NO. 32824-4-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

CARL K. MATHENY, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 14-1-00203-7

BRIEF OF RESPONDENT

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I. COUNTER STATEMENT OF FACTS

On February 12, 2014, at about 10:00 p.m., the defendant almost caused a collision when he pulled out in front of Benton County Sheriff's Deputy Jon Schwarder who was driving away from a stop sign. RP[1] at 29-30. The defendant immediately said that he was going to go to jail. RP at 30. Dep. Schwarder determined that the defendant's driving privilege was revoked and arrested him. RP at 31.

In a search of his person, Benton County Sheriff's Deputy Grant Larson found a butterfly knife in the defendant's left rear pocket. RP at 52. He also found a hollowed out pen in the back pocket. *Id.* Dep. Larson saw a crystal substance in the pen, and field tested the substance, which resulted in a positive finding for methamphetamine. RP at 57.

Dep. Schwarder transported the defendant to the jail. RP at 33. After getting the defendant out of his patrol car, Dep. Schwarder noticed a residue of white substance on the backseat of the vehicle where the defendant had been sitting. RP at 34. Dep. Schwarder stated he was meticulous about checking the backseat of his patrol car, does so at the start of each shift and after each prisoner has been in the vehicle. *Id.* The defendant was the first individual who was transported on Dep.

[1] Unless otherwise specified, "RP" refers to the Verbatim Report of Proceedings of the September 15 and 16, 2014, Jury Trial and October 13, 2014, Sentencing Hearing in this case, consisting of one volume.

Schwarder's shift. RP at 35. Dep. Schwarder was positive the residue had not been there before the defendant was transported. RP at 34. Dep. Schwarder also noticed a similar residue on the defendant's fingers. RP at 35. Jason Trigg, a forensic scientist with the Washington State Patrol Crime Laboratory determined this substance was sildenafil, the active ingredient in Viagra. RP at 70, 74. The defendant was not questioned, either on direct or cross-examination, about the residue powder on the backseat of Dep. Schwarder's patrol car. RP at 78-93.

Mr. Trigg also determined that the pen contained methamphetamine hydrochloride, the salt of methamphetamine. RP at 72-73. Mr. Trigg also visually saw methamphetamine still in the pen. RP at 74.

The defendant admitted that he put the pen in his back pocket. RP at 78. He also admitted knowing it would probably be used for sniffing substances and for using drugs. RP at 79-80. However, he claimed that he did not know there were drugs in the pen and that he picked the pen up as an act of a good Samaritan who was protecting children from touching the pen in the house they were at: "I picked it up out of their front room where there were little kids running around. I didn't think it should be laying around somewhere accessible to them." RP at 79, 81. Still, the pen was for "[s]omebody doing drugs with it." RP at 80. The defendant

would not identify whose house he was at when he claimed he picked up the pen. RP at 89.

On cross-examination, the defendant backed away from his statement that he picked up the pen because children may be exposed to drugs, saying that he did not have a clue that it could contain methamphetamine and that he picked up the pen so the children would not lick it. RP at 88-89.

In a motion in limine, the defense moved to suppress admission of a bullet found in the defendant's rectum, which was granted. RP at 9-10. The defendant also moved to suppress admission of the sildenafil in the backseat of the patrol car, first arguing that the substance had not been tested and then arguing that the jury may confuse that substance, which was not charged, with methamphetamine, which was charged. RP at 10, 25. The Court denied that motion to suppress after learning that the substance in the backseat had been tested by the Washington State Patrol Crime Laboratory. RP at 26.

II. ARGUMENT

A. State's Response to Defendant's Argument Number One: "The evidence of the Viagra Powder Admitted Pursuant To ER 404(b) Proved Nothing More Than Mr. Matheny Acted In Conformity With A Character Trait Which Violated His Right To A Fair Trial."

1. The defendant must show that the trial court's evidentiary ruling was an abuse of discretion.

The standard on review for evidentiary ruling is abuse of discretion. *State v. Lane,* 125 Wn.2d 825, 889 P.2d 929 (1995). The State suggests that not only has the defendant not met this burden, but that the Viagra powder was properly admitted.

2. The defendant's attempt to secret Viagra powder is not character evidence under ER 404(b), but circumstantial evidence of his knowledge that he was in possession of drugs and wanted to hide that fact; this Court need not review the defendant's argument on appeal because he did not make an ER 404(b) objection at trial.

The defendant attempted to secret a controlled substance, Viagra, after his contact with the police. This is circumstantial evidence that he knew he was in possession of a controlled substance and wanted to hide that fact. The defendant was able to crush the Viagra tablets while in the patrol car while handcuffed; he could not do the same with the methamphetamine because it was in a pen which the police found during a pat-down search. This shows the lengths the defendant was willing to go to destroy evidence. It also could be the reason the defendant was immediately stating that he would go to jail after he was stopped.

The defendant's attempt to conceal a controlled substance while being arrested does not involve character evidence under ER 404(b). A similar case is *State v. Johnson,* 159 Wn. App. 766, 247 P.3d 11 (2011), in

which the defendant was charged with Burglary for entering a building with the intent to steal copper wire. The trial court admitted a receipt he was carrying showing that he sold 105 pounds of copper the day before to a recycler. The *Johnson* Court disagreed with the defendant's characterization of the receipt as a prior bad act, and said the receipt was circumstantial evidence of the defendant's motive and intent. *Johnson,* 159 Wn. App. at 772-73.

The defendant's objection to admission of the Viagra powder was based on relevancy. RP at 26. The defendant first argued that the powder had not been tested and therefore should not be admitted "because the State has no evidence to be able to establish what it is." RP at 10. After finding out that Forensic Scientist Jason Trigg did test it, the defendant then argued that the Viagra should not be admitted because it may be confused with methamphetamine. RP at 25.

Because the defendant did not object to the evidence of the Viagra powder under ER 404(b), it is unfair for him on appeal to argue that the trial court did not conduct the balancing test required under that rule. *See* App. Brief at 13-14. Indeed, this Court should not review an argument based on one rule of evidence when the objection at trial was made on the basis of a different rule of evidence. *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407 (1986). As stated in *State v. Ferguson*, 100 Wn.2d 131, 138, 667

P.2d 68 (1983) (quoting 5 K. Tegland, Wash.Prac., *Evidence* § 10, at 25 (2d ed. 1982)): "[i]f a specific objection is overruled and the evidence in question is admitted, the appellate court will not reverse on the basis that the evidence should have been excluded under a different rule which could have been, but was not, argued at trial."

Here, the key fact is not that the defendant had another controlled substance on his person; it was that he was attempting to destroy it. That is a distinction between this case and *State v. Pogue*, 104 Wn. App. 981, 17 P.3d 1272 (2001), which the defendant relies on. In *Pogue*, the defendant claimed he did not know a bag containing cocaine was in his sister's car, which he was driving after dropping her off at work. *Pogue*, 104 Wn. App. at 982-83. Mr. Pogue's prior convictions for delivery of cocaine were not admissible to rebut his claim of unwitting possession. *Id.* at 987-88. In the instant case, the fact that the defendant had another controlled substance is not important; his attempt to destroy it is circumstantial evidence that he knew he had it on his person.

3. In any event, the evidence concerning the Viagra powder was harmless.

The defendant was never asked about the powder, either on direct or cross-examination. It was not mentioned in the Opening Statements. Forensic Scientist Jason Trigg spoke a total of five lines in the transcript

about his test on the powder. RP at 74. In Closing Arguments, the sum total of the comments about Viagra was in the deputy prosecutor's rebuttal and amounted to about one page, from RP 133 to 134. The prosecutor stated that the defendant was trying to secret one controlled substance by crushing it, but that he could not crush the pen which contained the methamphetamine. RP at 134.

The defendant was found guilty because he had methamphetamine on his person, he admitted knowing that the pen containing methamphetamine was used to ingest controlled substances, he admitted picking up that pen and his explanation for his possession of the pen was not credible. The defendant's attempt to hide another controlled substance from the police was one addition to these facts.

B. State's Response to Defendant's Argument Number Two: "The trial court erred in imposing court costs and attorney's fees without making a finding regarding Mr. Matheny's inability to pay."

1. This is not properly before the Court because the defendant did not object to the legal financial obligations.

A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review. *State v. Blazina*, ____Wn.2d ____, 344 P.3d 680 (2015). The defendant never claimed that he was unable to make any payment. He did request

that the fine for Possession of a Controlled Substance be lowered. RP at 163-64. But, he did not claim any inability to make the payments.

2. The defendant testified about his work as a firefighter, repeated it at sentencing, and the trial court did not need to ask additional questions concerning his ability to pay LFOs.

At trial, the defendant discussed his ability to work, saying he had been employed as a firefighter for four years. RP at 85. At sentencing, his attorney also stated that the defendant had done work as a smoke jumper and said that he had worked as a mechanic. RP at 158. The defendant also stated that he missed working and wanted to resume his employment with the forest service. RP at 162.

This satisfies the trial court's obligation to make an individualized determination of a defendant's ability to pay LFOs.

C. State's Response to Defendant's Argument Number Three: "Placing the burden of proving unwitting possession on Mr. Matheny violated his right to due process which requires the State to prove all elements of the offense beyond a reasonable doubt."

1. Standard on Review: Under the principle of stare decisis, a prior decision should only be overruled upon a clear showing that the rule it announced is incorrect and harmful.

While rules of statutory construction and constitutional issues are reviewed de novo, *City of Redmond v. Moore*, 151 Wn.2d 664, 668, 91 P.3d 875 (2004), the defendant is requesting this Court to overrule the

decisions in *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004) and *State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981). Those cases should only be overruled if there is a clear showing that the rule they announced – the defendant has the burden of proving unwitting possession – is incorrect and harmful. *State v. Barber*, 170 Wn.2d 854, 863-65, 248 P.3d 494 (2011).

2. The case of *State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014) does not require *Bradshaw* and *Cleppe* to be overruled.

The Court in *W.R., Jr.* found that it was a due process violation to require a defendant in a rape case the sexual intercourse was consensual. *W.R., Jr.*, 181 Wn.2d at 769. The Court held that when the defendant raises that issue, it is actually a challenge to the element of forcible compulsion. *Id.* at 763. Requiring the defendant to prove the intercourse was consensual is the equivalent of requiring him or her to disprove the intercourse was by forcible compulsion.

The Court in *W.R., Jr.* held that the State is not required "to disprove every possible fact that would mitigate or excuse the defendant's culpability." *Id.* at 762. The legislature does not violate a defendant's due process rights when it allocates to the defendant the burden of proving an affirmative defense when the defense merely excuses conduct that would otherwise be punishable. *Id.*

The *Bradshaw* case outlines the history of the legislature's adoption of the Uniform Controlled Substances Act, RCW 69.50, discusses the legislature's deletion of "knowingly and intentionally" language from the Uniform Act for the State charge of Possession of a Controlled Substance, determines that knowledge is not an element of Possession of a Controlled Substance and that it is appropriate for a defendant to prove unwitting possession. *Bradshaw*, 152 Wn.2d 528. The *Bradshaw* Court noted that in the 22 years since the *Cleppe* case was decided, the legislature has had the opportunity to amend the statute, but has not added a mens rea element. *Id.* at 533. This continues to be the clear statutory intent.

3. If this Court is considering changing the law concerning unwitting possession, this is not a good case to do so because the defendant did not object to the instructions and the evidence of the defendant's guilt is very strong.

The defendant had no objections to the jury instructions. RP at 97. The Court gave the suggested WPIC instruction on unwitting possession RP 104-05; WPIC 52.01. Of course, the defendant may ask this Court to review the instructions for the first time on appeal under RAP 2.5(a). However, it would not be fair to the State or the trial court to reverse the case on an issue the defendant did not raise previously.

In this case, whether the State had the burden of proving the defendant knew the methamphetamine was in his possession or the defendant had the burden of proving unwitting possession would not matter. The defendant admitted he had a pen, knowing it was used for sniffing drugs. His explanation how and why he came to possess the pen was inconsistent. RP at 79-80, 88-89. None of his versions made sense. Any error is harmless.

D. State's Response to Defendant's Argument Number Four: "The court penalized Mr. Matheny for exercising his right to trial in denying his request for a DOSA."

1. The standard on review for failure to grant a DOSA is whether the trial court abused its discretion by refusing categorically to impose it under any circumstances.

State v. Grayson held that a trial judge's decision whether to grant a DOSA is not generally reviewable. *State v. Grayson*, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). However, the trial court must consider a request for a DOSA. In this case, there was no categorical refusal to consider a DOSA. The trial court did not abuse its discretion.

2. The trial court appropriately considered a DOSA sentence and determined it was not appropriate for the defendant.

The trial court pointed out that the defendant was not ready for treatment. RP at 162. The defendant at sentencing never stated he had a drug problem or ever admitted an addiction for methamphetamine. RP at

162-63. His only comment was that he wanted "the chance to get some rehab and do a little bit of that." RP at 161-62. His main focus was on his employment: "I miss working. I miss my job as a hotshot with the forest service, and I think rehab would help me with that. I ask Your Honor to please give me that chance." RP at 162.

The trial judge knew that at trial the defendant did not claim he had any drug problem and portrayed himself as a Good Samaritan who was trying to prevent children from being exposed to potentially hazardous substances. RP at 162. The trial judge concluded that the defendant was not ready for treatment. *Id.*

The trial judge considered the defendant's request for DOSA and appropriately denied it.

III. CONCLUSION

Concerning the evidentiary issue of admitting the Viagra powder secreted by the defendant in the patrol car, it is circumstantial evidence that the defendant knew he was in possession of a controlled substance and was willing to go to extreme measures to hide the fact. The defendant has not established that the trial court abused its discretion.

Regarding the LFOs, the defendant repeatedly told the trial court that he was employed as a fire jumper. RP at 85, 158, 162. The trial court did not need to inquire further.

Regarding the unwitting possession instruction, the defendant did not object to the instruction. RP at 97. There is no reason to overturn over two decades of case law and ignore legislative history to begin requiring the State to prove knowledge of possession. The defendant has not shown that the case law interpreting the statute for over two decades has been incorrect and harmful.

Regarding the DOSA, the trial court made a good record on the reasons the defendant was not ready for treatment. The defendant himself said virtually nothing about needing treatment.

The conviction and sentence should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of May, 2015.

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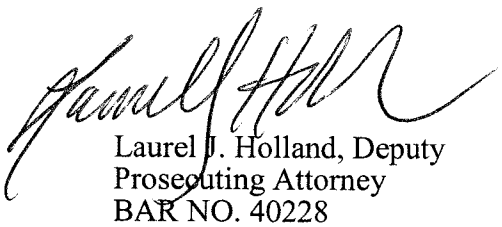

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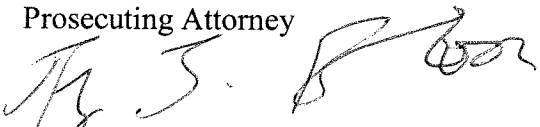

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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