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No. 36749-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Frank Willing,

Appellant.

Kittitas County Superior Court Cause No. 19-1-00033-2

The Honorable Judge Scott R. Sparks

Appellant's Reply Brief

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ARGUMENT

I. THE STATE FAILED TO PROVE A VIOLATION OF RCW 26.50.110.

A. The State did not prove that Mr. Willing violated an order restraining him from coming within “a specified distance” of the house.

RCW 26.50.110 contains multiple provisions, two of which are applicable here. The first criminalizes certain conduct as “a gross misdemeanor, except as provided in subsection[]... (5).” RCW 26.50.110(1)(a). The second – subsection (5) – elevates the crime to “a class C felony if the offender has at least two previous convictions.” RCW 26.50.110(5).

Thus subsection (1)(a) defines the crime, while subsection (5) requires an enhanced penalty for repeat offenders. Many criminal statutes employ this structure, defining the crime in one subsection while providing a higher penalty for repeat offenders in a second subsection. *See, e.g.*, RCW 9A.44.132 (failure to register); RCW 9A.46.110 (stalking); RCW 9A.52.100 (vehicle prowling in the second degree); RCW 9A.88.010 (indecent exposure); RCW 46.61.502 (driving under the influence).

Respondent asks this court to ignore the statute’s structure. Brief of Respondent, pp. 4-7. According to Respondent, Mr. Willing was not charged under subsection (1)(a) – the provision that defines the crime.

Brief of Respondent, p. 4 n. 2. Instead, Respondent suggests that Mr. Willing was charged under the penalty provision. Brief of Respondent, p. 4 n. 2.

Respondent does not provide any authority supporting this argument. Where no authority is cited, this court should assume counsel has found none after diligent search. *See Clark Cty. v. Growth Mgmt. Hearings Bd.*, --- Wn.App.2d ---, ___, 448 P.3d 81 (2019).

Respondent also suggests that Mr. Willing was charged under RCW 9A.46.040. Brief of Respondent, pp. 5-7. That statute governs pretrial anti-harassment orders; it is not applicable in Mr. Willing's case.¹ RCW 9A.46.040.

The evidence was insufficient to prove that Mr. Willing violated any qualifying provision of the no contact order. *See Appellant's Opening Brief*, pp. 6-7. His conviction in count four must be reversed and the charge dismissed with prejudice.

B. Mr. Willing did not violate the order, because he "stay[ed] away" from the house.

Mr. Willing rests on the argument set forth in Appellant's Opening Brief.

¹ The order at issue in this case is captioned "Post conviction." CP 26. Such orders are governed by RCW 9A.46.080.

- C. The no contact order was unconstitutionally vague because it did not define what it meant to “stay away” from the house.

Mr. Willing challenged the constitutionality of the order he was accused of violating. Appellant’s Opening Brief, pp. 8-10. He did not challenge the constitutionality of the statute.

Respondent’s argument addresses the constitutionality of the statute. Brief of Respondent, pp. 10-14. It does not address the standards for assessing the constitutionality of a court order. Court orders are not afforded a presumption of constitutionality. *See State v. Valencia*, 169 Wn.2d 782, 791-793, 239 P.3d 1059 (2010) (addressing conditions of community custody.)

For the reasons set forth in the Opening Brief, the order here was unconstitutionally vague. Appellant’s Opening Brief, pp. 8-10.

- D. The trial court’s findings are inadequate to sustain Mr. Willing’s conviction in count four.

Mr. Willing rests on the argument set forth in Appellant’s Opening Brief.

II. RESPONDENT HAS CONCEDED ERROR IN THE COURT’S CALCULATION OF MR. WILLING’S OFFENDER SCORE.

The State agrees that Mr. Willing should have been sentenced on count four with an offender score of four points. Brief of Respondent, pp. 14-15. Accordingly, the sentence must be vacated, and the case remanded.

Resentencing will not be a ministerial act. See Brief of Respondent, p. 15. An act is “merely ministerial [rather than] judicial...where the law prescribes and defines the duty to be performed with such precision and certainty as to leave nothing to the exercise of discretion or judgment.” *State ex rel. Clark v. City of Seattle*, 137 Wash. 455, 461, 242 P. 966 (1926) (internal quotation marks and citation omitted). By contrast, an act is not ministerial where it “involves the exercise of discretion or judgment.” *Id.* (internal quotation marks and citation omitted).

The miscalculated offender score yields a standard sentence of 60 months. The corrected offender score produces a standard range of 22-29 months. The trial court will have to select an appropriate sentence within that range. This involves the exercise of discretion and cannot be described as a ministerial act. *Id.*

If Mr. Willing’s conviction in count four is not vacated, the case must be remanded for correction of the offender score and standard range. Although Mr. Willing’s overall prison term will not be impacted, the court must hold a new sentencing hearing and impose a sentence within the standard range.

CONCLUSION

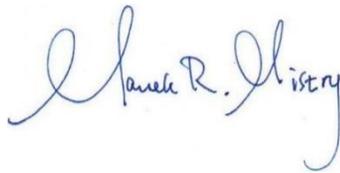
For the reasons set forth above and in Appellant’s Opening Brief, Mr. Willing’s conviction in count four must be reversed, and the charge dismissed with prejudice. Alternatively, Mr. Willing’s sentence in count four must be vacated and the case remanded for resentencing with an offender score of four.

Respectfully submitted on January 2, 2020,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division III, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on January 2, 2020.



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Transmittal Information

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