

NO. 39973-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL FILIPPI

Appellant.

FILED
BY [Signature]
STATE OF WASHINGTON
CLERK OF COURT
APPEALS DIVISION ONE
JAN 11 2011

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

The Honorable James Lawler, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENTS IN REPLY

1. THE “NO-CONTACT” ORDER DID NOT PRECLUDE FILIPPI FROM POSSESSING FIREARMS.

The State “does not agree” that it is clear that the district court’s “no contact” order, which the officers claimed gave them authority to search Filippi’s possessions, did not say what the prosecution claimed it said. Brief of Respondent (BOR) at 16. It also claims the issue was waived because not raised below. BOR at 10-11. It does not argue, however, that the failure to object to, or suppress the fruits of, the search of one’s possessions, conducted in one’s own residence and brought about by police misrepresentation of their authority, does not implicate “manifest error affecting a constitutional right” that may be raised for the first time on appeal. RAP 2.5(a)(3); see Brief of Appellant (BOA) at 26. Thus, the State’s two-part position seems to be that there was no error, but if there was this Court should not address it. Yet, the State appears to concede that if there was error -- and if this Court is troubled by it -- the Rules of Appellate Procedure allow this Court to correct it even though it was not raised below.

Filippi agrees with the State on at least two points: first, that this Court should make an independent evaluation of the evidence in the trial court. See BOR at 9 (citing State v Mennegar, 114 Wn.2d 304, 787 P.2d

1347 (1990), and State v. Hill, 68 Wn. App. 300, 842 P.2d 996, review denied, 121 Wn.2d 1020, 854 P.2d 42 (1993)). Second, this Court looks to see whether “substantial evidence” supports the trial court’s findings. BOR at 9-10.

The State plies murkier waters, however, when it seeks to justify its position that it “does not agree” that the district court’s no-contact order did not prohibit Filippi from possessing firearms. To this end the State offers three primary arguments. This Court should reject them all.

- a. The State’s argument that Filippi’s consent was voluntary misreads both the facts and the law.

The evidence may superficially suggest Filippi’s consent to search was voluntary: he did repeatedly say the officers could search. All of these “consents,” however, came on the heels of the officers’ telling him they had seen a court order forbidding him from possessing firearms, and that they therefore had a right to search his possessions to ensure he did not. The State dismisses Filippi’s reliance on Bumper v. North Carolina, 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968) (see BOA at 16-17), with the straw-man argument that the instant case does “not involve officers falsely asserting they could get a warrant when they could not.” BOR at 13 (emphasis added). The State proposes no meaningful distinction, however, between stating as a basis for their right to search

that they could get a warrant when they could not (as in Bumper) and that they had a court order saying something it did not (as here).

Instead, the State seems to take the position that to be a “misrepresentation” or factually “false” a statement must necessarily be made with the knowledge of its falsehood. In fact, a “misrepresentation” can be either negligent or intentional, and it makes no difference – in terms of its deceptive effect on the hearer – whether the mental state of the speaker was actively deceitful or merely careless. If the effect of the misrepresentation was to make Filippi think he had no choice but to consent to the search proposed by police if he wanted to retrieve his possessions, then his consent was coerced and not valid. See BOA at 17. When the State argues Bumper may be distinguished on the grounds it was evident the police there lied outright about the extent of their authority, this is a distinction without a difference. See BOR at 21-22. Nothing in Bumper indicates that the mental state of the officer making the misrepresentation played any part in the Court’s decision; rather the Court framed the question as turning on the factual question of representation of possession of a warrant when there was none, not on the reprehensibility of the police conduct. See Bumper, 391 U.S. at 548 (framing the question for review). The key was the effect in procuring the resultant, but only apparent, “consent.”

Similarly, the State cites State v. Thorkelson, 25 Wn. App. 615, 611 P.2d 1278, review denied, 94 Wn.2d 1001 (1980), for the proposition that the voluntariness of consent is not vitiated by the fact that a homeowner consented to a search only after police warned that they could get a warrant. In Thorkelson, there was no indication police would not have been able to obtain a search warrant. Thus, unlike here and in Bumper, where the police represented that there was a particular court order in existence when in fact there was not, Thorkelson does not involve a consent obtained through misrepresentation and therefore is not helpful.

- b. The only competent evidence of what the “no contact” order provided is the face of the order, which plainly does not say what the trial court erroneously found.

The State next argues that the district court’s “no-contact” order did, on its face, forbid Filippi from possessing firearms; that – at least to the attorney writing the State’s response brief – the marks at the top of page 2 of the order “look[] more like the box next to the ‘no firearms’ provision is simply entirely ‘filled in’ – as one would fill in the circles on a test answer sheet.” See BOR at 16; cf. BOA at Appendix at 2.

This Court should conduct its own “independent evaluation of the evidence” (see Mennegar, supra) and determine whether the marks on the order conform to the State’s characterization of them, or whether it looks

as though an “X” had first been drawn in the box and then, upon reflection, the whole area was obliterated and the obliteration initialed by the judge. In doing so this Court should consider that if the district court intended to make the large mark on page 2 in order to “simply entirely fill [the box] in – as one would fill in the circles on a test answer sheet”, then there would have been no reason for the court to also place its initial next to the entry as it did. BOR at 16.

Furthermore, the State apparently has no comment on the internal consistencies of the order, as previously pointed out by Filippi. See BOA at 5. The disputed marking should be compared to the marks on the first page of the order, where "200" was crossed out and also initialed. Also instructive and illustrative on page 1 are the court’s uses of a simple “x,” or a slash mark, when marking a box. Nowhere in the rest of the district court’s order is a box “simply entirely ‘filled in’” (as the State would have it), or filled in at all, in any manner remotely like the marked-out area at the top of page 2. See BOA at Appendix. Finally, faced with the fact that the district court’s order – if it intended to forbid the possession of firearms – omits, despite its design, to easily also order that Filippi surrender his guns to the Sheriff, the State brushes off the order’s failure to do so as most likely being the case that the district court “simply forgot.” BOR at 20; cf. BOA at Appendix at 2. In other words, the State’s position

is that what is clearly a cross-out is not a cross-out, there are superfluous and meaningless initials by the marks (or, at least, with some other meaning than similar initials elsewhere on the face of the order), and the district court judge was also sloppy in failing to fill out the balance of the order. This convergence of errors proposed by the State seems unlikely.

- c. If the officers did not have the legal authority they said they had, then they should not have told Filippi they had it.

The State's final argument seems to be that since there is no provision in Washington law either authorizing or prescribing the manner of a civil standby, the officers should simply be trusted to make it up as they go along, and that they did so in an understandable and reasonable manner here. See BOR at 22-25. The State's *a posteriori* argument admittedly proceeds from the disputed and dubious assumption that the district court's order did, in fact, forbid Filippi from possessing firearms.¹ Given those two "facts" the State argues that it was "proper [and] reasonable, and entirely consistent" with their peacekeeping function for the officers to concern themselves with Filippi's firearms and to take steps to keep them from him. BOR at 25.

¹ The officers' actions were "based upon the no contact order provision" as well as knowledge that there had recently been firearms in the home. BOR at 24.

If the district court order did actually forbid firearm possession, it might have been reasonable for a safety-conscious officer to proceed just as the officers did here. However, if it did not, then the argument proves far too much. The key is in the State's own argument, where it accuses Filippi of not having "cited a single case" for the proposition that an officer "cannot lawfully take action to ensure that no weapons are secreted out of the home. . . ." BOR at 23 (emphasis added). Filippi does not make this argument, and would not expect to find such a case. However, if the officers had no legitimate legal basis for telling Filippi that he could not legally possess firearms, and yet told him so, and by that mis-statement finagled his cooperation into consenting to a search that they otherwise had no "lawful[]" basis to undertake, his consent to such a search was wrongly obtained and therefore cannot insulate ensuing search from the consequences of violating Filippi's right under the Fourth Amendment and Wash. Const. Art. 1, section 7, which of course requires suppressing the fruits of that search, i.e., the drugs in the ammunition box. State v. Chenoweth, 160 Wn.2d 454, 473, 158 P.3d 595 (2007); State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982); Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

2. THE STATE INCORRECTLY CLAIMS FILIPPI'S "BAIL-JUMPING" ARGUMENTS ARE UNSUPPORTED BY CITATIONS TO AUTHORITY.

The State more than once claims that Filippi's argument that the "to convict" jury instruction for bail jumping (Instruction 12) relieved the State of some of its burden of proof is "unsupported by authority." See, e.g., BOR at 26, 27. Although the State also relents so far as to say only that the lack is of "on point" authority, the thrust of its position is nonetheless explicitly spelled out: Because (in its view) the claim is "unsupported by citation to authority" this Court ought not to consider it at all. BOR at 26. The State is wrong.

Not only did Filippi cite the Due Process Clause of the Fourteenth Amendment, but also those cases that hold that an element of the proof required for a conviction for bailing jumping is that a defendant had specific knowledge of the court date he is alleged to have missed (and, implicitly, that he had that knowledge at the time he missed the appearance). See BOA at 23-26. Filippi also cites authority holding that a "to convict" instruction that does not correctly set forth all the elements of the charged crime constitutes reversible error. BOA at 26-27.

The State characterizes Filippi's argument that Instruction 12 is unconstitutional as "unfathomable." BOR at 27. It must be that Filippi

did not phrase his argument clearly enough, and will try again to set it forth plainly.

Simply put, RCW 9A.76.170, the “bail jumping” statute, requires proof that a defendant failed to appear in court on a particular date when he had knowledge that he was supposed to appear in court on that particular date. Here, the State alleged Filippi failed to appear on August 13, 2009. CP 49. The “to convict” instruction provided to Filippi’s jury, however, was defective because it allowed the jury to convict Filippi even if it concluded he did not have notice of the requirement to appear at the August 13th hearing. Rather, it allowed for a conviction if the jury merely found Filippi had knowledge that he was supposed to appear on some future date, perhaps the one missed, perhaps some other. CP 41 (Instruction 12).

For example, the April 13, 2009 Order Setting Conditions of Release Pending Trial (Exhibit 7), was in evidence before the jury. That order purported to give Filippi notice that he had a “subsequent personal appearance” on April 23, 2009, at 2:15 pm. The jury may have believed this and thus concluded that, as of April 13, Filippi was on notice that he had to make a “subsequent personal appearance” on that particular date, i.e., April 23. Exhibit 9, a Notice of Trial Setting, was also offered to the jury to show that Filippi had notice he had to be in court on August 13,

2009, for trial.² But there are many reasons, as discussed in the opening brief, to question whether Filippi properly had that notice, both at the time it was allegedly given and at the time that August 13 rolled around. See BOA at 30-33. As such, there is a legitimate basis for the jury to have concluded that the State failed to prove Filippi he was supposed to appear for the August 13 court date.

The problem with the to-convict instruction is that it allowed the jury to convict Filippi of bail jumping for missing the August 13 hearing even if the State failed to prove he had notice he was required to appear on that date because that instruction only required finding (aside from an underlying Class C felony charge) that: (1) Filippi missed the hearing; and (2) that he "had been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before that court[.]" CP 41 (emphasis added). Instruction 12 is defective in that it required the jury to convict Filippi even if he had no knowledge of the duty to appear on August 13, as long as the jury found Filippi had knowledge of a requirement to make "a subsequent appearance" at some future hearing date (but not necessarily knowledge of the August 13 hearing). Thus, as instructed, a finding of knowledge of the April 23

² That written "notice" also provided that he had to be in court on May 28 for an omnibus hearing. Ex. 9.

appearance requirement would suffice to compel the jury to convict, even if they did not find Filippi had knowledge of a requirement to appear on August 13. Because of its internal failure to tie the “knowledge” element to the same date as the “non-appearance” requirement – a requirement mandated by the case law for conviction – the instruction is constitutionally defective.

Despite the State’s hand-wringing, Filippi’s concerns about the danger of how the defective jury instruction could mislead the jury do not constitute “wild speculation” about what the jury actually did, but only demonstrate the instruction’s deficiency by showing one of the myriad ways it may have permitted the jury to arrive at a conviction despite failing to find the required elements for the offense as confirmed by State v. Bryant, 89 Wn. App. 857, 950 P.2d 1004, review denied, 137 Wn.2d 1017, 978 P.2d 1100 (1998). See BOA at 29-30.

This Court may be as startled as Filippi by the State’s apparent position that no legal argument can ever succeed unless buttressed by citation to on-point, controlling case law. In other words, in the legal universe posited by the State, there can never be a case of first impression. Although it may be the legal universe desired by the State, it does not comport with reality.

Also startling is the State's repeated assertion that Filippi concedes that the "to-convict" instruction "is supported by the law." See, e.g., BOR at 27, 28, 32. Filippi concedes only that the instruction is mentioned in various cases. But none of these cases featured an attack on the instruction on the grounds that it is inconsistent and incomplete, as argued here. Filippi does not agree that the instruction is "supported by the law," but rather reiterates that the instruction is improper under cases construing the bail-jumping statute and under the Due Process Clause.

B. CONCLUSION

Filippi's "consent" to the search was not valid, as it was wrested from him by officers who falsely asserted he was legally forbidden by court order from possessing firearms. The "to-convict" instruction for bail jumping was constitutionally defective, in that it relieved the State of its burden of proof. These arguments may be raised for the first time on appeal, as they involve manifest errors affecting constitutional rights. Both of Filippi's convictions should therefore be reversed. In the alternative, if this Court concludes the record is inadequate to determine whether Exhibit 7 prohibited Filippi from possessing firearms, then this Court should remand to the trial court so this factual issue can be resolved.

DATED THIS 24th day of August, 2010.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 39973-3-II
)	
MICHAEL FILIPPI,)	
)	
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 23RD DAY OF AUGUST 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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FILED
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SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF AUGUST 2010.

x *Patrick Mayovsky*