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NO. 58176-7-I

81072-9

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ROGER ENGEL,

Appellant.

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

The Honorable James Cayce

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

A. ARGUMENT 1

BECAUSE THE WESTERN ASPHALT YARD WAS NOT A
“BUILDING” AS DEFINED BY STATUTE, THE STATE
COULD NOT PROVE MR. ENGEL COMMITTED
BURGLARY..... 1

1. The yard was not a “fenced area” under the ordinary
meaning of the phrase..... 1

a. Respondent’s reliance on *State v. Wentz* is inapposite. 5

2. The purported boundary was not designed or intended to
enclose the yard, and therefore the yard is not a fenced area
under the “main purpose” test. 7

B. CONCLUSION 11

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 828 P.2d 549 (1992) 2
State v. Roadhs, 71 Wn.2d 705, 430 P.2d 586 (1967) ... 8, 9, 10, 12, 13
State v. Wentz, 149 Wn.2d 342, 68 P.3d 282 (2003) 2, 6, 7, 8, 10

Washington Court of Appeals Decisions

State v. Brenner, 53 Wn. App. 367, 768 P.2d 509, rev. denied, 112 Wn.2d 1020 (1989) 9
State v. Brown, 50 Wn.App. 873, 751 P.2d 331 (1988)..... 4, 5
State v. Gans, 76 Wn. App. 445, 886 P.2d 578 (1994), rev. denied, 126 Wn.2d 1020 (1995) 9
State v. Livengood, 14 Wn. App. 203, 549 P.2d 480 (1975)..... 9
State v. Mounsey, 31 Wn. App. 511, 643 P.2d 892, rev. denied, 97 Wn.2d 1028 (1982) 5

Revised Code of Washington

RCW 9A.52.010 4
RCW 9A.52.070 3, 5
RCW 9A.52.080 3, 4
RCW 9A.52.110 2, 6

Other Authorities

House Judiciary Committee Bill Files 307 (1979) 4

A. ARGUMENT

BECAUSE THE WESTERN ASPHALT YARD WAS NOT A "BUILDING" AS DEFINED BY STATUTE, THE STATE COULD NOT PROVE MR. ENGEL COMMITTED BURGLARY.

Mr. Engel was convicted of burglary in the second degree for entering the Western Asphalt yard with the intent of committing a crime therein. However, the Western Asphalt yard was not a fenced area – and therefore a "building" – under the burglary statute because 1) the area was not fully enclosed by a fence; 2) in the absence of evidence that it would be difficult to enter the yard by way of the natural terrain or piles of rocks, the area was not fully enclosed by anything; and 3) even if fully enclosed by natural terrain and piles of rocks, there was no evidence that these purported barriers were intended or designed to function as a fence.

1. The yard was not a "fenced area" under the ordinary meaning of the phrase. Although the statutory definition of "building" expressly includes a "fenced area," there is no statutory definition of "fenced area." RCW 9A.52.110(5). Absent a contrary legislative intent, we give a term that is not defined by statute its ordinary meaning." State v. Wentz, 149 Wn.2d 342, 352,

68 P.3d 282 (2003), citing Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 813, 828 P.2d 549 (1992).

Respondent claims “the common understanding of a ‘fenced area,’ includes an area partially enclosed by a fence, where the fence – together with other obstacles or features of topography – completes an enclosed or contained area. The fence need not be an area that is wholly enclosed by a fence” and “in common parlance, an area that is inaccessible due to fencing and topography is a ‘fenced area.’” SRB 11-12, 15. Not only is this construction unsupported by the record, as discussed below, Respondent offers no authority to support this definition. It is simply Respondent’s own opinion.

In contrast, the legislative history of the criminal trespass statute is highly instructive. Before July 1979, criminal trespass in the first degree provided:

A person is guilty of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a *building or* on real property adjacent thereto *or* upon real property which is fenced or otherwise enclosed in a manner designed to exclude intruders.

Former RCW 9A.52.070(1) (emphasis added). Criminal trespass in the second degree provided:

A person is guilty of criminal trespass in the second degree if he knowingly enters or remains unlawfully in or upon *premises* of another.

Former RCW 9A.52.080(1) (emphasis added).

The statutes now read:

A person is guilty of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a building.

RCW 9A.52.070(1).

(1) A person is guilty of criminal trespass in the second degree if he knowingly enters or remains unlawfully in or upon premises of another under circumstances not constituting criminal trespass in the first degree.

RCW 9A.52.080(1). The statutory definition of “premises” includes “any building, dwelling, structure used for commercial aquaculture, or any real property.” RCW 9A.52.010(1).

Analyzing the legislative history behind the 1979 amendments, this Court found the legislature intended to create separate punishments for trespass in a building and trespass in fenced areas. State v. Brown, 50 Wn.App. 873, 877-78, 751 P.2d 331 (1988).

The effect of adoption of the amendments contained in these two sections would be to narrow the scope of the gross misdemeanor first degree criminal trespass offense to trespasses in a *building in its ordinary sense*. The reason for the necessity of the odd

appearing phrase "other than a fenced area" is because of the definition of "building" in RCW 9A.04.110(5) which includes fenced areas for purposes of using the term "building" elsewhere in the criminal code, in particular in such areas as arson or burglary. Moreover, all other types of trespasses other than in a building would be covered by the second degree criminal trespass offense graded at the misdemeanor level...

Id., quoting House Judiciary Committee Bill Files 307, at 5 (1979) (emphasis in quotation).

Thus, first-degree criminal trespass can be committed only by entering a building "in its ordinary sense," which is clearly not a fenced area. Second-degree criminal trespass can be committed by entering "premises," which include not only fenced areas but also open yards. State v. Mounsey, 31 Wn. App. 511, 518, 643 P.2d 892, rev. denied, 97 Wn.2d 1028 (1982). Most importantly for this case, through the 1979 amendments, the legislature specifically repealed language regarding "adjacent real property" and "fenced" or "enclosed" real property found in former RCW 9A.52.070(1). Brown, 50 Wn. App. at 877. Instead, the legislature focused on the distinction between "buildings" and non-building "premises." Under that scheme, it is clear that whether a piece of property is completely or partially fenced, or not fenced at all, it can be "premises" subject to trespass.

The legislature could have chosen a similar approach with the burglary statute. Instead, it chose the “building” definition in RCW 9A.52.110(5). Unlike the sweeping language of the “premises” definition, which includes “any real property,” the “building” definition lists specific items, including “fenced area.” In the absence of any indication to the contrary, the ordinary meaning of a fenced area must therefore mean an area enclosed by a fence.

a. Respondent’s reliance on *State v. Wentz* is inapposite. Respondent also argues that “the ordinary meaning of a fenced area includes an area that, by a combination of topography, barriers, and fencing, is closed off to the public.” SRB 13. In support, Respondent cites only the concurring opinion in *State v. Wentz*, 149 Wn.2d at 357.

In *Wentz*, the Supreme Court held that, following the plain language of the burglary statute as amended in 1975, a “fenced area” is a building. *Id.* at 352. The Court did not attempt to define “fenced area,” but merely observed “the ordinary meaning of ‘fenced area’ clearly encompasses the backyard in this case.” *Id.* (The yard in question was completely enclosed by a six-foot solid wood fence, with two padlocked gates.) *Id.* at 345. It was

unnecessary, the Court held, to analyze the purpose of the fence. Id. at 350.

The concurrence analysis actually supports Mr. Engel's argument. Respondent's strained interpretation of the concurrence, arguing this at odds with the opinion read as a whole. SRB at 14. Justice Madsen, concurring, believed the majority's construction of "fenced area" was too broad; yet here, Respondent argues for an even broader definition. Analyzing the legislature's intent, Justice Madsen found "that an area bounded by a fence that does not create an enclosed or contained area is not a 'building' for purposes of the burglary statutes... Thus, for example, a fence running only along the front of a lot separating it from the street does not create a fenced area constituting a building." Id. at 356. The Western Asphalt yard was not fully enclosed, and resembles this example much more closely than the yard at issue in Wentz.

Justice Madsen therefore concluded that "not all fenced areas are, automatically, buildings... I do not believe the legislature intends that an impenetrable barrier is required, but there must be a barrier *designed* for the security of people or the contents of the enclosed area." Id. at 357 (emphasis added). Here, as discussed in more detail in the next section, there was no evidence that the

purported barrier was so designed. Without fully returning to the Roadhs “main purpose” test rejected by the majority (and discussed further in the next section), Justice Madsen relied on the “underlying theory of the burglary statutes... the protection of persons or property and punishment for invasions that involve a risk of criminal harm or actual harm to person or property.” Id. Justice Madsen’s proposed analysis therefore would focus on the purpose, rather than the appearance of the barrier. Id. at 357-58.

Respondent’s reliance on this case is therefore inapposite. The Western Asphalt yard was not a fenced area either under the broader, plain meaning of the majority construction or the narrower, purpose-driven legislative intent analysis of the concurrence.

2. The purported boundary was not designed or intended to enclose the yard, and therefore the yard is not a fenced area under the “main purpose” test. Before Wentz, Washington courts used the “main purpose” test announced in State v. Roadhs, 71 Wn.2d 705, 430 P.2d 586 (1967) to determine whether a fenced area was a “structure” or “building” subject to the burglary statutes. See, e.g. State v. Gans, 76 Wn. App. 445, 449-52, 886 P.2d 578 (1994), rev. denied, 126 Wn.2d 1020 (1995) (fenced area is a “building” if its main purpose is to protect personal property inside

it); State v. Brenner, 53 Wn. App. 367, 377-78, 768 P.2d 509, rev. denied, 112 Wn.2d 1020 (1989) (wrecking yard completely enclosed by 8-foot fence is a “building”); State v. Livengood, 14 Wn. App. 203, 209, 549 P.2d 480 (1975) (under former statute, fence enclosing electrical substation and construction materials was a “structure” serving mainly to protect property).

Were the fence a mere boundary fence or one erected for the *sole* purpose of esthetic beautification, it would not constitute a “structure” as that term was intended to be interpreted by the legislature. However, where the fence is of such a nature that it is erected mainly for the purpose of protecting property within its confines and is, in fact, an integral part of a closed compound, its function becomes analogous to that of a “building and the fence itself constitutes a “structure” subject to being burglarized.

Id. at 708-09 (emphasis in the original).

The Wentz court held that, since the 1975 amendments explicitly included “fenced area” in the definition of a “building,” the Roadhs test was no longer necessary to analyze the purpose of a fence. Wentz, 149 Wn.2d at 350. Mr. Engel argues the Western Asphalt yard simply does not fall within the ordinary meaning of a “fenced area,” but in the alternative, this Court should return to the Roadhs test to analyze the purported barriers which were not fences. Such an analysis would be appropriate despite the Wentz

holding because the Wentz court did not overturn the Roadhs test, it merely found that analysis obsolete, in light of the 1975 amendments, to determine whether a fenced area is a building. Since the legislature still has not provided insight into the definition of “fenced area,” the Roadhs test is the ideal tool to determine whether an area is a fenced area.

Here, the issue is not the fence, but whether the stock piles and terrain, where no fence existed, were mainly intended “for the purpose of protecting property within its confines.” Id. There is no evidence that this was the case.

Respondent claims that the Western Asphalt yard was “surrounded by natural and man-made obstacles that served to enclose the yard.” SRB 16. According to Respondent, these include “a large pile of rocks deliberately placed to form a barrier, a steep hillside covered in vegetation, a vertical cliff, a steep slope angling downward.” Id. However, there was no evidence that the piles of aggregate material were “*deliberately* placed to form a barrier.” No witness testified as to the reason why these stock piles were placed in that location. Ms. O’Leary testified there was no fence in that part of the yard because “the stock piles varied depending on the time of year, and sometimes they would

completely bury a fence.” RP 118. Therefore, “it wasn’t economical to put a fence in there.” Id. This purely economical concern is the only reason on the record. There was no evidence that the piles obviated the need for a fence, much less that the piles were intended to serve as a fence.

Although Respondent claims the unfenced areas were “plainly inaccessible,” there was no evidence that it would be difficult or impossible for a person to walk or climb over these piles. SRB at 15. Similarly, there was no evidence that it would be difficult or impossible for a person to walk or climb the hillside, cliff, or slope. To the contrary, when defense counsel asked Ms. O’Leary, “If you walk up that hill, can you see into the residential area?” she replied, “I would assume so, yeah,” indicating that it *would* be possible to walk up (or, presumably, down) the hill. 3/21/06RP 161. Mr. Peterson vaguely testified “the terrain, probably acts as a fence more than anything.” 3/21/06RP 130. However, there was *no* evidence that the layout of the yard had been intended to use the terrain as a fence.

Thus, following the Roadhs test, the main purpose of the stock piles and terrain was not to protect property, and the yard therefore cannot be a fenced area.

Respondent also argues that Mr. Engel's literal definition of "fenced area" would produce absurd results; for example, a yard which is bounded on three sides by a fence and on the fourth side by the wall of the adjoining house. SRB at 15. Respondent's definition would also produce absurd results. According to Respondent, apparently the floor of a ravine or a clearing in a thicket of blackberry bushes would be a "building;" in fact, since the State utterly failed to prove that the natural terrain in this case would be difficult to cross, perhaps any area at the top or bottom of a moderately steep slope would be a "building" under Respondent's definition. But the Roadhs test would allow for Mr. Engel's common-sense interpretation of the phrase "fenced area," while at the same time ensuring a sensible result. Under the Roadhs test, the yard bounded on three sides by a fence and the house on the fourth would be a fenced area, provided the State could prove the main purpose of the layout was to protect the property within its confines.

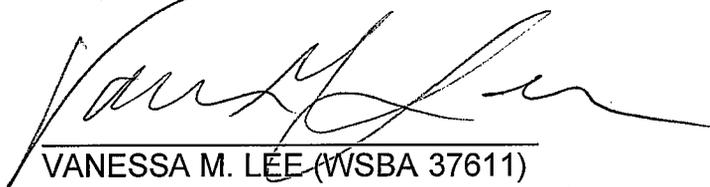
B. CONCLUSION

As to the other arguments raised in his Opening Brief, Appellant rests on the earlier pleadings. For the reasons presented in that Brief and above, Mr. Engel respectfully requests that this

Court reverse his conviction or, in the alternative, vacate the order
to provide a biological sample.

DATED this 5th day of March, 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Vanessa M. Lee', written over a horizontal line.

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DIVISION ONE**

STATE OF WASHINGTON,)	
)	NO. 58176-7-I
Respondent,)	
)	
v.)	
)	
ROGER ENGEL,)	
)	
Appellant.)	

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 5TH DAY OF MARCH, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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APPELLATE UNIT
KING COUNTY COURTHOUSE
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SEATTLE, WA 98104 | (X)
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HAND DELIVERY
_____ |
|
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| <input checked="" type="checkbox"/> ROGER ENGEL
898472
3606 KENT-KANGLEY RD
RAVENSDALE, WA 98501 | (X)
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