

NO. 65819-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

ABRAM VELIZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Ira Uhrig, Judge

REPLY BRIEF OF APPELLANT

2011 JUN -1 PM 4:27

COURT OF APPEALS
STATE OF WASHINGTON



CHRISTOPHER H. GIBSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENTS IN REPLY</u>	1
1. THE LAW OF THE CASE DOCTRINE DOES NOT PRECLUDE OR DEFEAT VELIZ'S CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE.	1
2. IF UNDERSIGNED COUNSEL'S FAILURE TO ASSIGN ERROR TO THE TO-CONVICT INSTRUCTION AND THE INFORMATION SERVES TO DEPRIVE VELIZ OF RELIEF, THEN THIS COURT SHOULD APPOINT NEW APPELLATE COUNSEL SO THE ISSUE MAY BE PROPERLY RAISED ON VELIZ'S BEHALF.	4
B. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Dalluge
152 Wn.2d 772, 100 P.3d 279 (2004)..... 5

In re Hinton
152 Wn.2d 853, 100 P.3d 801 (2004)..... 1

In re Maxfield
133 Wn.2d 332, 945 P.2d 196 (1997)..... 5

In re Personal Restraint of Frampton
45 Wn. App. 554, 726 P. 2d 486 (1986)..... 4

State v. Aho
137 Wn.2d 736, 975 P.2d 512 (1999)..... 1, 2, 4

State v. Rolax
104 Wn.2d 129, 702 P.2d 1185 (1985)..... 4

State v. Sweet
90 Wn.2d 282, 581 P.2d 579 (1978)..... 4

FEDERAL CASES

Evitts v. Lucey
469 U.S. 387, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985)..... 4

Fiore v. White
531 U.S. 225, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001)..... 1

RULES, STATUTES AND OTHER AUTHORITIES

Laws of 2009, Chapter 431, §20..... 3

RCW 9A.44.083 2

TABLE OF AUTHORITIES (CONT'D)

	Page
RCW 9A.56.350	3
U. S. Const. amend. 6	4
Const. art. I, § 22.....	2, 4

A. ARGUMENTS IN REPLY

1. THE LAW OF THE CASE DOCTRINE DOES NOT PRECLUDE OR DEFEAT VELIZ'S CHALLENGE TO THE SUFFICIENCY OF THE EVIDENCE.

The State invites this Court to reject Veliz's insufficiency of the evidence claim because appellate counsel did not assign error to the to-convict instruction, claiming this is fatal under the law of the case doctrine. Brief of Respondent (BOR) at 15-19. Because the law of the case doctrine does not apply to bar relief from a fundamental constitutional error, this Court should decline the State's invitation.

It is a fundamental due process violation to convict and incarcerate a person for a crime without proof of all the elements of the crime. Fiore v. White, 531 U.S. 225, 228-29, 121 S.Ct. 712, 148 L.Ed.2d 629 (2001). This principle applies to those instances where the accused is convicted of a non-existent crime. See e.g., In re Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004) (discussing Fiore and reversing convictions for second degree felony murder because at the time of the acts, assault could not be the predicate felony for felony murder).

Instructive is the Washington Supreme Court's decision in State v. Aho, 137 Wn.2d 736, 975 P.2d 512 (1999). Aho was charged with and convicted of three counts of first degree child molestation. Aho's jury was instructed that to convict on any particular count the State had to prove

Aho had "sexual contact with the victim during a stated time period beginning January 1, 1987, that the victim was under age 12, and that Aho was at least 36 months older than the victim." ¹ Aho, 137 Wn.2d at 739. Significantly, however, the statute under which Aho was charged (RCW 9A.44.083), was not effective until July 1, 1988. Id. In reversing all three convictions, the Court reasoned;

Aho was charged with, tried for, and convicted of child molestation. Convictions for child molestation cannot be upheld where the jury may have found Aho guilty based upon acts occurring before July 1, 1988. Given the express legislative directive, the statute absolutely cannot be applied to that period. Further, Aho's convictions for child molestation cannot be upheld on the basis that as to conduct before July 1988 he actually committed indecent liberties. Under Const. art. I, § 22, a defendant has the right to be tried only for offense charged. . . . Aho was not charged with, tried for, or convicted of indecent liberties. Because the jury did not identify when the acts that it found constituted offenses occurred, it is possible that Aho has been illegally convicted based upon an act or acts occurring before the effective date of the child molestation statute. Accordingly, Aho's convictions for child molestation violate due process.

Aho, 137 Wn.2d at 744.

The Court also held Aho was denied his right to effective assistance of counsel because his trial attorney failed to object to the court's erroneous to-convict instructions, proposed her own erroneous to-convict instructions, and failed to object to the information, which

¹ Aho's trial counsel proposed instructions that directed the jury to consider events beginning in January 1987. 137 Wn.2d at 740.

included the overly broad charging period. 137 Wn.2d at 745. The Court concluded there was no "conceivable legitimate tactic where the only possible effect of deficient performance was to allow the possibility of a conviction of a crime under a statute which did not exist and could not be applied during part of the charging period. Prejudice here is obvious." Id. at 745-46.

Where it was "possible" Aho's jury convicted him for acts that predated the statutory enactment under which he was tried, to convict Veliz his jury *had* to have relied on acts occurring before the effective date of the statute under which he was charged and tried, RCW 9A.56.350(1)(c) (effective September 1, 2009, Laws of 2009, Chapter 431, §20). CP 63. The state's proof at trial showed a theft of over \$1100 worth of merchandise *before* the effective date, but less than \$250 worth of merchandise *after*. See Brief of Appellant at 4-5 (setting forth value of items taken during each incident with supporting citations to the record). Thus, to the extent Veliz did steal merchandise after the effective date of the act, it was not in an amount sufficient to convict him of the charged offense, which requires proof of at least \$750 worth of stolen merchandise. RCW 9A.56.350(3). As such, Veliz's conviction violates due process. Aho, 137 Wn.2d at 744.

Veliz's trial counsel did not propose a to-convict instruction with an overly broad charging period. See CP 57-60 (defense proposed instruction do not include any to-convict instructions). Veliz's trial counsel did not take exception to any of the court's instructions, however, nor did she object to the information, which included the overly broad charging period. CP 63; RP 426. There is no strategic basis for failing to object to both the overly broad charging language and to-convict instruction, and the prejudice is obvious. Aho, 137 Wn.2d at 745-46. Therefore, this Court should reverse.

2. IF UNDERSIGNED COUNSEL'S FAILURE TO ASSIGN ERROR TO THE TO-CONVICT INSTRUCTION AND THE INFORMATION SERVES TO DEPRIVE VELIZ OF RELIEF, THEN THIS COURT SHOULD APPOINT NEW APPELLATE COUNSEL SO THE ISSUE MAY BE PROPERLY RAISED ON VELIZ'S BEHALF.

The Washington Constitution grants the right to appeal in all criminal cases. Const. art. 1, § 22 (amend. 10); State v. Sweet, 90 Wn.2d 282, 286, 581 P.2d 579 (1978). The right includes the right to effective assistance of counsel. U. S. Const. amend. 6; Const. art. 1, § 22; Evitts v. Lucey, 469 U.S. 387, 396, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985); State v. Rolax, 104 Wn.2d 129, 135, 702 P.2d 1185 (1985). This right is guaranteed as a matter of due process. In re Personal Restraint of Frampton, 45 Wn. App. 554, 726 P. 2d 486 (1986). A defendant is denied

this right where (1) appellate counsel fails to raise a meritorious issue and (2) but for this failure, there is a reasonable probability the defendant would have prevailed on appeal. In re Dalluge, 152 Wn.2d 772, 787-89, 100 P.3d 279 (2004); In re Maxfield, 133 Wn.2d 332, 344, 945 P.2d 196 (1997). And when the right is violated, this Court will reinstate the direct appeal to allow use of its more favorable standards. See Frampton, 45 Wn. App. at 558-563 (reinstating appeal where appellate counsel ineffective for failing to raise issues challenging defendant's conviction).

As discussed above, the defective information and to-convict instructions here demonstrate a clear violation of Veliz's state and federal constitutional due process rights, and should require reversal of his second degree organized retail theft conviction. To the extent undersigned counsel failed to properly raise these issues, Veliz was denied his right to effective assistance of appellate counsel, and this Court should appoint new counsel to assist Veliz raise these issues properly.

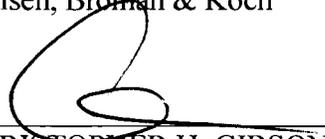
B. CONCLUSION

For the reasons discussed above and in Veliz's opening brief, supplemental brief, and pro se statement of additional grounds for review, this Court should reverse his organized retail theft conviction. In the alternative, this Court should appoint new appellate counsel to assist Veliz.

DATED this 15th day of June 2011.

Respectfully submitted,

Nielsen, Broman & Koch



CHRISTOPHER H. GIBSON

WSBA No. 25097

Office ID No. 91051

Attorneys for Appellant

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Respondent,)	
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v.)	COA NO. 65819-1-I
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Appellant.)	

DECLARATION OF SERVICE

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

THAT ON THE 1ST DAY OF MAY, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] JAMES HULLBERT
WHATCOM COUNTY PROSECUTOR'S OFFICE
SUITE 201
311 GRAND AVENUE
BELLINGHAM, WA 98227

- [X] ABRAM VELIZ
DOC NO. 824374
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001

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SIGNED IN SEATTLE WASHINGTON, THIS 1ST DAY OF MAY, 2011.

x Patrick Mayovsky