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NO. 64174-3-I

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

REC'D
MAY 14 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

DEXTER NANCE, JR.,

Appellant.

2010 MAY 14 11:03 AM
B

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

The Honorable Richard D. Eadie, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

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

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A. SUPPLEMENTAL ARGUMENT¹

STATE V. HALL REQUIRES REVERSAL OF THREE OF NANCE'S CONVICTIONS FOR WITNESS TAMPERING.

1. Factual Review

On appeal, Nance contends his multiple convictions for witness tampering violate double jeopardy. Brief of Appellant at 3-16. The Supreme Court's recent decision in Hall requires reversal of three of Nance's witness tampering convictions.

2. Under *Hall*, Nance's Multiple Attempts to Prevent his Former Girlfriend from Testifying Constitute Only One Count of Witness Tampering.

While in jail for burglary and assault, Hall attempted to call his girlfriend 1,200 times to persuade her not to testify or to testify falsely. Hall, supra, slip op. at 2. The State charged Hall with four counts of witness tampering on three different dates, and the jury found Hall guilty on three of the four counts. Id. at 3. The Washington Supreme Court unanimously reversed the Court of Appeals and held that "under these facts, Hall committed one crime of witness tampering, not three." Id. at 13.

The court began by analyzing the plain language of the witness tampering statute and concluded, "[T]he unit of prosecution is the ongoing

¹ On April 23, 2010, Commissioner Mary Neel directed appellant to file a supplemental brief of no more than ten pages addressing the impact of the Washington Supreme Court's decision in State v. Hall, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 1610966 (No. 82558-1, filed Apr. 22, 2010).

attempt to persuade a witness not to testify in a proceeding.” Id. at 8. The court went on to analyze the history of the statute and found it consistent with criminalizing “the act of obstructing justice by tampering with a witness no matter how many calls are made in an attempt to accomplish the act.” Id. at 10 (emphasis added).

Finally, the court looked at whether the facts of Hall revealed more than one unit of prosecution. Id. at 10, 13. The court acknowledged more than one unit of prosecution might be present if the attempts to induce were aimed at more than one person, occurred at a different time and place, or involved a change of strategies such as different methods of communication or use of intermediaries. Id. at 10, 13.

The court explicitly rejected the State’s argument, also made by the State in this case, that unless each attempt is charged, there will be no incentive to stop trying to tamper with the witness. Id. at 12; see Brief of Respondent at 12-13. On the contrary, the court agreed with Hall that the potential for 1,200 convictions (one for each attempted phone call) would be absurd. Hall, supra, slip op. at 12.

The court also explicitly rejected the State’s arguments based on State v. Moore, 292 Wis. 2d 101, 713 N.W.2d 131 (WI App. 2006), the Wisconsin case the State relies on in this case as well. See Brief of Respondent at 9. The court found the Wisconsin precedent unpersuasive

because Wisconsin common law on the unit of prosecution presumes the legislature intended multiple punishments, in direct contrast to Washington law that ambiguity is to be resolved in favor of one offense. Hall, supra, slip op. at 11-12.

Like Hall, Nance engaged in an ongoing course of conduct to induce a single witness in a single proceeding to either not testify or to testify falsely. The probable cause certification describes at least seven phone calls over the course of four days asking that various friends contact his former girlfriend to persuade her on his behalf. CP 6-7. With far fewer attempts than the 1,200 phone calls in Hall, the facts here also support only a single conviction for witness tampering. Hall, supra, slip op. at 13.

This case does not fall under any of the possible exceptions discussed in Hall. None of Nance's attempts were aimed at any other witness; there was no significant break in time between the attempts; and there was no change in strategy. CP 6-7; Hall, supra, slip op. at 10-11, 13. Nance merely made continuous, ongoing attempts to have someone persuade his girlfriend not to testify in this case. CP 6-7. Under Hall, this is one count of witness tampering, not four. Hall, supra, slip op. at 13.

B. CONCLUSION

For the reasons set forth here and in the Brief of Appellant, Nance requests this Court reverse three of his witness tampering convictions and remand for resentencing.

DATED this 14th day of May, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "Jennifer J. Sweigert", written over a horizontal line.

JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051

Attorney for Appellant

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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 14TH DAY OF MAY, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DEXTER NANCE, JR.
DOC NO. 306157
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 14TH DAY OF MAY, 2010.

x *Patrick Mayovsky*