STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2014AP2881-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

LAVARREN D ETIENNE,

Defendant-Appellant.

PLAINTIFF-RESPONDENT'S BRIEF

ON APPEAL FROM THE CIRCUIT COURT OF DANE COUNTY,
BRANCH #1, THE HONORABLE JOHN W. MARKSON, PRESIDING

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STATEMENT OF THE ISSUES

I. WHETHER THE EVIDENCE WAS SUFFICIENT FOR A RATIONAL JURY TO FIND BEYOND A REASONABLE DOUBT THAT ETIENNE INTENTIONALLY FAILED TO COMPLY WITH THE CONDITION OF HIS BOND THAT HE NOT HAVE ANY CONTACT WITH PEGGY JONES.

II. WHETHER ETIENNE'S CONVICTION VIOLATED HIS RIGHT TO DUE PROCESS INSOFAR AS AN INDIVIDUAL CANNOT BE PUNISHED FOR VIOLATING A NO-CONTACT CONDITION IF THE ENCOUNTER WAS UNAVOIDABLE OR ACCIDENTAL.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The state does not request oral argument. The briefs of the parties should adequately address the legal and factual issues presented.

The State does not request publication. The first issue presented is governed by Wis. Stat. § (Rule) 809.23(1)(b)2, which provides that publication is not warranted when "[t]he issue asserted is whether the evidence is sufficient to support the judgment and the briefs show the evidence is sufficient." The second issue presented is governed by Wis. Stat. § (Rule) 809.23(1)(b)1, which provides that publication is not warranted when "[t]he issues involve no more than the application of well-settled rules of law to a recurring fact situation."

STATEMENT OF THE CASE

Procedural Status of the Case

On July 10, 2014, after a jury trial, defendant-appellant Lavarren D. Etienne was convicted of misdemeanor bail jumping. (R41:1). On July 17, 2014, the Honorable John W. Markson, Circuit Court, Dane County, entered a judgment of conviction and sentenced Etienne to a jail term of eight months. Id. On December 11, 2014, Etienne filed an appeal of his judgment of conviction.[1] (R47:1).

Statement of Facts

On May 13, 2014, Etienne was charged with one count of battery, one count of resisting or obstructing an officer, and one count of intimidating a victim. He was released on bail with a condition that he not have any contact, direct or indirect, with Peggy A. Jones. (R:34:1 at Ex. 5). On May 21, 2014, Etienne was arrested for having contact with Jones. (R2:1-2). On May 22, 2014, Etienne was formally charged with one count of misdemeanor bail jumping. Id.

As stated above, the misdemeanor bail jumping charge arose from events occurring on May 21, 2014. Id. On that

[1] Neither of the two issues presented on appeal were raised by Etienne at the trial level.

date, in the afternoon, City of Madison Police Officer Mike Alvarez was dispatched to Turbot Drive in Madison, WI, in reference to a physical domestic incident involving two individuals fighting inside a car. (R53:123). The car where the incident was occurring belonged to Jones. (R53:128).

When Officer Alvarez approached, he saw Jones standing by the rear of the car and Etienne sitting inside the car. (R53:124). Etienne then stepped out of Jones' car and approached Officer Alvarez. (R53:124). Etienne told Officer Alvarez there was no disturbance. (R53:124). Jones had been talking loudly on the phone, and Etienne explained to Officer Alvarez that this may have been the reason for the report of a disturbance. (R53:124).

Officer Alvarez observed that Etienne appeared to think he was going to jail, (R53:125), so he asked Etienne if he had any open cases or was in violation of any rules. Id. Etienne answered no to these questions. Id. Officer Alvarez then asked Etienne if he would be willing to sit in the rear of the police car. (R53:125). Etienne stated that he was willing to do so and was placed in the police car. (R53:125).

Officer Alvarez then spoke to Jones. Officer Alvarez explained that he was responding to a report of a disturbance, with a woman kicking the car door. (R53:127-8). Jones told Officer Alvarez that that it wouldn't make any sense for her to kick the car door because it was her car, and she would not kick her own door. (R53:128).

Officer Alvarez returned to the police squad. Etienne told Officer Alvarez that he thought he would be going to jail. (R53:125). Officer Alvarez then ran Etienne's information through the Circuit Court records and learned that Etienne had an open case with bail conditions that he was not to have any contact with Jones. (R53:125-26). Etienne told Officer Alvarez that he knew he was prohibited from having any contact with Jones. (R53:126).

ARGUMENT

I. THE EVIDENCE WAS SUFFICIENT FOR A RATIONAL JURY TO FIND BEYOND A REASONABLE DOUBT THAT ETIENNE INTENTIONALLY FAILED TO COMPLY WITH THE CONDITION OF HIS BOND THAT HE NOT HAVE ANY CONTACT WITH JONES.

Etienne contends the evidence was insufficient as a matter of law for the jury to find him guilty of misdemeanor bail jumping. His argument is that on May 21, 2014, he tried to avoid contact with Jones but she would not leave him alone. However, Etienne's argument is defeated by the law and facts of the case.

A. The standard for review of a challenge to the sufficiency of the evidence to convict.

The standard for review of a challenge to the sufficiency of the evidence to convict was discussed in State v. Poellinger, 153 Wis. 2d 493, 451 N.W.2d 752 (1990):

> [I]n reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced

> at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

Poellinger, 153 Wis. 2d 493, 507 (citation omitted).

The maintenance of this standard for review is vitally important. An appellate court does not sit as a jury making findings of fact and applying the hypothesis of innocence rule de novo to the evidence presented at trial. Id., 505-06. "It is not the role of an appellate court to do that." Id., 506. Indeed, an appellate court "will only substitute its judgment for that of the trier of fact when the fact finder relied upon evidence that was inherently or patently incredible—that kind of evidence which conflicts with the laws of nature or with fully-established or conceded facts. State v. Tarantino, 157 Wis. 2d 199, 218, 458 N.W.2d 582 (Ct. App. 1990).

Additionally, the trier of fact is the sole arbiter of the credibility of witnesses and alone is charged with the duty of weighing the evidence. State v. Hahn, 221 Wis. 2d 670, 683, 586 N.W.2d 5 (Ct. App. 1998). When more than one inference can reasonably be drawn from the evidence, the inference which supports the trier of fact's verdict must be the one followed on review unless the evidence is

incredible as a matter of law. State v. Allbaugh, 148 Wis. 2d 807, 809, 436 N.W.2d 898 (Ct. App. 1989). It is exclusively within the trier of fact's province to decide which evidence is worthy of belief, which is not, and to resolve any conflicts in the evidence. State v. Wyss, 124 Wis. 2d 681, 693, 370 N.W.2d 745 (1985). The standard for review is the same whether the verdict is based on direct or circumstantial evidence. Poellinger, 153 Wis. 2d 493, 497.

B. The elements of misdemeanor bail jumping.

Misdemeanor bail jumping is committed by any person who, having been arrested for (or charged with) a misdemeanor and released from custody on bond, intentionally fails to comply with the terms of that bond. Wis. Stat. § 946.49(1). There are three elements to this offense: (1) the defendant was arrested for (or charged with) a misdemeanor; (2) the defendant was released from custody on bond; and (3) the defendant intentionally failed to comply with the terms of the bond. Wis. JI-Criminal 1795.

A person intentionally failed to comply with the terms of the bond if the person “knew the terms of the bond and

knew that (his) (her) actions did not comply with those terms." Id. The trier of fact "cannot look into a person's mind to find intent or knowledge." Id. Rather, "[i]ntent and knowledge must be found, if found at all, from the defendant's acts, words, and statements." Id. The term "intentionally" means that the actor either has a purpose to do the thing or cause the result specified, or is aware that his conduct is practically certain to cause that result. Wis. Stat. § 939.23.

C. A rational jury could and did find Etienne guilty of misdemeanor bail jumping beyond a reasonable doubt.

When it is viewed most favorably to the state and the conviction, the evidence is sufficient to show that on May 21, 2014, Etienne intentionally failed to comply with the condition of his bond that he have no contact with Jones. The jury's guilty verdict was a reasonable outcome. Indeed, based upon the evidence, it was patently clear that Etienne violated the no-contact condition.

Etienne does not contend that the state failed to prove the first two elements of misdemeanor bail jumping. He concedes that the state proved beyond a reasonable doubt that (1) he was arrested for a misdemeanor and (2) he was

released from custody on bond. What Etienne argues is that no reasonable jury could have concluded that he intentionally failed to comply with the condition of his bond that he not have any contact with Jones.

The law and facts of the case, however, show that a reasonable jury could conclude that Etienne's violation of his bond was intentional. As stated above, a person intentionally failed to comply with the terms of the bond if he knew the terms of the bond and knew that his actions did not comply with those terms. Wis. JI-Criminal 1795. Etienne knew the term of his bond, specifically, that he have no contact with Jones. Etienne testified that on May 21, 2014, when Jones approached him, he told her "we not supposed to have contact with each other." (R53:150). Etienne testified that he told Jones that he was on monitoring, that there was a no-contact, and that he was going to jail if they had contact with one another. (R53:151-52). He described to Jones that he could not even go near her house because of his electronic monitoring device. (R53:150). Etienne further testified that he discussed the no-contact condition with his bail monitoring supervisors. (R53:150-51). Given these facts, the jury

could reasonably conclude that Etienne knew of the no-contact provision.

Etienne also knew his actions did not comply with the no-contact provision. A jury could reasonably reach this conclusion via either or both of the following two reasonable inferences. Firstly, when Officer Alvarez first made contact with Etienne, Etienne appeared to think he was going to jail. (R53:125). Shortly thereafter, Etienne told Officer Alvarez that he believed he was going to jail. (R53:125). A jury could reasonably infer from these facts that Etienne thought he was going to jail because he knew his actions did not comply with his no-contact provision, and he had been caught in the act. Secondly, Etienne lied to Officer Alvarez when Officer Alvarez asked Etienne if he had any open cases or was in violation of any rules. (R53:125). A jury could reasonably infer from this fact that Etienne knew his actions did not comply with his no-contact provision, and hence he lied in a futile attempt to protect himself from being arrested. In sum, Etienne's conduct and statements to Officer Alvarez made it clear that Etienne knew he had been caught in the act.

Additionally, as stated above, an act is intentional where the actor is aware that his conduct is practically

certain to cause the result. Wis. Stat. § 939.23(3). By piecing together several facts, a jury could reasonably conclude that Etienne was aware that his conduct on May 21, 2014, was practically certain to cause him to be in contact with Jones. The scene where the incident occurred was in front of 2901 Turbot Drive in Madison, WI, 53713, located on the southwest side of the city and down the block from Jones' residence. When Officer Alvarez approached the scene on Turbot Drive, Jones was standing outside of her car. Etienne was sitting inside of Jones' car. Etienne had apparently remained in Jones' presence long enough for Jones to begin and end a telephone conversation in which she became disruptive. Taken together, these facts could lead a reasonable jury to conclude that Etienne was aware his conduct was practically certain to result in him contacting Jones: Etienne travelled across town, to a location down the block from Jones' residence, became seated inside her car, with Jones in his immediate vicinity, and remained present for a period of time while she was standing outside the car.

Even more incriminating for Etienne, a jury could reasonably conclude that Etienne and Jones had been in the car together fighting. This conclusion is reasonably drawn

from the fact that the police had received a call about two individuals fighting inside a car. When the police arrived, Etienne and Jones were present on the scene, with Etienne sitting inside the car and Jones immediately outside of it.

Etienne and Jones both testified that they were never inside the car together. However, a reasonable jury could disbelieve this version of events. Etienne had reason to lie because it was against his penal interest to say he had been in the car with Jones. Jones had reason to lie because she was in a relationship with Etienne and wanted to protect him from getting in trouble. (R53: 64).

Finally, a reasonable jury could disbelieve Etienne's basic storyline that he tried to avoid Jones on May 21, 2014. Etienne testified that he tried to walk away from Jones but she would not let him. However, this version of events is defeated by two facts. First, Etienne ended up inside of Jones' car. If Etienne sought to avoid Jones, it does not make sense that he was sitting inside her car. Second, Etienne remained in Jones' presence for a sustained period of time, at least long enough for her to complete a phone call. If Etienne sought to avoid Jones, it does not

make sense that he would hang around while she was on the phone.

II. THE DEFENDANT'S CONVICTION DID NOT VIOLATE HIS RIGHT TO DUE PROCESS

Etienne contends that his conviction violated his right to due process. His argument is that a defendant cannot be punished for violating a no-contact condition where the encounter was accidental or unavoidable, and that his contact with Jones falls under this exception. The law and the facts of the case show, however, that Etienne's contact with Jones does not fall under this exception.

A. Legal principles

In support of his position, Etienne cites Arciniega v. Freeman, 404 U.S. 4 (1971), as well as its progeny in the 3rd, 5th, 10th, and D.C. circuits. In Arciniega, the defendant was placed on parole with a condition that he not associate with any ex-convicts. Arciniega, at 4. The defendant later had his parole revoked for working in the same restaurant as two other ex-convicts. Id. The court held that the defendant's conduct did not violate his non-association condition because the condition not apply to "incidental contacts between ex-convicts in the course of

work on a legitimate job for a common employer." Id. The court reasoned that this exception to the non-association condition was necessary because the hiring decisions of the defendant's employer were beyond his control. Id. To prohibit a parolee from associating with ex-convicts who work for a common employer would, the court stated, "render a parolee vulnerable to imprisonment whenever his employer, willing to hire ex-convicts, hires more than one." Id.

Courts have routinely—and properly—cited Arciniega in support of the proposition that a non-association condition placed upon a parolee does not apply to encounters that are accidental or unavoidable. For instance, in United States v. Loy, 237 F.3d 251 (3rd Cir. 2001), the court reviewed a challenge to a non-association condition prohibiting a parolee from having unsupervised contact with minors. Relying upon Arciniega and other supporting authority (*e.g.*, Birzon v. King, 469 F.2d 1241 (2d Cir.1972)), the court held that the parolee's condition did not extend to "accidental or unavoidable contact with children, such as might occur in public arenas." Loy, 237 F.3d 251, 254.

The approach taken in Arciniega and Loy is now settled law, and for good reason. Loy, 237 F.3d 251, 269 ("At this point, it is well established that associational conditions

do not extend to casual or chance meetings.") Courts have frequently faced challenges to non-association conditions on the grounds that they are impractical and unworkable. Typically, as in Arciniega and Loy, the non-association condition prohibits contact with a category of persons (e.g., ex-convicts or minors). Courts have struggled with the fact that, where the condition prohibits contact with a category or persons, "a defendant might be viewed as violating his probation condition simply by being in conventional places such as schools, shopping malls, churches, sporting events, or other social events." State v. Martin, 171 Ariz. 159, 160, 829 P.2d 349 (Ct. App. Div. 1 1992). The judicial response to such concerns has generally been to recognize an exception to the non-associational condition for contact that is incidental. For instance, in United States v. Paul, 274 F.3d 155 (5th Cir. Tex. 2001), the defendant challenged a condition prohibiting contact with minors. The defendant argued that the condition would prohibit him from visiting "a restaurant [or] any retail establishment such as a grocery store or a department store" due to the possibility that he might come into contact with minors. Paul, 274 F.3d 155, 165. The court rejected the defendant's claim,

interpreting the associational condition to include an exception for such chance encounters in public places. Paul, 274 F.3d 155, 166.

B. Etienne's contact with Jones does not fall under the scope of the exception

The present case does not fall under the scope of *Arciniega* rule. First and foremost, Etienne's contact with Jones was not unavoidable or accidental. Etienne could have avoided contact with Jones by not getting in her car and not staying in her presence while she talked on the phone. Etienne, upon seeing Jones, could have walked away. More broadly, Etienne could have avoided the predictable encounter with Jones entirely by not travelling to a location down the street from Jones' residence. In Arciniega, the defendant's interactions with fellow convicts were unavoidable because he shared a common employer with the other ex-convicts. By contrast, in the present case, Etienne had no occupational excuse for being in Jones' car and staying near her.

Additionally, Etienne's contact with Jones was not accidental. Quite the opposite: Etienne's contact with

Jones was intentional. Etienne purposefully got inside Jones' car and chose to remain in her presence. As shown in Section I, Etienne's conduct was intentional in that he knew that he could not have contact with Jones but he did so anyway, and he was aware that his conduct was practically certain to result in him being in contact with Jones.

Secondly, the present case does not fall under the scope of Arciniega because it involves a different type of no-contact condition. *See* 1 Neil P. Cohen, *The Law of Probation and Parole* § 9.11, at 9–19(2ded.1999)(classifying prohibitions against contact with a particular person as a different type of condition than those against contact with a category of persons.) As stated above, in support of his position, Etienne cites Arciniega, as well as its progeny in the 3rd, 5th, 10th, and D.C. circuits. All of these cases involved conditions prohibiting contact with a category of persons. See Arciniega, 404 U.S. 4 (no contact with ex-convicts); Loy, 237 F.3d 251 (no contact with minors) ; United States v. Mike, 632 F.3d 686, (10th Cir. N.M. 2011) (no contact with children); United States v. Paul, 274 F.3d 155 (5th Cir. Tex. 2001) (no contact with

minors); United States v. Burroughs, 613 F.3d 233 (D.C. Cir. 2010) (no contact with children). In the present case, the prohibition is against contact with a particular person rather than with a category of persons. Hence the main rationale behind the Arciniega rule, that a defendant might be found guilty simply by being present in a crowded public place, is not present.

CONCLUSION

Based on the reasons stated above, the Plaintiff-Respondent requests that the decision of the trial court be affirmed.

Dated this _____ day of April, 2015, at Madison, Wisconsin.

Respectfully submitted:

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CERTIFICATION

I certify that this brief conforms to the rules contained in sec. 809.19(8)(b) and (c) for a brief produced using the following font:

> Monospaced font: 10 characters per inch; double spaced; 1.5 inch margin on left side and 1 inch margins on the other 3 sides. The length of this brief is _____ pages.

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Signed,

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Attorney

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I hereby certify that:

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This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this day of April, 2015.

_____

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