NO. 44033-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LARNARD PINSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John McCarthy

No. 11-1-05171-1

RESPONSE BRIEF

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State Cases

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Should this Court dismiss defendant's claim when it has been explicitly rejected by this Court in ***Brown***?

B. STATEMENT OF THE CASE.

1. Procedure

On March 5, 2012, the State charged Larnard Pinson, defendant, by amended information with one count of violation of a court order, one count of domestic violence court order violation, one count of tampering with a witness, and one count of attempted domestic violence court order violation. CP 8-10. Prior to trial, the State dismissed the count of violation of a court order. CP 40-41; RP 4.

Defendant's jury trial was held before the Honorable John McCarthy on July 24, 2012. RP 44. Defendant was found guilty as charged. CP 65-67; RP 193. The court sentenced defendant to a total of 50 months in confinement. CP 80-83; RP 210.

Defendant timely filed a Notice of Appeal on October 4, 2012. CP 104-105.

2. Facts

On July, 12, 2011, Pierce County Sheriff's Deputies Walter Robinson and Seth Huber responded to a call from Pierce Transit dispatch

reporting two individuals consuming alcohol in a bus shelter at 11700 Pacific Avenue in Tacoma. RP 44-46, 102-104. On arrival, the Deputies saw defendant sitting next to Cassandra Doyle in a bus shelter. RP 48-49, 103-104.

Defendant was restricted from contact with Ms. Doyle pursuant to a protective court order. Exh. P1; CP 42; RP 125. Both individuals appeared intoxicated and cold beer cans were found in a trash can. RP 48-49, 105. Inside a backpack that defendant claimed as his, was an open bottle of malt liquor and two Washington State identification cards belonging to defendant and Ms. Doyle. RP 48-49, 78, 107. Subsequent to running a check on defendant with Pierce Transit, Deputy Robinson found out that defendant was excluded from Pierce Transit services. CP 49, 50, 74, 106. Defendant was then arrested and taken to jail. CP 49, 50, 74, 106.

James Scollick, supervisor of the inmate phone system in the Pierce County jail, heard a phone call from defendant to his mother on January 19, 2012. RP 94. After hearing the statement, "Well, if she stays hidden." Mr. Scollick grew suspicious. RP 96. He looked up defendant's charging document, and found the no contact order with Ms. Doyle. RP 96. Mr. Scollick then recorded the phone call and forwarded the recording to the prosecutor's office. RP 94-95. In the recording, defendant asks his mother to call "Cassie" and "tell her she needs to stay gone." Exh. P10; CP 42.

C. ARGUMENT.

1. DEFENDANT'S CLAIM HAS BEEN EXPLICITY REJECTED BY THIS COURT IN ***BROWN***.

Defendant argues that the to-convict instructions were erroneous because they allegedly misled the jury on its power to acquit. Brief of Appellant at 4. This claim fails as several courts—including this Court—have repeatedly rejected defendant's argument. *See, e.g.*, ***State v. Brown***, 130 Wn. App. 767, 770–71, 124 P.3d 663 (2005); ***State v. Bonisisio***, 92 Wn. App. 783, 964 P.2d 1222 (1998); ***State v. Meggyesy***, 90 Wn. App. 693, 958 P.2d 319 (1998), *abrogated on other grounds by* ***State v. Recuenco***, 154 Wn.2d 156, 110 P.3d 188 (2005), *overruled in turn by* ***Washington v. Recuenco***, 548 US 212 (2006). Specifically, this Court in ***Brown*** held:

> [Defendant] argues that ***Bonisisio*** and ***Meggyesy*** are distinguishable because in those cases each defendant asked the court to instruct the jury that it "may" convict. Here, [defendant] argues that the language of the "to convict" instruction [which stated the jury had a "duty" to convict] affirmatively misleads the jury about its power to acquit. . . . . We find no meaningful difference between [defendant]'s argument and the issues raised in ***Bonisisio*** and ***Meggyesy***.

Brown, 130 Wn. App. at 770–71. These cases address and reject the same argument the defendant makes here. It is unnecessary to reexamine this issue as it has been adequately considered by the courts in ***Brown, Bonisisio***, and ***Meggyesy***.

Defendant also seeks relief under the state constitution, applying the six-step analysis under ***State v. Gunwall***, 106 Wn.2d 54, 720 P.2d 808 (1986). Again, ***Meggyesy*** rejected this. ***Meggyesy***, 90 Wn. App. at 700-01. It is unnecessary for the State to repeat the ***Gunwall*** analysis conducted by the Court of Appeals in ***Meggyesy***. *See* 90 Wn. App. at 701–04; *see also* ***Bonisisio***, 92 Wn. App. at 794 (accepting the ***Meggyesy*** court's analysis). Neither the state or federal constitutions support this argument.

D. CONCLUSION.

The Defendant's argument has previously been considered and rejected by the Court of Appeals; twice by this Court. The defendant does not argue or present any cases that were not available at the time that ***Meggyesy, Bonisisio,*** and ***Brown*** were decided. The State respectfully requests that the judgment be affirmed.

DATED: April 30, 2013.

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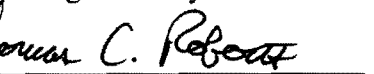

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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4-30-13 Shawn Kan
Date Signature

PIERCE COUNTY PROSECUTOR

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