

ORIGINAL

Supreme Court No. 81688-3
[COA No. 58717-0-1
Linked With No. 60082-6-1]

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

CLARENCE ANDREW KINTZ,

Petitioner.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR WHATCOM
COUNTY THE HONORABLE CHARLES R. SYNDER

PETITIONER'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

Petitioner Kintz seeks review of The Court of Appeals, Division One Opinion issued March 10, 2008 affirming the conviction. In particular, Petitioner seeks review of the published part of the Opinion, pages 1 through 9, defining the term “separate occasion.”

On April 30, 2008, the Court of Appeals issued an Order Publishing Opinion in Part herein: pages 1 through 9, defining the term “separate occasion.” On that same date, the Court of Appeals issued an Order Denying Motion for Reconsideration herein.

II. ASSIGNMENT OF ERROR

The Issue Petitioner Kintz asked this Court to review regards the legal definition of “separate occasion.” It is submitted that the brief contact between Petitioner and the respective victims does not amount to more than one “occasion,” and accordingly there was not sufficient evidence to convict Petitioner for either charge. The Court of Appeals determined that said issue is an issue of law which is reviewed de novo and opined as follows:

Neither the statute nor case law provides a definition of “separate occasions.” Undefined terms are given their plain and ordinary meaning unless a contrary legislative intent appears. (Citing Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 813, 828 P.2d 549 (1992)). Webster's Third New International Dictionary 1560 and 2069-70 (1969) defines “occasion” as “a particular occurrence: happening, incident.” “Separate” is defined as “set or kept apart,” “not shared with another:

individual, single,” autonomous, independent, distinct and different. Based on these definitions, a “separate occasion” is a distinct, individual, non-continuous occurrence or incident. Thus, if Kintz had several individual incidents with Gudaz and Westfall, his activities meet the plain meaning of “separate occasions.”

State v. Kintz, 114 Wash.App. 515, 522, 191 P.3d 62(2008).

Petitioner submits that the plain and ordinary meaning of “occasion” is at best ambiguous as applied to the facts herein. Petitioner further submits the Court of Appeals read into Webster’s definition the term “non-continuous.” Petitioner now requests that this Court review the Court of Appeals holding regarding the definition of “separate occasion,” and whether there were sufficient evidence herein to support the element of “repeated” following or harassment.

III. STATEMENT OF THE CASE

A. Pretrial Proceedings

On May 16, 2006, a Motion to Dismiss per State v. Knapstad, 107 Wash.2d.346, 729 P.2d 48 (1986), was heard before Trial Court Judge Snyder. The primary issue raised there regarded whether the State alleged sufficient facts to sustain Stalking convictions under either cause number therein, and, in particular, whether there were sufficient allegations to support the element of “repeated” following or harassment of the victims by Petitioner [hereinafter “Defendant” or “Defendant Kintz”]. “Repeatedly” is defined as more than one “occasion.” The trial court denied Defendant’s motion after briefing and oral argument.

It was stipulated at this hearing that both Stalking charges were erroneously filed as Felony Stalking and, accordingly, both charges were amended to Misdemeanor Stalking. Verbatim Report of the Proceedings [hereinafter "RP"] May 16, 2006.

On May 30, 2006, a Motion to Join Cause Numbers 06-1-00190-0 and 06-1-00324-4, initiated by the State, was heard before Judge Snyder. Cause Number 06-1-00190-0 was a Stalking case regarding an incident on January 28, 2006 at East Lake Samish Drive with complaining witness, Jennifer Gudaz [hereinafter the "Gudaz Incident"]; Cause Number 06-1-00324-4 was a Stalking case regarding an incident on December 21, 2005 at Lake Padden Park with complaining witness, Theresa Westfall [hereinafter the "Westfall Incident"]. The trial court granted the State's Motion to Join over Appellant's opposition after briefing and oral argument. RP May 30.

B. The Gudaz Incident

Jennifer Gudaz testified to the effect that she was jogging around Lake Samish on January 28, 2006 when a white van traveling north going the opposite direction passed her. RP pages 81-82. The white van turned around and stopped, then the driver asked Jennifer Gudaz for directions to an address. Ms. Gudaz stopped running and told the driver she did not know the address and then continued jogging. RP pages 83-85. The white van passed Ms. Gudaz and parked in a driveway. Ms Gudaz jogged passed the white van then the white van passed Ms. Gudaz and

stopped a little bit in front of her and the driver again asked Ms. Gudaz for directions. The driver handed Ms. Gudaz a clipboard to draw a map to “*get him out of there.*” Ms. Gudaz drew him a map and handed the clipboard back to the driver and started jogging again. RP pages 86-89.

The van drove past Ms. Gudaz and stopped again on the side of the road. Ms. Gudaz ran past the white van and turned left onto North Lake Samish. The white van pulled up next to Ms. Gudaz into the oncoming traffic lane facing the wrong way. The driver then said “*do you need a ride.*” Ms. Gudaz answered “*No.*” The driver asked “*You don’t need money?*” Ms Gudaz answered “*No. Maybe your road is up there,*” pointed and started running. PR pages 90-92.

The white van continued traveling in the same direction as Ms. Gudaz was running until it was out of her sight. Ms Gudaz ran down a road that goes down to the lake and hid between a fence and a shed there. RP pages 92. Ten to fifteen minutes later Ms Gudaz encountered bicyclists who accompanied Ms. Gudaz toward a county park. Ms. Gudaz and the bicyclists saw the white van again before they reached the park, but there was no further contact between Ms. Gudaz and the driver of the white van. RP pages 92-94.

C. The Westfall Incident

Ms. Westfall testified that on December 21, 2005, she left Lake Padden Park walking with her three children and two dogs pushing a jogging stroller when she encountered a person parking a van in the trailer

parking area. RP pages 213- 214. Ms. Westfall believed the person parking the van said "*parking in it.*" RP page 215.

As Ms. Westfall left the park and came out to 40th Street, the van drove slowly by her at a walking pace, and then drove out of visual field. Before too long, the van came up from behind Ms. Westfall. Apparently, the van made a right onto Samish Way and made a triangular loop to come up behind Ms. Westfall. RP pages 217-218. The van passed Ms. Westfall, pulled into the trailer court parking lot to turn around, and came back directly toward Ms. Westfall. RP page 219. The van turned around behind Ms. Westfall and passed her again. The van continued to the stop sign at the intersection of 40th Street and Samish Way. The van was sitting there as Ms. Westfall crossed Samish Way. Soon after crossing Samish Way, after passing Harrison Street, Ms. Westfall called 911. RP pages 221-222. The van drove up by Ms. Westfall again on 40th Street and continued passed her straight up 40th. Ms. Westfall did not see the van again. RP page 223.

On August 9, 2006, Defendant was sentenced under cause number 06-1-00190-0 to serve 365 days in the Whatcom County Jail with 90 days suspended; Defendant was sentenced under cause number 06-1-00324-4 to serve 365 in the Whatcom County Jail with 90 days suspended. The sentences were to be served consecutively. Judgment and Sentencing number 06-1-00190-0 and Judgment and Sentencing number 06-1-00324-4.

IV. ARGUMENT

The standard of review in a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wash.2d 216, 221, 616 P.2d 628 (1980). All reasonable inferences from the evidence are to be drawn in the State's favor and interpreted most strongly against the defendant. State v. Partin, 88 Wash.2d 899, 906-07, 567 P.2d 1136 (1977).

The Stalking Statute, RCW 9A.46.110 provides in pertinent part:

(1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

(a) He or she intentionally and **repeatedly** harasses or **repeatedly** follows another person; and

(b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person; or

(ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person....

(6) As used in this section:

(a) "Follows" means deliberately maintaining visual or physical proximity to a specific person over a period of time. A finding that the alleged stalker **repeatedly** and deliberately appears at the person's home, school, place of employment, business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary to establish that the alleged stalker follows the person while in transit from one location to another. [my emphasis]

....

(b) "Harasses" means unlawful harassment as defined in RCW 10.14.020....

(d) "**Repeatedly**" means on two or more separate occasions. [My emphasis]

The Harassment Statute, RCW 10.14.020 provides in pertinent part:

(1) "Unlawful harassment" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.

(2) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose.... Constitutionally protected activity is not included within the meaning of "course of conduct."

Pursuant to RCW 9A.46.110(1)(a) the State must establish sufficient evidence of Stalking herein by a sufficient showing that Defendant intentionally and **repeatedly** harassed or **repeatedly** followed the respective victims. Both the Trial Court and the Court of Appeals

apparently determined that there was sufficient evidence of “following” because the language use to support their determination approximates the definition of “following:”

Given the nature of the stalking in this case--repeated incidents of physical proximity with visual and/or verbal contact--the trial court concluded Kintz' conduct satisfied the “separate occasions” requirement of the statute.

There's time, space between those incidents, not a lot, obviously but time, space. There's a period of time where Mr. Kintz and the alleged victim are not even in the same, in sight of each other, in the same or close proximity. They're separated both physically by sight and over time, and he comes back and makes contact again....

[W]e have separate, discrete, levels of contact, separated by periods of time where the parties are not in contact and where the parties are, in fact, physically and visually separated. That constitutes to me the second time and the third time for a repeat under the purposes of the statute.

We agree with the trial court's reasoning.

State v. Kintz, 114 Wash.App. 515, 522, 191 P.3d 62(2008).

Defendant respectfully submits that both the Trial Court and the Court of Appeals failed to fully consider the statutory definition of “following” in making the foregoing determination: A finding that the alleged stalker **repeatedly** and deliberately appears at...[some] location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person [my emphasis]. RCW 9A.46.110(6)(a). Accordingly, to establish one following, there must be sufficient evidence that Defendant repeatedly, or, on two or more separate

occasions, deliberately appeared at the subject locations to maintain visual or physical proximity with the each of the respective victims.

Of course, the Stalking Statute requires two or more separate occasions of “following.” Therefore, to establish sufficient evidence of repeated following under subsection (1)(a), there must be sufficient evidence that Defendant on at least **four** separate occasions deliberately appeared at the subject locations to maintain visual or physical proximity with the each of the respective victims. Defendant submits that the respective incidents herein each constitute only one ongoing “following” briefly interrupted by a short break in visual proximity. But even under the most strained interpretation of the facts herein can it be said that Defendant maintained visual proximity with the respective victims on four separate occasions.

Although the foregoing argument may appear at first blush to be somewhat hyper-technical, it is submitted that such close parsing merely reflects a common sense understanding of “following,” an understanding that puts a reasonable person on notice as to the conduct proscribed. Neither under the statutory definition nor under a common understanding of “following” can it be reasonably argued that merely because there is a short break in visual proximity one following has stopped and another one begins. Indeed, it is respectfully submitted that such reasoning propounded by the Trial Court and affirmed by the Court of Appeals is the kind of forced, narrow and over-strict construction that defeats the intent of the

legislature, and which this Court should not adopt. State v. Lee, 82 Wash.App. 298, 306, 917 P.2d 159 (1996), aff'd, 135 Wash.2d 369, 957 P.2d 741 (1998)(Citing State v. Cann, 92 Wash.2d 193, 595 P.2d 912(1979)).

V. CONCLUSION

By reason of the foregoing points and authorities, Defendant respectively request this Court to reverse the Court of Appeals order affirming the convictions below and dismiss the same with prejudice, or, alternatively to grant Petitioner such other relief as the Court deems just.

Dated this 29th day of January 2009.

Respectively Submitted By:

A handwritten signature in cursive script that reads "Thomas Dunn". The signature is written in black ink and is positioned above a horizontal line.

Thomas Dunn; WSBA #35279
Attorney for Petitioner Kintz

VI. APPENDIX

RCW 9A.46.110:

Washington Stalking Statute

RCW 10.14.020:

Washington Statute defining Harassment

→9A.46.110. Stalking

(1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:

(a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

(b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person; or

(ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

(2)(a) It is not a defense to the crime of stalking under subsection (1)(c)(i) of this section that the stalker was not given actual notice that the person did not want the stalker to contact or follow the person; and

(b) It is not a defense to the crime of stalking under subsection (1)(c)(ii) of this section that the stalker did not intend to frighten, intimidate, or harass the person.

(3) It shall be a defense to the crime of stalking that the defendant is a licensed private investigator acting within the capacity of his or her license as provided by chapter 18.165 RCW.

(4) Attempts to contact or follow the person after being given actual notice that the person does not want to be contacted or followed constitutes prima facie evidence that the stalker intends to intimidate or harass the person. "Contact" includes, in addition to any other form of contact or communication, the sending of an electronic communication to the person.

(5)(a) Except as provided in (b) of this subsection, a person who stalks another person is guilty of a gross misdemeanor.

(b) A person who stalks another is guilty of a class C felony if any of the following applies: (i) The stalker has previously been convicted in this state or any other state of any crime of harassment, as defined in RCW 9A.46.060, of the same victim or members of the victim's family or household or any person specifically named in a protective order; (ii) the stalking violates any protective order protecting the person being stalked; (iii) the stalker has previously been convicted of a gross misdemeanor or felony stalking offense under this section for stalking another person; (iv) the stalker was armed with a deadly weapon, as defined in RCW 9.94A.602, while stalking the person; (v) the stalker's victim is or was a law enforcement officer, judge, juror, attorney, victim advocate, legislator, or community correction's officer, and the stalker stalked the victim to retaliate against the victim for an act the victim performed during the course of official duties or to influence the victim's performance of official duties; or (vi) the stalker's victim is a current, former, or prospective witness in an adjudicative proceeding, and the stalker stalked the victim to retaliate against the victim as a result of the victim's testimony or potential testimony.

(6) As used in this section:

(a) "Follows" means deliberately maintaining visual or physical proximity to a specific person over a period of time. A finding that the alleged stalker repeatedly and deliberately appears at the person's home, school, place of employment, business, or any other location to maintain visual or physical proximity to the person is sufficient to find that the alleged stalker follows the person. It is not necessary to establish that the alleged stalker follows the person while in transit from one location to another.

(b) "Harasses" means unlawful harassment as defined in RCW 10.14.020.

(c) "Protective order" means any temporary or permanent court order prohibiting or limiting violence against, harassment of, contact or communication with, or physical proximity to another person.

(d) "Repeatedly" means on two or more separate occasions.

10.14.020. Definitions

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Unlawful harassment" means a knowing and willful course of conduct directed at a specific person which seriously alarms, annoys, harasses, or is detrimental to such person, and which serves no legitimate or lawful purpose. The course of conduct shall be such as would cause a reasonable person to suffer substantial emotional distress, and shall actually cause substantial emotional distress to the petitioner, or, when the course of conduct would cause a reasonable parent to fear for the well-being of their child.

(2) "Course of conduct" means a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose. "Course of conduct" includes, in addition to any other form of communication, contact, or conduct, the sending of an electronic communication. Constitutionally protected activity is not included within the meaning of "course of conduct."