75257-0

FILED
November 7, 2016
Court of Appeals
Division I
State of Washington

75257-0

NO. 75257-0-I

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

STATE OF WASHINGTON,

Respondent,

v.

RANDY HARKEY,

Appellant.

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

The Honorable Janice E. Ellis, Judge

BRIEF OF APPELLANT

JENNIFER J. SWEIGERT
Attorney for Appellant

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

TABLE OF CONTENTS

Page

A. ASSIGNMENT OF ERROR 1

Issue Pertaining to Assignment of Error 1

B. STATEMENT OF THE CASE 1

1. Procedural Facts 1

2. Substantive Facts 2

C. ARGUMENT 3

1. THE EVIDENCE WAS INSUFFICIENT TO PROVE ATTEMPTING TO ELUDE BEYOND A REASONABLE DOUBT. 3

2. APPEAL COSTS SHOULD NOT BE IMPOSED. 6

D. CONCLUSION 8

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Staats v. Brown
139 Wn.2d 757, 991 P.2d 615 (2000) 7

State v. Blazina
182 Wn.2d 827, 344 P.3d 680 (2015). 7

State v. Hickman
135 Wn.2d 97, 954 P.2d 900 (1998) 6

State v. Hummel
_ Wn. App. _, _ P.3d _, 2016 WL 6084101
(no. 72068-6-I, filed Oct. 17, 2016) 4

State v. Rich
184 Wn.2d 897, 365 P.3d 746 (2016) 4

State v. Sherman
98 Wn.2d 53, 653 P.2d 612 (1982) 5, 6

State v. Sweany
162 Wn. App. 223, 256 P.3d 1230 (2011)
aff'd, 174 Wn.2d 909 (2012) 4

State v. Treat
109 Wn. App. 419, 35 P.3d 1192 (2001) 6

FEDERAL CASES

In re Winship
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) 4

Jackson v. Virginia
443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). 4

TABLE AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

RAP 15.2 7

RCW 10.73.160 6

RCW 46.61.024 4

U.S. Const. amend. XIV 4

Const. art. I, § 3 4

A. ASSIGNMENT OF ERROR

The evidence was insufficient to convict appellant of attempting to elude a pursuing police vehicle.

Issue Pertaining to Assignment of Error

The crime of attempting to elude a police vehicle is committed when a person fails to stop "immediately" after being signaled by police. Immediately is defined as "as soon as reasonably possible." After being signaled to stop on a dark road with no safe shoulder, appellant continued driving for a matter of seconds, covering 0.4 miles before stopping in his nearby driveway. Did the State fail to prove he did not stop as soon as reasonably possible?

B. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Randy Harkey was charged with attempting to elude a pursuing police vehicle, driving with license suspended in the first degree, and bail jumping. CP 85. Harkey conceded the license suspension charge, but argued the State had failed to prove the attempt to elude and the bail jump. The jury found him guilty, and the court imposed concurrent standard range sentences. CP 8, 18, 37-40. Notice of appeal was timely filed. CP 6.

2. Substantive Facts

Harkey was driving over the speed limit on a rural road in Arlington while his license was revoked in the first degree. RP 97. He came up behind a patrol car being driven by Sergeant Greg Sanders. RP 43-44. Sanders estimated Harkey's car was going 70 miles per hour in a 40 miles per hour zone. RP 44. As the car approached Sanders, Sanders testified its high beams flashed a couple of times as if the driver were trying to alert him in some way. RP 44.

Sanders figured the driver either needed police assistance or wanted him to pull over and get out of the way. RP 44. Sanders declined to pull over because there was no shoulder or safe space to pull out of the lane of traffic. RP 44. Harkey then pulled into the oncoming lane and passed Sanders at what Sanders described as a "high rate of speed." RP 44-45.

Sanders turned on his lights and siren and tried to catch up. RP 46. He could see the car was white, and as Sanders got closer, he identified it as a BMW and noted the license number. RP 45-46. Sanders described the roadway as narrow with hidden driveways but no shoulder. RP 48, 51. Sanders was specifically asked, "Would someone be able to pull their vehicle over to the right?" RP 51. He answered, "Probably not, no." RP 51. On cross-examination, he was asked, "And so, even you had a problem pulling over?" RP 72. Sanders answered, "Oh, yeah." RP 72. He was then

asked, "There really is no place to pull over along here." RP 72. Sanders answered, "Correct." RP 72.

Harkey traveled .4 miles at approximately 70 miles per hour after Sanders turned on his siren and lights. RP 49, 80. Then he slowed down with brake lights on and quickly pulled without signaling into his own driveway. RP 47, 50, 79. When asked about how long it took Harkey to stop, Sanders testified he couldn't say exactly how many seconds, but "I guess it was not very long." RP 75.

Knowing he had no valid driver's license, Harkey got out of his car and ran. RP 52, 97. Sanders testified he yelled, "Police! Stop!" but Harkey continued running. RP 52. After checking to make sure no one else was in the car, Harkey waited for backup. RP 53. A police dog led his handler to Harkey hiding under a bush on a neighboring piece of property. RP 87, 89.

The county clerk's office manager testified to the authenticity of minute entries and court orders showing Harkey failed to appear at a required hearing on September 25, 2014. RP 129, 141, 143-44.

C. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO PROVE ATTEMPTING TO ELUDE BEYOND A REASONABLE DOUBT.

Harkey's conviction for attempting to elude a police vehicle must be reversed because the State failed to present evidence that he did not stop

immediately upon being signaled by the officer. "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. Insufficiency of the evidence is an issue that may be raised for the first time on appeal. State v. Sweany, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011) aff'd, 174 Wn.2d 909 (2012). It is a legal issue that appellate courts review de novo. State v. Hummel, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 6084101, *12 (no. 72068-6-I, filed Oct. 17, 2016) (citing State v. Rich, 184 Wn.2d 897, 903, 365 P.3d 746 (2016)). The question before the appellate court is whether, after viewing the facts in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the crime proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

Washington law defines attempting to elude a police vehicle as applying to any driver who, after being given the signal to stop by a uniformed police officer in a marked police vehicle "willfully fails or refuses to immediately bring his or her vehicle to a stop." RCW 46.61.024. The term "immediately" is not defined by statute. However, our supreme court has interpreted it to mean "as soon as reasonably possible." State v.

Sherman, 98 Wn.2d 53, 57, 653 P.2d 612 (1982). The evidence was insufficient to convict Harkey because no evidence showed Harkey failed to stop his vehicle as soon as was reasonably possible.

The undisputed testimony by the police officer testifying for the State was that this was a dark, two-lane, narrow road with no shoulder. RP 44, 48, 68. It was not possible to safely pull off the roadway. RP 51, 72. After the officer activated his lights and sirens, Harkey continued only for a matter of seconds before stopping his vehicle in his own driveway. RP 49, 75, 80. There was no need for him to slow down to look for a safe place to stop, because he knew his own driveway was a safe place not far away. RP 79. From the point where the officer signaled him to stop to the driveway where he stopped was 0.4 miles. RP 49. At 70 miles per hour, a person travels .4 miles in less than 21 seconds. The State failed to prove Harkey did not stop as soon as reasonable possible. No evidence was presented that Harkey had any other reasonably safe opportunity to stop given his initial speed and the lack of safe turn-outs on the road.

Cases finding sufficient evidence of failure to stop immediately generally have involved far greater delays of distance and time than this case. For example, the element of failing to stop immediately was deemed met in State v. Perez, 166 Wn. App. 55, 61, 269 P.3d 372 (2012), where the driver continued for roughly twice as long as Harkey – 40 seconds. In

Sherman, the evidence was held sufficient where the driver continued for a full mile, during which time he looked over his shoulder at the pursuing police car several times. 98 Wn.2d at 55, 57. By contrast, Harkey stopped after less than half that distance. RP 49. In State v. Treat, 109 Wn. App. 419, 426-27, 35 P.3d 1192 (2001), the court specifically noted there was no evidence that the driver could not have stopped sooner. By contrast, in this case, the evidence showed unequivocally that there was no safe place for Harkey to pull over. RP 48, 51, 72.

The evidence in this case shows Harkey stopped as soon as reasonably possible under the circumstances. Thus, the State failed to meet its burden to prove the failure to stop immediately. Harkey's conviction should be reversed and the charge dismissed with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (insufficient evidence requires dismissal with prejudice). Reversal of the conviction for attempting to elude will also reduce Harkey's offender score and require resentencing on the remaining charges.

2. APPEAL COSTS SHOULD NOT BE IMPOSED.

The trial court found Harkey indigent and entitled to appointment of appellate counsel at public expense. CP 1-2. If Harkey does not prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. RCW 10.73.160(1) states the "court of appeals . . . may require an adult . . .

to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." Staats v. Brown, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). Thus, this Court has discretion to deny the State's request for costs.

Trial courts must make individualized findings of current and future ability to pay before they impose legal financial obligations (LFOs). State v. Blazina, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. Accordingly, Harkey's ability to pay must be determined before discretionary costs are imposed. At the time of his conviction, Harkey declared under penalty of perjury he had no job, no assents and no income. CP 4-5. At sentencing, Harkey informed the court he already owes more than $10,000 in legal financial obligations in addition to much more in child support. RP 226-27. Although he had retained counsel, the court found him indigent and allowed him to appeal at public expense. CP 1-2; RP 223. The finding of indigency made in the trial court is presumed to continue throughout the review under RAP 15.2(f).

Without a basis to determine that Harkey has a present or future ability to pay, this Court should not assess appellate costs against him in the event he does not substantially prevail on appeal.

D. CONCLUSION

Harkey's conviction for attempting to elude should be reversed and the charge dismissed with prejudice because the evidence was insufficient to show that he failed to stop immediately.

DATED this 7th day of ~~October~~ November, 2016.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

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

Attorney for Appellant