

No. 46869-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Brian Oleson,

Appellant.

Kitsap County Superior Court Cause No. 14-1-00266-0

The Honorable Judge Kevin Hull

Appellant's Reply Brief

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ARGUMENT

I. THE STATE DID NOT PROVE THAT MR. OLESON CONSTRUCTIVELY POSSESSED ANY GUNS OR DRUGS FOUND IN CHRISTOPHER'S HOUSE.

Mr. Oleson rests on the arguments set forth in his Opening Brief.

II. THE COURT'S INSTRUCTIONS ALLOWED THE STATE TO PREVAIL ON ITS CONSTRUCTIVE POSSESSION THEORY WITHOUT PROOF OF DOMINION AND CONTROL.

Instructions must be manifestly clear. *State v. Kylo*, 166 Wn.2d 856, 864, 215 P.3d 177 (2009).¹ The court's instructions here were not. They allowed conviction based on a constructive possession theory, even if Mr. Oleson did not have the immediate ability to take actual possession. CP 63, 69. This is contrary to law. *State v. Davis*, 182 Wn.2d 222, 234, 340 P.3d 820 (2014) (Stephens, J., dissenting, for a majority of the court).

The error is not harmless beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Mr. Oleson argued that he did not constructively possess the guns or drugs. RP 582-594. The state presented very little evidence of constructive possession, and no evidence showing an ability to immediately take actual possession.

¹ An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of an offense violates due process. U.S. Const. Amend. XIV; *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004). Such an error is not harmless unless it can be shown beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

The instructions misled the jury and prejudiced Mr. Oleson. Mr. Oleson's convictions must be reversed. *Kyllo*, 166 Wn.2d at 864. The charges must be remanded for a new trial with proper instructions. *Id.*

III. THE CHARGING DOCUMENT FAILED TO ALLEGE CRITICAL FACTS ALLOWING MR. OLESON TO PLEAD THE INFORMATION AS A BAR TO SUBSEQUENT PROSECUTION FOR EACH FIREARM CHARGE.

A charging document must not only give notice but must also protect against double jeopardy by specifying the conduct alleged. *Valentine v. Konteh*, 395 F.3d 626, 631 (6th Cir. 2005); *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962). This requires "a statement of the facts and circumstances." *Russell*, 369 U.S. at 763-764. Critical facts must be found "within the four corners of the charging document." *City of Seattle v. Termain*, 124 Wn. App. 798, 803, 103 P.3d 209 (2004).

The charging document in this case did not include critical facts. Because it did not identify or differentiate between any of the three firearms allegedly possessed, it does not pass the notice and double jeopardy requirements of *Russell*. CP 42-44; *Russell*, 369 U.S. at 763-64.

The firearm convictions must be reversed and the charges dismissed without prejudice.

IV. MR. OLESON WAS DEPRIVED OF A FAIR TRIAL WHEN THE PROSECUTOR TOLD JURORS “THERE’S CERTAINLY THINGS YOU DON’T KNOW,” BECAUSE THE JURY HADN’T HEARD THE “BACK-STORY” OF THE CASE.

Mr. Oleson rests on the argument in the Opening Brief.

V. THE COURT’S “REASONABLE DOUBT” INSTRUCTION INFRINGED MR. OLESON’S FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

Mr. Oleson rests on the argument in the Opening Brief.

VI. THE TRIAL COURT FAILED TO MAKE AN ADEQUATE INQUIRY INTO MR. OLESON’S ABILITY TO PAY DISCRETIONARY LFOs.²

A sentencing court must make a particularized inquiry into an offender's ability to pay discretionary LFOs. *State v. Blazina*, 182 Wn.2d 827, 841, 344 P.3d 680 (2015). The obligation to conduct the required inquiry rests with the court. *Id.*

Because of this, the sentencing court "must do more than sign a judgment and sentence with boilerplate language." *Id.* Instead, the record must reflect the court's individualized inquiry. *Id.* The burden is on the prosecution to show an ability to pay. *State v. Duncan*, 180 Wn. App. 245, 250, 327 P.3d 699 (2014) *review granted*, (Wash. Aug. 5, 2015).

Furthermore, a defendant's silence or a pre-imposition statement expressing hopes for employment should not be taken as proof of ability to

² Respondent concedes that the expert witness fund contribution should be stricken. Brief of Respondent, pp. 32-33.

pay. *Cf. Duncan*, 180 Wn. App. at 250 (noting most offenders' motivation "to portray themselves in a more positive light.") It is only after the court imposes a term of incarceration that an offender can make a meaningful presentation on likely future ability to pay, since the length of incarceration will affect that ability.

Following *Blazina*, the Supreme Court will remand any case in which the record does not reflect an adequate inquiry. *See, e.g., State v. Vansycle*, No. 89766-2, 2015 WL 4660577 (Wash. Aug. 5, 2015).³

For all these reasons, the court should vacate the trial court's imposition of discretionary LFOs. The case must be remanded for the trial court to make the individualized inquiry required under *Blazina*.

CONCLUSION

Mr. Oleson's convictions must be reversed and the charges dismissed with prejudice. In the alternative, the case must be remanded for a new trial.

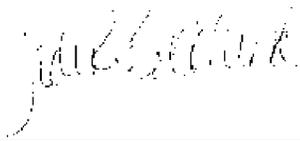
If the convictions are not reversed, the court's order to pay \$100 to the Kitsap County expert witness fund must be vacated, as Respondent

³ Similar orders were also entered on August 5th in *State v. Cole*, No. 89977-1; *State v. Joyner*, No. 90305-1; *State v. Mickle*, No. 90650-5; *State v. Norris*, No. 90720-0; *State v. Chenault*, No. 91359-5; *State v. Thomas*, No. 91397-8; *State v. Bolton*, No. 90550-9; *State v. Stoll*, No. 90592-4; *State v. Bradley*, No. 90745-5; *State v. Calvin*, No. 89518-0; and *State v. Turner*, No. 90758-7.

concedes. In addition, the court improperly imposed \$4,635 in LFOs without adequately considering Mr. Oleson's ability to pay.

Respectfully submitted on September 8, 2015,

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Brian Oleson
2412 Seabeck Holly Road
Seabeck, WA 98380

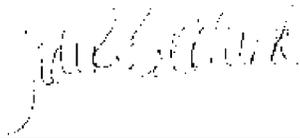
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Kitsap County Prosecuting Attorney
kcpa@co.kitsap.wa.us

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on September 8, 2015.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

September 08, 2015 - 1:04 PM

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