

FILED
February 26, 2016
Court of Appeals
Division I
State of Washington

No. 73842-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JIMMY THOMPSON,

Appellant.

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

The Honorable Helen Halpert

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. SUMMARY OF ARGUMENT 1

B. ASSIGNMENT OF ERROR 1

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR..... 1

D. STATEMENT OF THE CASE..... 1

E. ARGUMENT 3

 1. The State proved only Mr. Thompson’s presence near
 the stolen van..... 3

 a. *The State bears the burden of proving each of the
 essential elements of the charged offense beyond a
 reasonable doubt.* 3

 b. *There was no evidence produced that proved Mr.
 Thompson was a principal or accomplice to the theft of
 the van.*..... 4

 c. *Mr. Thompson’s conviction must be reversed with
 instructions to dismiss.* 5

 2. This Court should order that no costs be awarded on
 appeal..... 6

 a. *Mr. Thompson may seek an order from the Court
 ordering that no costs be awarded in his Brief of
 Appellant.*..... 6

 b. *Alternatively, this Court must remand to the trial court
 for a hearing where the court must determine whether
 Mr. Thompson has the current or future ability to pay.* .. 8

F. CONCLUSION 9

TABLE OF AUTHORITIES

UNITED STATES CONSTITUTIONAL PROVISIONS	
U.S. Const. amend XIV	3
FEDERAL CASES	
<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).....	3
<i>Burks v. United States</i> , 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978).....	6
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	3
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....	4
<i>Morrissey v. Brewer</i> , 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).....	10
WASHINGTON CASES	
<i>State v. Abd-Rahmaan</i> , 154 Wn.2d 280, 111 P.3d 1157 (2005).....	9
<i>State v. Amezola</i> , 49 Wn.App. 78, 741 P.2d 1024 (1987)	5
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015).....	7
<i>State v. Crediford</i> , 130 Wn.2d 747, 927 P.2d 1129 (1996).....	5
<i>State v. Nolan</i> , 141 Wn.2d 620, 8 P.3d 300 (2000).....	6
<i>State v. Salinas</i> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	3
<i>State v. Sinclair</i> , ___ Wn.App. ___ (72102-0-I, January 27, 2016)	6, 7, 8

STATUTES

RCW 10.73.160 6, 8

RCW 9A.08.020 4

RCW 9A.56.020 4

RULES

RAP 14.2..... 6

RAP 15.2..... 7

A. SUMMARY OF ARGUMENT

Jimmy Thompson was discovered by the police standing next a recently stolen van. He was convicted of theft of the van without any further evidence but his presence. Mr. Thompson asks that his conviction be reversed with instructions to dismiss.

B. ASSIGNMENT OF ERROR

Mr. Thompson's conviction for theft a motor vehicle was not supported by sufficient evidence in violation of his right to due process.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Due process requires the State prove every element of the charged offense. Mr. Thompson was charged theft a motor vehicle under the theory he was an accomplice, which required the State to prove more than his mere presence near the stolen van. The evidence produced at trial failed to establish anything more than Mr. Thompson's presence. Is Mr. Thompson entitled to reversal of his conviction with instructions to dismiss?

D. STATEMENT OF THE CASE

On May 6, 2015, Kennan Southworth, an electrician for Pride Electric, drove his company van to a job in the University District of Seattle. 7/21/2015RP 14-17. Mr. Southworth arrived at his jobsite at

approximately 3:00 am, and parked the van on the street. 7/21/2015RP 20-21. Mr. Southworth made several trips between the van and the jobsite and always locked the van when he returned to the jobsite, keeping the keys to the van with him. 7/21/2015RP 21-23.

At approximately 5:15 am, when Mr. Southworth walked out to the van and noticed it was gone. 7/21/2015RP 23. While standing where he had parked the van, he saw the van drive by. 7/21/2015RP 24-25. Mr. Southworth immediately reported the missing van to the police. 7/21/2015RP 25-26.

Seattle Police Officers Gingrey and Hoppers were in the area where Mr. Southworth reported his van missing. 7/21/2015RP 62, 101. In response to the call, the officers began searching the area and discovered the van a few blocks from where it was taken. 7/21/2015RP 68, 106. Standing next to the van were two men, one later identified as Jimmy Thompson. 7/21/2015RP 68. Both men immediately fled but Mr. Thompson was detained a short time later. 7/2/2015RP 115. The other person standing near the van was never found. 7/21/2015RP 130.

Mr. Thompson was charged with theft of a motor vehicle, and in the alternative, possession of a stolen vehicle. CP 11-12. The jury convicted Mr. Thompson of theft a motor vehicle and reached no

verdict regarding the possession of a stolen vehicle count. CP 16-17;

7/22/2015RP 50.

E. ARGUMENT

1. **The State proved only Mr. Thompson's presence near the stolen van.**

- 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).

- b. *There was no evidence produced that proved Mr. Thompson was a principal or accomplice to the theft of the van.*

The State was required to prove beyond a reasonable doubt that Mr. Thompson committed a theft of the van. Theft, as relevant here, is defined as wrongfully obtaining or exerting unauthorized control over the property of another, with intent to deprive the owner of the property. RCW 9A.56.020(1)(a).

Here, Mr. Southworth did not know who took the van. After finding the van missing, he then saw it being driven down the street, but was unable to see who was driving it. 7/21/2015RP 23-25. When the van was discovered by the police, Mr. Thompson was standing near it. 7/21/2015RP 68. Thus, the State could not prove that Mr. Thompson had taken the van, thus failing to prove he acted as a principal.

The State was aware of this and argued that Mr. Thompson was an accomplice to the theft. 7/22/2015RP 18. An accomplice is guilty to the same extent as the principal. RCW 9A.08.020(1)-(2). An accomplice is someone who, “[w]ith knowledge that it will promote or facilitate the commission of the crime, he ... aids or agrees to aid such other person in planning or committing it.” RCW 9A.08.020(3). Presence and knowledge are not enough; the accomplice must associate

himself with the crime charged, participate in it, and seek to make it succeed. *State v. Amezola*, 49 Wn.App. 78, 89, 741 P.2d 1024 (1987).

The State did not present any physical evidence linking Mr. Thompson to the van. There were no fingerprints lifted from the door handle or the body suggesting he had touched the outside of the vehicle. There was no DNA or other trace forensic evidence presented as well. The State merely showed that Mr. Thompson was standing near the van, but failed to prove that Mr. Thompson took it or was an accomplice to the person who did.

c. *Mr. Thompson's conviction must be reversed with instructions to dismiss.*

Since there was insufficient evidence to support the conviction, this Court must reverse the conviction with instructions to dismiss. 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. Thompson may seek an order from the Court ordering that no costs be awarded in his Brief of Appellant.*

Should this Court reject Mr. Thompson'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).

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. 34. As in *Sinclair*, there is no evidence that Mr. Thompson’s financial situation will improve. Slip op. at 14

At the time of sentencing, Mr. Thompson was 45 years of age. CP 88. Mr. Thompson was sentenced to statutory maximum sentence of 60 months. CP 86. In light of the decision in *Sinclair*, given Mr. Thompson’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. Thompson asks this Court to order that the State cannot obtain an

award of costs on appeal, should the State seek reimbursement for such costs. *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. Thompson 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. Thompson'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. Thompson'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. Thompson 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

For the reasons stated, Mr. Thompson asks this Court to reverse
his conviction with instructions to dismiss.

DATED this 25th day of February 2016.

Respectfully submitted,

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v.)	NO. 73842-9-I
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JIMMY THOMPSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH 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 26TH DAY OF FEBRUARY, 2016.

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