

42546-7-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

State of Washington
Respondent

v.

NICK TAYLOR ARQUETTE
Appellant

42546-7-II

On Appeal from the Superior Court of Cowlitz County
Superior Court Cause number 10-1-01249-1

The Honorable S. Brooke Taylor

**APPELLANT'S SUPPLEMENTAL BRIEF
ADDRESSING THE FINDINGS & CONCLUSIONS**

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I. AUTHORITIES CITED

Washington Cases

Nessman v. Sumpter, 27 Wn. App. 18
615 P.2d 522 (1980) 2, 3, 7, 8

State v. Dial, 44 Wn. App. 11
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State v. Olson, 92 Wn.2d 134
594 P.2d 1337 (1979) 2

State v. Rutledge, 37 Wash. 523
79 P. 1123 (1905) 2, 7

Federal Cases

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

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. Mr. Arquette was convicted of perjury on insufficient evidence in violation of due process.
 - (a) Under the extraordinarily high standard of proof the State must satisfy in a prosecution for perjury, the record does not contain sufficient evidence to support the bench trial court's Findings of Fact.
 - (b) The bench trial court's Findings of Fact do not support its Conclusions of Law.

B. Issues

Mr. Arquette challenges the sufficiency of the evidence for the following findings and contends the findings are insufficient to support the conclusion that he committed perjury. Findings and Conclusions, filed July 18, 2012, CP 37-42.

1. In March 2009, Gary McKee bought a 1970 Datsun pickup truck from Robert Tribble. Mr. Tribble resided with and was a friend of Nick Arquette, but he was not the owner of the pickup. Mr. Arquette was the legal owner of the pickup.
2. Mr. Tribble pocketed the proceeds from the sale of the pickup and failed to deliver the pickup to Mr. McKee.

As a result, Mr. McKee attempted to locate Mr. Tribble at his residence and met Mr. Arquette. Mr. Arquette informed Mr. McKee that he and not Mr. Tribble was the owner of the pickup. Mr. Arquette and Mr. McKee had several conversations about the pickup over several days.

3. After his contact with Mr. McKee, Mr. Arquette signed the State of Washington Vehicle Certificate of Ownership (Title), Certificate Number 0730411921, Exhibit #2, for the pickup and released all his ownership interests in the pickup.

4. After his contact with Mr. Arquette, Mr. McKee brought Mr. Ash to help him tow away the pickup from Mr. Arquette's residence. Mr. Ash and Mr. McKee went to where the pickup was located and somebody moved another truck to give them access to the pickup and let them haul it away.

5. After his contact with Mr. Arquette, Mr. McKee possessed both he signed title and the pickup at all times thereafter.

7. On March 29, 2009, Mr. Arquette called the Longview Police Department to report the pickup was located in the 200 block of Cypress Street in the City of Longview, County of Cowlitz, State of Washington

8. On March 29, 2009, Officer Charlie Meadows of the Longview Police Department located the pickup in a carport for the 269 Cypress Street complex. Mr. McKee's brother, Larry McKee, resided at the complex. The pickup was unoccupied, not covered, had its original plates and was clearly visible from the alleyway.

9. On March 29, 2009, Officer Meadows called Mr. Arquette to retrieve the pickup from the 269 Cypress Street complex. Mr. Arquette told Officer Meadows to leave the pickup where it was located.

10. After the pickup was located by Officer Meadows, Mr. Arquette never retrieved the pickup from the 269 Cypress Street complex and Mr. McKee continued to maintain possession of both the signed title and the pickup.

11. After March 29, 2009, Mr. Arquette never followed up with Officer Meadows about whatever physically happened to the pickup that was left at the 269 Cypress Street complex and in Mr. McKee's possession.

12. On March 29, 2009, Larry McKee called Officer Meadows to inquire why Officer Meadows was at his residence looking at the pickup. Officer Meadows informed Larry McKee of the stolen vehicle report. Larry McKee subsequently met with Officer Meadows and showed him the original signed title with Mr. Arquette's signature releasing all of Mr. Arquette's ownership interests in the pickup.

19. During the jury trial, Mr. Arquette knowingly made statements under an oath required or authorized by law and in an official proceeding indicating the pickup was stolen. Mr. Arquette testified that the pickup was stolen from his residence by Gary McKee and that he never gave possession of the signed title and pickup to Mr. McKee. Mr. Arquette testified that he signed the title and released all his ownership interests in the pickup because he anticipated on selling the pickup to another individual. When that sale did not fall through [sic], the signed title was stolen from his residence during a burglary.

21. Mr. Arquette did not provide any credible reason for signing the title to the pickup and releasing all his interests in the vehicle. Mr. Arquette's story of signing the title in anticipation of a sale and having the title stolen from a burglary was not credible.

22. Mr. Arquette's interaction with Officer Meadows was not indicative of a person having his or her vehicle being stolen as he told the officer to leave the alleged stolen vehicle where it was found at the residence of the suspected

thief's brother, failed to retrieve the pickup, and failed to follow up with the officer about whatever happened to the pickup truck after it was located and left at Larry McKee's residence, and continued to remain in Gary McKee's possession.

23. The manner in which the pickup was stored was not indicative of it being stolen because no attempts were made to hide the pickup. The pickup was parked in the carport of the residence of Mr. McKee's brother, was not covered up, had its original plates and was clearly visible from the alleyway.

24. The interactions between Larry McKee and Gary McKee with Officer Meadows were not indicative of them stealing the pickup. After Officer Meadows located the pickup at his residence, Larry McKee called Officer Meadows to inquire why Officer Meadows was looking at the pickup and met with Officer Meadows after being informed of Mr. Arquette's theft allegation. Gary McKee at all times had possession of both the pickup and the signed title. Mr. Arquette signed the title to the pickup and released all his ownership interests in the pickup.

Supp. CP 37-42.

III. SUMMARY OF THE CASE¹

Arquette I. Appellant, Nick T. Arquette, owned an old Datsun pickup. His roommate purported to sell Arquette's pickup to Gary McKee. When McKee removed the truck from Arquette's back yard, Arquette filed a stolen vehicle report with the police. McKee claimed Arquette freely released the pickup and gave him a signed title. Arquette denied this, claiming the roommate had stolen the title and that McKee took the truck unlawfully. The State believed McKee and charged Arquette with filing a false report. He was tried to a jury on May 5, 2010. Arquette testified in his own defense. He repeated the allegations from the stolen vehicle report and testified under oath that those allegations were true. The jury convicted him of second degree perjury. This Court affirmed in *State v. Arquette*, Unpublished Opinion No. 40776-1-II, filed June 21, 2011 (*Arquette I*).

Arquette II. The State then filed new charges of first degree perjury based on Arquette's trial testimony in *Arquette I*. This time, Arquette opted for a bench trial. The trial consisted of the judge's reviewing the record from *Arquette I* and hearing argument of counsel. The court rejected Arquette's challenge to the sufficiency of the evidence,

¹ Prolific citations to the record are included in the Appellant's briefs already filed. Cites specific to arguments on a particular finding are included with the argument on that finding.

and convicted him again. All agreed that the judge should decide the case based solely on the transcript of the May 5, 2010 trial. 8/11 RP 12.

IV. ARGUMENT

Fundamental due process requires the State in a criminal prosecution to meet the requisite standard of proof. *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). In the usual case, this means beyond a reasonable doubt. *Id.* In a prosecution for perjury, however, the standard of proof is even more stringent.

The proofs required to sustain a perjury conviction are the strictest known to the law, with the sole exception of treason. *State v. Olson*, 92 Wn.2d 134, 136, 594 P.2d 1337 (1979). To prove perjury, the State bears the burden of providing evidence that establishes the essential facts by a standard of proof that exceeds beyond reasonable doubt. *State v. Dial*, 44 Wn. App. 11, 16, 720 P.2d 461 (1986).

At minimum, the evidence must include direct testimony of at least one credible witness that positively and directly contradicts the defendant's oath. *Nessman v. Sumpter*, 27 Wn. App. 18, 23, 615 P.2d 522 (1980), quoting *State v. Rutledge*, 37 Wash. 523, 528, 79 P. 1123 (1905). In addition to that witness, the State must produce a second, equally credible, direct witness, or independent corroborating evidence "of such a character as clearly to turn the scale and overcome the oath of the

defendant and the legal presumption of his innocence. Otherwise the defendant must be acquitted.” *Nessman*, 27 Wn. App. at 23.

Here, the State’s witnesses were not of a sufficient caliber to meet the demanding credibility standard in a prosecution for perjury.

The chief witness, Mr. McKee, had a clear incentive to provide conflicting testimony. Leaving McKee aside, Doyle Ash was worthless as a second witness. Besides being “problematic” in terms of his credibility, 8/11 RP 24, Ash testified that he knew nothing about how the Datsun was purchased. CP 87. Moreover, the circumstantial evidence deemed by the court as sufficient corroboration was not “of such a character as clearly to turn the scale and overcome the oath” of Arquette. The court regarded the mere fact that the title was in fact signed as corroboration of McKee’s claim that Arquette signed it (outside his presence) on the day McKee took possession, rather than earlier as claimed by Arquette. 8/11 RP 26.

The evidence fell far short of the standard for a perjury conviction, and the Court should reverse both the 2010 and the 2011 convictions for the reasons discussed in the Appellant’s Opening brief and the Reply.

1. THE EVIDENCE DOES NOT SUPPORT
THE FINDINGS OF FACT.

In its introduction to the Findings, the court states that it heard and read stipulated testimonies and relied on stipulated evidence. Findings

and Conclusions filed July 18, 2012, CP 37. To the extent this suggest that the defense stipulated to the truth of the testimony or evidence, it is erroneous. The defense stipulated merely that the testimony and evidence presented at the first trial on May 5, 2010, would serve as the testimony and evidence at the second trial.

Finding of Fact No. 1 includes multiple findings. First, that Mr. McKee bought Mr. Arquette's Datsun from Robert Tribble. This is erroneous on its face. That finding is confounded by the second finding in No. 1, that the owner of the Datsun was not Tribble but Arquette. That is, Mr. McKee "bought the Brooklyn Bridge."

Accordingly, Finding No. 1 constitutes a finding that Mr. Arquette testified truthfully that, when McKee showed up to claim the truck, Arquette told him that Tribble had cheated him. CP 25.

Moreover, McKee was not an independent, disinterested witness; it was in his self-interest to dispute Arquette's testimony.

Finding of Fact No. 2, affirms this.

Finding No. 3, that Arquette signed the title after his contact with McKee is not supported by the requisite standard of proof.

The testimony established no more than that Arquette and McKee told different stories. CP 16-17, 60. The court merely found that Arquette's account of how the title came to be signed was unlikely, and

thought it was “pretty clear” that the title had not been stolen. 8/11 RP 26. The Court actually entered findings that the evidence reflected conflicting stories by Arquette and McKee. Finding 13 and 14. But, even accepting McKee’s testimony as true, he testified merely that he assumed Arquette signed the title when he went inside the house on the day McKee came to claim the truck, rather than simply retrieving a previously-signed title.

This does not constitute the requisite “directly contradictory testimony.” Directly contradictory testimony sufficient to overcome Arquette’s oath would be that McKee saw Arquette sign the title. Instead, McKee’s testimony is equally consistent with Arquette’s oath that he delivered a previously-signed title. There was no second witness. McKee’s companion that day, Doyle Ash, testified that he had no personal contact with Arquette that day. RP 76, CP 86; RP 78, CP 88.

The court’s finding of “pretty clear” corroborating evidence does not reflect a degree of certainty greater than beyond a reasonable doubt. The evidence is equally consistent with Arquette’s version as with McKee’s.

The State did not produce direct testimony from a single credible witness that positively and directly contradicted Arquette’s oath.

Finding No. 4, concerning the activities of Mr. McKee and Mr. Ash, is not supported by evidence of the requisite standard of two credible, direct witnesses or one plus rock-solid corroboration.

The trial court expressed on the record its lack of confidence in Mr. Ash's credibility, which was further demonstrated by objective facts in the record. These included Ash's own testimony that his memory was so bad that he received disability for it. RP 81, CP 91. Also that Ash thought he was supposed to testify to a different story until he conferred for 15 minutes with McKee before taking the stand. RP 80, CP 90.

Findings 5, 7, 8, 9, 10, 11, and 12 are immaterial. They add nothing to the evidence that Mr. Arquette lied, either to the police or under oath at his first trial.

Finding 16 is immaterial. Arquette never disputed that the signature on the title was his,

Finding 19 merely summarizes Arquette's testimony.

Finding 21 is directly contradicted by the evidence. Arquette consistently repeated the same explanation for the signature on the title. The court gives no intrinsic reason why Arquette's testimony is not credible, such as that it was internally inconsistent or that another witness directly contradicted it. Absent any direct evidence regarding the actual signing of the title, the court's opinion that Arquette's version sounds less

likely than McKee's — while possibly a sufficient basis upon which to acquit McKee of stealing the truck — is not sufficient to convict Arquette of perjury.

Findings 22, 23, and 24 concerning Arquette's inability to immediately redeem the stolen truck, the manner in which McKee garaged it, and his brother's interaction with an investigating officer are immaterial. This evidence meets none of the criteria necessary to constitute proof of perjury.

2. THE FINDINGS DO NOT SUPPORT
THE CONCLUSIONS OF LAW.

1. The opinion of the fact-finder that Arquette's account of how the title came to be signed was unlikely, and that it was "pretty clear" that the title had not been stolen (8/11 RP 26) is not sufficient to support a conviction for perjury.

2. The existence of "independent or direct or circumstantial evidence of supporting circumstances" is not sufficient to overcome a witness's oath. The requisite quantum of evidence is testimony of at least one credible witness that positively and directly contradicts the defendant's oath. *Nessman*, 27 Wn. App. at 23; *Rutledge*, 37 Wash. at 528, and either the testimony of second credible, direct witness, or independent corroborating evidence "of such a character as clearly to turn

the scale and overcome the oath of the defendant and the legal presumption of his innocence. Otherwise the defendant must be acquitted.” *Nessman*, 27 Wn. App. at 23.

The State did not come close to meeting this standard.

V. CONCLUSION

Sound public policy reasons support reversal. If a mere difference of opinion as to which witness’s story sounds more plausible is deemed sufficient to convict a defendant for perjury, every criminal defendant who testifies at his trial and is ultimately convicted will be subject to a second trial on new charges based on the same evidence.

Accordingly, for the reasons stated herein, as well as for the reasons argued in the opening brief, the Court should reverse Mr. Arquette’s current conviction, vacate the previous conviction, dismiss the prosecution with prejudice, and remand for proceedings to compensate Arquette for costs assessed in *Arquette I*.

Respectfully submitted this 17th day of August, 2012.

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CERTIFICATE OF SERVICE

Jordan McCabe served a copy of this Appellant's Brief upon opposing counsel by the Division II upload portal.

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