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COA No. 55405-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DEMETRIUS WILLIAMS,

Appellant.

FILED
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Anita Farris,
The Honorable Thomas Wynne

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. THE CHARGING DOCUMENT WAS
INADEQUATE, WARRANTING REVERSAL.

As set forth in the Opening Brief, a charging document must contain “[a]ll essential elements of a crime.” State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Under the “essential elements” rule, the charging document should contain facts supporting every element of the offense and sufficiently identify the crime charged. State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). Furthermore, the information should set forth the facts behind both the statutory and non-statutory elements of the crime. Kjorsvik, 117 Wn.2d at 101.

Ignoring caselaw to the contrary, Respondent claims:

The necessary fact, that the defendant was charged with a particular crime, is clearly stated in the information. What particular level of felony classification of the crime the defendant was charged with and for which he failed to appear, is not an “essential element of the offense.”

Brief of Respondent (BOR) at 5 (emphasis added).

Respondent attempts to distinguish State v. Ibsen, 98 Wn.App. 214, 989 P.2d 1184 (1999) and State v. Green, 101 Wn.App. 995, 6 P.3d 53 (2000). BOR at 6-7. Ibsen and Green, however, provide clear guidance in the instant matter. In Ibsen, the

defendant was charged with bail jumping, but the information made no mention of the underlying charge. 98 Wn.App. at 215.

Although the case ultimately centered on the jury instructions, the Ibsen Court held that the underlying crime, charge, or conviction, is an essential element of the charge of bail jumping, requiring reversal for the State's failure to identify the underlying offense. Id. at 217, 215.

In Green, the charging document alleged the defendant failed to appear under a particular cause number, but failed to identify the underlying offense. 101 Wn.App. at 889. Even allowing for a "liberal construction" of the information, the Green Court found the charging document failed to sufficiently provide the accused with notice of the alleged offense and failed to inform him of the essential elements of the crime. Id. at 890. The Green Court noted it was improper to force the accused to search "for the rules or regulations they are accused of violating," and dismissed the charge. Id. at 891.

Contrary to Respondent's claims, Green and Ibsen demonstrate the shortcomings of the information filed against Mr. Williams. This is further underscored by State v. Pope, 100 Wn.App. 624, 629, 999 P.2d 51 (2000), in which a "to convict"

instruction informed the jury it could convict if it found the defendant's act of bail jumping occurred when he failed to appear "regarding a felony matter." On appeal, the jury instruction was found inadequate as it failed to correctly inform the jury of the elements of bail jumping in that it did not require jurors to determine if Mr. Pope was held for a class B felony, an essential element of his bail jumping charge. Id.

These cases show that simply alleging the underlying charge is a felony, without stating the class of the felony, is not sufficient to satisfy the requirement that the charging document contain all of the essential elements of the charge. Here, Mr. Williams had no way to know what level of bail jumping he was charged with by reading the information, the bail jumping statute, and the statute defining possession of a controlled substance. This error requires reversal of his conviction. Ibsen, 98 Wn.App. at 215.

2. MR. WILLIAMS DID NOT INVITE THE INSTRUCTIONAL ERROR AND IN THE ALTERNATIVE, THIS COURT SHOULD REVISIT THE INVITED ERROR DOCTRINE.

a. The instructional error was not invited.

Respondent contends Mr. Williams invited the error contained in the "to convict" instruction which improperly omitted an essential

element of the offense. BOR at 14-16. Respondent notes that defense counsel proposed a “to convict” instruction with language identical to that provided by the State. BOR at 15. Mr. Williams did not invite the error.

In City of Seattle v. Patu, 147 Wn.2d 717, 719, 58 P.3d 273 (2002), relied upon by Respondent, the trial court “adopted” the “to convict” instruction proposed by the defendant which omitted mention of obstruction, an essential element of the charge. See also, City of Seattle v. Patu, 108 Wn.App. 364, 369, 30 P.3d 522 (2001) (instruction given “at Patu’s request”). Here, Mr. Williams excepted to the “to convict” instruction, albeit on alternate grounds. 5/18/04RP 81.

Based on Mr. Williams’s exception to the instruction, the error resulting from the faulty instruction cannot be laid solely at the feet of Mr. Williams. Nor should he be denied his constitutional right to due process on this basis. Recent United States Supreme Court decisions call into question the “invited error doctrine” in circumstances like those presented by the instant case.

b. This Court should reconsider the invited error doctrine in light of recent United States Supreme Court decisions.

As set forth in the Opening Brief, the Sixth Amendment guarantees the accused the right to a jury trial and to a “jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” AOB at 17 (quoting Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). Where a fact “increase[s] the prescribed range of penalties to which a criminal defendant is exposed” that fact is an essential element which must be proven beyond a reasonable doubt. Apprendi, 530 U.S. at 490. Subsequent cases from the United States Supreme Court have only strengthened this notion of the accused’s right to jury trial. See e.g., Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002); Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L. Ed. 2d 403 (2004); United States v. Booker, 125 U.S. 738, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).

Given the position of the United States Supreme Court on the importance of the right to jury trial and due process, Washington cases regarding “invited error” must be reevaluated. It is not evident that the goal of the “invited error doctrine” – to

“prohibit a party from setting up an error at trial and then complaining of it on appeal” – should supersede a defendant’s constitutional right to jury trial and due process and to proper punishment based on the elements found by the jury beyond a reasonable doubt. Patu, 147 Wn.2d at 720 (quoting State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984)).

In light of these United States Supreme Court decisions, the Washington cases governing the “invited error doctrine” with respect to improper jury instructions should be revisited. As stated in the Patu dissent,

Patu argues his right to a fair trial was violated. The most fundamental requirement of a fair trial is that “criminal convictions . . . rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.” United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). Our own cases also reflect this principle, State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002); State v. Stein, 144 Wn.2d 236, 241, 27 P.3d 184 (2001). The majority, however, applies the invited error doctrine without regard to Patu’s constitutional right to due process.

Patu, 147 Wn.2d at 722 (Johnson, J., dissenting).

Mr. Williams asserted his right to due process was violated by the erroneous jury instruction given in this case. AOB at 12-16. He also claimed his right to due process was violated when he was

sentenced based upon a judicial finding of fact never made by the jury beyond a reasonable doubt. AOB at 17-20. Given the stance of the United States Supreme Court on the significance of these rights, Mr. Williams's claims should not be rejected on "invited error" grounds.

Should this Court entertain Respondent's suggestion that Mr. Williams invited the instructional error in this case, Mr. Williams asks this Court to reconsider the invited error doctrine in light of recent Supreme Court cases reiterating the defendant's right to due process and "a jury determination . . . of every element of the crime . . . charged, beyond a reasonable doubt." Apprendi, 530 U.S. at 476-77. Since the jury instructions in this case permitted Mr. Williams to be convicted of the crime of class C bail jumping in the absence of proof of an essential element of the offense – the classification of the underlying charge, and he was sentenced for that higher offense, his constitutional right to due process was violated. Apprendi, 530 U.S. at 490. The fundamental rights to due process and jury trial should not be swept under the rug by the "judicially created prudential doctrine" of invited error. Patu, 147 Wn.2d at 722 (Johnson, J., dissenting). If this Court considers

Respondent's invited error claim, Mr. Williams urges this Court to reconsider the doctrine in light of recent Supreme Court case law.

3. THE COURT DENIED MR. WILLIAMS'S RIGHT TO JURY TRIAL AND DUE PROCESS AT SENTENCING.

Respondent disputes Mr. Williams's sentencing complaints on the basis of the faulty "to convict" instruction, contending Apprendi, supra, and Blakely, supra, do not apply to Mr. Williams's case as he did not receive an "exceptional sentence." BOR at 20; AOB at 17-20. In its analysis, Respondent asserts that since "the defendant's sentence falls within the 'statutory maximum' as defined by Blakely, he is not entitled to relief." BOR at 20. Respondent misapprehends Blakely as well as fundamental constitutional protections.

In claiming Mr. Williams is "wrong," with respect to his sentencing challenge, Respondent ignores the express language of Apprendi:

" . . . the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." The Fourteenth Amendment commands the same answer in this case involving a state statute.

Apprendi, 530 U.S. at 476 (2000) (quoting Jones v. United States, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999)) (emphases added). In the instant case, the fact that the underlying charge was a class C felony and not a misdemeanor offense increased the penalty faced by Mr. Williams. Had his underlying “possession of a controlled substance” charge been possession of less than 40 grams of marijuana, he would have faced only a misdemeanor bail jumping charge. Instead, since he faced a class C felony possession offense, the bail jumping penalty was increased, exposing him to punishment for a class C felony. Nothing in the jury’s verdict clarified the classification of the underlying offense, thus Respondent’s claims that Mr. Williams received a standard range sentence are without merit.

The bail jumping statute sets forth differing classifications depending on the underlying offense –bail jumping may vary from a class A offense down to a misdemeanor offense. RCW 9A.76.170(1) and (3). Possession of a controlled substance similarly varies from a misdemeanor offense to a class B felony. RCW 69.50.4014; RCW 69.50.401(2)(a). Here, the jury simply found what it was asked to – that Mr. Williams failed to appear in court while “charged with Possession of a Controlled Substance.”

CP 75. Mr. Williams, however, was punished for failing to appear in court while charged with a class B or class C felony drug possession offense, although the jury never found such facts. CP 6, 8, 11.

In asserting Mr. Williams was punished within the “standard range,” Respondent conveniently presumes the jury found Mr. Williams faced a class B or class C felony at the time he failed to appear in court. BOR at 21. This did not happen. Respondent also supports the notion that Mr. Williams received a “standard range” sentence by noting that the second amended information alleged Mr. Williams failed to appear after being charged with “Possession of a Controlled Substance – a felony.” BOR at 21. Details enumerated in a charging document do not establish the jury’s findings. See State v. DeRyke, 110 Wn.App. 815, 824, 41 P.3d 1225 (2002), aff’d, 149 Wn.2d 906, 73 P.3d 1000 (2003) (“State correctly points out that the charging document specified [degree of attempted rape charge elevated based on] use of a deadly weapon. But neither the jury instructions nor the verdict form required the jury to specify which act it chose to reach its verdict on the [elevated degree] attempted rape charge. The State could have, but chose not to, submit[] a [proper] proposed instruction. . . .

Principles of lenity require us to interpret the ambiguous verdict in favor of [the defendant].”) Because the jury never found Mr. Williams faced a class B or class C felony at the time he failed to appear in court, Respondent’s argument fail.

In sentencing Mr. Williams based on a judicial finding of fact – that he underlying charge was a class B or class C felony – the court violated his constitutional rights to due process and jury trial, requiring resentencing as for a misdemeanor bail jumping charge, under principles of lenity. RCW 9A.76.170(d); DeRyke, 110 Wn.App. at 824.

4. THE USE OF MR. WILLIAMS’S JUVENILE OFFENSES AT SENTENCING VIOLATED HIS CONSTITUTIONAL RIGHT TO JURY TRIAL, REQUIRING REVERSAL.

Mr. Williams maintains that the inclusion of juvenile adjudications of guilt in his offender score violated his right to jury trial and due process.

Respondent cites State v. Weber, 127 Wn.App. 879, 889-90, 892-93, 112 P.3d 1287 (2005), petition for review pending, wherein this Court rejected a defendant’s similar claim regarding the inclusion of juvenile adjudications of guilt in an adult’s offender score and rejected the Ninth Circuit’s opinion in United States v.

Tighe, 266 F.3d 1187 (9th Cir. 2001). BOR at 23. The Weber Court instead followed State v. Smalley, 294 F.3d 1080 (8th Cir. 2002), cert. denied, 537 U.S. 1114 (2003). The Smalley Court found “juvenile adjudications, like adult convictions, are so reliable that due process of law is not offended by such an exemption.” Id. at 1033. The Eighth Circuit further found that the procedural safeguards involved in juvenile proceedings “more than sufficient to ensure the reliability” required by Apprendi, supra. Id.

Mr. Williams asks this Court to revisit Weber, in light of the following cases. In State v. Harris, 339 Ore. 157, 118 P.3d 236, 245 (2005), the Oregon Supreme Court rejected the Smalley Court analysis, finding that while juvenile adjudications provide a “high degree of reliability,” reliability alone is insufficient. The Harris Court quoted Blakely, supra, explaining “the framer’s paradigm for criminal justice was”:

Not the civil-law ideal of administrative perfections, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury. As Apprendi held, every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment.

Harris, 118 P.3d at 245-46 (quoting Blakely, 124 S.Ct. at 2543, emphasis in Blakely). The Harris Court thus rejected Smalley,

concluding the use of juvenile adjudications as sentencing factors, absent proof beyond a reasonable doubt or a knowing and informed waiver, violated a defendant's Sixth Amendment right to jury trial. Id. at 246.

In State v. Brown, 879 So.2d 1276, 1285 (La. 2004), the Louisiana Supreme Court recognized "two reasonable schools of thought on whether juvenile adjudications, in which the juvenile did not have the right to a jury, can properly be characterized as 'prior convictions' for felony sentence enhancement purposes." In Brown, the Court reviewed the history of juvenile courts and acknowledged the reduced procedural safeguards in juvenile courts. Id. at 1285-89. The Court concluded:

. . . there is a difference between a 'prior conviction' and a prior juvenile adjudication and we believe the Tighe decision more closely comports with the rationale for finding juveniles are not constitutionally entitled to a jury trial.

Id. at 1289. The Court also rejected the reasoning behind Smalley and its progeny that the "reliability" of juvenile adjudications is sufficient to warrant the harsher consequences of their use as sentence enhancements. Id. at 1290 (citation omitted). The Court concluded:

Because a juvenile adjudication is not established through a procedure guaranteeing a jury trial, it cannot be excepted from Apprendi's general rule; the use of these adjudications to increase the penalty beyond the statutory maximum violates the defendant's Due Process right guaranteed by the *Fourteenth Amendment of the United States Constitution*.

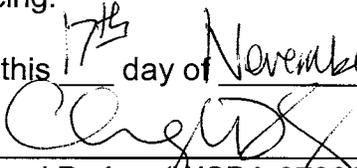
Id. (italics in original).

Mr. Williams asks this Court to reexamine its reliance on Smalley and its rejection of Tighe and to find that the inclusion of juvenile priors raises the punishment imposed on the defendant in violation of Apprendi and its progeny and the constitutional principles embraced therein.

B. CONCLUSION.

For the reasons set forth above and in the Opening Brief, Mr. Williams respectfully requests this Court dismiss his conviction for bail jumping. Alternatively, Mr. Williams asks this Court to remand his case for resentencing.

Respectfully submitted this ^{17th} day of November, 2005.


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Washington Appellate Project – 91052
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
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V.)	COA NO. 55405-1-1
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DEMETRIUS WILIAMS,)	
)	
APPELLANT.)	

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DECLARATION OF SERVICE

I, MARIA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 17TH DAY OF NOVEMBER, 2005, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- SNOHOMISH COUNTY PROSECUTING ATTORNEY
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MOUNTLAKE TERRACE, WA 98043

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF NOVEMBER, 2005.

x _____ *gmg*