No. 46329-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kenneth Taylor,

Appellant.

Pacific County Superior Court Cause No. 14-1-00009-8

The Honorable Judge Michael J. Sullivan

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

WASHINGTON STATE CASES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

ARGUMENT

I. THE JUDGE COERCED A VERDICT WHILE DELIBERATIONS WERE PENDING.

Historically, jury deliberations were not complete until a verdict was filed and jurors discharged. *State v. Ford*, 171 Wn.2d 185, 196-198, 250 P.3d 97 (2011) (Stephens, J., dissenting) (collecting cases). The *Ford* decision changed this. *Id.,* at 190.

However, even under *Ford,* deliberations are not final until the jury announces it has reached a *unanimous* verdict. *Id.* The *Ford* court found no judicial coercion possible in that case "because the jury had announced its *unanimity* prior to the judicial conduct at issue." *Id.,* at 186 (emphasis added).

In this case, the jury returned partly blank verdict forms.[1] The presiding juror told the court they'd reached a verdict, but the court did not make sure they'd reached a *unanimous* verdict. RP (4/16/14) 97-98, 121-123. Despite this lack of announced unanimity, and over defense objection, the court directed the jury to return to the jury room to fill in the verdict forms. RP (4/16/14) 123. This violated Mr. Taylor's state and

[1] The jury had completed the portion relating to a sentencing enhancement. RP (4/16/14) 97-98, 121-123.

federal constitutional right to a jury trial. U.S. Const. Amends. VI, XIV, and by Wash. Const. art. I, §§ 21 and 22.

Under *Ford,* deliberations are not final until the jury announces a unanimous verdict. *Id.* Here, jurors did not announce a unanimous verdict. RP (4/16/14) 97-98, 121-123. As a matter of law, deliberations were not complete. *Id.*

Respondent does not address this absence of unanimity. Brief of Respondent, pp. 7-9. Respondent's failure to argue this point may be treated as a concession. *In re Pullman*, 167 Wn.2d 205, 212 n.4, 218 P.3d 913 (2009).

This case differs from *Ford* in one crucial respect – the judge's failure to ensure that the jury had reached a unanimous decision. The judge told jurors that "[t]he Court is directing the jury to return to the jury room and complete Verdict Form A and Verdict Form B according to the answer given by the Presiding Juror that the jury was able to reach a verdict." RP (4/16/14) 123. Because the jury had not yet announced a *unanimous* verdict, this directive improperly influenced the jury's deliberations. *Id.*

The trial court's directive violated *Ford.* It also violated CrR 6.15(f)(2). Mr. Taylor's convictions must be reversed, and the case remanded for a new trial. *Id.*

II. THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED.

A. Deputy Tully did not establish probable cause for issuance of a search warrant.

The issuing magistrate noted that "a juvenile under the influence" is "not very reliable." Ex. C, p. 2. Tully admitted that he didn't know B.W. very well. Ex. C, p. 4. He added that she'd been on the run for months, had a juvenile warrant for contempt, and had been in and out of foster care. Ex. C, p. 4.

Tully himself said he didn't know and wouldn't speculate about her motivation for accusing Mr. Taylor. Ex. C, pp. 5-6. His only other information consisted of his claim that Mr. Taylor had been involved with drugs three years prior. Ex. C, pp. 3, 5.

The uncorroborated accusations of a juvenile runaway who is under the influence of methamphetamine cannot be enough to allow police to search a private residence. It does not satisfy the *Aguilar-Spinelli*[2] standard. *State v. Ollivier*, 178 Wn.2d 813, 850, 312 P.3d 1 (2013) *cert. denied,* 135 S.Ct. 72 (2014).

Respondent points to no additional information in the warrant application to support B.W.'s accusation. Instead, Respondent attempts to characterize B.W. as a named citizen informant. Brief of Respondent, pp.

13-15.

B.W. was hardly a disinterested citizen. Nor did she voluntarily disclose her own criminal involvement: she had been arrested on her warrant and was hospitalized for her methamphetamine use. Her "admissions" were made when it was too late for her to attempt further deception. *See* Ex. C, pp. 2-7. They do not enhance her reliability.

The trial judge should have granted Mr. Taylor's motion and suppressed the evidence. *Ollivier*, 178 Wn.2d at 850. Mr. Taylor's convictions must be reversed. *Id.* The evidence must be suppressed, and the case dismissed with prejudice. *Id.*

B. Deputy Tully lied by saying he knew Mr. Taylor "quite well."

The issuing magistrate was reassured by Deputy Tully's false claim that he knew Mr. Taylor "quite well." Ex. C, p. 2. In fact, Tully "didn't have a great amount of dealings with him," and didn't "know him… in a personal capacity." RP (4/4/14) 28.

Tully intentionally misrepresented the truth, exaggerating his familiarity with Mr. Taylor, in order to reassure the judge. Ex. C, p. 2. Material misrepresentations such as these cannot contribute to probable cause. *Ollivier*, 178 Wn.2d at 847. The only true information the issuing

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[2] *Aguilar v. Texas,* 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) and *Spinelli v. United States,* 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

judge had was an accusation from "a juvenile under the influence," who was "not very reliable." Ex. C, p. 2. The trial judge should have granted Mr. Taylor's motion to suppress. The convictions must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Id.*

III. MR. TAYLOR DID NOT INVITE INSTRUCTIONAL ERROR.

An attorney's "mere failure to object is not sufficient to invite an error." *In re Coggin*, 182 Wn.2d 115, 124, 340 P.3d 810 (2014) (Madsen, C.J., concurring). Respondent erroneously asserts that Mr. Taylor invited error by failing to object. Brief of Respondent, pp. 20-21.

Mr. Taylor did not propose the disputed instruction. He did not invite any error. This court should review the instructional issue on its merits.

IV. THE SENTENCING COURT EXCEEDED ITS AUTHORITY BY IMPOSING CONSECUTIVE DRUG-ZONE ENHANCEMENTS.

The Supreme Court heard argument on this issue on May 21, 2015. *State v. Conover,* Supreme Court No. 90782-0. The court's decision in *Conover* will resolve the issue in this case. Accordingly, Mr. Taylor rests on the argument in his Opening Brief.

V. THE INFORMATION FAILED TO ALLEGE CRITICAL FACTS.

A charging document must contain both legal elements and critical facts. *Russell v. United States*, 369 U.S. 749, 763-64, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962). The Information here charged the legal elements of the sentencing enhancements. It included no critical facts. CP 29-30.

Respondent appears to acknowledge this omission, but asserts that Mr. Taylor was obligated to request a Bill of Particulars. Brief of Respondent, pp. 31-34. This is incorrect.

An Information is constitutionally deficient if it fails to include critical facts. *Id.* The Information here fails to meet the requirements of *Russell.*

Nor is Mr. Taylor obligated to show prejudice. The obligation to show prejudice arises only if the Information can be construed to include the critical facts. *State v. Rivas*, 168 Wn. App. 882, 887, 278 P.3d 686 (2012) *review denied,* 176 Wn.2d 1007, 297 P.3d 68 (2013). Respondent erroneously argues lack of prejudice; however, the issue of prejudice only arises if the Information is sufficient through liberal construction of its language. *Id.*

The Information here did not meet the requirements set forth in *Russell.* Respondent does not address *Russell*. Brief of Respondent, pp. 29-34.

The Information is constitutionally deficient. Mr. Taylor's sentencing enhancements must be reversed and the case remanded for sentencing within the standard range. *Rivas*, 168 Wn. App. at 893.

CONCLUSION

Mr. Taylor's convictions must be reversed and the case dismissed with prejudice. In the alternative, the case must be remanded for a new trial.

If the convictions are not reversed, the drug-zone enhancements must be vacated.

Respectfully submitted on July 16, 2015,

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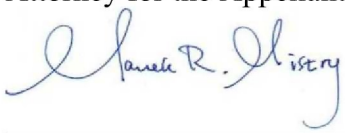

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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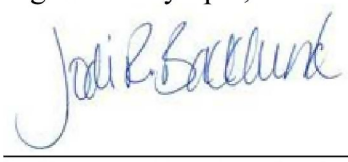
I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on July 16, 2015.



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