

70133-9

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COA No. 70133-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS VEILLEUX,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF KING COUNTY

The Honorable Theresa B. Doyle

REPLY BRIEF

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TABLE OF CONTENTS

A. REPLY ARGUMENT 1

 1. No obstructing. 2

 2. Speech. 7

 3. Reversal. 9

B. CONCLUSION 10

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Dunaway, 109 Wn.2d 207, 743 P.2d 1237, 749 P.2d 160 (1987). 2

State v. Contreras, 92 Wn. App. 307, 966 P.2d 915 (1998) 8,9

State v. Hoffman, 35 Wn. App. 13, 664 P.2d 1259 (1983) 8

State v. Steen, 164 Wn. App. 789, 265 P.3d 901 (2011) 9

State v. White, 97 Wn.2d 92, 640 P.2d 1061 (1982) 8

State v. Williams, 171 Wn.2d 474, 251 P.3d 877 (2011) 8,9

State v. Williamson, 84 Wn. App. 37, 924 P.2d 960 (1996) 8

State v. CLR, 40 Wn. App. 839, 700 P.2d 1195 (1985) 9

STATUTES

RCW 9A.76.020(1) 1

RCW 9.94A.589(1)(a) 2

RCW 9A.76.175 8

RCW 9A.76.020 (1975) 8

PATTERN INSTRUCTIONS

WPIC 120.02 1

A. REPLY ARGUMENT

Cleverly disguised in the Respondent's brief is a dramatic new theory of evidentiary sufficiency for the crime of obstructing a law enforcement officer, RCW 9A.76.020(1).¹

The defendant did not obstruct Officer Renner, or act with a purpose to do so. Contrary to the Respondent's arguments, his conduct toward others of the many police officers involved in his arrest and processing did not constitute obstruction of Officer Renner.

If the Court were to accept the Respondent's novel theory, a defendant could be charged and convicted of an unlimited number of counts of Obstructing, for each and every police officer who was physically or temporally involved in an investigation or the detaining of a defendant that took more time than desired, irregardless of the absence of proof that the defendant actually obstructed that particular officer(s) in performance of that particular officer('s)

¹ Obstructing a law enforcement officer is defined as follows:

A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

RCW 9A.76.020(1); see WPIC 120.02, CP 99, 103 (Jury instructions nos. 19, 23).

duties, or that the defendant did so knowingly and purposefully as to each and every one of them.²

Further, if the Court accepts the State's arguments, the defendant's criminal liability will extend to all of these officers while the defendant engages in conduct making the admittedly important work of *civilian* civil servants in the arrest process, such as medics, and fingerprint technicians, more difficult.³

1. No obstructing. The defendant here, Nicholas Veilleux, was arrested; he then refused to volunteer his name, also gave false answers when asked to identify himself, complained of police brutality and not being given his Miranda rights during the time he was being transported by car, refused to cooperate with medics, dragged his feet when being walked into the police station, and curled up his hands when the civilian fingerprint technician tried to

² By dint of the jury instructions, the State was required to prove in this case that Mr. Veilleux willfully obstructed the named Officer, i.e., that he purposely acted with knowledge that his actions would obstruct Officer Renner in discharge of duties. CP 99 (Instruction 19), CP 100 (Instruction 20), CP 103 (Instruction 23).

³ Under the "same criminal conduct" test, a defendant's convictions for thereby 'obstructing' each of all the police officers in the proximity would fail the analysis, and be scored as offender score points against each other as "different victims," significantly increasing the defendant's term of imprisonment. See RCW 9.94A.589(1)(a); State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987).

roll his prints. See AOB, at pp. 2-3, 7-9, and SRB at pp. 2-7, 12-13 (both citing record).

Yet these acts were either speech, or involved obstruction of duty performance by police officers *other than* the officer named in the information, and named by the prosecutor in closing argument – Officer Renner -- as discussed in the Opening Brief and implicitly conceded by the State. SRB at p. 12 (arguing that Mr. Veilleux's conduct acted with purpose to obstruct not only the officers “that he was not complying with directly,” but also Officer Renner).

Officer Renner was not the arresting officer nor was he dispatched to the burglary; rather, as he noted, when he volunteered to “assist with a burglary call” somewhere in West Seattle, there were a large amount of officers at the house; Renner went inside with some of them, and he ended up conversing with the homeowners in their upstairs bedroom . 2/19/13RP at 106-08.

The arresting officer was Officer Koshak, assisted by Officer Sabay; they were the officers who located Mr. Veilleux in the basement of the home, ordered him to raise his hands, and together held and handcuffed him. SRB at p. 4; 2/14/13RP at 39-40; 2/19/13RP at 19-20; CP 5. Officer Renner learned over the radio that the defendant had been found, then, as they brought Mr.

Veilleux upstairs from the basement in handcuffs, Renner and the owners looked down at Mr. Veilleux from the upper floor atrium. 2/19/13RP at 106-110.

Officer Renner primarily testified that he made sure the homeowners did not know Mr. Veilleux, then he drove on his own to the Southwest precinct “[to] assist the primary officer, Officer Koshak” and to do paperwork.⁴ 2/19/13RP at 111-12.

At the Southwest Precinct, Officer Renner was present in a holding cell with other officers while medics examined Mr. Veilleux, who was stating his back had been injured. 2/19/13RP at 112. When Officer Renner was occasionally paying attention to what Veilleux was saying, he testified, the defendant was “just generally whining.” 2/19/13RP at 113.

Then, Renner sat as a passenger in Officer McDougald’s patrol car as McDougald drove Mr. Veilleux to the Downtown police headquarters for fingerprinting. 2/19/13RP at 114-15. Other than Mr. Veilleux’s complaints about his Miranda rights during the car

⁴ The police superform report and the original Affidavit of Probable Cause charging burglary were prepared by Officer Sabay and Detective Adonis Topacio; they mention neither Officer Renner, nor any obstructing except perhaps for noting that Officers Koshak and Sabay had to issue “several” verbal commands to Mr. Veilleux in the basement. CP 3-5 (affidavit of probable cause and SPD superform). The amended information, adding obstructing, is unaccompanied by any other police report or further affidavit. CP 6-7 (amended information).

trip, Officer Renner could not recall what the defendant said, other than “various whining.” 2/19/13RP at 116. As thoroughly described in the Opening Brief, Officer Renner (when he paid attention, which he testified he was not doing) saw that the officer walking Mr. Veilleux into the building had trouble because the defendant was “making the choice not to walk.” 2/20/13RP at 29-30. In the fingerprinting room, Officer Renner completed the necessary forms in the company of at least four of the other police officers, while the “fingerprint tech” tried to use the ink roller on Mr. Veilleux unsuccessfully. 2/19/13RP at 120-21.

The record speaks for itself. The great bulk of Officer Renner’s testimony actually had to do with his experience with DUI cases and his assessment that Mr. Veilleux was not significantly intoxicated by alcohol (for purposes of the voluntary intoxication defense to the intent element of burglary). 2/19/13RP at 23-29; 2/20/13RP at 16-24, 35-40; CP 91 (Instruction 12 - voluntary intoxication instruction). Where Officer Renner *did* discuss Mr. Veilleux’s detention and processing, his testimony is notable for the degree to which he (a) was annoyed by Veilleux’s oral complaints, (b) didn’t notice Veilleux’s conduct, and/or (c) ignored Mr. Veilleux’s behavior.

This is not obstruction of Officer Renner. The Respondent's brief, naming multiple officers and other persons, describes the silence, speech, and conduct by Mr. Veilleux when Officers Koshak, Wengard, medics, and the fingerprint technician were dealing with him, along with other officers who were among the large number of police who responded to the robbery and participated in the defendant's detention and processing thereafter. SRB, at pp. 4-7.

On appeal, regarding Officer Renner, the Respondent notes that • "Officer Michael Renner stayed in Veilleux's cell while Veilleux was evaluated [by medics]," SRB at p. 4; and • that "Officer Renner and another Officer transported Veilleux in one vehicle while two additional officers followed in a separate vehicle," SRB at pp. 5, and see p. 6 (to the same effect). The Respondent also writes that "[t]hroughout the officers' interaction with Veilleux, he 'badmouthed' the officers." SRB, at p. 6. Respondent also accurately notes that during this time, "Officer Renner explained that he was 'trying not to pay attention to Veilleux's behavior,' because at that point officers were just trying to identify Veilleux

and get him “where he needed to be: [to fingerprinting and jail].”
SRB, at pp. 6-7.

This is, still, not obstruction of Officer Renner. Thus, the State asks this Court of Appeals to find that Officer Renner was obstructed because other officers were obstructed. Veilleux did not obstruct Officer Renner, or act with a purpose to obstruct him.

All of this is made clear by the State’s brief’s *own* recitation of the facts, as it was by Mr. Veilleux’s Opening Brief, and the record below.⁵

2. Speech. Mr. Veilleux’s only possible ‘behavior’ involving Officer Renner was the fact that he did not *volunteer* his identity to that particular officer, in addition to not volunteering it to others. 2/12/13RP at 26 (State’s closing argument) (“And he didn’t give his name for the rest of the night. Officer Renner took him to the jail and never knew his name.”). But an obstructing arrest, charge or conviction cannot be based on a refusal to identify oneself, or even (as regards Veilleux’s behavior regarding other, different officers) on a refusal to answer questions, or a giving of a false identity.

⁵ On appeal, the Respondent understandably declines to defend a theory of obstructing proffered by the prosecutor in closing that Officer Renner was obstructed because the processing and fingerprinting of the arrestee resulted in Renner testifying that he worked .5 hours of paid overtime, beyond the scheduled end of his shift. 2/22/13RP at 27; see 2/20/13RP at 29 (“I work a lot of hours, so the overtime is appreciated.”).

State v. Williams, 171 Wn.2d 474, 486, 251 P.3d 877 (2011) (crime of obstructing in its most recent statutory version at RCW 9A.76.020(1) is not proved by the accused's act of giving a false name) (act of giving brother's name in response to investigating officer's request was not obstructing, but was merely offense of making false statement to public officer, RCW 9A.76.175); State v. Hoffman, 35 Wn. App. 13, 16-17, 664 P.2d 1259 (1983) (citing State v. White, 97 Wn.2d 92, 106, 640 P.2d 1061 (1982) (invalidating portions of former obstructing statute (former RCW 9A.76.020 (1975)) criminalizing refusal or failure to furnish any statement or make knowingly untrue statement to public servant)); State v. Contreras, 92 Wn. App. 307, 316, 966 P.2d 915 (1998) (“[m]ere refusal to answer questions is not sufficient grounds to arrest for obstruction of a police officer.”); AOB at pp. 10-11.

Respondent inaccurately asserts that false speech can be the basis for an *obstructing* conviction, not just a conviction under section .175, the false statement statute. BOR at p. 8 and n. 5; see also State v. Williamson, 84 Wn. App. 37, 39-40, 43-45, 924 P.2d 960 (1996) (evidence insufficient for obstructing by hindrance or delay where giving of nonsensical name “Christopher Columbus” was mere false speech).

3. Reversal. Ultimately, then, the defendant did not obstruct Officer Renner by hindering or delaying the fingerprinter, or Officers Koshak, Sabay, Wengard, etc. None of the cases cited by the Respondent support the State's requested expansion of the law in this area. BOR at pp. 7, 9 citing State v. Steen, 164 Wn. App. 789, 796, 802, 265 P.3d 901 (2011) (defendant guilty of obstruction under RCW 9A.76.020(1) by refusing commands of Officer Terrone and Officer Finley during community caretaking investigation)⁶; BOR at pp. 8-9 citing State v. Contreras, 92 Wn. App. at 316 (defendant lawfully arrested for obstructing for disobeying order of Officer Scarfo and physically resisting weapons patdown by Officers Scarfo and Wolfe); BOR at p. 8 citing State v. Williams, 171 Wn.2d at 475-76, 486 (evidence *insufficient* for obstructing investigating officer where defendant gave that officer a false name); BOR at p. 12 citing State v. CLR, 40 Wn. App. 839, 841-42, 700 P.2d 1195 (1985) (evidence *insufficient* for obstructing Officer Striedinger where defendant warned prostitution suspect that Officer Striedinger was an undercover officer, where Striedinger

⁶ The dissent in Steen argued that the evidence of obstructing was insufficient where the defendant's combined conduct was merely a refusal to open the door of his home to officers who had no warrant, and his silence when the officers demanded that he identify himself. Steen, 164 Wn. App. at 814-19 (Dissenting opinion of Quinn-Brintnall, J.).

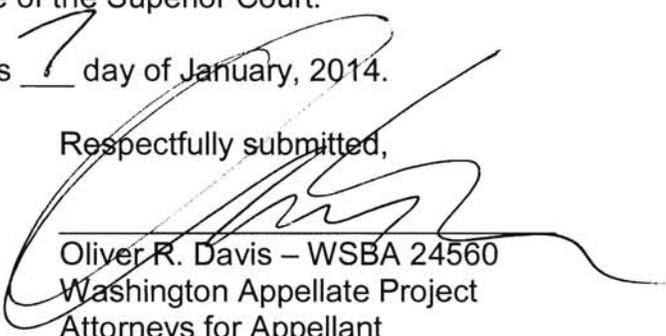
successfully arrested suspect and testified merely that his undercover status may have been exposed). Mr. Veilleux's conviction must be reversed.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. Veilleux respectfully asks this Court to reverse the judgment and sentence of the Superior Court.

Dated this 7 day of January, 2014.

Respectfully submitted,



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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF JANUARY, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF JANUARY, 2014.

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