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JUL 19 2012

King County Prosecutor
Appellate Unit

COURT OF APPEALS
DIVISION ONE

JUL 19 2012

COA NO. 67444-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMAL ALI,

Appellant.

FILED
JUL 19 2012
COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

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

The Honorable Michael Heavey, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE BAIL JUMPING CONVICTION MUST BE REVERSED DUE TO INSUFFICIENT EVIDENCE.

In support of its contention that the evidence was sufficient to convict Ali of bail jumping, the State cites to the pre-trial verbatim report of proceedings from November 4, 2010 and November 17, 2010. Brief of Respondent (BOR) at 11 n.13, 14, 14 n. 17, 17 n.20. This is improper.

Due process requires that guilt must be proved beyond a reasonable doubt based on the evidence admitted at trial. Speiser v. Randall, 357 U.S. 513, 526, 78 S. Ct. 1332, 1342, 2 L. Ed. 2d 1460 (1958) ("Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt."); Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) (the "verdict must be based upon the evidence developed at the trial."); State v. Dorsey, 701 N.W.2d 238, 249-50 (Minn. 2005) ("An impartial trial requires that conclusions reached by the trier of fact be based upon the facts in evidence . . . and prohibits the trier of fact from reaching conclusions based on evidence sought or obtained beyond that adduced in court.").

On appeal, this Court reviews the evidence produced at trial in determining whether sufficient evidence exists: "the critical inquiry on

review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 318, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

The pre-trial verbatim report of proceedings from November 4 and 17 were not admitted as evidence at Ali's bench trial. They are not part of the record produced at trial to determine whether the State proved every necessary fact beyond a reasonable doubt. The State, in citing to those verbatim report of proceedings, invites this Court to rely on evidence not admitted at trial to conclude the evidence was sufficient to convict Ali of bail jumping. The invitation must be disregarded. Ali stands on the argument set forth in the opening brief.

2. PROHIBITION ON USE OF NON-PRESCRIBED DRUGS AS A CONDITION OF COMMUNITY CUSTODY IS UNAUTHORIZED BY STATUTE AND MUST BE REMOVED FROM THE JUDGMENT AND SENTENCE.

The State argues the community custody condition that categorically prohibits consumption of non-prescribed drugs is not unconstitutionally vague because the condition prohibits only *illegal*, non-prescribed drugs. BOR at 44-47. In making that argument, the State

effectively concedes a prohibition on *legal*, non-prescribed drugs would not be a crime-related prohibition under the Sentencing Reform Act.

Ali's argument in the opening brief is that the challenged condition, to the extent it prohibits use of legal, non-prescribed drugs, is not a crime-related prohibition. Brief of Appellant at 42-45. Ali does not argue the condition is unconstitutionally vague. Rather, the breadth of the condition, as entered in the judgment and sentence, encompasses use of legal, non-prescribed drugs that have nothing to do with the offenses. CP 58.

The State suggests the condition must be read as only prohibiting illegal drugs because a person of ordinary intelligence would supposedly understand it that way. BOR at 44. That argument fails because the court's order is written in absolute terms: Ali is "not consume *any* . . . non-Rx drugs." CP 58 (emphasis added). "Any" means "one, no matter what one: EVERY . . . without restriction or limitation in choice." State v. Acrey, 135 Wn. App. 938, 943, 146 P.3d 1215 (2006) (quoting Webster's Third New Int'l Dictionary 97 (3d ed.1993)). That is the plain and ordinary meaning of the word. State v. Marohl, 170 Wn.2d 691, 699, 246 P.3d 177 (2010) (dictionaries provide plain and ordinary meanings of terms). There is no limitation on the kind of non-prescribed drugs that are prohibited under the plain language of the court's order.

Moreover, the court, as a separate condition, ordered Ali not to possess or consume controlled substances except pursuant to lawfully issued prescriptions. CP 58. An ordinary person, faced with interpreting the two conditions, would quite reasonably infer that the "non-prescribed drug" prohibition encompasses drugs that are not covered by the controlled substance prohibition. If the two conditions only covered the same kinds of drugs (i.e., illegal drugs), then there would be no reason to list two separate conditions.

A sentence must be "definite and certain." State v. Jones, 93 Wn. App. 14, 17, 968 P.2d 2 (1998) (citing Grant v. Smith, 24 Wn.2d 839, 840, 167 P.2d 123 (1946)). Consistent with this mandate, "[s]entences in criminal cases should reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them." United States v. Daugherty, 269 U.S. 360, 363, 46 S. Ct. 156, 70 L. Ed. 309 (1926). The condition here fails this test. It should be stricken.

B. CONCLUSION

For the reasons stated above and in the opening brief, Ali requests that this court reverse the convictions, dismissing the bail jumping charge with prejudice. In the event it declines to do so, then the challenged community custody conditions should be reversed.

DATED this 19th day of July 2012

Respectfully Submitted,

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DIVISION ONE

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 67444-7-1
)	
JAMAL ALI,)	
)	
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 19TH DAY OF JULY 2012, 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] JAMAL ALI
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SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF JULY 2012.

x *Patrick Mayovsky*