

72712-5

FILED
August 28, 2015
Court of Appeals
Division I
State of Washington

72712-5

NO. 72712-5-I

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

STATE OF WASHINGTON,

Respondent,

v.

CURTIS RODGERS, JR.,

Appellant.

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

The Honorable Monica Benton, Judge

REPLY BRIEF OF APPELLANT

JENNIFER WINKLER
Attorney for Appellant

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A. ISSUES IN REPLY

1. Where the State fails to allege or demonstrate the incorrectness and harmfulness of controlling precedent, should this Court adhere to that precedent?

2. Based on controlling precedent, should the appellant's conviction be reversed for insufficient evidence?

B. ARGUMENT IN REPLY

CONSISTENT WITH PRECEDENT, THIS COURT SHOULD REVERSE RODGERS'S CONVICTION.

The State appears to acknowledge that State v. Pella, 25 Wn. App. 795, 612 P.2d 8 (1980) requires reversal of Rodgers's conviction but then seems to argue this Court should not follow it. This Court should adhere to its precedent. The standard for overruling Court of Appeals precedent is strict: The earlier decision must be *both* incorrect *and* harmful. State v. Stalker, 152 Wn. App. 805, 808, 219 P.3d 722 (2009). The State does not embrace this requirement but rather announces its intention to sidestep it. Brief of Respondent (BOR) at 15 (citing to case announcing split among panels of this Court as to emerging issue). In any event, the State does not come close to making the necessary showing under either required prong.

First, the State cannot demonstrate Pella was incorrectly decided. The State observes that "official proceeding" is defined broadly under

Washington law, and this undermines Pella. BOR at 10. While “official proceeding” may be defined broadly in terms of the types of proceedings covered by the statutes, its definition—applicable since well before Pella was decided—does not to speak to *when* a proceeding begins. RCW 9A.72.010(4); 1975 1st ex.s. c 260 § 9A.72.010. Pella clearly and concisely answers that question. As the State acknowledges, moreover, that decision has never been overruled by a court or undermined by subsequent legislative action. BOR at 16; see Stalker, 152 Wn. App. at 813 (where statutory language remains unchanged after a court’s decision, the court will not overrule clear precedent interpreting the same statutory language).

The State also attempts to distinguish, on their facts, two cases cited in Pella as exemplars of the general rule that official proceedings begin with the filing of a complaint. 25 Wn. App. 795 (citing State v. Howe, 247 N.W.2d 647 (N.D.1976); United States v. Metcalf, 435 F.2d 754 (9th Cir. 1970); see BOR at 12-14 (comparing facts of those cases to Rodgers’s case). A close reading of those cases reveals they stand for what Pella says they stand for. E.g., Howe, 247 N.W.2d at 653; Metcalf, 435 F.2d at 756. The State’s argument thus fails to undermine the general rule adopted by this Court in Pella. Cf. State v. Barber, 170 Wn.2d 854, 864, 248 P.3d 494 (2011) (precedent may be deemed “incorrect” if it relies

on authority to support a proposition that the authority itself does not actually support). This attempt to evade the “incorrectness” requirement should also be rejected.

Second, the State makes no attempt to argue the Pella decision is harmful. BOR at 15. Nor could the State show harmfulness, considering its acknowledgement that the alleged acts could have been prosecuted under a different portion of the statute. BOR at 16.¹ The State points to no negative consequence of adherence to this 35-year-old precedent.

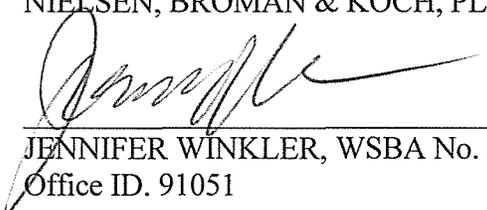
C. CONCLUSION

For the reasons stated above and in Rodgers’s opening brief, this Court should reverse his conviction based on insufficient evidence.

DATED this 28TH day of August, 2015.

Respectfully submitted,

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¹ Cf. Barber, 170 Wn.2d at 865 (analyzing decisions in which precedent was overruled and noting, as common thread in analysis of harmfulness, “decision’s detrimental impact on the public interest”).

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

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| STATE OF WASHINGTON |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | COA NO. 72712-5-1 |
| |) | |
| CURTIS RODGERS, JR., |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28TH DAY OF AUGUST 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CURTIS RODGERS, JR.
DOC NO. 721910
WASHINGTON STATE PENITENTIARY
1313 N.13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF AUGUST 2015.

x *Patrick Mayovsky*