No. 93710-9

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Court of Appeals
Division III
State of Washington

No. 32962-3-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

ANTHONY A. JOSEPH,

Defendant/Appellant

Respondent's Brief

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TABLE OF CONTENTS

I. TABLE OF CONTENTS……2.

II. TABLE OF AUTHORITIES……..……....3

III. RESPONSE TO ASSIGNMENT OF ERROR……..4

IV. STATEMENT OF FACT …….....….5

V. ARGUMENT…….…….....8

VI. CONCLUSION……...…17

TABLE OF AUTHORITIES

Cases **Page(s)**

State v. Bergeron, 105 Wn.2d 1 (1985) 8

State v. Brittain,38 Wn. App. 740 (1984).....11,12,14,15

State v. Brown, 50 Wn.App. 873 (1988).....7,10,11

State v. Salinas, 119 Wn. 2d 192 (1992).....9

State v. Soto, 177 Wn. App. 706 (2013).....13,14

Statutes

RCW 9A.04.110(5) 10
RCW 9A.52.010 13
RCW 9A.52.070.....9,10
RCW 9A.52.080.....12

House Judiciary Committee Bill Files 307 commenting on Washington Session Laws of 1979 1st ex. Session c. 244 Sections 12 and 13.....11

III. RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR

There was sufficient evidence to sustain a conviction for Criminal Trespass in the Second Degree under these facts.

IV. STATEMENT OF FACT

On October 4, 2014, Officer Caillier of the Ellensburg Police Department was working a foot beat patrol night shift. (Report of Proceedings (RP), p. 29) He was wearing a short sleeve uniform with a badge and driving a marked police car. (RP 30-31) He received a call of a vehicle prowl in the area of a towing impound lot in Ellensburg. (RP31) When he arrived, people at the area were pointing to another vehicle parked on the street. (RP 32) The officer walked over and saw a man reclined in the front passenger seat of a Blazer. (RP 33) He immediately recognized Anthony Joseph, with whom he has had contacts in the past. (RP 33) He knew Mr. Joseph did not have a vehicle. (RP 34) Since Mr. Joseph was apparently asleep, the officer got Mr. Joseph's attention by knocking on the window. (RP 34) At first, Mr. Joseph told him he had permission from the owner to be in the vehicle, but he couldn't give a name for the owner. (RP 35) Eventually Mr. Joseph admitted he did not know the owner of the car he was sleeping in. (RP35) He was arrested for vehicle prowl and searched incident to arrest. (RP 36) Mr. Joseph became very angry and hostile. (RP37) He was so hostile he said he was going to

hire someone to kill the police. (RP 37) He started acting like he was going to spit on the officer. (RP 38) The officer warned him not to spit on him. (RP 38) Mr. Joseph tensed up when they tried to handcuff him. (RP 38-39) He was placed in the patrol car, but he had a very strong odor, so the officer decided to roll down the back vehicle window. (RP 39) The window had a plastic grating when the glass was rolled down, with cutouts in it. (RP 40) The officer stood by the window. Mr. Joseph got as close as he could to the holes in the window and leaned toward them. (RP 40) He put his face up to the hole and spit a substantial amount at the officer, hitting his uniform in the chest and hitting the officer on the arms. (RP 41) He was very angry, hostile, and profane toward the officer. (RP 41-42) The officer had to decontaminate himself with hand sanitizer and later soap and water. (RP 48)

The owner of the Chevy Blazer, Mr. Mackenzie Bond, testified that this vehicle, which had a broken side window, had broken down on the freeway, and he had had it towed in to Ellensburg. (RP 69) It was parked there while he was trying to decide what to do with it. He did not know the defendant, and he did not give the defendant permission to get into his

vehicle. (RP 70) It was possible to get into the car by reaching in the little triangular broken out window behind the driver's seat. (RP 70) Mr. Bond did have some property in the car that he was planning to come get when his schedule allowed. (RP 71) Since Mr. Joseph was caught in the car, nothing had been stolen at that point. (RP 72)

The defendant did not testify. (RP 88, 115)

The parties and the court had a fairly lengthy discussion about whether it is a trespass to break into or get into a stranger's car just to sit in it without their permission. (RP 58-67) This discussion was renewed when the parties discussed the jury instructions. (RP 96-97, 102, 103-110) The state of the law and policy issues were discussed at length. The court finally decided not to give the criminal trespass in the first degree lesser, because of *State v. Brown*, 50 Wn.App.873 (1988), but to give the criminal trespass in the second degree lesser instead and let the parties argue about whether a car fit the definition of premises. (RP 103-110 and 113-114)

The jury deliberated and found Mr. Joseph guilty of Assault in the Third Degree. They found Mr. Joseph not guilty of vehicle prowl, but

guilty of a lesser included charge for the second offence, criminal trespass in the second degree. (CP 91-93) (RP 151) .

This appeal followed.

V. ARGUMENT

There was sufficient evidence to sustain a conviction for Criminal Trespass in the Second Degree under these facts.

The standard for review when sufficiency of the evidence is questioned, is whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, when the evidence is viewed in the light most favorable to the State. State v. Bergeron, 105 Wn. 2d 1 (1985). A challenge to the sufficiency of the evidence to support a criminal conviction admits the truth of the State's

evidence and all inferences that can be reasonably drawn therefrom. All reasonable inferences must be drawn in favor of the State and most strongly against the defendant. State v. Salinas, 119 Wn. 2d 192 (1992).

Therefore, in reviewing this case, the review would admit the truth of the State's evidence, i.e. that Mr. Anthony Joseph went into a stranger's car, which was parked on the street next to an impound lot. The car was able to be accessed via a small window that was already broken out on the driver's side. Mr. Joseph had no permission to be in this car. The car had some personal property in it. Mr. Joseph, a man of strong odor, had gone in there on a nice night in October in 60 degree weather, and was found asleep. When woken up and confronted by the police, who were investigating vehicle prowl, Mr. Joseph first said he did have permission to get into the car, and finally admitted he did not know the owner and did not have permission to be in the car. He became very angry and spit on the officer. These are verities on appeal.

However, in this case, the issue is not whether the state has proven that certain facts existed, but whether the facts constitute the crime of criminal trespass under the laws of the State of Washington.

It is instructive to look first at Criminal Trespass in the First Degree. A Criminal Trespass in the First Degree is defined in RCW 9A.52.070, which is the same section in Title 9A that deals with Burglary and Vehicle Prowl. The Statute states:

"(1) A person is guilty of criminal trespass in the first degree if he or she knowingly enters or remains unlawfully in a building." RCW 9A.52.070.

On first look, it would not seem to fit the entering or remaining unlawfully in a vehicle, except that RCW 9A.04.110 (5) defines building,

> "(5) 'Building,' in addition to its ordinary meaning, includes any dwelling, fenced area, vehicle, railway car, cargo container, or any other structure used for lodging of persons or for carrying on business therein, or for the use, sale, or deposit of goods; each unit of a building consisting of two or more units separately secured or occupied is a separate building."

This definition does seem to include vehicle in the definition of building. However, in *State v. Brown*, 50 Wn.App. 873 (1988), a case about a trespass in a fenced area, the Court of Appeals in Division I stated,

"The Legislature clearly intended to exclude fenced areas

> from the definition of "building" in the amended first degree criminal trespass statute. Rather, fenced areas were intended to be covered by the broader definition of "premises" in the second degree criminal trespass statute." *Brown* at 878.

In reaching this decision, the Court relied heavily on the legislative intent expressed in the report language that accompanied the 1979 Session Law Chapter 244 amendments to Criminal Trespass 1 and 2. In that language, the legislature indicated:

> "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.* [Italics from the Brown court]. 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 trepass offense graded at the misdemeanor level.* [These italics added for emphasis.]

Thus, the law in Washington became essentially, that the criminal trespass statutes used the term "building" in its ordinary sense for Criminal Trespass First Degree, and contemplated that all other trespasses would be covered by Criminal Trespass in the Second Degree.

The *Brown* court cited with some approval *State v. Brittain,* 38 Wn.App. 740 (1984), in which the defendant complained that Criminal Trespass first and second degrees provided different penalties for the same act. The Court held, "Second degree criminal trespass is applicable only in those situations where the defendant allegedly enters or remains unlawfully on private property not constituting a building, such as fenced land." *Brittain* at 746.

Taken together, the two cases stand for the proposition that criminal trespass first degree would cover a building in its ordinary sense, and criminal trespass second degree would cover other private property that wasn't a building.

Looking now at Criminal Trespass in the Second Degree, it is defined as follows:

"A person is guilty of criminal trespass in the second degree if he or she 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

The legislature uses several words or phrases of interest to the current analysis. One is the word "premises." In RCW 9A.52.010, the legislature says,

> " The following definitions apply in this chapter:...
>
> (6) 'Premises' includes any building, dwelling, structure used for commercial aquaculture, or any real property." RCW 9A.52.010

The State disagrees with defense characterization of this definition as an exclusive and complete list. The legislature did not say "Premises" *means* any building, dwelling, etc.. It used the word "means" in some of the previous definitions. But in this definition, it simply said "Premises" *includes* any building, dwelling, etc.. This is not an exclusive list at all. The legislature knows how to make an exclusive list, to which defense's canon of statutory construction might apply. The case of *State v. Soto*, 177 Wn. App. 706 (2013) involved a list of crimes to which a statute applied, and under its plain language, the statute applied to certain specific crimes. The plain language of the statute was, "the provisions of this section apply to the standard sentence ranges determined by RCW 994A.510 or 9.94A.517" It did not say the provisions of this section apply to standard

sentence ranges that include…" The plain language of the statute was very direct. The Court of Appeals declined to decide that plain language of the statute was meant to be illustrative. However, the statute at question in this case and the history of legislative intent in this case are quite different from the *Soto* issue. Instead, the way the definition of premises is written, the plain language of the statute is simply that the definition includes these various real property items. And the legislative intent as written down when the criminal trespass statutes were amended was that all other types of trespasses other than in a building would be covered by criminal trespass in the second degree.

Furthermore, the legislature specifically used the language "in or upon," premises of another when discussing criminal trespass in the second degree. Since the legislature did not mean for criminal trespass in the second degree to include a building, the use of the word "in" would be meaningless if trespass in the second degree only included stepping onto real property. *Brittain*, likewise holds that criminal trespass in the second degree applies to unlawful entry on private property that is not a building. A car is private property that is not a building. The *Brittain* court used

Soto's "example" or "like" words, "*such as* " when it says "such as fenced land." Clearly fenced land was not meant to be an exhaustive list of private property for the *Brittain* court.

To adopt the reading of the statute the defense proposes, it would not be a crime for someone to reach through a window, unlock a stranger's car and go sit in it or lie down in it or be inside it, for example, in the back seat, even if the owner showed up and told the person to leave. If it is not a trespass, and if it is not a theft, there is no crime in Washington that fits. In that situation, the police could not charge someone with a crime even if *they* told the person to leave and he didn't. This could not be the state of the law in the State of Washington. The State urges the appellate court to adopt a common sense approach to trespass in vehicles.

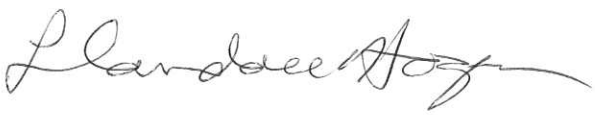
Would it be reasonable for a jury to decide that a vehicle qualified as premises? The State believes it would. A vehicle is not like most personal property. It is a place out of the elements where someone can come in and, as Mr. Joseph did, take a nap. The State and the defense agreed that the vehicle was lawfully parked on a public road. (RP 111) A vehicle takes up space on real property that persons who have lawfully

parked for free or who have paid for a parking space are allowed to have to the exclusion of others for a time. A common sense reading of statutes should prevail, and the word premises should be able to be interpreted by a jury under the facts of the case to include a vehicle when, as here it was essentially a location owned by another person where the defendant could go to take a nap. This is not a situation that would surprise ordinary citizens. The State hazards a guess that 100 percent of persons polled on the street would identify it as a crime to break into or reach in and unlock some unknown person's vehicle without permission and then go into the car, whether to sleep in it or just to sit there. That 100 percent of people on the street, including all legislators, would undoubtedly call the police to to get the recalcitrant stranger out, under the impression it would be a crime for the stranger to remain. The State urges this court to allow the jury to determine given the facts of a case whether a car serves as "premises" in determining the elements of Criminal Trespass in the Second Degree. If so, then there was clearly substantial evidence to convict Mr. Joseph of that crime.

VI. CONCLUSION

Since Mr. Joseph was caught sleeping in a stranger's car in the night, and admitted he had no permission to be there, and since a vehicle could be considered "premises" by a jury, it was not Constitutional error for the jury to find him guilty of criminal trespass.

Respectfully submitted,



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PROOF OF SERVICE

I, Jacob Schroeder, do hereby certify under penalty of perjury that on November 23rd, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of the Respondent's Brief:

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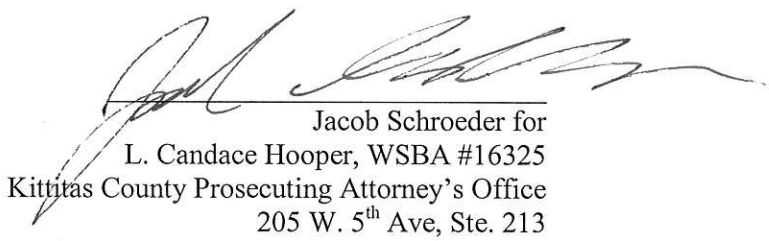

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