

No. 65056-4-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

TRINIDAD MACIEL MOLINA,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

The State charged Trinidad Molina with one count of failure to register as a sex offender and alleged that he had a prior sex offense conviction, which is an element of the crime. To prove the prior conviction, the State presented only a certified copy of a 1999 judgment and sentence from Yakima County. But the rule is well-established that when the State bears the burden to prove a prior conviction beyond a reasonable doubt, the State must present evidence independent of the record of the prior conviction to show that the person named in the judgment is the same as the person then on trial, even if the names are identical. Because the State presented no independent evidence in this case, the evidence was insufficient to prove Mr. Molina had a prior sex offense. Therefore, the conviction for failure to register as a sex offender must be reversed.

B. ASSIGNMENT OF ERROR

The State failed to prove beyond a reasonable doubt that Mr. Molina had a prior conviction for a felony sex offense.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Where the State bears the burden to prove a prior conviction beyond a reasonable doubt, it cannot rely on a copy of a judgment

and sentence alone to prove the person named in the document is the same as the person then on trial, even if the names are identical. Did the State fail to sustain its burden of proving the prior conviction, where it offered only a copy of a judgment and sentence and did not offer any independent evidence of identity?

D. STATEMENT OF THE CASE

The State charged Trinidad Molina with one count of felony failure to register as a sex offender, RCW 9A.44.130(11)(a). CP 14. The State alleged Mr. Molina had a conviction for a felony sex offense from 1999 that required him to register as a sex offender, and that he failed to register as required. Id.

At the jury trial, to prove Mr. Molina had a prior conviction for a felony sex offense, the State offered a certified copy of a Yakima County judgment and sentence from 1999. 2/23/10RP 55; Exhibit 1. The Yakima County conviction was for third degree rape. Exhibit 1. The person named in the judgment and sentence has the same name as the defendant in the present case—"Trinidad Maciel Molina." Id. But the State offered no evidence independent of the record of the prior conviction to prove that the person named in the document was the same as the person then on trial.

After the State rested its case, defense counsel moved to dismiss the charge. 2/24/10RP 5-6; CP 35-36. Counsel argued the State had not proved beyond a reasonable doubt that the person named in the Yakima County judgment and sentence was the defendant, Mr. Molina. Id. The court denied the motion, finding the evidence was sufficient to go to the jury. 2/24/10RP 11.

The jury found Mr. Molina guilty of felony failure to register as a sex offender as charged. CP 52, 56.

E. ARGUMENT

THE EVIDENCE IS INSUFFICIENT TO SUSTAIN
THE CONVICTION BECAUSE THE STATE DID NOT
PROVE BEYOND A REASONABLE DOUBT THAT
MR. MOLINA HAD A PRIOR SEX OFFENSE
CONVICTION

As discussed below, the rule is well-established in Washington, dating at least to the 1930s, that when the State bears the burden to prove beyond a reasonable doubt that a defendant has a prior conviction, the State must present evidence independent of the record of the prior conviction to show that the person named in the prior judgment is the same person then on trial. Because the State did not present such independent evidence in this case, it did not bear its burden of proving every element of the crime beyond a reasonable doubt.

1. The State was required to prove beyond a reasonable doubt that Mr. Molina had a prior conviction for a felony sex offense. It is a fundamental principle of constitutional due process that the State must prove every element of a charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 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); U.S. Const. amend. 14; Const. art. 1, § 3.

To prove the felony crime of failure to register as a sex offender, the State must prove beyond a reasonable doubt that the defendant has a prior conviction for a "felony sex offense." RCW 9A.44.130(11)(a); CP 45, 48, 49 (jury instructions). Third degree rape is a "felony sex offense" for purposes of the failure to register statute. RCW 9A.130(10)(a); RCW 9.94A.030(45)(a)(i); RCW 9A.44.060; CP 48.

2. When the State bears the burden to prove a prior conviction beyond a reasonable doubt, it must present evidence independent of the record of the prior conviction to show that the person named in the prior judgment is the same person then on trial. Where a prior conviction is an element of the substantive crime charged, the State must present more than a copy of a

judgment and sentence to prove the defendant committed the prior offense. State v. Hunter, 29 Wn. App. 218, 627 P.2d 1339 (1981). In Hunter, a prosecution for escape, the State presented certified copies of two Lewis County judgment and sentences, which showed the felony convictions of a person named "Dallas E. Hunter," who had the same name as the defendant in the case on review. Id. at 221. This Court declared that the judgment and sentences alone were not sufficient to prove the prior conviction. The Court affirmed the long-standing rule that, "[w]here a former judgment is an element of the substantive crime being charged, identity of names alone is not sufficient proof of the identity of a person to warrant the court in submitting to the jury a prior judgment of conviction." Id. at 221 (citing State v. Harkness, 1 Wn.2d 530, 96 P.2d 460 (1939); State v. Brezillac, 19 Wn. App. 11, 573 P.2d 1343 (1978); State v. Clark, 18 Wn. App. 831, 832 n.1, 572 P.2d 734 (1977)). Instead, the State must show "by independent evidence that the person whose former conviction is proved is the defendant in the present action." Hunter, 29 Wn. App. at 221. But the Court concluded in Hunter that the State *had* presented sufficient independent evidence, because a probation and parole officer identified the defendant at trial and testified he

had tried to escape while incarcerated pursuant to his Lewis County felony convictions. Hunter, 29 Wn. App. at 221.

Similarly, in State v. Huber, 129 Wn. App. 499, 500-01, 119 P.3d 388 (2005), a prosecution for bail jumping, the State alleged Mr. Huber failed to appear at a hearing in a prosecution for violating a protection order and tampering with a witness. To prove the prior prosecution, the State offered only certified copies of documents such as the information and clerk's minutes, but did not call any witnesses or otherwise attempt to show that the exhibits related to the same Wayne Huber who was then on trial. Id. The Court concluded the evidence was insufficient to support a finding that the person on trial was the same person named in the State's exhibits. The Court reversed the conviction and remanded with instructions to dismiss the bail jumping charge with prejudice. Id. at 504.

Like Hunter, Huber relied on the long-standing rule that "when criminal liability depends on the accused's being the person to whom a document pertains, . . . the State must do more than authenticate and admit the document; it must also show beyond a reasonable doubt that the person named therein is the same person on trial." Id. at 502 (citing State v. Kelly, 52 Wn.2d 676, 678, 328 P.2d 362 (1958); Brezillac, 19 Wn. App. at 12). The State

"cannot do this by showing 'identity of names alone.'" Huber, 129 Wn. App. at 502 (citing United States v. Jackson, 368 F.3d 59, 63 (2nd Cir. 2004); Harkness, 1 Wn.2d at 542-43). Instead, the State "must show, 'by evidence independent of the record,' that the person named therein is the defendant in the present action." Huber, 129 Wn. App. at 502 (citing State v. Furth, 5 Wn.2d 1, 10, 104 P.2d 925 (1940); Harkness, 1 Wn.2d at 543; Hunter, 29 Wn. App. at 221; Brezillac, 19 Wn. App. at 12)).

As stated, this rule applies whenever "criminal liability depends on the accused's being the person to whom a document pertains." Huber, 129 Wn. App. at 502. Thus, for example, the rule applies in a prosecution for first degree escape, Hunter, 29 Wn. App. at 221-22; a prosecution for being a felon in possession of an item a felon may not lawfully have, Jackson, 368 F.3d at 63-64; United States v. Allen, 383 F.3d 644, 649 (7th Cir. 2004); and a prosecution for being an habitual criminal, Furth, 5 Wn.2d at 10; Harkness, 1 Wn.2d at 543; Hunter, 29 Wn. App. at 221; Brezillac, 19 Wn. App. at 12. Huber, 129 Wn. App. at 502. The rule must also apply in a prosecution for failure to register as a sex offender, which requires proof beyond a reasonable doubt of the defendant's prior conviction for a sex offense. RCW 9A.130(11)(a).

The rule applied in Hunter and Huber is a long-standing rule in Washington dating at least to the 1930s, which the Supreme Court formally adopted in State v. Harkness, 1 Wn.2d 530. In Harkness, an habitual offender proceeding, the court explained that the State was required to prove not only the existence of the prior judgments, but also that the "Lyle Harkness" named in the documents was the same person as the Lyle Harkness on trial in the present action. Id. at 540. The court concluded that "identity of names alone is not sufficient proof of identity of person to warrant the court in submitting to the jury a prior judgment of conviction."

Id. at 542. The court summarized:

"The record of a former conviction is not sufficient alone to show that defendant in the present prosecution was formerly convicted. It must be shown by evidence independent of the record of the former conviction that the person whose former conviction is proved is the defendant in the present prosecution. The state has the burden of producing evidence to prove such identity."

Id. at 543 (quoting H.C. Underhill, A Treatise on the Law of Criminal Evidence § 829, at 1500 (4th ed. 1935); also citing 2 Wharton's Criminal Evidence § 852 (11th ed. 1935)). Because the State failed to offer evidence independent of the record of the prior conviction to show that appellant was the same person named in the prior

judgment, the State failed to sustain its burden of proving Harkness was an habitual offender. Harkness, 1 Wn.2d at 544.

Washington courts have consistently applied the rule articulated in Harkness—that the State must present evidence of identity independent of the record of the prior judgment—in cases where the State bears the burden of proving a defendant's prior conviction beyond a reasonable doubt.¹ See State v. Reed, 56 Wn.2d 668, 682, 354 P.3d 935 (1960); Kelly, 52 Wn.2d at 678; Furth, 5 Wn.2d at 10; Huber, 129 Wn. App. at 502; Hunter, 29 Wn. App. at 221; Brezillac, 19 Wn. App. at 13.

Depending on the circumstances, the State can meet its burden of proving identity in a variety of ways. For example, the State can offer booking photographs. State v. Murdock, 91 Wn.2d 336, 340, 588 P.2d 1143 (1979); Kelly, 52 Wn.2d at 682; State v. Johnson, 33 Wn. App. 534, 538, 656 P.2d 1099 (1982); Brezillac, 19 Wn. App. at 13. The State can rely on fingerprints. Murdock, 91 Wn.2d at 338, 340; Kelly, 52 Wn.2d at 682; State v. Allen, 75 Wn.2d 17, 19, 448 P.2d 332 (1969); State v. Domanski, 9 Wn.2d 519, 521, 115 P.2d 729 (1941). Or the State can offer eyewitness

¹ The rule may not apply in sentencing proceedings, where the State bears the burden of proving prior convictions by only a preponderance of the evidence and the presumption of innocence does not apply. Huber, 129 Wn. App. at 503 n.19.

identification. State v. Powell, 161 Wash. 514, 517, 297 P. 160 (1931); State v. Bringgold, 40 Wash. 12, 17-18, 82 P. 132 (1905), overruled in part on other grounds sub nom. State v. Hamshaw, 61 Wash. 390, 112 P. 379 (1910); Hunter, 29 Wn. App. at 221.

3. The State did not prove the prior conviction beyond a reasonable doubt, requiring reversal of the conviction and dismissal of the charge. To prove Mr. Molina had a prior felony conviction for a sex offense, the State offered only a copy of a 1999 judgment and sentence from Yakima County. 2/23/10RP 55; Exhibit 1. The judgment and sentence shows that a person named "Trinidad Maciel Molina" was convicted of third degree rape. Exhibit 1. Although the name on the document is the same as the name of the defendant in the present case, under the authorities cited above, that evidence is insufficient to prove beyond a reasonable doubt that Mr. Molina is the person who was convicted of the prior offense.

If the reviewing court finds insufficient evidence to prove an element of the crime, reversal is required. State v. Lee, 128 Wn.2d 151, 164, 904 P.2d 1143 (1995). Retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d

1080 (1996) ("The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence.") (citing North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled in part on other grounds by Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989)).

F. CONCLUSION

The State failed to prove beyond a reasonable doubt that Mr. Molina had a prior conviction for a sex offense. Because the State failed to prove an element of the crime, the conviction for failure to register must be reversed and the charge dismissed with prejudice.

Respectfully submitted this 5th day of November 2010.


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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65056-4-I
v.)	
)	
TRINIDAD MOLINA,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 5TH DAY OF NOVEMBER, 2010, 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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