NO. 89624-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NICHOLAS HIGGS,

Petitioner.

PETITION FOR REVIEW FROM THE COURT OF APPEALS
(DIVISION II)

ANSWER TO PETITION FOR REVIEW

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A. ISSUES PRESENTED

1. Should the Supreme Court accept review in order to rule that a particular search warrant was overbroad where the Court of Appeals already essentially ruled on this issue in the context of an ineffective assistance of counsel claim?
2. Should the Supreme Court accept review in order to rule that the petitioner (Nicholas Higgs) was denied his right to effective assistance of counsel, where the ruling of the Court of Appeals on that issue relies heavily upon prior precedents?
3. Should the Supreme Court accept review in order to recognize a non-statutory element or affirmative defense to the crime of Possession of a Controlled Substance, requiring a "measurable quantity that is more than a trace amount," Petition for Review at 22, where it has long been settled law that it is criminal in Washington to possess *any* amount of a controlled substance, and where the evidence would be sufficient to convict Higgs in this case even were the Court to adopt the proposed new element?

B. STATEMENT OF THE CASE

On the evening of August 13, 2011, Angela Hall went to the home of Nicholas Higgs, RP 184-188, at 27 Russell Avenue in Stevenson, Skamania County, Washington. RP 131-133, 153-154. While at Higgs' home, Hall saw Higgs take from a plastic baggie what she recognized, from her own past experience, as methamphetamine and smoke it by using a pen inserted into a light bulb. RP 200-202, 216, 223-224.

At one point, when Hall had a headache, Higgs gave her an Adderall pill, taken from a collection of 40 to 50 of these pills held in a cupboard and not in a pill bottle. RP 210-212, 404-405.

Using this information from Hall in his sworn affidavit, CP 58-64, Detective Tracy Wyckoff obtained a search warrant for Higgs' home, CP 72-75. Det. Tracy Wyckoff, who was trained in testing drugs in the field, who had been to "meth lab school," and who had investigated hundreds of methamphetamine cases, RP 270-271, knew that methamphetamine is usually found in small plastic bags, and is typically smoked from a home-made pipe such as a straw in a light bulb. RP 272-273, 279.

Executing the search warrant, officers found suspected methamphetamine, drug paraphernalia with suspected

methamphetamine residue, and 51 unlabeled orange pills in a container. RP 283-285, 287, 313-314, 319.

Also seized as relating to dominion and control were a rental agreement, Department of Licensing documentation relating to the appellant, and the appellant's Driver's License RP 285-286, 291-292, 313-314.

Higgs' trial counsel moved to suppress all evidence seized, arguing that the affidavit was based upon an informant who failed both prongs of the *Aguilar-Spinelli* test for evaluating information obtained from an informant, CP 54-57. The trial court denied the motion to suppress, RP 43-45, CP 6-9.

At trial, the jury found Higgs guilty of Possession of Methamphetamine (Count Two), Possession of Amphetamine (Lesser Included in Count Three), Use of Drug Paraphernalia (Count Four), and Delivery of Amphetamine (Count Five). CP 65-71, RP 467-468.

Higgs testified at trial, admitting that on the dates in question, he was smoking methamphetamine out of a bulb "multiple times" (specifically three or four times) in the lower level of his house. RP 368, 373, 384-385. He identified the smoking device seized during execution of the warrant as belonging to him and as

the one from which he was smoking methamphetamine, referring to it as his "methamphetamine bulb," RP 368, 383. He also testified that afterward, there was still some methamphetamine "left in the bulb," RP 385.

Higgs denied that the baggy seized by Deputy Rasmussen was the one from which he was smoking methamphetamine on the dates in question, RP 369, but admitted that he had methamphetamine in his house on those dates and that the baggy had been in his house, RP 383-384. He was not able to identify anyone else to whom it might have belonged. RP 384.

Higgs also identified the orange pills as his Adderall pills and admitted that they were not in a prescription bottle. RP 370, 387. He also admitted that Hall had taken one of his Adderall pills, RP 372, that he had given it to her, RP 388, and that he knew they contained amphetamine, a controlled substance, RP 387.

Upon appeal, Higgs argued that the search warrant was unconstitutionally overbroad, that he was denied effective assistance of counsel because the search warrant was unconstitutionally overbroad, and that the Court should adopt a non-statutory element for possessing controlled substances requiring possession of a measurable amount more than a trace

amount and thereby rule that the evidence was insufficient to convict him of possessing methamphetamine.

The Court of Appeals declined to rule directly on whether the search warrant was unconstitutionally overbroad, Opinion at 5-6, but did consider this issue in the context of Higgs' claim of ineffective assistance of counsel, Opinion at 6-17. This claim was rejected, Opinion at 17. Finally, the Court of Appeals declined Higgs' invitation to add a non-statutory element to Possession of Controlled Substances crimes, Opinion at 18-20.

C. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED.

1. THE SUPREME COURT SHOULD NOT ACCEPT REVIEW IN ORDER TO RULE THAT THE SEARCH WARRANT WAS OVERBROAD SINCE THAT ISSUE HAS ALREADY BEEN EFFECTIVELY ADJUDICATED BY THE COURT OF APPEALS IN THE CONTEXT OF AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Higgs argues that "[t]he Supreme Court should accept review and reach the merits of [his] . . . overbreadth claim," Petition for Review at 13. However, as he concedes, "[t]he Court of Appeals considered the warrant's overbreadth in the context of an ineffective assistance claim," Petition for Review at 6.

Thus, this issue in fact was effectively adjudicated by the Court of Appeals, even though the lower court technically did not reach the issue directly.

2. THE SUPREME COURT SHOULD NOT ACCEPT REVIEW IN ORDER TO RULE THAT HIGGS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE COURT OF APPEALS RELIED UPON PRIOR PRECEDENTS IN REACHING ITS CONCLUSION THAT INEFFECTIVE ASSISTANCE OF COUNSEL DOES NOT APPLY.

Higgs repeatedly argues that the Opinion of the Court of Appeals is in conflict with the Supreme Court opinion State v. Perrone, 119 Wn.2d 538, 834 P.2d 611 (1992). Petition for Review at 6, 11, 12-13, 14, 16. However, the opinion below in fact relies heavily on Perrone. Opinion at 7-8, 11-14.

Furthermore, the Court relies directly on State v. Maddox, 116 Wn. App. 796, 67 P.3d 1135 (2003), affirmed on other grounds, 152 Wn.2d 499, 98 P.3d 1199 (2004). Opinion at 8, 12-15. This case, though not cited in Higgs' Petition for Review, is, as argued by the State in the Court of Appeals, more analogous to Higgs' case than is Perrone.

Even though there was probable cause in Maddox for methamphetamine *delivery*, 116 Wn. App. at 804, the Court of Appeals found the warrant overbroad, Id. at 806. Nevertheless, as

in Higgs' case, the Court held "that the warrant's overbreadth did not require suppression of the items admitted at trial," Id. at 810 because it met all five requirements for severability, Id. at 809. Maddox was affirmed (on other grounds) by the State Supreme Court, State v. Maddox, 152 Wn.2d 499, 98 P.3d 1199 (2004).

In Perrone, the police "seem to have conducted a general search, for they seized many items not related to any crime," Maddox, 116 Wn. App. at 809. There is no evidence of such here.

Furthermore, in Perrone, the search warrant related to materials "presumptively protected by the First Amendment," 119 Wn.2d at 550, creating a heightened scrutiny requirement, Id. at 547-548. However, this provision only applies when the items to be seized "'are books, *and the basis for their seizure is the ideas which they contain . . .*,'" Id. at 548, quoting Stanford v. Texas, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L.Ed.2d 431 (1965) (emphasis added).

In Higgs' case, on the other hand, the written materials are mostly in the category of records and ledgers, to which the heightened particularity requirement does not apply. United States v. Espinoza, 641 F.2d 153, 164-165 (4th Cir. 1981), cert. denied, 454 U.S. 841, 102 S.Ct. 153, 70 L.Ed.2d 125 (1981)(cited with approval in Perrone, 119 Wn.2d at 548.)

3. THE SUPREME COURT SHOULD NOT ACCEPT REVIEW IN ORDER TO RECOGNIZE A NON-STATUTORY ELEMENT OR AFFIRMATIVE DEFENSE TO THE CRIME OF POSSESSION OF A CONTROLLED SUBSTANCE, REQUIRING A "MEASURABLE QUANTITY THAT IS MORE THAN A TRACE AMOUNT," SINCE THE LAW ON THIS QUESTION HAS LONG BEEN SETTLED AND SINCE THE EVIDENCE IN THIS CASE, EVEN WERE THE COURT TO ADOPT THE PROPOSED NEW ELEMENT, IS SUFFICIENT TO CONVICT HIGGS.

Higgs asks the Court

> to recognize a non-statutory element or an affirmative defense in drug residue cases, permitting conviction only if the accused person possessed a measurable quantity that is more than a trace amount of a controlled substance.

Petition for Review at 22. Despite many opportunities over the past forty years, the Court of Appeals and the Supreme Court have repeatedly rejected such a step.

In State v. Malone, the Court of Appeals (Division I) found the argument that possession of a controlled substance required a "measurable or usable amount" to be "contrary to Washington law," 72 Wn. App. 429, 438-439, 864 P.2d 990 (1994). That court went on to state that even if the court

> believe[d] that punishing defendants for the possession of drug residue is a poor allocation of resources, it is within the province of the legislature to decide whether the possession of a minute quantity of a controlled substance should be punished under the statute.

Malone, 72 Wn. App. at 439 (footnote 12).

In State v. Rowell, 138 Wn. App. 780, 786, 158 P.3d 1248 (2007), Petition for Review denied, 163 Wn.2d 1013, 180 P.3d 1291 (2008), the Court of Appeals (Division III) found that "residue is sufficient to support a conviction for simple possession." "[S]ince neither the statute nor case law sets a minimum amount, we are hard pressed to conclude there is a minimum amount required for bare possession." Id.

The appellant argues that the Malone and Rowell courts used dicta from State v. Williams, 62 Wn. App. 748, 815 P.2d 825 (1991), review denied, 118 Wn.2d 1019, 827 P.2d 1012 (1992) that cited the Supreme Court's ruling in State v. Larkins, 79 Wn.2d 392, 486 P.2d 95 (1971), but that Larkins "involved a 'measurable' quantity of controlled substance, not trace amounts of residue." Petition for Review at 21.

However, the Malone court in fact went directly to Larkins, finding that in that case, "the fact that the narcotic was 'measurable' was not dispositive" and that "Larkins clearly held that possessing any amount of narcotic drug could sustain a conviction." Malone,

72 Wn. App. at 439 (footnote 11). The language of Larkins would seem to support that interpretation:

> Although the legislature had the power to do so, it provided no minimum amount of a narcotic drug, possession of which would sustain a conviction. It adopted no 'usable amount' test. On the contrary, the legislature provided that the possession of *Any* narcotic drug is unlawful unless otherwise authorized by statute. [statutory citation omitted]

79 Wn. 2d at 394 (emphasis added). See also Larkins, 79 Wn.2d at 394 ("For us to establish the minimum standard suggested would require us to substitute our wisdom for that of the legislature. This we will not do.")

The Supreme Court should again reject this invitation to revisit this long-settled issue.

Furthermore, Higgs' case does not properly present the question since there was sufficient evidence to convict the appellant even were the proposed new element recognized. Hall testified that the appellant smoked methamphetamine at least four times, RP 201, filling up his pipe more than once from the plastic baggie containing the methamphetamine, RP 224.

The appellant admitted to using the seized smoking device "multiple times," RP 384, specifically about three or four times, RP 385. He also testified that afterward, there was still some

methamphetamine "left in the bulb," RP 385. While he denied that the baggy seized by Deputy Rasmussen was the one from which he was smoking methamphetamine on the dates in question, RP 369, he admitted that he had methamphetamine in his house on those dates, RP 383-384.

Both the smoking device and the baggy tested positive for methamphetamine. RP 350-351. Just as the jury was able to infer that the Adderall pill given to Hall contained amphetamine based upon the positive test of the remaining similar pills, RP 351-352, so too would the jury have properly inferred that the methamphetamine which the appellant admitted to having smoked would have also tested positive.

Finally, given the agreement between the testimony of Hall and that of the appellant that he smoked methamphetamine at least three times, there was a measurable quantity more than a trace amount on the dates in question (August 13-14, 2011).

Thus, Higgs' sufficiency of the evidence argument fails even on his own terms, so the question of whether to recognize a new element is moot.

D. CONCLUSION

For the above reasons, the Supreme Court should decline to accept review.

DATED this 26th day of December, 2013.

RESPECTFULLY submitted,

By: _____
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Attached is Skamania County's Answer to Petition for Review of Nicholas Higgs in State of Washington v. Nicholas Higgs, Supreme Court Case No. 89624-1.

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