

81498-8

No. 35947-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Patrick Drum,

Appellant.

Jefferson County Superior Court

Cause No. 04-1-00110-8

The Honorable Judge Craddock Verser

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316

FILED
COURT OF APPEALS
DIVISION II
07 SEP -4 AM 9:01
STATE OF WASHINGTON
BY AD DEPUTY

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT..... 1

I. Mr. Drum’s burglary conviction must be dismissed. 1

II. Reversal is required because the trial court’s permissive inference did not flow beyond a reasonable doubt from facts proved at trial..... 3

III. The trial judge improperly employed a mandatory presumption..... 3

IV. Respondent’s concession requires reversal of Mr. Drum’s conviction..... 4

CONCLUSION 5

TABLE OF AUTHORITIES

WASHINGTON CASES

Barnett v. Hicks, 119 Wn.2d 151, 829 P.2d 1087 (1992)..... 1

In re Pers. Restraint of Isadore, 151 Wn.2d 294, 88 P.2d 390 (2004)..... 4

State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997) 2

State v. Barton, 93 Wn.2d 301, 609 P.2d 1353 (1980)..... 4

State v. Brunson, 128 Wn.2d 98, 905 P.2d 346 (1995)..... 3

State v. Byrd, 110 Wn.App. 259, 39 P.3d 1010 (2002) 2

State v. Cantu, 156 Wn.2d 819, 132 P.3d 725 (2006) 3, 4

State v. Ross, 129 Wn.2d 279, 916 P.2d 405 (1996)..... 5

State v. Turley, 149 Wn.2d 395, 69 P.3d 338 (2003)..... 5

State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995)..... 1, 3

STATUTES

RCW 9A.52.040..... 3, 4

ARGUMENT

I. MR. DRUM'S BURGLARY CONVICTION MUST BE DISMISSED.

The evidence was insufficient to establish that Mr. Drum entered a residence with intent to commit a crime against people or property therein, and the trial judge did not find that he entered with intent to commit a crime against people or property therein. RP (1/21/05) 69. Respondent relies on Mr. Drum's purported stipulation to supply the missing element. But Mr. Drum's alleged stipulation-- that "facts presented by [the] reports, declarations, statements and/or expert examinations [were] sufficient for the Court to find the defendant guilty..."¹ --was to an issue of law (the legal sufficiency of the evidence.) A stipulation to law is not binding on the court. *See, e.g., State v. Vangerpen*, 125 Wn.2d 782 at 792, 888 P.2d 1177 (1995); *Barnett v. Hicks*, 119 Wn.2d 151 at 161, 829 P.2d 1087 (1992).

Furthermore, Mr. Drum repeatedly asserted that he did not possess the intent to commit a crime. RP 4-5, 15, 46, 68-72. Recognizing this, the trial judge invited argument at Mr. Drum's bench trial and independently reviewed the documentary evidence for sufficiency, disregarding the

¹ Paragraph 19, Drug Court contract, CP 22.

alleged stipulation. RP 69-70, 93-95, 99-100. In addition, if Mr. Drum's stipulation to his guilt is taken at face value without independent judicial review, then the contract is equivalent to a guilty plea, and should have been accompanied by the protections afforded those who plead guilty. *See* Appellant's Opening Brief, pp. 17-19.

The trial court's failure to find intent to commit a crime against persons or property within the residence requires reversal. Respondent's suggestion that remand for entry of amended findings is without merit, because the evidence was insufficient. Even if Mr. Drum's entry established "criminal intent" (as Respondent characterizes the element, *see* Brief of Respondent, p. 5), nothing in the record suggests that this criminal intent was directed at persons or property. Instead, Mr. Drum may have been seeking a place to use drugs or participate in other illegal activity not directed at persons or property.

Because the trial judge did not find that Mr. Drum intended a crime against persons or property, this court must presume that the state failed to meet its burden of proof. *State v. Armenta*, 134 Wn.2d 1 at 14, 948 P.2d 1280 (1997); *State v. Byrd*, 110 Wn.App. 259 at 265, 39 P.3d 1010 (2002). Mr. Drum's conviction must be reversed and the burglary charge dismissed with prejudice.

II. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT'S PERMISSIVE INFERENCE DID NOT FLOW BEYOND A REASONABLE DOUBT FROM FACTS PROVED AT TRIAL.

The trial judge expressly noted that the inference allowed by RCW 9A.52.040 was "the sole and sufficient proof of the element of entering with intent to commit a crime" in Mr. Drum's case. RP 68. Despite this, Respondent relies on Mr. Drum's purported stipulation as additional proof. Brief of Respondent, p. 8. As noted above, the alleged stipulation addressed an issue of law, and thus was not binding on the court.

Vangerpen, supra. Mr. Drum did not stipulate to any additional facts beyond those contained in the documents submitted by the prosecutor; his purported stipulation dealt with the legal effect of those facts. CP 19-24.

Respondent does not contend that the presumed fact (intent to commit a crime against persons or property therein) flows beyond a reasonable doubt from the proved fact (unlawful entry), as required under *State v. Brunson*, 128 Wn.2d 98 at 105, 905 P.2d 346 (1995).

Accordingly, the conviction must be reversed and the burglary dismissed with prejudice.

III. THE TRIAL JUDGE IMPROPERLY EMPLOYED A MANDATORY PRESUMPTION.

Following the trial court's decision in this case, the Supreme Court issued its opinion in *State v. Cantu*, 156 Wn.2d 819, 132 P.3d 725 (2006).

The Court held that RCW 9A.52.040 is unconstitutional when used as a mandatory presumption. In *Cantu*, as in this case, the trial court found the accused's explanation unpersuasive. RP (1/21/05) 69. Indeed, even Respondent admits the trial court found Mr. Drum's explanation "unconvincing." Brief of Respondent, p. 9. When a trial court places the burden on the accused to rebut the presumption-- as in this case and in *Cantu*-- the presumption is unconstitutionally applied. This case is controlled by *Cantu*, which requires reversal and dismissal of the burglary charge.

IV. RESPONDENT'S CONCESSION REQUIRES REVERSAL OF MR. DRUM'S CONVICTION.

Respondent concedes that the drug court contract was equivalent to a guilty plea: "In effect, it was a guilty plea." Brief of Respondent, p. 9. Because of this, the record must demonstrate that Mr. Drum entered into the contract intelligently and voluntarily, with a full understanding of the consequences. *State v. Barton*, 93 Wn.2d 301 at 304, 609 P.2d 1353 (1980). But the record does not show that Mr. Drum knew *any* of the direct consequences of his plea, including the standard range, the financial penalties, or the term of community custody. RP (10/15/04) 19-29; RP (10/29/04) 30-34. Because of this, the guilty plea is invalid, and Mr. Drum's conviction must be reversed. *See, e.g., In re Pers. Restraint of*

Isadore, 151 Wn.2d 294, 88 P.2d 390 (2004); *State v. Turley*, 149 Wn.2d 395, 69 P.3d 338 (2003); *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996).

CONCLUSION

For the foregoing reasons, Mr. Drum's conviction for Residential Burglary must be reversed and the case dismissed with prejudice. In the alternative, the case must be remanded for a jury trial.

Respectfully submitted on August 31, 2007.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant



Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

Patrick Drum, DOC# 784289
Washington State Reformatory
PO Box 777
Monroe, WA 98272

and to:

Juelanne B. Dalzell
Jefferson County Prosecuting Attorney
P.O. Box 1220
Port Townsend, WA 98368-0920

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on August 31, 2007.

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 August 31, 2007.


Joel R. Backlund, No. 22917
Attorney for the Appellant

FILED
COURT OF APPEALS
DIVISION II
07 SEP -4 AM 9:01
STATE OF WASHINGTON
BY _____
DEPUTY