

NO. 68813-8-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

A.A. (dob 6/18/95),

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The juvenile court abused its discretion by taking judicial notice of appellant's name and birth date based on his appearance at arraignment in order to establish the elements of making a false or misleading statement to a public servant.

2. The juvenile court erred by entering Conclusion of Law I, in the absence of substantial evidence in the record, that appellant's true name is Ali Ali and his date of birth is June 18, 1995. CP 29.

3. The evidence was insufficient to establish appellant provided a false name or date of birth to officers.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

In order to prove the charge of making a false statement to a public servant, the prosecution was required to prove that the name appellant provided was not his own. When the State never presented evidence of the appellant's true name, was the juvenile court permitted to take judicial notice of the arraignment order which purported to find appellant's true name and date of birth for jurisdictional purposes?

C. STATEMENT OF THE CASE

Nordstrom loss prevention agents Fidelito Lontoc and Angela Rueber testified they were working at the Southcenter store on

November 29, 2011, when they noticed a suspicious person, whom they identified as the appellant (respondent below), displaying furtive eye movements while looking at North Face jackets, a high theft item. RP 10-15, 54-56. The person selected two jackets, placed one over the other on a hanger and then selected two more jackets. He took them to a fitting room. RP 17, 61. Mr. Lontoc went into another nearby fitting room and watched from under the door. RP 18.

After a moment, this person came out without any jackets, retrieved three more jackets from the rack and went back into the fitting room. RP 19-20, 64. After a little while, he went to another fitting room carrying two jackets and crawled in underneath the door. RP 21. Soon he exited the fitting room carrying only one jacket and reentered the first fitting room. RP 21. He then exited the fitting room and left the store. Mr. Lontoc determined only six jackets had been left in the fitting rooms and communicated this to other loss prevention agents. RP 22-23.

The suspect left the store, but no security alarms went off. RP 24-26, 68. Mr. Lontoc testified merchandise at Nordstrom generally has security tags, but he did not find any in the fitting rooms, on the floor or on the suspect's person. RP 42-46. Mr. Lontoc also

acknowledged that North Face clothing is sold at a number of places other than Nordstrom. RP 33.

The suspect was subsequently apprehended by loss prevention agents. RP 25. When Tukwila Police Officer Dan Lindstrom arrived, the suspect's sweatshirt was removed and he was found wearing a North Face jacket which matched those with which he had been seen. RP 29-30, 65, 96. When Officer Lindstrom took the suspect to the police station for booking he asked for a name and date of birth. RP 80-83. The name and date of birth did not match their information, however, and fingerprints were checked in the database. RP 83-84. The suspect was subsequently booked, and later charged, under the name Ali Ali (dob 6-18-95). RP 93; CP 1-2.

Following an adjudicatory hearing, Findings and Conclusions were entered. CP 27-30. Finding 9 includes, "The respondent told the officers that his name was Mohamed Hassan Abdiwahali and that he was born in June of 1993." CP 28. Finding 10 notes that Officer Sturgill was not able to confirm the name and date of birth he had been provided. CP 28. In Finding 14, the court noted "At the station, the respondent told Officer Lindstrom that his name was Mohamed Hassan Abdiwahali and that his date of birth was January 1, 1993." CP 29.

Finally, the Court concluded, in Conclusion of Law I, “the above-entitled court has jurisdiction of the subject matter and of the Respondent, ALI ALI, who was born on 06-18-95,” CP 29.

D. ARGUMENT

The evidence was insufficient to establish the appellant made a false or misleading statement

1. The State argued inconsistencies in the biographical information supporting the charge.

Based on the events of November 29, 2011, appellant was charged with theft in the third degree (RCW 9A.56.050 and 9A.56.02(1)(a)) and making a false or misleading statement to a public servant (RCW 9A.76.175).¹ CP 1-2. The information alleged Ali Ali “did knowingly make a false or misleading material statement to Daniel Lindstrom, a public servant....” CP 2.

¹ RCW 9A.76.175 provides:
A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. “Material statement” means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

In closing argument, the prosecutor cited inconsistencies in the date of birth provided to the initial responder, Officer Sturgill, as the basis for the false statement charge. RP 124.

And, your Honor, regarding Count II, false or misleading statement, here we have blatantly the respondent telling officers that his date of birth is in June of 1993 and later he tells another officer that his date of birth is January 1st of 1993.

RP 124. The prosecutor goes on to allege, “it’s clear that from the beginning the respondent was being deceptive.” RP 125.

Defense counsel argued that the State failed to prove there was an incorrect date of birth and name provided to the officers because the State never presented any evidence to establish what appellant’s correct date of birth or name would have been. RP 125. In the absence of documentary evidence such as a birth certificate, or the testimony of other knowledgeable witnesses, the evidence was insufficient to establish the biographical information he provided was false. RP 126.

In rebuttal, the prosecutor argued a guilty finding could be based upon testimony “the respondent said June 1993 to one police officer was his date of birth and he said January 1, 1993 to another police officer.” RP 132. Furthermore, “He gave the name of Mohamed

Abdawahali to police officers multiple times. He was booked under a different name.” RP 132-33.

Judge Hilyer concluded “Mr. Ali did give false information to the police officer, both with respect to his age, his birthday and with respect to his name.” RP 134.

With respect to the evidence of his name, the evidence is that he gave a different name other than Ali Ali and the court ... and I do not believe that the birth mother has to come to court and testify as to someone’s name.

The court is aware that Mr. Ali Ali was arraigned under the name Ali Ali, that he was asked if that was his true and correct name and in fact not only was it established through the arraignment but also essentially in the course of the evidence he eventually admitted to the police officer that his name was Ali Ali.

RP 134-35.

Appellant sought reconsideration of the court’s ruling regarding the sufficiency of the evidence to support the false statement charge. CP 10-16. Defense counsel specifically objected that “The identifying information on arraignment document was for purpose of jurisdiction only and was not presented as substantive evidence by either party during the fact finding, thus, it would be improper to take judicial notice of any information on the arraignment order.” CP 11. Judge

Hilyer rejected this challenge and adhered to his finding of guilt. RP 140; CP 20.

2. The juvenile court was required to find substantial evidence appellant's true name and date of birth were something other than what Officer Lindstrom was told.

The due process protections of the Fifth Amendment to the United States Constitution extend to juveniles and require that the State prove the elements of the charged offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364–65, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. K.N., 124 Wn.App. 875, 881, 103 P.2d 844 (2004).

In the present case it was necessary for the State to prove the name and date of birth provided by the appellant to Officer Lindstrom were false. CP 1-2. Because the State presented no evidence establishing the truth of the name and date of birth under which he was charged, the judge was left to find it himself. It was there he sought to take judicial notice of the name and date of birth used at arraignment.

The court is aware that Mr. Ali Ali was arraigned under the name Ali Ali, that he was asked if that was his true and correct name and in fact not only was it established through the arraignment but also essentially in the course of the evidence he

eventually admitted to the police officer that his name was Ali Ali.

RP 134-35.

Appellate review of a juvenile court's findings of fact and conclusions of law is focused on determining whether the trial court's findings are supported by substantial evidence in the record and, if so, whether the conclusions of law are supported by those findings of fact. Scott v. Trans-Sys., Inc., 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003); State v. Duran-Davila, 77 Wn.App. 701, 703-04, 892 P.2d 1125 (1995). Findings of fact are reviewed under a substantial evidence standard, defined as a quantum of evidence sufficient to persuade a rational fair-minded person the premise is true. Wenatchee Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

The Findings of Fact and Conclusions of Law Pursuant to CrR 6.1(d) and JuCR 7.11 entered in this case contain no finding of fact regarding the appellant's true name or date of birth. CP 27-30. To the extent that Conclusion of Law I includes a finding of fact regarding appellant's true name and date of birth, it must be supported by substantial evidence in the record. State v. Marcum, 24 Wn.App. 441, 445, 601 P.2d 975 (1979) (When findings of fact are contained improperly denominated as conclusions of law they

are reviewed under the standard applicable to findings of fact, not the standard applicable to conclusions of law.); State v. Pierce, 23 Wn.App. 664, 669, 597 P.2d 1383 (1979). Where this finding was unsupported by the record it must be stricken.

Judge Hilyer relied upon the arraignment in his oral ruling. RP 134. Although an oral opinion “has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment” in this case the findings incorporated the oral ruling as well. Pierce, 23 Wn.App. at 669 (quoting State v. Mallory, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966)).

3. The judge’s effort to take judicial notice was improper.

Judge Hilyer concluded the fact-finding hearing by noting,

The court is aware that Mr. Ali Ali was arraigned under the name Ali Ali, that he was asked if that was his true and correct name and in fact not only was it established through the arraignment but also essentially in the course of the evidence he eventually admitted to the police officer that his name was Ali Ali.

RP 134-35.

Judicial notice of “adjudicative facts” is governed by ER 201.² The tradition “has been one of caution in requiring that the matter

² RULE 201, JUDICIAL NOTICE OF ADJUDICATIVE FACTS, provides:

be beyond reasonable controversy.” Fed.R.Evid. 201 advisory committee's note subdivision (b). Thus, in order for the court to take judicial notice of an adjudicative fact, the fact in question must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. ER 201(b).

As a rule, a court “will take judicial notice of the record in the cause presently before it or in proceedings engrafted, ancillary, or

(a) Scope of Rule. This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When Discretionary. A court may take judicial notice, whether requested or not.

(d) When Mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to Be Heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

supplementary to it.” Swak v. Department of Labor & Indus., 40 Wn.2d 51, 53, 240 P.2d 560 (1952). While a court can take judicial notice of its own records, that does not mean that it notices the truth of all facts that are asserted in those records. K.N., 124 Wn.App. at 881.

In K.N. there was only a finding that KN's true name and date of birth “are correctly stated in the information.” That finding, based on a stipulation limiting it to purposes of jurisdiction. This Court has held that this does not establish that accuracy and cannot reasonably be questioned. K.N., AT 882-83. An individual might falsely stipulate to being under 18 hoping to take advantage of the more lenient penalties imposed in juvenile court. K.N. plainly holds that treating jurisdiction as an adjudicative fact is improper. Id.

The State alternatively argued that the age element of the offense was established by KN's stipulation to his correct date of birth on the order on arraignment. 124 Wn.App. at 883. But the pleading specifically states it is for “jurisdictional purposes only.” CP 15. This limitation was prominently featured on the order of arraignment. CP 15; cf K.N., at 882-83. Judge Hilyer did not explain how a stipulation limited to that purpose can lawfully be used for the different purpose of proving an element of an offense.

Judicial notice may be taken of those facts capable of immediate and accurate demonstration by resort to easily accessible sources of indisputable accuracy and verifiable certainty. Fusato v. Washington Interscholastic Activities Ass'n, 93 Wn.App. 762, 771-72, 970 P.2d 774 (1999). A judicially noticed fact that is capable of accurate determination under ER 201(b) cannot be sustained on appeal if it was challenged in the trial court and the court's basis for accepting the fact does not appear in the record. State v. Payne, 45 Wn.App. 528, 726 P.2d 997 (1986).

Given the contested nature of the information at the fact-finding hearing, judicial notice was not appropriate. As counsel noted, the stipulation at arraignment was for the limited purposes of establishing jurisdiction. CP 15. The finding for the purposes of jurisdiction does not establish accuracy that cannot reasonably be questioned. As the court in K.N. observed, "An individual might falsely stipulate to being under 18 hoping to take advantage of the more lenient penalties imposed in juvenile court. Under these circumstances, treating jurisdiction as an adjudicative fact is improper." 124 Wn.App. at 882.

"A respondent charged in juvenile court who stipulates to his date of birth for purposes of jurisdiction does not thereby relieve

the State of proving his age by means other than the stipulation when age is an element of the offense.” 124 Wn.App. at 884.

4. The remaining evidence was insufficient to establish made false or misleading statements. In the absence of evidence regarding the appellant’s true name and date of birth, the State failed to prove the biographical information provided was false or misleading. Furthermore, in the absence of sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that the name and date of birth were false or misleading, the conviction can not stand.

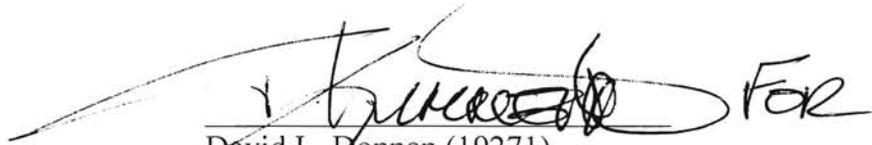
“The double jeopardy clause of the Fifth Amendment to the U.S. Constitution protects against a second prosecution for the same offense, after acquittal, conviction, or a reversal for lack of sufficient evidence.” State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) citing North Carolina v. Pearce, 395 US 711, 717, 89 S. Ct. 2072, 2076, 23 L.Ed.2d 656 (1969). Because the State failed to prove the essential elements of charge, this Court should reverse the conviction.

E. CONCLUSION.

Appellant requests this Court reverse his adjudication of guilt for providing false or misleading statement and remand to the juvenile for further proceedings as appropriate.

DATED this 18th day of December, 2012.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "David L. Donnan", with a large, sweeping flourish extending to the left and the word "For" written to the right.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

| | | |
|----------------------|---|---------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | NO. 68813-8-I |
| v. |) | |
| |) | |
| ALI A., |) | |
| |) | |
| Juvenile Appellant. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF DECDEMBER, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF DECEMBER, 2012.

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