IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 32869-4-III

STATE OF WASHINGTON, Respondent,

v.

JOHN MARK CROWDER, Petitioner.

ANSWER TO STATE'S PETITION FOR REVIEW

Andrea Burkhart, WSBA #38519
Burkhart & Burkhart, PLLC
6 ½ N. 2nd Avenue, Suite 200
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630
Attorney for Appellant

TABLE OF CONTENTS

AUTHORITIES CITED

Cases

Washington State:

Court Rules

I. IDENTITY OF PETITIONER

John Mark Crowder, Respondent, submits this Answer to the Petition for Review filed by the State of Washington, Petitioner.

II. DECISION OF THE COURT OF APPEALS

The State seeks review of that portion of the Court of Appeals' opinion filed on December 1, 2016 reversing Crowder's convictions for delivering marijuana to a minor.

III. ISSUES PRESENTED FOR REVIEW

1. Whether the State presented sufficient evidence to prove that Crowder delivered a controlled substance.

IV. STATEMENT OF THE CASE

For purposes of this Answer, Crowder accepts the Statement of the Case set forth in the State's Petition for Review, as well as the facts set forth in the Court of Appeals' December 1, 2016 opinion.

V. ARGUMENT ON ACCEPTANCE OF REVIEW

The State failed at trial to present evidence from which the jury could conclude that marijuana seized from Crowder's home and tested was a representative sample of the substance delivered to S.I. and Z.H. five days later, or establishing a foundation from which the jury could

have concluded that the subjective experiences of S.I. and Z.H. after consuming the substance indicated that the substance was marijuana. *Opinion*, at 9-12. Contrary to the State's argument, the ruling does not establish an impossible standard of proof in drug cases where the substance is not recovered; rather, it identifies the evidentiary deficiencies in the State's case and described how those deficiencies could have been overcome by applying accepted and established legal principles. As such, the petition seeks only to overturn an appellate decision with which the State disagrees, but does not establish grounds for discretionary review under RAP 13.4(b)(2). Accordingly, the petition should be denied.

The State's allegation that the opinion conflicts with three published decisions from other divisions of the appellate courts is incorrect, because the Court of Appeals correctly applied the principles of those decisions in this case. *Petition for Review*, at 6. In *State v. Hernandez*, 85 Wn. App. 672, 676, 935 P.2d 623 (1997), the court held that properly qualified lay or expert testimony could establish the identity of a substance, without requiring chemical testing. The Court of Appeals did not dispute or reject this principle, but simply pointed out that the State did not lay an adequate foundation from which identity could be concluded. *Opinion*, at 10 (State did not present foundational testimony of similarity from which tested materials could be deemed a representative

sample), 11 (State did not present foundational testimony about the effects of THC that could show a correlation between the effects reported by S.I. and Z.H. and the potency of the substance they consumed). Thus, contrary to the State's assertion, the opinion does not conflict with *Hernandez*; rather, it applies the same principles and reaches a different result in light of deficiencies in the State's case.

Likewise, the decision does not conflict with *State v. Colquitt*, 133 Wn. App. 789, 137 P.3d 892 (2006). In *Colquitt*, following a stipulated facts trial based solely on the police reports, the court determined that in the absence of foundational testimony supporting the officer's ability to identify the substance on sight, the identity of the substance could not be proven beyond a reasonable doubt. 133 Wn. App. at 800-01. Here, again, the State's evidence simply failed to present sufficient evidence from which the jury could reach the required conclusions – not only that the substance was marijuana, but that it had a minimum THC content. The opinion identifies a number of possible ways the State *could* have met this burden, including testimony explaining the significance of the requirement of 0.3% THC content – i.e., whether this was a large, small, or typical concentration - and whether this amount would produce the "high" reported by S.I. and Z.H. *Opinion*, at 11-12. Absent this link, the subjective experiences of S.I. and Z.H., while circumstantial evidence of

the substance's identity, are not sufficient to prove it beyond a reasonable doubt – exactly the conclusion reached in *Colquitt*. *Id.* at 801-02.

Finally, the State contends the decision conflicts with *State v. Caldera*, 66 Wn. App. 548, 832 P.2d 139 (1992) because the Court of Appeals concluded the State's foundation was inadequate to show that the tested material was a representative sample of the substance consumed five days earlier by S.I. and Z.H. *Opinion*, at 10. *Caldera* held that "scientific testing of a random portion of a substance that is consistent in appearance and packaging is reliable and supports a finding that the entire quantity is consistent with the test results of the randomly selected portion." *Id.* at 550. Here, the Court of Appeals cited *Caldera* and held that the required foundation was not established in this case. *Opinion*, at 10. Thus, the decision is not in conflict with *Caldera*, but rather applies *Caldera* to the State's evidence.

The State has shown no conflict with existing law and argued no other basis for accepting review than error correction. Contrary to its assertion that the Court of Appeals created "an impossible standard whereby the State of Washington would never be able to prove delivery of a controlled substance where the substance is gone," the Court of Appeals applied the same standards that the State identifies and even advised the

State what evidence it needed to present to establish the necessary foundation. *Petition for Review*, at 13. The State's disagreement with the Court of Appeals' application of existing law does not put the decision in conflict with existing law within the meaning of RAP 13.4(b)(2). Accordingly, the State has failed to demonstrate grounds for acceptance of review.

VI. CONCLUSION

For the foregoing reasons, Crowder respectfully requests that the Court DENY the State's petition for review.

RESPECTFULLY SUBMITTED this 16 day of February, 2017.

ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

DECLARATION OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Answer to Petition for Review upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Andrew Kevin Miller
Anita Isabelle Petra
Benton County Prosecuting Attorney's Office
7122 W. Okanogan Pl Bldg A
Kennewick, WA 99336

John Mark Crowder, DOC #377539
Airway Heights Corrections Center
Airway Heights, WA 99001-2049
Living Unit R-B-25, PO Box 2049

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 16th day of February, 2017 in Walla Walla, Washington.

Breanna Eng