State v. Flores

Court of Appeals of Washington, Division Three

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No. 27678-3-III

Reporter
2010 Wash. App. LEXIS 469

THE STATE OF WASHINGTON, *RESPONDENT*, v. ADRIAN CALDERON FLORES, *APPELLANT*.

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Subsequent History: Reported at *State v. Flores, 2010 Wash. App. LEXIS 541 (Wash. Ct. App., Mar. 9, 2010)*

Prior History: [*1] Appeal from Grant Superior Court. Docket No: 08-1-00561-8. Judge signing: Honorable Ken L Jorgensen.

Counsel: Janet G. Gemberling, Julia Anne Dooris, Gemberling & Dooris PS, Spokane, WA, for Appellant(s).

D. Angus Lee, Grant County Prosecuting Attorney, Ephrata, WA, for Respondent(s).

Judges: Dennis J. Sweeney, J. WE CONCUR: Stephen M. Brown, A.C.J., Kevin M. Korsmo, J.

Opinion by: Dennis J. Sweeney

Opinion

¶1 Sweeney, J. — Forgery requires a showing of intent to injure or defraud. Here, the defendant had forged identification cards in his wallet. The trial judge rejected the defendant's proposed instruction on defraud that included the phrase "means to cause injury or loss to by deceit" in favor of his own instruction that defined defraud as "to mislead or deceive." The defendant's proposed instruction was a correct statement of the law; the court's instruction was an incorrect statement of the law. We then reverse and remand for a new trial.

FACTS

¶2 Officer Darren Smith stopped Adrian Flores's car for a loud exhaust. He asked Mr. Flores for his driver's license. Mr. Flores said he did not have a driver's license and handed the officer a Mexican identification card instead. Officer Smith gave Mr. Flores's name to dispatch and learned [*2] that Mr. Flores did not have a valid Washington driver's license or identification card. He then arrested Mr. Flores for driving without a valid operator's license and searched him incident to that arrest. The officer located Mr. Flores's wallet and found a social security card and a permanent resident card inside. Mr. Flores told the officer the cards were counterfeit. He used the cards to get work.

¶3 The State charged Mr. Flores with one count of driving without a valid operator's license and two counts of forgery. Mr. Flores moved to exclude the two identification cards and the statements he made to Officer Smith. He argued that the officer's reason for stopping him was a pretext to search for evidence of other crimes. The trial court concluded that the stop, the arrest, and the search incident to the arrest were all lawful and denied his motion.

¶4 Mr. Flores proposed jury instructions defining "defraud" as "means to cause injury or loss to by deceit" and "injure" as "to inflict material damage or loss on." Clerk's Papers (CP) at 49-50. He wanted to argue that he had no intent to defraud anyone and no one was injured by the forged cards. The court rejected the instructions and

refused [*3] to let Mr. Flores admit evidence or argue that he did not intend to defraud or that no one was injured. The court ruled that the statute does not require a showing that anyone has been actually defrauded. And it instructed the jury by its own instruction that "[d]efraud means to deceive or misrepresent"; there was no reference to any legal authority on the instruction or in the record. CP at 65.

¶5 The jury found Mr. Flores guilty of all three charges.

DISCUSSION

Proposed Jury Instruction – Defraud

¶6 Mr. Flores contends that the trial court's instruction to the jury defining defraud is incorrect and that his proposed instruction was correct. He contends that the court's instruction prevented him from arguing his theory of the case: that he did not intend to defraud anyone and no one was injured by the forged cards. He argues that the forged cards simply allowed him to work in the fields, which he did, and that he worked for his wages and paid all of his required payroll taxes.

¶7 The test here is whether the instruction misstated the law, misled the jury, or denied Mr. Flores the opportunity to argue his theory of the case. *State v. Douglas, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005)*. That is [*4] a question of law and so our review is de novo. *State v. Brightman, 155 Wn.2d 506, 519, 122 P.3d 150 (2005)*.

¶8 The forgery statute, *RCW 9A.60.020*, requires proof of intent to injure or defraud and possession of an instrument the defendant knows is forged:

¶9 (1) A person is guilty of forgery if, with intent to injure or defraud:

> … .
>
> (b) He possesses, utters, offers, disposes of, or puts off as true a written instrument which he knows to be forged.

RCW 9A.60.020. The words "defraud" and "injure" must be given their common and ordinary meaning. *State v. Simmons, 113 Wn. App. 29, 32, 51 P.3d 828 (2002)*. The trial court's definition of "defraud" does not do this. It told the jury that "[d]efraud means to deceive or misrepresent." CP at 65. The instruction actually defines *"fraud"*, which means "an act of … deceit esp. when involving misrepresentation." Webster's Third New International Dictionary 904 (1993).

¶10 Defraud is different. " 'Defraud' means '[t]o cause injury or loss to … by deceit.' " *Simmons, 113 Wn. App. at 32* (alterations in original) (quoting Black's Law Dictionary 434 (7th ed. 1999)). It includes not only an act of deception but also a resulting injury or loss. And that is how [*5] Mr. Flores's proposed instruction defined the term.

¶11 The trial court's instruction defining "defraud," therefore, misstates the law. And it erred by refusing to adopt Mr. Flores's proposed instruction. An erroneous instruction is presumed prejudicial unless it affirmatively appears harmless. *State v. O'Neill, 91 Wn. App. 978, 990, 967 P.2d 985 (1998)*. And, here, Mr. Flores's factual argument was that he did not intend to defraud anyone nor did his action cause loss or injury to anyone. He was denied the opportunity to make these arguments because the trial court's instruction says nothing about resulting injury or loss and the court refused to give his instruction that accurately defined defraud. We must, then, reverse and remand for a trial with proper instructions. We address Mr. Flores's other assignments of error since we reverse and remand for trial.

Proposed Jury Instruction – Injure

¶12 The trial judge also rejected a proposed instruction defining "injure." But Mr. Flores does not have a right to an instruction defining each element of forgery unless the element is not a matter of common understanding. *State v. Bledsoe, 33 Wn. App. 720, 727, 658 P.2d 674 (1983)*; *State v. Pawling, 23 Wn. App. 226, 233, 597 P.2d 1367*

(1979). [*6] The term "injure" is a matter of common understanding. Simmons, 113 Wn. App. at 32. The trial judge, then, had the discretion to refuse to instruct the jury on the definition of injure. State v. Brown, 132 Wn.2d 529, 612, 940 P.2d 546 (1997).

PROPOSED JURY INSTRUCTION – FORGERY

¶13 Mr. Flores also assigns error to the trial court's refusal to give his proposed instruction defining forgery. Specifically, he apparently believes that the trial court's instruction was incorrect because it did not include all the possible means of committing forgery. The court instructed the jury that "[a] person commits the crime of forgery when, with intent to injure or defraud, he possesses, a written instrument which he knows to be forged." CP at 62. The instruction correctly states the law. RCW 9A.60.020(1)(b). It, indeed, uses only the means alleged—possesses—and not the entire list of means included in the statute (i.e., possesses, utters, offers, disposes of, or puts off as true). But the instruction defining "forgery" was proper given the facts of this case and the allegations in the information.

PRETEXTUAL STOP

¶14 Mr. Flores contends that the officer's search was a pretext to search for evidence of other [*7] crimes.

¶15 The question whether or not a traffic stop is pretextual is essentially a fact-based determination. State v. Minh Hoang, 101 Wn. App. 732, 743, 6 P.3d 602 (2000). Either the trial judge believes the officer's testimony that the stop was not pretextual or the judge finds that the officer had something else in mind when he made the stop and so concludes the stop was a pretext.

¶16 Here, Officer Smith testified that he stopped Mr. Flores's car because he heard its exhaust system and believed it was louder than what the law allowed. Report of Proceedings (RP) (Oct. 15, 2008) at 10. The judge found that the officer subjectively intended to stop Mr. Flores because he heard very loud exhaust coming from Mr. Flores's car. CP at 21. So the court's finding is, of course, supported by the evidence. State v. Aase, 121 Wn. App. 558, 564, 89 P.3d 721 (2004). We review the conclusions of law in a suppression order de novo. State v. Cole, 122 Wn. App. 319, 322-23, 93 P.3d 209 (2004).

¶17 We look at the officer's subjective intent and the objective reasonableness of his actions to determine whether the stop was pretextual. State v. Ladson, 138 Wn.2d 343, 358-59, 979 P.2d 833 (1999). But it seems that [*8] the factor that generally controls in these cases is the officer's subjective intent. And, again, the officer's subjective intent distills down into the simple factual question of whether the trial judge believed the police officer's explanation for the stop.

¶18 Mr. Flores contends that Officer Smith subjectively intended to stop him to search for evidence showing that he is not a legal United States resident. But the trial court's unchallenged findings show that Officer Smith subjectively intended to stop Mr. Flores only because he heard very loud exhaust coming from Mr. Flores's car. CP at 21 (Findings of Fact 2.3, 2.4, and 2.5).

¶19 The stop here was also objectively reasonable. RCW 46.37.390 prohibits a person from operating a motor vehicle that has an excessively loud muffler, and RCW 46.61.021(2) permits an officer to briefly detain a motorist on suspicion of a traffic infraction. The trial court here concluded, "Officer Smith lawfully contacted the defendant because of a defective muffler." CP at 21. The court's unchallenged findings, then, support its conclusion that the stop here was lawful, not pretextual. CP at 21 (Conclusion of Law 3.1).

CUSTODIAL ARREST

¶20 Mr. Flores also challenges [*9] the trial court's conclusion that Officer Smith lawfully arrested Mr. Flores for driving without a valid license. CP at 22 (Conclusion of Law 3.3).

¶21 Generally, an officer must cite and release a motorist who is stopped for a minor traffic offense. RCW 46.64.015; State v. Reding, 119 Wn.2d 685, 690, 835 P.2d 1019 (1992); State v. Hehman, 90 Wn.2d 45, 50, 578

P.2d 527 (1978). Driving without a valid driver's license is a misdemeanor. RCW 46.20.005. And an officer may arrest a motorist for driving without a valid license if the officer saw the motorist commit the offense and had a substantial reason beyond the offense to make the arrest. State v. Barajas, 57 Wn. App. 556, 559, 789 P.2d 321 (1990); State v. Watson, 56 Wn. App. 665, 667, 784 P.2d 1294 (1990); State v. McIntosh, 42 Wn. App. 573, 576, 712 P.2d 319 (1986).

¶22 Again, unchallenged findings by the trial court show that Officer Smith saw Mr. Flores drive without a valid driver's license and had a substantial reason to arrest him. CP at 20 (Finding of Fact 2.2); CP at 21 (Finding of Fact 2.6).

¶23 One substantial reason justifying a warrantless arrest for a misdemeanor traffic violation includes the reasonable probability that the motorist [*10] will fail to appear in court. McIntosh, 42 Wn. App. at 576. Here, Mr. Flores's Mexican identification card made it reasonable for Officer Smith to assume that Mr. Flores might not respond to a citation if he issued one. RP (Oct. 15, 2008) at 11-12. The officer, then, lawfully arrested Mr. Flores.

The Search

¶24 Finally, Mr. Flores challenges the trial court's conclusion that Officer Smith lawfully searched Mr. Flores incident to arrest. CP at 22 (Conclusions of Law 3.4 and 3.5).

¶25 A search incident to arrest under article I, section 7 is a recognized exception to the general warrant requirement. State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006). A "valid arrest provides the 'authority of law' to search." *Id.* Because the arrest here was valid, Officer Smith could search Mr. Flores incident to the arrest. State v. Darst, 65 Wn.2d 808, 812, 399 P.2d 618 (1965); State v. Quintero-Quintero, 60 Wn. App. 902, 906, 808 P.2d 183 (1991).

¶26 But Mr. Flores contends for the first time on appeal that Officer Smith exceeded the scope of the search incident to arrest exception by searching his wallet. *See* CP at 7-9. He asserts that the officer could search only for evidence of driving without a valid [*11] driver's license. He argues that Officer Smith had all the evidence he needed to prove that offense before the officer ever searched him.

¶27 A warrantless search incident to a lawful arrest permits the arresting officer to search the person arrested only for weapons or evidence of the crime for which he is arrested. State v. Valdez, 167 Wn.2d 761, 769, ___ P.3d ___ (2009). The trial court here concluded that Officer Smith's search incident to the arrest was valid. CP at 22 (Conclusions of Law 3.4 and 3.5). And, certainly, if the reason for the arrest was driving with no valid operator's license, a wallet is a likely place to look for evidence of that crime. The fact that the officer may have already collected enough evidence to arrest would not prohibit a reasonable search for other evidence related to that crime. United States v. Robinson, 414 U.S. 218, 234, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973).

Sufficiency of the Evidence

¶28 Mr. Flores next argues that using false identification to gain employment does not prove the intent to defraud. Mr. Flores argues that the State failed to show that anyone suffered injury or loss by his possession and use of the social security card or the permanent [*12] resident card. He also argues that the trial court prohibited him from offering evidence rebutting the presumption that he committed forgery by merely possessing the cards. Mr. Flores then argues that the State's evidence does not support the element of intent required to prove forgery. He contends that intent to defraud cannot be established by proof that he only possessed forged cards.

¶29 We review a challenge to the sufficiency of the evidence to decide whether the evidence in the record supports the challenged elements of the crime charged. Simmons, 113 Wn. App. at 33. The defendant's challenge admits the truth of the State's evidence and all inferences from that evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We, therefore, consider the evidence in the light most favorable to the State and afford it all reasonable inferences. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

¶30 The State did not have to prove that Mr. Flores actually defrauded anyone. *State v. Esquivel, 71 Wn. App. 868, 871, 863 P.2d 113 (1993)*. The State had to prove that Mr. Flores possessed the forged instruments with the *intent to injure or defraud* another. *RCW 9A.60.020(1)(b)*. Proof [*13] of intent to defraud is proof of intent to injure. *Simmons, 113 Wn. App. at 33*. "[I]ntent … may be inferred from surrounding facts and circumstances if they 'plainly indicate such an intent as a matter of logical probability'." *Esquivel, 71 Wn. App. at 871* (quoting *State v. Woods, 63 Wn. App. 588, 591, 821 P.2d 1235 (1991)*). And intent to defraud can be inferred from evidence of possession. *See id. at 872*.

¶31 The State here produced uncontroverted evidence that Mr. Flores possessed forged cards and used the cards to get a job in Washington. The jury could infer from all this evidence that Mr. Flores intended to defraud another with these cards because he had already presented them as true.

¶32 Mr. Flores, however, claims that the State's evidence is uncontroverted only because the trial court barred him from showing that his wages were taxed and that he, therefore, did not actually defraud anyone by using the cards to gain employment. On remand, he should be allowed to introduce evidence that he intended to defraud no one.

¶33 We reverse and remand for a new trial.

¶34 A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed [*14] for public record pursuant to *RCW 2.06.040*.

Brown, A.C.J., and Korsmo, J., concur.