No. 42938-II
Pierce County Superior Court No. 10-1-03148-2

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

STATE OF WASHINGTON,
Plaintiff-Respondent,

v.

REX ALAN MCNICOL,
Defendant-Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable John R. Hickman, Judge

APPELLANT'S REPLY BRIEF

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I. ASSIGNMENTS OF ERROR

In this Reply, Mr. McNicol reaffirms the Assignments of Error included in his opening brief, while focusing his argument in this brief on the following two Assignments of Error:

1. There was insufficient evidence to sustain the conviction of First Degree Perjury.

2. In a case of perjury, where witness credibility is paramount, the trial court erred in preventing testimony regarding an essential witness's previous conviction for a crime of dishonesty.

II. SUMMARY OF ARGUMENT

A defendant should not be convicted of perjury where the state fails to present witness testimony that is positive or directly contradictory of anyone's oath. In this case, the State pursued perjury charges against two deputies whose testimony did not conform with the prosecutors' preferred version of events. They had no motive to lie. In fact, they knew a criminal case against a felon for unlawful possession of a firearm would likely fail, if they told the truth as they remembered it to be.

In the perjury trial, the court below mistakenly withheld critical impeachment evidence from the jury regarding one the state's two witnesses' previous conviction for a crime of dishonesty. Because a reasonable juror could have used such evidence to deem the state's case as not credible, the verdict on appeal should be reversed and the underlying charges should be dismissed with prejudice.

III. STATEMENT OF THE CASE

Mr. McNicol reaffirms and incorporates by reference the Statement of the Case contained in his opening brief. For purposes of this Reply, McNicol directs the Court's attention to the following facts.

Rex Alan McNicol was charged with one count of first degree perjury, alleging to have occurred on March 16, 2010. CP 1-2. The state alleged that McNicol made a false statement under oath during a CrR 3.6 hearing when he stated that he did not enter Robert Barham's home to retrieve a firearm. CP 3.

At trial, as the State's only two witnesses called in its effort to present direct testimony sufficient to sustain perjury charges against the two

deputies, the State offered Robert Barham and his girlfriend, Doris "Dorey" Resch, who provided two entirely different stories on how events unfolded.

At trial, Mr. Barham testified that the deputies told him that they were at his home to conduct a "child welfare check" and he admitted that he had a gun in the home (RP 232, 233), which he said had belonged to his father who recently passed away (RP 235). At some point in the welfare check at the home, Barham claimed that he walked a deputy back to his bedroom, where he says somehow the deputies took possession of the rifle, one taking it from the other. RP 241. Barham explained that he was "pretty sure that's how it happened." RP 242. Mr. Barham says they stepped back onto the porch where he was arrested for unlawful possession of a firearm. CP 18; RP 241, 242.

Before Barham's firearm charge went to trial, despite the prosecutor's arguments and the evidence confirmed by three witnesses (the two deputies and Barham himself) that the deputies were at the home for the purposes of conducting a 'welfare check', and Barham's testimony to the effect that he consented to the officer's taking possession of his rifle, Judge Buckner granted Barham's motion and suppressed the rifle as evidence. RP 146.

In July, 2010, the State filed charges against both deputies, for Perjury in the First Degree. CP 1-5.

In the perjury trial, Defense counsel argued that evidence regarding Barham's credibility was of the utmost importance in this case. However, in a pre-trial ruling, the trial judge prohibited testimony regarding Mr. Barham's prior conviction of a crime of dishonesty. RP 93.

Barham's former girlfriend, Doris Resch, who was in the mobile home when the deputies visited for the welfare check on her son back in 2009, also testified at the trial. Her account of events varied greatly from that described by Mr. Barham. According to Ms. Resch, "we told them that, yeah, there was one [a gun/rifle] in the back closet. Then that's when they asked Rob to step outside and onto the porch. They handcuffed him... put him in the car or truck." RP 257. She confirmed that deputies were at the mobile home for the purpose of doing a welfare check on her son. RP 261. Ms. Resch stated that the deputies "immediately" arrested and handcuffed Barham after they learned that there was a gun in the house. RP 264. In her version of events, *after* Barham was arrested, Ms. Resch, not Barham, took the deputies back to retrieve the gun. RP 264. She could not recall if she handed the gun to the deputy or if he reached in the closet and got it. RP 269. Her testimony was in direct conflict with

Mr. Barham's, who, according to Ms. Resch, was already under arrest and in handcuffs when she claims to have directed the deputies to where the gun was located.

McNicol testified that he believed his testimony at the hearing was the truth with all his heart. RP 452. He consistently explained that Barham was told the visit was for a welfare check, that Barham admitted to having a weapon in the home, and that Barham brought him the rifle. McNicol repeated that his recollection was different from that shown in Montgomery's report, with respect to entering the home to get the rifle. McNicol recalled receiving the gun on the porch. RP 446.

The jury returned a guilty verdict against both defendants, McNicol and Montgomery. CP 373-386. This appeal follows. CP 387-403.

IV. ARGUMENT

A. THE STATE FAILED TO MEET ITS BURDEN OF PROOF TO SUSTAIN A CONVICTION FOR PERJURY IN THE FIRST DEGREE.

As the court stated in *United States v. Brumley,* 560 F.2d 1268, 1277 (5th Cir.1977), "[e]specially in **perjury** cases, defendants may not

be assumed into the penitentiary." cited in *State v. Stump*, 73 Wash.App. 625 (Div. 3, 1994).

Mr. McNicol's perjury conviction should be reversed due to the insufficiency of the evidence, a constitutional defect of the highest magnitude. First degree perjury requires a heightened standard of proof from other crimes. To obtain a conviction, the State must prove beyond a reasonable doubt that: 1) the statement was made in an official proceeding, under oath; 2) the statement was false; 3) the defendant knew the statement to be false; and 4) the statement was material to the outcome of the case. RCW 9A.72.020(1).

"Perjury requires a higher measure of proof than any other crime known to the law, treason alone excepted." *State v. Wallis*, 50 Wn.2d 350, 311 P.2d 659 (1957). The evidence and facts in the record below was shown though the course of the trial testimony to be insufficient, not credible, and certainly not evidence which is "positive" and "directly contradictory" of defendant's testimony under oath.[1]

Instead of positive, and directly contradictory evidence, the state's witnesses created a classic swearing contest that boiled down to: 1)

[1] In fact, in explaining his ruling to deny the pretrial motion to dismiss the charges Judge Orlando explained: "if the case were tried to me with the facts presented, I would find the defendants not guilty." CP 197.

(McNicol and Montgomery) B gave Mc the gun; 2) (Barham) Mc went with B to get the gun; 3) (Doris Resch) R went to get the gun because B was "immediately" arrested when he admitted there was a gun in the home.

A superior court judge acknowledged that the facts of this case compounded tragedy upon tragedy, and never should have been part of a suppression hearing regarding how Barham's rifle was taken into evidence.[2] The prosecutor lost that hearing, and the judge who ruled on the Knapstad motion for the deputies' subsequent perjury trial implied that the suppression hearing only occurred in error, an error that someone should have noticed, presumably the prosecutor. Instead, the evidence should have been presented to a jury to decide on the possession charge against Mr. Barham. There, a jury could have weighed the credibility of 4 witnesses, the two deputies plus Mr. Barham and Ms. Resch, to decide if a crime occurred. Instead, at the suppression hearing, the fact finder in that forum, a judge, assessed the credibility of 3 witnesses with stories that varied from one another, though all agreed that Barham admitted to

[2] Judge Orlando observed: "It was actually a suppression hearing, a 3.6 hearing, which looking at the docket in the Barham case probably should have never been set for hearing anyway because it was never properly noted. There was a motion -- I mean there was a memorandum filed, but no motion that was filed. There was never a declaration by the client that would have formed a basis to even set the hearing. So that's kind of a compounding tragedy upon tragedy here." CP at 70.

possession of a weapon, and voluntarily consented to cooperate with deputies as part of their welfare check. Conflicting testimony -- especially that which deviates from a prosecutor's version of events -- does not, and should not, serve as the basis for a perjury charge.

In this case, the defendants were charged with perjury for providing testimony that they each believed to be true, and which the prosecutor argued still supported taking the rifle into evidence, even if every single aspect of the deputies' testimony in the suppression hearing did not square with the prosecution's charging documents against Mr. Barham. To win the case at all costs against a known felon, some might presume that a police officer's incentive would be to tailor testimony to conform with the version of events promoted by the prosecutor. McNicol and Montgomery did not. Instead, they told the truth, knowing that doing so may place the case in jeopardy.

Witnesses should always be encouraged to tell the truth and state what they believe the truth to be, without fear of prosecution for perjury if their testimony does not advance the state's cause in prosecuting a particular defendant. Other courts have noted the absence of any legal precedent supporting a contention that a witness commits perjury when he or she gives testimony that does not support the prosecution's theory of

the case. See *Dixon v. Conway*, 613 F.Supp. 2d 330, at 374 (W.D.N.Y 2009). If the deputies' convictions are upheld in this case, Washington may be the first state to establish precedent that would actually support perjury charges for witnesses who dare provide testimony in conflict with the prosecution's case.

Mr. McNicol's testimony was the truth as he believed it to be. The state's perjury charge rests on differences in his testimony and that of biased witnesses, and inferences for which there is no concrete factual underpinning, especially on the requirement to show that Mr. McNicol knew his testimony was untrue. All of the witnesses to the Deputies' call out to Mr. Barham's mobile home agree on major subjects, including who was there, what the purpose of the visit was, that Mr. Barham admitted that he had a firearm in the house, and that the deputies were inside the mobile home for part of their visit to perform their welfare check. Some of the details in testimony provided by the Deputies and the state's two witnesses were different, like who retrieved the gun, the sequence of events, and where the parties were located when they had various discussions or answered questions.

The state asserts that the perjury conviction should stand because McNicol's testimony differs in some fashion from that of Mr. Barham, a felon with a prior conviction for a crime of dishonesty, and his girlfriend, Ms. Resch. But, the evidence in this case does not and should not give rise to a perjury conviction. Federal Courts hold that "even a direct conflict in testimony does not in itself constitute perjury." *United States v. Gambino*, 59 F.3d 353, 365 (2d Cir.1995); See *United States v. Bortnovsky*, 879 F.2d 30, 33 (2d Cir.1989); see also *United States v. Sanchez*, 969 F.2d 1409, 1413 (2d Cir.1992). Alleged instances of "false" testimony that amount to no more than inaccuracies or inconsistencies in testimony resulting from confusion, mistake, or faulty memory, has been consistently held not to constitute perjury in Federal Courts, including the Supreme Court. *Dixon*, at 390; *United States v. Monteleone,* 257 F.3d 210, at 219; *United States v. Dunnigan,* 507 U.S. 87, at 94, 113 S.Ct. 1111 (1993).

In this case, none of the stories were entirely consistent with one another. The precise sequence of events was not "positive". And, the state's key witness, Mr. Barham, could only say that he was "pretty sure" he described how things really happened. Such inconsistencies should not

form the basis for perjury against either of the deputies; just as perjury charges were not raised against the state's two witnesses for their conflicting testimony. Ms. Resch's account of events is impossible to reconcile with Mr. Barham's, if he was "immediately" placed under arrest, cuffed, and taken to a police vehicle after admitting that a firearm was in the home.

The evidence in the record is far below that which is, or should be, required in a perjury case. It is insufficient to support a conviction for first degree perjury.

B. THE TRIAL COURT ERRED IN BARRING TESTIMONY REGARDING A KEY PROSECUTION WITNESS'S PREVIOUS CONVICTION FOR A CRIME OF DISHONESTY.

Possession of stolen property is a crime of dishonesty. *State v. McKinsey*, 116 Wn.2d 911, 913, 810 P.2d 907 (1991). Prior convictions for crimes of dishonesty are admissible for impeachment purposes. ER 609(a)(2). If a prior conviction falls within the scope of ER 609(a)(2), it is *per se* admissible and the court is not required to balance its value against its prejudicial effect. *State v. Brown*, 113 Wn.2d 520, 532-33, 782 P.2d 1013 (1991).

In this case, Barham's prior conviction of a crime of dishonesty (Attempted Possession of Stolen Property in the Second Degree) occurred on March 7, 2001. RP 88-90. The State filed its Information, formally pursuing perjury charges against the defendants, in July 26, 2010. CP 1-2. Under ER 609(a), Barham's prior conviction would have been *per se* admissible without any considerations as to time, had defendant's case gone to trial at some point before March 7, 2011. The trial below occurred just several months later, in September of 2011. In circumstances such as those presented in this case, the trial court erred by excluding such evidence. Excluding evidence in cases such as this solely based on the 10 year time limit, which had not expired until well after the time charges were filed against the defendants, might serve to encourage tactical, manipulative strategies by both sides involved in criminal cases in order to obtain "bright-line" rulings in their favor, one way or the other, excluding evidence that they see as hurtful to their particular case.

In its brief, the state essentially implies that in the mind of a jury, a criminal history is a criminal history. The state minimizes the nature of the evidence withheld from the jury, seeking to convince this court, as it did the trial judge, that a history of drug offenses has the same impact on a reasonable jury as any other crime, including those that show a witness to

be dishonest. Such is not the case. Crimes of dishonesty are -- in fact and law -- in a league of their own. And, the significance of such convictions is heightened when it can (and should) impact the credibility a jury might assign to a key witness in a perjury trial.

Mr. Barham's conviction of a crime of dishonesty, like the term "dishonest" itself, implies the act or practice of telling a lie, or of cheating, deceiving, and stealing. Drug crime convictions, like those revealed to the jury about Mr. Barham, do not. The Washington Supreme Court has noted with favor that former Chief Justice Burger once observed:

> "[i]n common human experience acts of deceit, fraud, cheating, or stealing, ... are universally regarded as conduct which reflects adversely on a man's honesty and integrity." .... The act of taking property is positively dishonest ... [t]he sole purpose of impeachment evidence is to enlighten the jury with respect to the defendant's credibility as a witness. This purpose is met by allowing admissibility of prior convictions evidencing dishonesty [...] *State v. Ray*, 116 Wash.2d 531, 545 (1991).

The *Ray* holding applied to a conviction of dishonesty involving a defendant as a witness, where the protections and sensitivities are heightened well above those that are commonly afforded a witness in a case who is not on trial themselves. Virtually all of the cases cited by the state to support its contention that the jury should not or need not hear of witness-Barham's conviction of a crime of dishonesty were cases where

the defendant's conviction history was in question, not that of a key witness being used to support a perjury charge against a defendant.

As of the date of this brief, neither the State or Mr. McNicol have been able to identify a reported decision involving perjury charges where a key state witness's prior conviction of a crime of dishonesty was withheld from the jury. The very essence of the distinction applied to crimes of "dishonesty" versus other general crimes would be rendered meaningless if a jury in a perjury case is never told that a key state witness was himself adjudged to be "dishonest" in the form of a prior criminal conviction.

The state cites to cases where prior convictions were 17, 18 and 20 years old, to support their rigid application of a 10 year rule, even where the conviction of a crime of dishonesty for a key witness (one of two expressly required by the perjury statute) was less than 10 years old when charges were filed.

None of the cases cited in the state's brief address key-witness credibility in a perjury case. Instead, the cases involve prior conviction histories where robbery, arson, drug, rape, assault and other non-perjury convictions were at issue.

Perjury is different, and the burden of proof is greater than for any crime but treason. The distinction afforded "crimes of dishonesty" is

rendered meaningless if it is not recognized as a piece of information that would certainly be of critical importance in any case of perjury -- the criminal charge that rests almost entirely on the credibility of witnesses providing testimony that differs in some way from that of the defendant, not DNA samples, fingerprints, tire treads, or other forms of physical evidence available in so many other criminal cases.

If the state's concern was with the type of crime of dishonesty, a limiting instruction from the judge could have corrected the problem, i.e. the jury could have learned that he had a prior conviction of another crime considered by Washington courts to be a crime of dishonesty.

In the record below, the testimony of Barham and Resch -- the state's only two witnesses used to present "direct and contradictory evidence" required under the perjury statute -- was contradictory on major and minor points, and evidence that affirmatively establishes that one of the two required witnesses, Mr. Barham, was convicted of a crime of dishonesty could have influenced a reasonable juror. If the jury found that Mr. Barham was NOT credible, it might have acquitted the defendant. The trial court's error, suppressing evidence of Bartram's conviction of a crime of dishonesty, especially here in a case of perjury, was not harmless and requires reversal.

Finally, the State's brief bolster's the relevance of Barham's dishonesty record in the eyes of the jury. As support for excluding it as evidence the jury could hear, the state essentially argues that the court should not allow the jury to learn of its key witness's record of dishonesty in a case where it is trying to prove that the defendants committed perjury because if the jury knew about Barham's conviction, the state may not get a conviction because so many jurors were victims of/or were personally familiar with the dishonesty crime at issue.[3] That is not a basis to exclude such pertinent evidence, especially where the nature of the crime is one that is "universally regarded as conduct which reflects adversely on a man's honesty and integrity."

In a case of perjury, evidence which reflects on honesty and integrity should be paramount, and never excluded from consideration by the jury.

V. CONCLUSION

Perjury charges require the strictest proof of all crimes but treason. Given this statutory requirement, the failure by the state to present credible evidence that was positive and directly contradictory of Mr. McNicol's

[3] See p. 31 of the state's brief, where it admits that admission of Barham's dishonesty-conviction would have had a "substantial" effect on the jury.

oath, and the court's failure to inform the jury of a key witness's prior conviction of a crime of dishonesty, was prejudicial to McNicol. The court erred by allowing the case to go to the jury and by failing to share a key witness's conviction of a crime of dishonesty with the jury.

For the reasons explained above, this court should reverse Mr. McNicol's conviction for perjury and dismiss the charges with prejudice.

DATED this 5th day of November, 2012.

Respectfully submitted,

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON Appellee, v. REX MCNICOL, Appellant.	No. 42938-1-II DECLARATION OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I caused to be served by ABC Legal Messengers a copy of the attached "Reply Brief of Appellant" upon the following counsel of record:

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