

NO. 89418-3

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Oct 25, 2013, 1:47 pm
BY RONALD R. CARPENTER
CLERK

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

E CRF
RECEIVED BY E-MAIL

STATE OF WASHINGTON,

Respondent,

v.

GARY A. CROW,

Petitioner.

ANSWER TO
PETITION FOR REVIEW

MARK K. ROE
Prosecuting Attorney

SETH A. FINE
Deputy Prosecuting Attorney
Attorney for Respondent

Snohomish County Prosecutor's Office
3000 Rockefeller Avenue, M/S #504
Everett, Washington 98201
Telephone: (425) 388-3333

 ORIGINAL

TABLE OF CONTENTS

I. IDENTITY OF RESPONDENT 1

II. STATEMENT OF THE CASE..... 1

III. ARGUMENT3

THE TRIAL COURT PROPERLY REFUSED TO GIVE
INSTRUCTIONS ON ABSTRACT LEGAL PRINCIPLES THAT
WERE UNRELATED TO THE ELEMENTS OF THE CRIME OR
ANY DEFENSES.....3

IV. CONCLUSION6

TABLE OF AUTHORITIES

WASHINGTON CASES

Graffel v. Honeysuckle, 30 Wn.2d 390, 191 P.2d 858 (1948)..... 4
In Re Kelly and Moesslang, 170 Wn. App. 722, 287 P.3d 12 (2012)
..... 5
Olver v. Fowler, 161 Wn.2d 655, 168 P.3d 648 (2007) 3
State v. Robinson, 92 Wn.2d 357, 597 P.2d 892 (1979) 5

WASHINGTON STATUTES

RCW 64.12.020 4
RCW 69.53.010 2, 4

I. IDENTITY OF RESPONDENT

The State of Washington, respondent, asks that review be denied.

II. STATEMENT OF THE CASE

On January 12, 2011, police served a search warrant on a house in Arlington that was owned by the defendant (petitioner), Gary Crow. 1/10 RP 69-70. They found that a detached garage had been converted into three growing rooms for marijuana. 1/10 RP 85-86. In the garage, there were 90 marijuana plants. 1/11 RP 35-38. In the house itself, a bedroom held 28 starter plants. 1/11 RP 39.

At trial, the defendant testified that the grow operation was tended and harvested by his girlfriend, Rebecca Brice. 1/11 RP 153-54. He admitted that he had built the walls in the garage and set up an electrical system for the grow lights. 1/11 RP 165. The defendant claimed that he believed that Ms. Brice was lawfully growing marijuana for medical purposes. 1/11 RP 154-55.¹

¹ The petition for review characterizes the defendant's testimony as "uncontroverted." PRV at 3. In fact, portions of that testimony were contradicted by both other witnesses and circumstantial evidence. The verdict reflects a finding that, contrary to the defendant's testimony, he knew that the grow was unlawful.

The defendant was charged with unlawful use of a building for drug purposes, in violation of RCW 69.53.010. 1 CP 42. The court instructed the jury on the following elements of the crime:

(1) That on or about January 12, 2011, the defendant knowingly made available for use a building, room, space or enclosure, for the purpose of unlawfully manufacturing, or unlawfully storing, a controlled substance;

(2) That the building, room, space, or enclosure was under the defendant's management and control as an owner; and

(3) That the acts occurred in the State of Washington.

1 CP 30, inst. no. 5.

The court further instructed the jury: "The State must prove that the defendant knowingly allowed use of his property knowing the purpose was the unlawful manufacturing or unlawful storing of marijuana." 1 CP 34, inst. no. 9. The instructions went on to state that manufacturing and storing marijuana is authorized by law when done by a designated provider to assist a qualifying patient in the medical use of marijuana. 1 CP 35, inst. no. 10.

At the conclusion of trial, the defendant submitted two proposed instructions concerning a “meretricious relationship.”² 1 CP 40, 41. The court rejected these instructions as inapplicable and confusing to the jury. 1/11 RP 226. The jury found the defendant guilty. 1 CP 22.

On appeal, the defendant’s only assignment of error was to the trial court’s refusal to give his two proposed instructions. Brief of Appellant at 1. The Court of Appeals affirmed in an unpublished opinion.

III. ARGUMENT

THE TRIAL COURT PROPERLY REFUSED TO GIVE INSTRUCTIONS ON ABSTRACT LEGAL PRINCIPLES THAT WERE UNRELATED TO THE ELEMENTS OF THE CRIME OR ANY DEFENSES.

The petitioner claims that the trial court failed to instruct the jury on his theory of the case. In fact, the proposed instructions did not set out any “theory of the case.” Rather, they set out abstract legal propositions. For that reason, the instructions were properly refused.

² The term “meretricious relationship” is used in older cases. According to newer cases, the preferable term is “committed intimate relationship.” Olver v. Fowler, 161 Wn.2d 655, 657 n. 1, 168 P.3d 648 (2007). In discussing case law, this Answer will use the preferable term. In referring to the proposed instructions, it will use the language of those instructions.

The petitioner proposed two instructions. One of them defined a “meretricious relationship.” The other stated that any property acquired during such a relationship is presumed to be jointly owned. 1 CP 40-41. The petitioner did not propose any instructions explaining how another person’s co-ownership would affect the elements of the crime or establish any defense. Absent any such explanation, the proposed instructions were properly refused as unhelpful to the jury.

The petitioner claims that RCW 69.53.010 “does not apply to those with an equal right to use the property.” PRV at 9. It is doubtful whether a co-owner has any “equal right” to use property to grow drugs unlawfully. Such conduct constitutes waste, since it threatens the owner’s interest in the property. See RCW 64.12.020 (tenant in common is liable for waste); Graffel v. Honeysuckle, 30 Wn.2d 390, 398, 191 P.2d 858 (1948) (defining “waste”).

But even assuming that the petitioner’s claim is correct, it was not set out in any proposed instruction. The petitioner never asked for an instruction that he could not be convicted for drugs owned by a co-owner. Consequently, the validity of the petitioner’s legal theory is not at issue in this case.

The petition for review sets out hypothetical situations in which a person might be aware of a co-owners possession of drugs, without having any meaningful involvement in that possession. PRV at 9-10. These hypotheticals bear no relationship to the present case. The defendant did not merely know of the illegal use – he actively facilitated it. By his own testimony, he assisted in modifying the property to make it more suitable for growing marijuana. 1/11 RP 165. This court can address the petitioner’s hypothetical situations if someone is ever convicted under those facts.

In addition to the other problems with the petitioner’s proposed instructions, they were incorrect as a matter of law. One of the instructions said that if a “meretricious relationship” existed, “the law presumes that property purchased during the course of that relationship is jointly owned.” 1 CP 41. The Court of Appeals has held that a partner in a committed intimate relationship does not acquire ownership, but only a claim for equitable distribution. In Re Kelly and Moesslang, 170 Wn. App. 722, 287 P.3d 12 (2012). The trial court had no duty to re-write an erroneous instruction. State v. Robinson, 92 Wn.2d 357, 361, 597 P.2d 892 (1979).

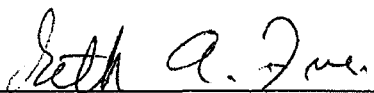
The trial court properly refused instructions on an abstract principle of law that had no relationship to the elements of the crime. The Court of Appeals correctly upheld that decision. Review by this court is unwarranted.

IV. CONCLUSION

The petition for review should be denied.

Respectfully submitted on October 25, 2013.

MARK K. ROE
Snohomish County Prosecuting Attorney

By: 

SETH A. FINE, WSBA # 10937
Deputy Prosecuting Attorney
Attorney for Respondent

OFFICE RECEPTIONIST, CLERK

To: Kremenich, Diane; 'mark.mestel@gmail.com'
Subject: RE: State v. Gary Crow

Received 10/25/13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Kremenich, Diane [mailto:Diane.Kremenich@co.snohomish.wa.us]
Sent: Friday, October 25, 2013 1:45 PM
To: OFFICE RECEPTIONIST, CLERK; 'mark.mestel@gmail.com'
Subject: State v. Gary Crow

Good Afternoon...

RE: State v. Gary A. Crow
Supreme Court No. 89418-3
Petition for Review

Please accept for filing the attached pleading: State's Answer to Petition for Review.

Let me know if there is a problem opening the attachment.


Thanks.

Diane.

Diane K. Kremenich
 Snohomish County Prosecuting Attorney - Criminal Division
Legal Assistant/Appellate Unit
Admin East, 7th Floor
(425) 388-3501
Diane.Kremenich@snoco.org

CONFIDENTIALITY STATEMENT

This message may contain information that is protected by the attorney-client privilege and/or work product privilege. If this message was sent to you in error, any use, disclosure or distribution of its contents is prohibited. If you receive this message in error, please contact me at the telephone number or e-mail address listed above and delete this message without printing, copying, or forwarding it. Thank you.

 please consider the environment before printing this email