SUPREME COURT NO. 91003-1
COURT OF APPEALS NO. 32299-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JESSICA M. SWEARINGEN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable John Wulle, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Jessica M. Swearingen asks this Court to review the decision of the Court of Appeals referred to in Section B.

B. COURT OF APPEALS DECISION

Petitioner seeks review of the Court of Appeals' decision in *State v. Jessica M. Swearingen*, COA No. 32299-8-III, filed October 2, 2014. Opinion attached at Appendix.

C. ISSUES PRESENTED FOR REVIEW

Whether this Court should accept review of the Court of Appeals's holding that there were sufficient facts presented at a stipulated facts trial to support the trial court's finding that Ms. Swearingen possessed more than 40 grams of marijuana?

D. STATEMENT OF THE CASE

The following testimony was heard at a suppression motion.

Jessica Swearingen was driving over the speed limit and she did not have her headlights on at 8 a.m. on December 26, 2010. Washington State Patrol Trooper Bettger pulled her over. 1RP at 4-8. Ms. Swearingen handed the trooper her driver's license but not, per Trooper Bettger, her proof of insurance or the car's registration information. 1RP 11, 67, 143.

Trooper Bettger noticed a small black bag with parts of plastic bags sticking out of it and asked Ms. Swearingen about the bag. She

thought the bag and its contents were none of the trooper's business. 1RP at 145-47. Ms. Swearingen rummaged in the bag and concealed her rummaging from the trooper's view. This caused the trooper to be concerned for his safety. 1RP at 12-13, 15. Trooper Bettger told Ms. Swearingen to put her hands on the steering wheel. 1RP 12-13, 15. She did so but not consistently enough for the trooper. 1RP 15, 28. Trooper Bettger testified Ms. Swearingen grabbed a small bag of marijuana from the driver's door panel, threw it on the passenger seat, and told him, "here, you can have the marijuana then." 1RP at 25. Trooper Bettger arrested Ms. Swearingen for unlawful possession of marijuana. 1RP 27. Ms. Swearingen denied producing the marijuana. 1RP 152.

Trooper Bettger requested Trooper Gardiner come to the traffic stop. Trooper Gardiner is a K-9 officer and has a drug sniffing dog. The dog alerted on the car. 1RP 27, 96, 98, 108.

In searching Ms. Swearingen incident to arrest, Trooper Bettger found a small baggy of methamphetamine in Ms. Swearingen's pants pocket. 1RP 91-92.

Ms. Swearingen refused to allow the troopers to search her car. 1RP 35. The troopers decided to seal and impound her car in preparation for obtaining and serving a search warrant on the car. 1RP 110-11. Trooper Gardiner later obtained a warrant to search the car based in large

part on the dog sniff of the car's exterior. 1RP 110-11. Supplemental Designation of Clerk's Papers, Motion to Suppress and Motions to Dismiss (sub. nom. 13).

At the jail, corrections officers found methamphetamine in Ms. Swearingen's jacket pocket and in her bra. 1RP 46, 49-52.

The State charged Ms. Swearingen with various crimes to include Possession of Methamphetamine and Possession of Over 40 Grams of Marijuana. Supplemental Designation of Clerk's Papers, Information (sub. nom. 5.)

Ms. Swearingen challenged the traffic stop. She argued Trooper Bettger exceeded the scope of the stop. She also argued the search warrant affidavit was invalid on its face as it failed to provide probable cause for the search. Supplemental Designation of Clerk's Papers, Motion to Suppress and Motions to Dismiss (sub. nom. 13).

In ruling on the motions, the court found the troopers' testimony more credible than Ms. Swearingen's testimony and adopted the troopers' version of events as truthful. 1RP at 174-75. The court found Trooper Bettger had not exceeded the scope of the traffic stop. Rather, Ms. Swearingen's concealing the small black bag and its contents from Trooper Bettger created an officer safety concern. The court also found Ms. Swearingen voluntarily threw the baggy of marijuana into Trooper

Bettger's plain view. (Possession of a small amount of marijuana at that time was illegal.) The court found the search warrant affidavit valid on its face. 1RP 172-178. The court later entered written findings of fact and conclusions of law on the suppression motion. Supplemental Designation of Clerk's Papers, Findings of Fact and Conclusions of Law on Motion to Suppress and Dismiss (sub. nom. 63.)

Ms. Swearingen filed a written waiver of her right to a jury trial. CP 3-5; 2RP 181. To preserve her right to appeal any suppression issues, Ms. Swearingen agreed to a trial on stipulated facts. The state crafted 26 Findings of Fact and 2 Conclusions of Law. CP 6-10. Attached to the Findings and Conclusions are 66 pages of police reports, photographs, lab reports, a probable cause statement, and K-9 Corbin's credentials. CP 7-73.

In Findings of Fact 1 and 2, the State clarifies that the 66 pages of attachments create the basis for the 26 Findings of Fact:

> 1. The parties in this matter have stipulated to a set of facts contained in the pleading filed in this matter, entitled "Stipulation." That pleading and its accompanying attachments are herein incorporated by reference in their entirety as the basis of the Court's Findings of Facts following Stipulated Facts Trial.
>
> 2. Those facts are summarized below.

CP 6.

Only Findings of Fact 9, 10, 12 21, 23, and 24 include any information about marijuana:

> 9. Trooper Bettger would testify that: While waiting for the driver's check to come back on the radio the Defendant made another sudden move; she turned, blocking the Trooper's view, and reached with her right hand across her left side and downward. Tr. Bettger commanded her again to place her hands back on the steering wheel. As Defendant turned back towards Tr. Bettger, the Trooper observed a plastic bag now in her hand; Defendant tossed the bag/baggie into the front passenger seat and said to the Trooper, "Here, you can have the Marijuana then." Defendant would have testified that she did not throw bag of Marijuana or make admissions. (Refer to 3.5/3.6 hearing - Tr. Bettger & Defendant's testimony).
>
> 10. Tr. Bettger observed the contents of the baggie now in plain view and the contents did appear to be consistent with Marijuana and, based on the Trooper's training and experience, smelled like Marijuana – Tr. Bettger indicated at the suppression hearing that the smell had wafted through the open passenger side window.
> ...
>
> 12. Tr. Bettger advised Communications via radio that he would be placing Defendant under arrest for Possession of Marijuana and Tr. Bettger also requested a narcotics K-9 to respond to his location.
> ...
>
> 21. Some of the evidence found during the subsequent search of defendant's vehicle under authority of search warrant signed by Clark County District Court Judge Vernon L. Schreiber:
>
> a. Black pouch that had the following contents: Suspected Marijuana, glass pipe with suspected Methamphetamine residue.
>
> b. Next to pouch: more plastic baggies containing suspected Marijuana

c. A black plastic bag with more suspected Marijuana and Methamphetamine.

...

e. Between driver's seat and door: More plastic baggies containing suspected Marijuana: one plastic bag had a brown substance that field-tested positive for Hashish.

f. Driver's door pocket: glass pipe with Marijuana residue....

g. On front passenger seat: plastic baggie with suspected Marijuana inside, and

h. Inside trunk of vehicle: plastic bag containing sandwich-sized bags of suspected Marijuana, silver grinder suspected of being used to grind Marijuana, and a small clear glass vial with crystalline residue.

...

23. Ms. Dunn also tested item BY8104, suspected Marijuana/Hashish. This item weighed 0.1 grams and contained THC, or "delta-9-tetrahydrocannabinol" which is a compound that occurs naturally in Marijuana.

24. Although much of the Marijuana was not tested, it was recognized as Marijuana by the Troopers based on their training and experience, and Defendant admitted to Tr. Bettger that the baggie she threw towards him during the stop was Marijuana.

CP 7, 9.

Even though the stipulated facts did not include the actual weight of the marijuana, the trial court entered the following Conclusion of Law:

1. The defendant is guilty beyond a reasonable doubt of the crimes of Possession of a Controlled Substance ... Marijuana (over 40 grams)....

CP 10.

E. REASON WHY REVIEW SHOULD BE ACCEPTED

Pursuant to RAP 13.4(b)(3) and (4), a petition for review will be accepted by the Supreme Court if it presents a significant question of law under the Constitution of the State of Washington or of the United States is involved or if it involves an issue of substantial public interest that should be determined by the Supreme Court.

Ms. Swearingen's conviction for possession of over 40 grams of marijuana was entered without a supporting factual basis. As such, both the state and federal constitutions are implicated.

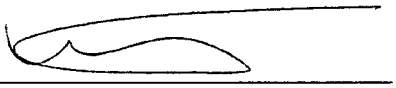
Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from that evidence. *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Id. U.S. Const Amend. 14; Wash. Const. Art. I, § 3, *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

To prove that Ms. Swearingen possessed over 40 grams of marijuana, the state had to prove (1) that Ms. Swearingen possessed marijuana and (2) that she possessed over forty grams of marijuana. RCW 69.50.4013(1). The stipulated facts readily established the first element. Ms. Swearingen had marijuana on her person and in her car. CP 7, 9. However, none of the stipulated facts specify how much marijuana Ms. Swearingen possessed. Yet, in Conclusion of Law 1, the trial court concludes Ms. Swearingen had over 40 grams of marijuana. CP 10. The trial court did not have a factual basis for making this conclusion or entering a judgment against Ms. Swearingen for possessing a felony amount of marijuana. The court of appeals erred in affirming the trial court's conclusion. This Court should grant review of the Court of Appeals decision and reverse Ms. Swearingen's conviction for felony possession of marijuana.

F. CONCLUSION

This Court should accept review of Ms. Swearingen's Petition for Review.

Respectfully submitted this 3rd day of November 2014.



LISA E. TABBUT/WSBA #21344
Attorney for Jessica M. Swearingen

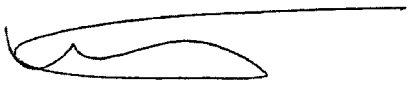
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Petition for Review to (1) Rachel Probstfeld, Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division III; and (3) I mailed it Jessica Swearingen at 13615 SE 11th Circle, Vancouver, WA 98683.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed November 3, 2014, in Mazama, Washington.



Lisa E. Tabbut, WSBA No. 21344
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APPENDIX

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CASE # 322998
State of Washington v. Jessica M. Swearingen
CLARK COUNTY SUPERIOR COURT No. 101020951

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:ko
Attach.
c: **E-mail** Hon. David Gregerson (Judge Wulle's case)
c: Jessica M. Swearingen
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent,	)	No. 32299-8-III
v.	)	
JESSICA M. SWEARINGEN, Appellant.	)	UNPUBLISHED OPINION

KORSMO, J. — Jessica Swearingen challenges the result of a stipulated facts hearing and resulting judgment and sentence, raising evidentiary sufficiency and sentencing issues. We affirm.

FACTS

A state trooper pulled Ms. Swearingen over for traffic violations and noted plastic baggies protruding from a pouch on the floor of her car. A subsequent search following her arrest uncovered a substantial amount of marijuana, methamphetamine, and other controlled substances. She ultimately was charged with possession of cocaine, possession of methamphetamine, possession of marijuana in excess of 40 grams, possession of a controlled substance by an inmate, obstructing a law enforcement officer, and bail jumping.

After a failed suppression hearing, Ms. Swearingen waived her right to a jury trial and proceeded to a stipulated facts bench trial. The cocaine possession and possession by an inmate charges were dismissed by the prosecutor. The court, after considering the stipulation and attached police reports, found Ms. Swearingen guilty of the four remaining charges. She faced a sentence range of 6-18 months under the drug sentencing grid. The parties were jointly recommending 366 days in custody.

Defense counsel indicated that the defense was prepared for sentencing, but told the court that Ms. Swearingen wanted the matter rescheduled in order to have time to get her affairs in order. She then personally indicated that she did not want sentencing set over, but she wanted more time to get her affairs in order before reporting to jail. The court asked if there was anything else. The prosecutor asked that the court proceed to sentencing. Ms. Swearingen attempted to say something, but counsel assured her, "It's okay." Report of Proceedings at 241. The court indicated that it would accept the agreement of the parties. The transcript indicates that Ms. Swearingen asked her counsel, "Can I talk?" and was told no.

The court then imposed the 366 day sentence jointly recommended by the parties. The court imposed various legal financial obligations and expressly found that the defendant had the future ability to pay. The court also imposed a 12 month term of community custody that included a condition she have no contact with "known felons." The defense did not object to the finding or to the community custody condition.

She then timely appealed from the sentence.

ANALYSIS

Ms. Swearingen argues that the evidence does not support the marijuana conviction, that she was denied her right of allocution, and that the sentencing finding and noted community custody condition are improper. We address each contention in turn.[1]

Sufficiency of the Evidence

Ms. Swearingen argues that the evidence does not support the determination that she possessed more than 40 grams of marijuana because the *findings* do not mention an amount. Her argument confuses the sufficiency of the evidence with the adequacy of the findings.

Long settled standards govern review of evidentiary sufficiency challenges. Such challenges are reviewed to see if there was evidence from which the trier of fact could find each element of the offense proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). The reviewing court will consider the evidence in a light most favorable to the prosecution. *Id.*

---

[1] Ms. Swearingen filed a Statement of Additional Grounds taking issue with the traffic stop and subsequent search of the car. However, her Statement provides no reasoned argument describing any alleged errors in the issuance of the search warrant or its execution. It is insufficient for this court's review. RAP 10.10(c).

Applying that standard to the *evidence* presented in this case, there easily was sufficient evidence to support the determination that Ms. Swearingen possessed more than 40 grams of marijuana. The police reports were appended to the stipulated facts and stated to be one of the bases for the decision. Clerk's Papers (CP) at 10. One page of the evidence report lists the various marijuana containers and tallies the total marijuana as 163.1 grams. CP at 24. That evidence alone was sufficient to support the determination that Ms. Swearingen possessed more than 40 grams of marijuana.

Perhaps realizing that the evidence supported the conviction, Ms. Swearingen argues that none of the stipulated *findings* expressly stated the amount of the marijuana. However, the adequacy of the findings is not a sufficiency of the evidence question. There was ample evidence—i.e, sufficient evidence—that the defendant possessed more than 40 grams of marijuana. Her express challenge in this appeal fails.

If she was presenting an actual challenge to the adequacy of the findings, we also would reject the contention. Ms. Swearingen and her counsel expressly stipulated to the findings and conclusions. Conclusion of Law 1 states that Ms. Swearingen possessed more than 40 grams of marijuana. CP at 10. She thus could not show any prejudicial error from the adequacy of the findings since she stipulated to the relevant conclusion of law.

The evidence was sufficient to support the conviction for possession of more than 40 grams of marijuana. To the extent she is challenging the adequacy of the findings, she

cannot show prejudicial error given her stipulation to the conclusion of law that she possessed more than 40 grams of marijuana.

Allocution

Ms. Swearingen argues that either the trial court denied her right of allocution or her counsel provided ineffective assistance by preventing her from allocuting. There is no factual basis for believing she was denied the right to allocute.

The record does not reflect that Ms. Swearingen wanted to address the court before sentence was imposed. The court heard her address whether to conduct a sentencing hearing at that time. When the prosecutor agreed that the matter should proceed to sentencing, she appeared to want to say more at about the same time the court indicated it was accepting the agreement of the parties for 366 days incarceration. In context, her desire to speak simply does not appear to be directed at the question of the sentence to be imposed. The parties had already recommended, in writing, that the court impose 366 days so that she could face an earlier release under department of corrections policy.

It would be pure speculation to say that Ms. Swearingen wanted to exercise her right of allocution. Accordingly, any claim that counsel performed ineffectively is without factual basis.[2] If she is to present such a claim, she will have to proceed by way

[2] There also would be no basis for finding prejudice from any alleged failure of counsel since the court followed the sentence recommendation made by the defense.

of a personal restraint petition in which she can make a record of her intentions. *See, e.g.*, *State v. Norman*, 61 Wn. App. 16, 27-28, 808 P.2d 1159 (1991).

The claim that the trial court denied the right of allocution fails because the error was not preserved. Allocution is a statutory, not constitutional, right. Accordingly, the issue must be presented to the trial court in order to preserve a claim of error for appeal. RAP 2.5(a); *State v. Canfield*, 154 Wn.2d 698, 707, 116 P.3d 391 (2005). Even the limited constitutional due process right of allocution recognized in sentence revocation proceedings must be asserted in order to be preserved. *Canfield*, 154 Wn.2d at 707. Ms. Swearingen did not assert a right to allocute at trial, nor did she object to any failure of the court to inquire about her interest in allocuting. Thus, the claim that the trial court denied Ms. Swearingen her right of allocution is not preserved for this appeal.

Both of her bases for claiming a right of allocution cannot be considered in this action. They are not supported by the record and one of them was not preserved for appellate review.

Legal Financial Obligation Finding

Ms. Swearingen also argues that the court erroneously found that she had the future ability to pay her financial obligations. This argument, also, was not preserved for our review.

Ms. Swearingen did not object to the finding. All three divisions of this court unanimously agree that these types of challenges cannot be presented for the first time on

appeal. *State v. Duncan*, 180 Wn. App. 245, 327 P.3d 699 (2014); *State v. Calvin*, 176 Wn. App. 1, 316 P.3d 496, *petition for review filed*, No. 89518-0 (Wash. Nov. 12, 2013); *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492, *review granted*, 178 Wn.2d 1010, 311 P.3d 27 (2013). As noted in *Duncan*, there seldom is a reason for a defendant to desire to convince a judge that she will never be able to afford to pay her obligations. 180 Wn. App. at 250-51.

In accordance with the noted authorities, we decline to entertain Ms. Swearingen's belated argument in this appeal.

"Known Felons" Restriction

The final issue presented is a contention that the community custody restriction on Ms. Swearingen associating with "known felons" is unconstitutionally vague. We disagree and affirm the condition.

Once again, Ms. Swearingen did not challenge this condition at sentencing. In this instance, however, that fact is not a bar to our consideration of her claim. *State v. Bahl*, 164 Wn.2d 739, 745, 193 P.3d 678 (2008) (vagueness challenge to condition that defendant not possess "pornographic materials" permitted initially on appeal). When a vagueness challenge presents solely a question of law and there is no need to develop the facts, it can properly be considered initially on appeal. *Id.* at 746-52. That is the situation here.

The restriction that Ms. Swearingen not associate with "known felons" is not vague. This court dealt with an analogous restriction in *State v. Llamas-Villa*, 67 Wn. App. 448, 836 P.2d 239 (1992). There the defendant was restricted from associating with persons who used, possessed, or distributed controlled substances. *Id.* at 454. He argued that the provision was vague because it did *not* limit his liability only to situations involving people he *knew* were engaging in the prohibited activities. *Id.* at 455. This court disagreed, stating that if the defendant "is arrested for violating the condition, he will have an opportunity to assert that he was not aware that the individuals with whom he had associated were using, possessing, or dealing drugs." *Id.* at 455-56. We concluded that the condition was not vague. *Id.* at 456.

The condition at issue here is even less subject to challenge than that in *Llamas-Villa*. First, the condition contains the restriction, argued for by the defendant in *Llamas-Villa*, that it applies only to persons known to the defendant to be felons. Second, as in *Llamas-Villa*, the wording of the condition permits Ms. Swearingen to present evidence that she did not know an associate was a felon should she be accused of violating the condition. Similarly, the condition appears to put the burden on the Department of Corrections to prove her knowledge of her associates' felon status. Since she is the one who may not contact "known felons," the knowledge element in question is her knowledge, not that of some unknown community corrections officer. Properly considered, the condition is not vague.

The court properly imposed the condition that Ms. Swearingen not associate with "known felons."

The convictions are affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Siddoway, C.J.

Brown, J.

COWLITZ COUNTY ASSIGNED COUNSEL

November 03, 2014 - 8:05 AM

Transmittal Letter

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Party Respresented:	petitioner
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Comments:

No Comments were entered.

Sender Name: Lisa E Tabbut - Email: ltabbutlaw@gmail.com