

FILED
Dec 13, 2012
Court of Appeals
Division III
State of Washington

No. 306801

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

JOSE LUIS GONZALEZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE ROBERT LAWRENCE-BERREY, JUDGE

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether the elements jury instructions violated the defendant's right to a jury trial, by stating that the jury had a "duty to return a verdict of guilty" if it found each element proven beyond a reasonable doubt?
2. Whether the trial court's findings that Mr. Gonzalez had the current or future ability to pay his legal financial obligations were clearly erroneous?
3. Whether a condition of community custody prohibiting the defendant from purchasing, possessing or viewing "any pornographic material in any form as defined by the treatment provider or the supervising Community Corrections Officer" is unconstitutionally vague?
4. Whether a sentencing court has the authority to impose restitution for the victim's counseling costs as a condition of community custody?
5. Whether the sentencing court exceeded its statutory authority by imposing certain conditions of community custody which were not crime-related?

II. ANSWERS TO ASSIGNMENTS OF ERROR.

1. Divisions I and II of the Court of Appeals have both rejected similar constitutional challenges to the pattern elements instruction, and the Washington Supreme Court has denied review in each of those cases. Further, as there was no manifest constitutional error, the appellant is precluded from raising this issue for the first time on appeal.
2. The State concedes that the court's findings as to the defendant's current or future ability to pay his legal financial obligations were clearly erroneous.
3. The State also concedes that the community custody condition which prohibited the defendant from purchasing, possessing or viewing pornographic material is unconstitutionally vague, based upon established precedent.
- 4-5. The State also concedes that the sentencing court lacked the authority to impose restitution for the victim's counseling as a condition of community custody, as well as non-crime-related conditions.

III. STATEMENT OF FACTS

The Respondent, State of Washington is satisfied with the Appellant's Statement of the Case, as well as the citations to the record contained in the footnotes in the opening brief. RAP 10.3(b).

IV. ARGUMENT

1. Gonzalez has failed to show that the pattern “to convict” instructions are unconstitutional in light of well-established case law, and any constitutional error was not manifest.

On this direct appeal, Gonzalez contends that language in the “to convict” jury instructions provided in his case rendered the instructions unconstitutional. Specifically, he contends that the following language is a misstatement of the law: “[i]f you find from the evidence that each of these elements has been proved beyond a reasonable doubt, **then it will be your duty to return a verdict of guilty.**” (CP 147; WPIC 44.11; CP 150; WPIC 44.21) (emphasis added).

The language complained of is included in every “to convict” WPIC jury instruction. *See, e.g.*, WPIC 26.02, 26.04, 26.06.

The purpose of a jury instruction is to provide jurors with the applicable law in each case. State v. Borrero, 147 Wn.2d 353, 362, 58 P.3d 245 (2002) Jury instructions are sufficient if they are not misleading,

permit the parties to argue their cases, and properly inform the jury of the applicable law when read as a whole. State v. Barnes, 153 Wn.2d 378, 382, 103 P.3d 1219 (2005).

In State v. Brown, 130 Wn. App. 767, 771, 124 P.3d 663 (2005), Division II of the Court of Appeals rejected the same argument Gonzalez now advances. In Brown, the court held that “[t]he power of jury nullification is not an applicable law to be applied” in a criminal prosecution. Id., at 771. This holding, in turn, relied upon a prior decision by Division I, State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, *rev. denied*, 136 Wn.2d 1028 (1998), *overruled on other grounds*, State v. Recuenco, 154 Wn.2d 156, 110 P.3d 188 (2005), *rev’d by* 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006), as well as State v. Bonisio, 92 Wn. App. 783, 964 P.2d 1222 (1998). A similar result was reached in State v. Fleming, 140 Wn. App. 132, 170 P.3d 50 (2007), *rev. denied*, 163 Wn.2d 1047 (2008).

In Meggyesy, the court held that an instruction that informed the jury that it had a “duty” to convict if it found the State proved each element of the crimes beyond a reasonable doubt, did not misstate the law. Id., at 700-01. Furthermore, the Meggyesy court held that this language did not violate the federal or state constitutions. Id., at 701-04. After conducting a thorough review of the constitutional provisions under State

v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986), the court recognized that there was no independent state constitutional basis to invalidate the challenged instruction. Id., at 704. The court also noted that art. IV, sec. 16 of the Washington Constitution “is inconsistent with appellants’ argument that the jury should be instructed that it may acquit even where it finds that the State has proven, beyond a reasonable doubt, all the elements of the charged crime.” Id. *See, also*, Bonisisio; the trial court did not err when instructing the jury that it had a duty to convict if it found the State had proven all the elements beyond a reasonable doubt. 92 Wn. App. at 794.

In determining whether the state constitution provides broader protection in a certain area, a reviewing court considers the six Gunwall factors. Under Gunwall, the court is guided in deciding whether to conduct an independent analysis under the state constitution based upon: (1) the language of the Washington Constitution, (2) differences between the state and federal language, (3) constitutional history, (4) preexisting state law, (5) structural differences, and (6) matters of particular state or local concern. Meggyesy, 90 Wn. App. at 701.

As noted in Appellant’s opening brief, art. I, sec. 22 grants the right to a jury trial. In addition, art. I, sec. 21 simply provides that “[t]he right to trial by jury shall remain inviolate.” That this right should

continue “unimpaired” as well as inviolate is clear from the case law.

State v. Strasburg, 60 Wash. 106, 115, 110 P. 1020 (1910). However, the State would submit that the Court of Appeals was correct when it observed that “[n]othing in the language of these constitutional provisions addresses the question presented.” Meggyesy, 90 Wn. App. at 701.

Gonzalez appears to agree with Meggyesy that there is no language in the state constitution specific to the issue raised here, but argues that the language which *is* there indicates that the jury trial right is so fundamental that any infringement would violate that right. (**Appellant’s Brief, p. 10**) Whether the pattern instruction constitutes such an infringement, however, is the issue framed here. The first factor is neutral.

As to the second factor, the Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed.” In State v. Brown, 132 Wn.2d 529, 595, 940 P.2d 546 (1997), the Washington Supreme Court has previously held that the language of the Sixth Amendment and that of art. I, sec. 22 is substantially similar. In light of that authority, Mr. Gonzalez’s argument that the language of art. I, sec. 22 is so fundamentally different as to dictate a different result, must necessarily fail. The second factor is neutral in this analysis.

The third Gunwall factor, state constitutional history, also does not support Mr. Gonzalez's argument. Again, the Washington Supreme Court has addressed this issue, holding that "the constitutional history shows there is no indication the framers intended the state constitutional right to a jury to be broader than the federal right." Brown, 132 Wn.2d at 596.

Art. I, sec. 21, as interpreted by the Supreme Court, preserved the right to a jury trial as it existed at common law at the time the Washington State Constitution was adopted. Sofie v. Fiberboard Corp. 112 Wn.2d 636, 645 771 P.2d 711, 780 P.2d 260 (1989). However, Gonzalez's reliance upon the territorial court's decision in Leonard v. Territory, 2 Wash. Terr. 381, 7 Pac. 872 (1885) is misplaced.

As the Court of Appeals has observed, there is no pre-constitutional case establishing a rule prohibiting the language which is challenged here. In Leonard, the defendant was convicted of murder and sentenced to death. On appeal, he challenged a number of the jury instructions, though none involved the issue present here.

Mr. Gonzalez argues that the following language in the Leonard jury instructions demonstrates the prevailing common law practice in the territory: "[i]f you find the facts necessary to establish the guilt of defendant proven to the certainty above stated, then you *may* find him

guilty . . . “ Id., at 399-400 (emphasis added). This argument also fails for several reasons.

First, the instruction was found, along with several others, to have misstated the law as to the State’s burden of proof and defenses available to the defendant. The defendant was granted a new trial. Id., at 401.

It is also clear from the opinion that the instructions were drafted by either the court or counsel, and were not of a standard type relied upon by courts generally. If they were, a great number of convictions from that period would have been reversed because of the same infirmities addressed there. The quoted instruction, then, cannot be considered indicative of common law practice prior to the adoption of the constitution.

Additionally, the Meggyesy court relied upon the Supreme Court’s decision in State v. Wilson, 9 Wash. 16, 36 P. 967 (1894), in which the defendant complained of an instruction which stated that if the jury found the elements of the crime, the jury “must” find the defendant guilty. The court stated that, taking all the language in context, “it clearly appears that all the court intended to say was that, if they found from the evidence that all the acts necessary to constitute the crime had been committed by the defendant, the law *made it their duty* to find him guilty.” Id., at 21

(emphasis added). The court held that there was no instructional error. Id. The defendant's argument as to the fourth factor is not persuasive.

As to the fifth factor, the differences in the structures of the federal and state constitutions, the State conceded in Meggysey, as it does here, that this factor always supports an independent analysis. Meggysey, 90 Wn. App. at 703.

Applying the sixth factor, matters of particular state or local concern, the State would submit that there is nothing about this concern that would suggest that there is any different standard in regards to the elements instruction issue than in any other jurisdiction, including the federal courts.

Here, the trial court utilized pattern jury instructions to inform the jurors of the law pertaining to first degree rape of a child and first degree child molestations. **(CP 147; 150)** Those same instructions also reminded the jurors that they had a "duty" to acquit if they had a reasonable doubt as to any of the elements. The defense did not object to the instructions below. **(RP 815-16)**

An instructional error not objected to below may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988). To obtain review, the defendant must show that the claimed

error is of constitutional magnitude and that it resulted in actual prejudice. State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). A reviewing court will not assume that an error is of constitutional magnitude. The court will look to the asserted claim and assess whether it implicates a constitutional interest as compared to another form of trial error. Id.

If the claimed error is of constitutional magnitude, the court will determine whether error is manifest. Manifest requires a showing of “actual prejudice”. Id. To demonstrate actual prejudice there must be a “plausible showing by the appellant that the asserted error had practical and identifiable consequences in the trial of the case.” Id. Mr. Gonzalez has not demonstrated that any error resulted in identifiable consequences, and has not shown that he was prevented from arguing his theory of the case.

As noted, this issue is not one of first impression; it has been raised multiple times and rejected by the Court of Appeals. In three of the cases cited, the Washington Supreme Court has declined to accept review. This court should reject this challenge, as well.

Mr. Gonzalez seeks to distinguish his argument from that addressed in Meggyesy, asserting that he does not ask for an affirmative jury instruction to the effect that the jury has the power to acquit, but rather that the jury should not be *mised* as to the duty to convict. This has

been previously addressed, as well. The Court of Appeals finding that there was “no meaningful difference” between the two arguments. Brown, 130 Wn. App. at 771. There is no need to reconsider Meggyesy.

2. The sentencing court’s findings as to the ability to pay legal financial obligations were clearly erroneous.

An appellate court reviews a trial court’s determination on an offender’s financial resources and ability to pay under the clearly erroneous standard. State v Bertrand, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), *citing* State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991). “A finding of fact is clearly erroneous when, although there is some evidence to support it, review of all the evidence leads to a ‘definite and firm conviction that a mistake has been committed.’” Schryvers v. Coulee Cmty. Hosp., 138 Wn. App. 648, 654, 158 P.3d 113 (2007).

A sentencing court must make an adequate record for a finding that an offender has an ability to pay legal financial obligations, though formal findings need not be entered. Baldwin, 63 Wn. App. at 311-12; RCW 10.01.160(3).

Here, the State concedes that there is not an adequate record of the court’s consideration of Mr. Gonzalez’s ability to pay his legal financial obligations. As a result, the issue should be remanded to the trial court for

reconsideration of the court's findings in paragraph 2.7 of the judgment and sentence.

3. The State concedes that the community custody prohibition against viewing pornography is unconstitutionally vague.

As Gonzalez argues in his opening brief, the due process vagueness doctrine under the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Washington Constitution requires that citizens have fair warning of proscribed conduct. State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008). The vagueness doctrine serves two main purposes. First, it provides citizens with fair warning of what conduct must be avoided. Second, it protects from arbitrary, ad hoc, or discriminatory conduct. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993).

In Bahl, the court examined a community custody provision prohibiting the defendant from “possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer.” Bahl, 164 Wn.2d at 754. The court concluded that the prohibition on possessing and accessing pornographic materials was unconstitutional and the fact that the condition allowed Mr. Bahl's community corrections officer to determine what falls within the prohibition demonstrated that the

condition contained no ascertainable standards for enforcement. Id., at 761.

The State would concede that, in light of Bahl, the prohibition against the possession of pornography here is also unconstitutionally vague, as it is presently constituted in the community custody order of March 2, 2012 - depending upon a treatment provider or community corrections officer to define what is pornographic. For that reason, this matter should be remanded to either strike the provision or amend to sufficiently specify what conduct is prohibited.

4. The State concedes the remaining assignments of error.

The State has reviewed the record below, as well as the authorities cited in Appellant's brief, and is of the opinion that certain conditions of community custody should be struck from the judgment and sentence.

Generally, the court lacks authority to impose conditions of community custody which are not directly related to the circumstances of the crime, and are not otherwise authorized by statute, and statutory authority to impose conditions is reviewed *de novo*. State v. Moen, 129 Wn.2d 535, 544-48, 919 P.2d 69 (1996); State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007); RCW 9.94A.703(3)(f); RCW 9.94A.030(10).

As noted in the opening brief, a court may impose court-ordered legal financial obligations, including restitution to the victim. RCW 9.94A.753; RCW 9.94A.735(5). Restitution is to be ordered in a specific amount pursuant to statute. RCW 9.94A.030(42); RCW 9.94A.753(9).

Here, the court did not order restitution to the victim, but instead ordered restitution as a condition of community custody. That provision should be stricken upon remand, and the court should reconsider whether restitution specifically should be ordered.

Likewise, there is no apparent statutory authority for the prohibition on purchasing or possessing children's games, toys or clothing. Such condition is also not related to the facts of the case, and should be stricken.

There is also no specific statutory authority for, or relation to the facts of the case, for the restriction on the purchase, possession or use of law enforcement identification or clothing. The provision should be stricken.

V. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions on Counts 1 and 2, but remand for modification of the community custody order.

Respectfully submitted this 13th day of December, 2012.

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Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4), and upon the Appellant via U.S. Mail.

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Dated at Yakima, WA this 13th day of December, 2012