State v. George

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JUDGES: Concurring: Marlin Appelwick, Susan Agid.

PUBLISHED IN PART

Keith George was convicted of two misdemeanor no-contact order violations, one occurring in Kent and the other in Renton, and one charge of felony harassment of his wife, Julianna. George did not attend two hearings on the Renton charge because he was in custody elsewhere on other charges; each time, the court reset the speedy trial clock to zero. We hold this did not violate George's right to a speedy trial.

In the unpublished portion of this opinion we also hold that George's conviction on the Kent charge did not violate double jeopardy principles, that sufficient evidence supported both misdemeanor convictions, and that juror bias did not taint the deliberations. We thus affirm the misdemeanor convictions. We accept the State's concession of error as to the felony harassment conviction, however, because a jury instruction omitted an essential element of the crime. We therefore vacate that conviction and remand for retrial.

BACKGROUND

While Keith and Julianna George[1] were living together in California, George physically abused Julianna, and she obtained a restraining order against him. The order was issued on July 10, 2001 in San Joaquin County, and was valid for three years in all 50 states. George was served with the order on November 19, 2001.

Thereafter, George and Julianna reunited and relocated to Seattle. George's abusive behavior continued, and in July 2003, Julianna moved into a domestic violence shelter.

On December 22, 2003, George attempted to visit Julianna at her workplace. As a result of that visit, George was charged in Renton with violation of the California restraining order. George was arraigned in Renton Municipal Court on February 4, 2004.

Ten days later, George spoke to a friend, Carina Borjas, and made threats to kill Julianna. Borjas told Julianna of the threats. On February 21, 2004, George appeared at Julianna's domestic violence shelter. As a result of that visit, George was charged in Kent Municipal Court with violation of the California restraining order. Three days later, George was charged in King County Superior Court

with felony harassment by threats to kill, and with the misdemeanor charge already pending in Kent.

On April 28, 2004, Kent Municipal Court dismissed the Kent charge with prejudice for insufficient evidence of personal service. The superior court charge on the same violation remained pending.

On June 14, 2004, Renton Municipal Court dismissed the Renton charge to allow it to be refiled in superior court with the felony. On July 13, 2004, the State amended the King County information to add the Renton misdemeanor charge. George made a speedy trial objection. The court informed George that briefing would be required to address the speedy trial objection, but none was ever submitted. Trial began that day on all three charges, and George was convicted on all three charges.

ANALYSIS

Time for Trial Violation

George contends his conviction on the Renton offense violated speedy trial rules. A defendant must be brought to trial within 60 days of his arraignment if he is in custody and within 90 days if he is not.[2] When the time for trial rule is violated, the remedy is dismissal with prejudice.[3]

We need not belabor the details of George's custody status at various times, or the various hearings and dates underlying George's argument. Simply stated, George was in custody elsewhere on other municipal court charges (first in the Kent jail, then in the Regional Justice Center) and so did not appear on two occasions when pretrial hearings were scheduled in Renton municipal court. Each time, the Renton court reset the speedy trial time clock to zero. Eventually, on June 15, the Renton court dismissed the charge to allow King County prosecutors to file it in superior court.

George contends that because he was in custody, he did not fail to appear for purposes of the time for trial rule, and the trial court erred in resetting the commencement dates. We disagree.

The impact of a defendant's failure to appear at a hearing on the time for trial is governed by CrRLJ 3.3(c)(2)(ii), which since 2003[4] has provided as follows:

(2) Resetting of commencement date. On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. . . .

(ii) Failure to appear. The failure of the defendant to appear for any proceeding at which the defendant's presence was required. The new commencement date shall be the date of the defendant's next appearance.[5] Under the plain language of this section, each failure to appear resets the speedy trial clock.[6]

Essentially George contends that because a defendant in custody must depend upon the efforts of the

State for his or her appearance in court, we must interpret CrRLJ 3.3(c)(2)(ii) as imposing a duty of good faith and due diligence upon the municipality to ensure the defendant's presence, absent which a failure to appear cannot extend the speedy trial calculation. In the circumstances presented, we reject this argument.

State v. Guay[7] addresses a different rule, but is nonetheless instructive. Interpreting former CrRLJ 3.3(g)(5),[8] under which time spent incarcerated in another county was excluded from the speedy trial calculation, the court considered whether a municipality should have a duty like that imposed on the State in felony cases,[9] such that if the location of the defendant is known and he or she is amenable to service of a warrant, the municipality must exercise due diligence to obtain his or her presence.[10] The court refused to impose such a duty, holding that although courts of limited jurisdiction have inherent authority to issue transport orders, their authority does not extend to compelling the holding county to release the defendant.[11] The court noted that statutes exist to facilitate transfers of felony defendants, but the legislature has created no mechanism by which courts of limited jurisdiction may compel the transfer of a misdemeanant held by another jurisdiction.[12] Under these circumstances, the court held that time spent in jail in another county was properly excluded from the speedy trial calculation under CrRLJ 3.3(g)(5).[13]

As a court of limited jurisdiction, Renton Municipal Court had no power to require George's transport to Renton while he was held by other jurisdictions on other charges. In practice such transports are common, but they depend upon voluntary cooperation and uncertain resources, and are thus unreliable. The only way to ensure George could participate in his trial preparation was to reset the commencement date. Under the present rule, this is the required result even where a defendant fails to appear because he or she is held in custody by another jurisdiction.[14] There was no speedy trial violation.[15]

George's conviction for the Renton no-contact order violation is affirmed. The balance of this opinion having no precedential value, the panel has determined it should not be published in accordance with RCW 2.06.040. Double Jeopardy. Article I, section 9 of the Washington Constitution and the Fifth Amendment of the United States Constitution prohibit the State from twice putting a defendant on trial for the same offense.[16] George argues that conviction on the Kent misdemeanor charge violated double jeopardy because Kent Municipal Court dismissed the charge with prejudice before he was convicted on the same charge in King County Superior Court. We disagree.

At a pretrial hearing on the Kent charge, the prosecutor offered an exhibit related to proof of service. The municipal judge ruled the exhibit insufficient and 'dismisse{d} {the} restraining order violations with prejudice'[17] on grounds the city had not met its burden of proving personal service. George was thereafter tried and convicted of the same offense in King County Superior Court.

The prohibition against double jeopardy applies if jeopardy previously attached or previously terminated and the defendant is again in jeopardy for the same offense.[18] Jeopardy does not attach

until a defendant is 'put to trial before the trier of the facts, whether the trier be a jury or a judge.'[19] Thus jeopardy attaches when the jury is empanelled, or when the court begins to receive evidence.[20] Jeopardy does not attach 'merely because a charge is filed or pretrial proceedings are held.'[21]

Here, trial had not begun. Jeopardy did not attach. Further, even where a trial has been conducted, jeopardy does not attach where the ground for dismissal is not an element of the offense.[22] Proof of personal service is not an essential element of misdemeanor violation of a no-contact order.[23]

George relies on United States v. DiFrancesco[24] for the proposition that double jeopardy prohibits retrial when a charge is dismissed with prejudice. But DiFrancesco is inapt. The question there was whether double jeopardy barred the imposition of an increased sentence.[25] George also relies on Burks v. United States[26] and State v. DeVries.[27] These cases are equally unavailing. In each, double jeopardy was implicated because the defendant was subjected to a trial where evidence of the elements of the offense was evaluated.[28] Whatever effect the with prejudice dismissal may have had on the Renton court's ability to reinstate the charge, it was not a bar to proceedings on the same offense in superior court. Double jeopardy did not bar the superior court trial of the Kent restraining order violation.

Validity of the California Restraining Order. After she moved to the domestic violence shelter, Julianna obtained a temporary protection order in King County Superior Court. But the court later refused to enter a permanent order, because Julianna admitted she had initiated contact with George after the temporary order was entered. The order denying the permanent order provided that any previously entered temporary order expired immediately.

George argues[29] the California restraining order underlying his misdemeanor convictions was no longer valid because when the November 2004 King County order terminated any previously entered temporary order, it terminated the California order as well as the temporary King County order.

The validity of a restraining order is a legal question to be decided by the court.[30] Although validity is not an implied element of the crime of violating a no-contact order, the court must determine as a threshold matter whether the order alleged to be violated is applicable and will support the crime charged.[31]

The California order was valid for three years in all 50 states, and expired on July 10, 2004, well after George committed his offenses. 'Any protection order issued by the court of one State . . . shall be accorded full faith and credit by the court of another State . . . and enforced as if it were the order of the enforcing State.'[32] George cites no authority for the proposition that a superior court in Washington can summarily terminate an unexpired California protection order.[33] Further, the California order was not a temporary order.[34] The Washington order denying Julianna's request for a permanent Washington order had no effect on the permanent California order. The trial court did not err in finding the California order applicable to George's offenses.

Juror Bias

A member of the jury in George's trial was employed as a correctional officer at the King County jail where George was incarcerated during trial. This fact was discussed at trial. The juror was examined individually, and reported that indeed George looked somewhat familiar and that the juror may have transported him to court at some point. The juror affirmed his ability to be impartial, and no party challenged him, although challenges were available.[35] In a statement of additional grounds for review, George appears to allege juror bias on grounds that the juror had access to his jail records. But George points to nothing in the record to support this allegation. It thus cannot be considered on direct review.[36] Felony Harassment. The State concedes that George's felony harassment conviction must be reversed because the jury instructions omitted an essential element of the crime, and the error was not harmless.[37] We accept the State's concession of error.

George contends, without citation to authority, that double jeopardy prohibits retrial on the felony harassment charge. He is incorrect. A defendant may be retried after reversal of a conviction so long as the reversal is not for insufficiency of the evidence.[38]

We reverse and remand for retrial on the felony harassment charge.

Affirmed in part, reversed in part and remanded.

1. Because the appellant and the victim share the same last name, we occasionally refer to Julianna by her first name for purposes of clarity.

2. CrRLJ 3.3(b)(1), (2).

3. CrRLJ 3.3(h).

4. The comments to the 2003 amendments to CrR 3.3 encourage us to avoid judicial gloss on these rules: Task Force members are concerned over the degree to which the time-for-trial standards have become less governed by the express language of the rule and more governed by judicial opinions. To address this concern, the task force has tried to fashion a rule that is simpler, has fewer ambiguities, and covers more of the field of time-for-trial issues, with the hope that a reader of the rule will have a better understanding of the overall picture than currently exists. Time-for-Trial Task Force Final Report, sec. I(B) (Wash. Courts 2002), http://www.courts.wa.gov/programs orgs/pos tft.

5. (Emphasis added).

6. The rule makes some exceptions not relevant here. For example, CrRLJ 3.3(e)(6) provides that periods when the defendant is held outside the county or is in federal custody are excluded from the speedy trial calculation. A failure to appear during such a period thus extends, but does not reset, the time for trial under CrRLJ 3.3(c). Also excluded from the rule is a failure to appear resulting from unavoidable or unforeseen circumstances beyond the control of the court or

parties. CrRLJ 3.3(e)(8).

7. 150 Wn.2d 288, 76 P.3d 231 (2003).

8. Former CrRLJ 3.3(g)(5) (amended effective 9/1/03) excluded '{t}he time during which a defendant is detained in jail or prison outside the county in which the defendant is charged or in a federal jail or prison and the time during which a defendant is subjected to conditions of release not imposed by a court of the State of Washington.' This provision is identical to CrRLJ 3.3(e)(6).

9. See State v. Anderson, 121 Wn.2d 852, 865, 855 P.2d 671(1993) (State must exercise due diligence to bring a defendant to superior court where a mechanism exists to do so such as the interstate agreement on detainers).

10. Guay, 150 Wn.2d at 295.

11. Id. at 304.

12. The court noted: 'The absence of . . . a mechanism in the case of misdemeanors is . . . significant because it leaves no guidance as to the allocation of costs or burdens involved in the transport of misdemeanant defendants . . . . This type of allocation is legislative in nature and exceeds the authority of this court.' Id. at 301.

13. Id.

14. We express no opinion as to whether a showing of due diligence is required where a defendant is held by the same jurisdiction in which the charges are pending.

15. We note that even if we adopted George's speedy trial calculation, George waived the issue by failing to object to the trial date. George was arraigned on February 4, 2004. Under George's calculation, his 90-day time for trial expired on May 4, 2004. On April 13, 2004, a jury trial was scheduled for May 6, 2004, two days after the 90-day time for trial expired. Contrary to the requirements of CrRLJ 3.3(d)(3), George did not object to the trial date, thus waiving any objection.

16. In re Percer, 150 Wn.2d 41, 49, 75 P.3d 488 (2003).

17. Br. of App., App. A at 4.

18. State v. Heaven, 127 Wn. App. 156, 160-61, 110 P.3d 835 (2005).

19. Serfass v. United States, 420 U.S. 377, 391, 95 S.Ct. 1055, 43 L.Ed. 2d 265 (1975) (quoting United States v. Jorn, 400 U.S. 470, 479, 91 S.Ct. 547, 27 L.Ed. 2d 543 (1971)).

20. United States v. Martin Linen Supply Co., 430 U.S. 564, 569, 97 S.Ct. 1349, 51 L.Ed. 2d 642 (1977).

21. State v. Higley, 78 Wn. App. 172, 179, 902 P.2d 659 (1995).

22. See City of Spokane v. Lewis, 16 Wn. App. 791, 793, 559 P.2d 581 (1977) (double jeopardy does not bar retrial where trial court's grant of a motion to dismiss for lack of proof involved venue, a nonelement of the offense).

23. City of Auburn v. Solis-Marcial, 119 Wn. App 398, 400, 79 P.3d 1574 (2003).

24. 449 U.S. 117, 129, 101 S.Ct. 426, 66 L.Ed. 2d 328 (1980).

25. Id. at 138-39.

26. 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed. 2d 1 (1978).

27. 149 Wn.2d 842, 72 P.3d 748 (2003).

28. See Burks, 437 U.S. at 10 (court's decision represented a resolution of some or all of the factual elements of the offense charged); DeVries,149 Wn.2d at 853 (insufficient evidence to establish essential elements of knowing delivery of a controlled substance).

29. Below, George argued only that there was no proof of service of the California order.

30. We review questions of law de novo. Hue v. Farmboy Spray Co., 127 Wn.2d 67, 92, 896 P.2d 682 (1995).

31. State v. Miller, No. 76156-6, 2005 Wash. LEXIS 930 at *12-14 (Dec. 1, 2005).

32. 18 U.S.C. sec. 2265; People v. Perez, 734 N.Y.S.2d 398, 401 (N.Y. Misc. 2001).

33. State v. Logan, 102 Wn. App. 907, 911 n.1, 10 P.3d 504 (2000) ('Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after a diligent search, has found none.').

34. The title of the California order is 'Restraining Order After Hearing (Domestic Violence Prevention).' Ex. 3. Nowhere on the order does the word 'temporary' appear.

35. The juror also stated that he had 'zero ability as a lie detector' and that words and gestures would, standing alone, not be evidence of guilt beyond a doubt in a threat case. Report of Proceedings (July 14, 2004) at 66-67.

36. RAP 10.10(c).

37. See State v. C.G., 150 Wn.2d 604, 612, 80 P.3d 594 (2003) (instruction on victim's reasonable belief that defendant would carry out a threat to kill is an essential element of felony harassment); State v. Mills, 154 Wn.2d 1, 15, 109 P.3d 415 (2005)

(omission of this essential element is reversible error).

38. State v. Brown, 127 Wn.2d 749, 757, 903 P.2d 459 (1995); see also State v. Corrado 81 Wn. App. 640, 647, 915 P.2d 1121 (1996) ('Insufficient evidence is equivalent to an acquittal, because no rational trier could find all essential elements of the crime charged.') (emphasis added).