convict Gerrit Kobes of Residential Burglary. CP 35.

IV. CONCLUSION

Appellant's argument fails when confronted by the facts of the case. The appeal should be denied and Appellant's convictions for Residential Burglary and Violation of a No Contact Order should be upheld.

Dated: December 29, 2014

Respectfully Submitted,


Kenneth Tyndal, WSBA#44031
Deputy Prosecuting Attorney

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that I electronic filed a true and correct copy of the foregoing Brief of Respondent to the Court of Appeals, Division III, and copies to Thomas E. Weaver, by regular mail to P.O. Box 1056, Bremerton, WA 98377 and by email to admin@tomweaverlaw.com, on December 29, 2016.

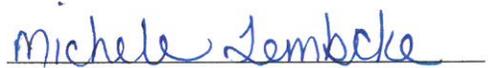

Michele Lembcke, Legal Assistant to
Kenneth Tyndal

EXHIBIT A

Handwritten initials/signature

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IN SUPERIOR COURT
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF FERRY

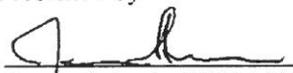
STATE OF WASHINGTON)	NO.: 15-1-00075-1
Plaintiff,)	
)	AGREED MOTION AND ORDER
)	FOR FURLOUGH
)	
GERRIT KOBES)	
Defendant.)	
_____)	

MOTION

Comes now the defendant Gerrit Kobes, in the above entitled cause, by and through his attorney, James F. Irwin, and requests a furlough for Thursday, October 29, 2015. Mr. Kobes is to be released at 9:00 a.m. Thursday, October 29, 2015 and is to return to jail Sunday, November 1, 2015 at 9:00 a.m.

BASIS

The basis for this motion is that Mr. Kobes needs to attend his grandmother's funeral in Yakima, WA.

Presented by:

James F. Irwin WSBA#12454
Attorney for the Defendant

EXWACT

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Handwritten initials/signature

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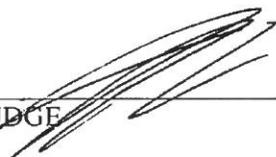
ORDER

This matter having come on regularly before this court, this court being informed of the matter before it and having reviewed the files and records herein, acknowledging that both parties agree, hereby finds that good cause exists to grant a furlough and thereby it is:

ORDERED: The defendant is to be released on Thursday, October 29, 2015 at 9:00 a.m., the Defendant is to return to the Ferry County Jail Sunday, November 1, 2015 at 9:00 a.m.;

Defendant to travel with his father - to be released only to his father
All other conditions of release shall remain in full force and effect.

Dated this 27th day of Oct., 2015.

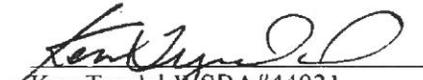


JUDGE

Presented by:

Approved by:


James F. Irwin WSBA#12454
Attorney for Defendant


Ken Tyndal WSBA#44031
Prosecuting Attorney