73762-7

FILED
February 11, 2016
Court of Appeals
Division I
State of Washington

No. 73762-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL MARKNSEN,

Appellant.

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

The Honorable Dean Lum

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Michael Marknsen was convicted of violating two different no contact orders while having two prior convictions for violating court orders. The parties stipulated that Mr. Marknsen had two prior convictions for violating court orders. But, the State produced no evidence that the prior court orders were issued pursuant to the stated RCW chapters of RCW 26.50.110(5). Mr. Marknsen submits that this omission by the trial court requires reversal of his convictions with instructions to dismiss.

B. ASSIGNMENTS OF ERROR

1. There was insufficient proof presented that the prior court orders which Mr. Marknsen had been convicted of violating were issued pursuant to the requisite RCW chapters.

2. There was insufficient evidence presented to support the convictions.

C. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Due process requires the State to prove all the essential elements of the offense. A necessary element of felony violation of a no contact order is that the defendant already has two prior convictions for violating a court order. In addition, there must be sufficient evidence for the trial court to conclude the two prior court orders were issued pursuant to the requisite RCW chapters stated in RCW 26.50.110. Where there was no evidence in the record for the trial court to make this determination, are Mr. Marknsen's convictions constitutionally deficient for a failure to provide the necessary proof?

D. STATEMENT OF THE CASE

Michael Marknsen was charged with violating two separate court orders barring him from contacting his wife and with having two prior convictions for violating court orders.[1] CP 8-9. At trial, the parties stipulated that Mr. Marknsen had two prior convictions for violating court orders:

> The parties stipulate that the defendant had been twice previously convicted for violating the provisions of a court order prior to May 10, 2013.

[1] In count 1, Mr. Marknsen was discovered by Department of Corrections' (DOC) employees in a motel room with his wife. In count 2, Mr. Marknsen was the driver of a car stopped by police in which his wife was a passenger.

CP 52. No evidence was presented that the prior court orders were issued pursuant to the stated RCW chapters in RCW 26.50.110(5).

At the conclusion of the trial, Mr. Marknsen was found guilty as charged. CP 73-74.

E. ARGUMENT

1. The State failed to prove the essential prerequisite for the admission of Mr. Marknsen's prior convictions, thus the State provided insufficient evidence for the offenses mandating reversal.

a. *The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt.*

The State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend XIV; *Apprendi v. New Jersey,* 530 U.S. 466, 471, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is "[w]hether, after viewing the evidence in the light most favorable to the prosecution, 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, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). A challenge to the sufficiency of

evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Here, the State was required to prove to the trial court that the prior convictions were for violating court orders issued pursuant to the specific RCW chapters listed in RCW 26.50.110(5).

b. *The stipulation failed to establish that the prior court orders were issued pursuant to the requirements of RCW 26.50.110(5).*

Violation of a no contact order under chapter 10.99 RCW becomes a felony if the offender has at least two previous convictions for violating the provisions of an order issued under chapter 26.50, 7.90, 9.94A, 9A.46, 10.99, 26.09, 26.10, 26.26, or 74.34 RCW. RCW 26.50.110(5). The statutory authority for the issuance of the two prior court orders is not an essential element of the offense, which must be decided by the jury. *State v. Miller*, 156 Wn.2d 23, 24, 123 P.3d 827 (2005). But, the State must still submit to the *trial court* sufficient evidence to determine whether the orders that constituted the two prior convictions were issued pursuant to one of the relevant RCW chapters. *State v. Case*, 189 Wn.App. 422, 428-30, 358 P.3d 432 (2015).

The decision in *Case* is indistinguishable from Mr. Marknsen's matter. In *Case*, the defendant stipulated, as did Mr. Marknsen, that

> The defendant has at least two prior convictions for violating the provisions of a protection order, restraining order, or no-contact order issued under Washington State Law.

Case, 189 Wn.App. at 425. This evidence was all the State produced; it did not provide any evidence to the trial court that the two prior convictions involved court orders issued under one of the stated RCW chapters in RCW 26.50.110(5).

Division Two of this Court reversed the defendant's conviction, finding that under its gatekeeping function, the trial court must still find that the two prior convictions involved court orders issued pursuant to the stated provisions in the statute:

> Under *Miller*, the trial court determines as a question of law whether the predicate convictions supporting the charge of felony violation of an NCO involved orders issued under one of the RCW chapters listed in former RCW 26.50.110(5). 156 Wn.2d at 24, 31, 123 P.3d 827. This determination involves the trial court's exercise of its "gate-keeping function." *Id.* To enable the trial court to make this determination, the State must submit evidence to the trial court proving that the defendant's prior convictions were in fact for violating court orders issued under one of the specific RCW chapters listed in former RCW 26.50.110(5). *Miller*, 156 Wn.2d at 31, 123 P.3d 827. Only once the State produces such evidence can the trial court allow the State to submit evidence to the jury of a defendant's prior convictions for violating

> court orders. If no prior convictions are admissible, the defendant's charge for felony NCO violation must be dismissed. *Id.*

Case, 189 Wn.App. at 429. Since the State produced only the stipulation, there was insufficient evidence to allow the trial court to conduct its gate-keeping function. *Id.* Thus, there was insufficient evidence to support the defendant's conviction. *Id.* at 429-30.

Here, the facts mirror those in *Case*. The only evidence concerning Mr. Marknsen's two prior convictions was the stipulation. CP 51. There was no evidence produced to the trial court that the two prior court orders for which Mr. Marknsen was convicted of violating were issued pursuant to the stated RCW chapters in RCW 26.50.110(5). While the two current no contact orders which Mr. Marknsen was alleged to have violated were admitted, there was no evidence presented to the trial court that the prior orders were issued pursuant to the required RCW chapters in RCW 26.50.110(5). Accordingly, this Court must reverse Mr. Marknsen's convictions for violating the no contact orders. *Case*, 189 Wn.App. at 430.

c. *Mr. Marknsen is entitled to reversal of his convictions with instructions to dismiss.*

Since there was insufficient evidence to support the convictions, this Court must reverse the conviction with instructions to dismiss. *Case*, 189 Wn.App. at 430 ("[w]e hold that there was insufficient evidence to support the felony violation of an NCO and dismissal is the appropriate remedy."). To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), *quoting Burks v. United States*, 437 U.S. 1, 9, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).

2. **This Court should order that no costs be awarded on appeal.**

a. *Mr. Marknsen may seek an order from the Court ordering that no costs be awarded in his Brief of Appellant.*

Should this Court reject Mr. Marknsen's argument on appeal, he asks that this Court to issue a ruling refusing to allow the State to seek any reimbursement for costs on appeal due to his continued indigency. Such as request is authorized under this Court's recent decision in *State*

v. Sinclair, ___ Wn.App. ___, slip op. at 10-12 (72102-0-I, January 27, 2016). (A copy of the decision is attached in the Appendix).

The appellate courts may require a defendant to pay the costs of the appeal. RCW 10.73.160. While appellate court commissioners have no discretion in awarding costs where the State substantially prevails, the appellate courts may "direct otherwise." RAP 14.2; *Sinclair*, slip op. at 5, *quoting State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000). This discretion is not limited to "compelling circumstances." *Sinclair*, slip op. at 8, *quoting Nolan*, 141 Wn.2d at 628.

In *Sinclair*, the Court ruled it has an obligation to deny or approve a request for costs, and a request for the Court to consider the issue of appellate costs can be made when the issue is raised preemptively in the Brief of Appellant. Slip op. at 9-10. This Court must then engage in an "individualized inquiry." Slip op. at 12, *citing State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015).

One factor this Court found persuasive in making its determination regarding costs on appeal in *Sinclair* was the trial court findings supporting its order of indigency for the purposes of the appeal pursuant to RAP 15.2. *Sinclair*, slip op. at 12-14. Here, the trial court entered the order of indigency and findings supporting its order. CP

Supp ___, Sub. No. 136. As in *Sinclair*, there is no evidence that Mr. Marknsen's financial situation will improve. Slip op. at 14

At the time of sentencing, Mr. Marknsen was 45 years of age. CP 88. Mr. Marknsen was sentenced to statutory maximum sentence of 60 months. CP 86. In light of the decision in *Sinclair*, given Mr. Marknsen's indigency and the fact he has felony convictions which can limit his ability to obtain gainful employment, "[t]here is no realistic possibility that he will be released from prison in a position to find gainful employment that will allow him to pay appellate costs." Slip op. at 14.

Because of his current and continued indigency and likelihood that he will remain so while in prison and once he is released, Mr. Marknsen asks this Court to order that the State should not be awarded costs on appeal. *Sinclair*, slip op. at 14.

b. *Alternatively, this Court must remand to the trial court for a hearing where the court must determine whether Mr. Marknsen has the current or future ability to pay.*

Should this Court determine that it cannot make a finding regarding ability to pay because the record is not complete, due process requires this Court to remand to the trial court for a hearing to determine Mr. Marknsen's present or future ability to pay these costs.

Any award of costs becomes part of the Judgment and Sentence, thus amending that document. RCW 10.73.160(3) states that: "An award of costs shall become part of the trial court judgment and sentence." A defendant has due process rights where the State seeks to modify or amend a Judgment and Sentence, including:

> (a) written notice (b) disclosure of evidence against him or her; (c) an opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the court specifically finds good cause for not allowing confrontation); (e) a "neutral and detached" hearing body; and (f) a written statement by the court as to the evidence relied on and reasons for the modification.

State v. Abd-Rahmaan, 154 Wn.2d 280, 286, 111 P.3d 1157 (2005), *citing Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

Since adding any costs that might be requested by the State to Mr. Marknsen's Judgment and Sentence necessarily amends the judgment, due process requires that there be a hearing which complies with the dictates of *Abd-Rahmann* regarding his present or future ability to pay. As such, Mr. Marknsen requests that, in the absence of a finding by this Court regarding his ability to pay, this Court remand to the trial court for a hearing on his ability to pay.

F. CONCLUSION

Mr. Marknsen asks this Court to reverse his convictions with instructions to dismiss. Alternatively, Mr. Marknsen asks this Court to reverse the convictions and remand for a new trial. Finally, in the chance that the Court rejects Mr. Marknsen's arguments, he asks that this Court refuse to award costs on appeal.

DATED this 11th day of February 2016.

Respectfully submitted,

s/Thomas M. Kummerow

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	)	
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	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF FEBRUARY, 2016, I CAUSED THE ORIGINAL **OPENING 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 11TH DAY OF FEBRUARY, 2016.

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