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S. Ct. No.
COA No. 33944-1-III

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

RODNEY CLIFFORD MENARD,

Petitioner.

PETITION FOR REVIEW

Kenneth H. Kato, WSBA # 6400
Attorney for Petitioner
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

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A. IDENTITY OF PETITIONER

Rodney Clifford Menard asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The published decision of the Court of Appeals, *State v. Menard*, 197 Wn. App. 901, ___ P.3d ___ (2017), which he wants reviewed was filed on February 23, 2017. A copy is attached as Appendix A. His motion for reconsideration was denied on April 11, 2017. A copy is attached as Appendix B.

C. ISSUE PRESENTED FOR REVIEW

1. Did the undisputed facts establish a prima facie case of guilt for the offense of maintaining a drug dwelling when drug use was simply incidental to Mr. Menard's substantial purpose of residing in the house?

D. STATEMENT OF THE CASE

This appeal originated from the granting of a *Knapstad* motion to dismiss and the facts are undisputed. For purposes of the trial court motion, the State relied on the investigating detective's declaration of probable cause. (CP 1-3). The State also accepted the "limited" facts stated in defense counsel's

supporting declaration. (CP 6, 13). These facts are recited in the Court of Appeals' opinion. Reference will be made to specific facts as the discussion necessitates in the argument as to whether review should be granted.

Since the undisputed facts did not establish a prima facie case against Mr. Menard, the trial court entered an order of dismissal without prejudice. (CP 39). The State appealed. (CP 40). The Court of Appeals reversed in a published decision. (App. A). Mr. Menard's motion for reconsideration was denied. (App. B).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The decision of the Court of Appeals conflicts with *State v. Ceglowski*, 103 Wn. App. 346, 12 P.3d 160 (2000). Review is thus warranted under RAP 13.4(b)(2).

In order to grant a *Knapstad* motion, the trial court must find there are no disputed facts and the undisputed facts do not establish a prima facie case of guilt. *State v. Knapstad*, 107 Wn.2d 346, 352, 729 P.2d 48 (1986). The trial court so found and granted the motion to dismiss without prejudice. But the Court of Appeals reversed on these same undisputed facts.

Even when viewed in a light most favorable to the State, those facts showed only that there were crime stopper phone calls

complaining about traffic to Mr. Menard's residence; a solitary CI drug buy from another person at the house; items seized pursuant to a search warrant; and Mr. Menard's admissions. (CP 2). He admitted he was the property owner; he rented rooms to five persons and sometimes got meth in exchange for rent money; he admitted using the drug periodically and possessed drug pipes in his bedroom; he was aware the tenants were using meth but unaware they were selling drugs from the residence; and he tried to stop all the people coming to his house with no success. (*Id.*). Two renters in his residence indicated to police that at least 10-15 different people came by the house daily to use drugs. (*Id.*).

To prove Mr. Menard guilty of maintaining a drug dwelling under RCW 69.50.402(1)(f), the State must show (1) the drug activity was of a continuing and recurring character and (2) a substantial purpose of maintaining the premises is for the illegal drug activity. *Ceglowski*, 103 Wn. App. at 352-53. The undisputed facts failed to establish the "substantial purpose" prong.

Adopting the reasoning applied to the federal crack house statute, the *Ceglowski* court noted the casual user does not fall under the prohibition because his house is not maintained for the purpose of using drugs but rather for the purpose of residing in it,

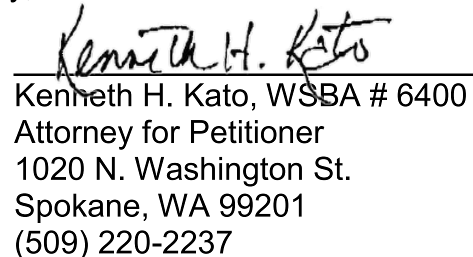
the drug use simply being incidental to that purpose. 103 Wn. App. at 351 (quoting *United States v. Verners*, 53 F.3d 291, 296 (10th Cir. 1995)). Mr. Menard falls squarely within the holding of *Ceglowski*. All the facts showed was that Mr. Menard was a casual user of drugs in the house where he had lived since he was five years old. (CP 6). He resided in the house and a substantial purpose of maintaining the residence was to live in it – not to maintain it for using drugs. *Ceglowski*, 103 Wn. App. at 351. Having failed to establish the "substantial purpose" requirement, the State did not make a prima facie case. The trial court properly granted the *Knapstad* motion.

The Court of Appeals' reversal of the dismissal conflicts with *Ceglowski*, so review should be accepted under RAP 13.4(2)(b).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Menard respectfully urges this court to grant his petition for review.

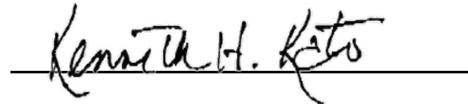
DATED this 10th day of May, 2017.



Kenneth H. Kato, WSBA # 6400
Attorney for Petitioner
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on May 10, 2017, I served a copy of the petition for review by USPS on Rodney Menard, 1421 SW 148th St., Burien, WA 98166; and by email, as agreed, on Tamara Hanlon at tamara.hanlon@co.yakima.wa.us.



APPENDIX A

1 of 100 DOCUMENTS

Analysis
As of: May 09, 2017

THE STATE OF WASHINGTON, *Appellant*, v. RODNEY CLIFFORD MENARD, *Respondent*.

No. 33944-1-III

COURT OF APPEALS OF WASHINGTON, DIVISION THREE

197 Wn. App. 901*; *2017 Wash. App. LEXIS 457

February 23, 2017, Filed

SUBSEQUENT HISTORY: Reconsideration denied by *State v. Menard, 2017 Wash. App. LEXIS 848 (Wash. Ct. App., Apr. 11, 2017)*

PRIOR-HISTORY: Appeal from Yakima Superior Court. Docket No: 15-1-01090-1. Judge signing: Honorable Ruth E Reukauf. Judgment or order under review. Date filed: 11/13/2015.

SUMMARY:

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: Prosecution for maintaining a drug dwelling.

Superior Court: The Superior Court for Yakima County, No. 15-1-01090-1, Ruth E. Reukauf, J., on November 13, 2015, dismissed the charge on the defendant's pretrial motion claiming that the State did not have sufficient evidence to prove the elements of the crime.

Court of Appeals: Holding that the evidence was sufficient to find that the defendant maintained his house for others to use drugs there on an ongoing basis, the court *reverses* the dismissal order and *remands* the case for further proceedings.

COUNSEL: Joseph A. Brusic, *Prosecuting Attorney*, and Tamara A. Hanlon, *Deputy*, for appellant.

Kenneth H. Kato, for respondent.

JUDGES: Authored by George Fearing. Concurring: Kevin Korsmo, Robert Lawrence-Berrey.

OPINION BY: George Fearing

OPINION

¶1 FEARING, C.J. -- In response to respondent Rodney Menard's pretrial *Knapstad* motion, the trial court dismissed the charge of maintaining a drug dwelling. *State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986)*. The State appeals. We reverse and remand for further proceedings.

FACTS

¶2 We outline the facts in a radiance most favorable to the State. Respondent Rodney Menard owns and lives at 810 N. 26th Avenue, in Yakima, a home where he has resided since the age of five. Menard rented rooms to five individuals, occasionally received methamphetamine from tenants as rent payment, consumed twenty dollars' worth of methamphetamine per day, and possessed drug pipes. Menard knew his tenants imbibed methamphetamine, but denied knowledge of the use of his home for methamphetamine sales.

¶3 The Yakima Drug Enforcement Administration Task Force (DEA) received numerous complaints regarding recurrent drug traffic to and from 810 N. 26th Avenue. On July 15, 2015, a DEA confidential informant purchased approximately a gram of methamphetamine at Rodney Menard's home.

¶4 On July 23, 2015, at 6:45 a.m., the DEA Task Force conducted a narcotics search of Yakima's 810 N. 26th Avenue. The front door was unlocked. Rodney Menard and thirteen other individuals were present when law enforcement officers entered the residence. In a basement bedroom, a lady rested on a small couch with a bag of methamphetamine next to her pillow.

¶5 Law enforcement officers spoke with Rodney Menard and other denizens of the home. When asked if people who visit take drugs, Menard answered: "[M]ost people do." Clerk's Papers (CP) at 24. Two renters informed the officers that ten to fifteen different people came daily to the house to use drugs. Menard claimed he had unsuccessfully tried to end the heavy traffic at the house. Officers confiscated drug paraphernalia and 25.5 grams of drugs inside the home.

PROCEDURE

¶6 The State of Washington charged Rodney Menard with maintaining a drug dwelling under *RCW 69.50.402*. Menard filed a *Knapstad* motion. Menard argued that any drug-related activity at his house was incidental to the primary purpose of the residence and the statute proscribed his conduct only if the drug activity constituted the residence's major purpose. The State responded that Menard knew drug users employed his house for the purpose of enjoying controlled substances. In turn, the State contended that drug activity, for purposes of the crime, need be only a substantial purpose, not the primary one. The trial court granted Menard's motion to dismiss.

LAW AND ANALYSIS

¶7 Under Washington law, a defendant may present a pretrial motion to dismiss a charge and challenge the State's ability to prove all of the elements of the crime. *State v. Montano, 169 Wn.2d 872, 876, 239 P.3d 360 (2010)*. Judges and lawyers refer to such a motion as a *Knapstad* motion from the leading decision of *State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986)*. The trial court has inherent power to dismiss a charge when the undisputed facts are insufficient to support a finding of guilt. *Knapstad, 107 Wn.2d at 351*. The court must decide whether the facts that the State relies on, as a matter of law, establish a prima facie case of guilt. *Knapstad, 107 Wn.2d at 356-57*. We review de novo a trial court's dismissal of a criminal charge under *Knapstad. State v. Conte, 159 Wn.2d 797, 803, 154 P.3d 194 (2007)*.

¶8 The parties renew their respective arguments on appeal. Rodney Menard contends that he may be found guilty of maintaining a drug dwelling only if he maintains the home for the principal purpose of facilitating the use of controlled substances. We disagree.

¶9 *RCW 69.50.402(1)*, known colloquially as the "drug house statute," declares:

> It is unlawful for any person:
>
> ... .
>
> (f) Knowingly to keep or maintain any ... dwelling, building, ... or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter *for the purpose of using these substances*, or which is used for keeping or selling them in violation of this chapter.

(Emphasis added.) Note that the statute refers to the purpose for which the drug users employ the residence, not the owner's purpose for the residence. The statute does not insert the word "primary" or any other term similar in meaning.

¶10 To convict under *RCW 69.50.402(1)(f)*, the totality of the evidence must demonstrate more than a single isolated incident of illegal drug activity in order to prove that the defendant "maintains" the premises for keeping or selling a controlled substance. *State v.*

Ceglowski, 103 Wn. App. 346, 350, 12 P.3d 160 (2000). Sporadic or isolated incidents of drug use do not suffice to prove criminal conduct under the drug house statute. *State v. Ceglowski, 103 Wn. App. at 351*. The requirement that the defendant "maintain" the premises necessarily connotes a course of continuing conduct. *State v. Ceglowski, 103 Wn. App. at 350*. Since "maintain" is not specifically defined in the statute, we employ the plain and ordinary meaning of the word as found in a dictionary. *State v. Ceglowski, 103 Wn. App. at 350*. *Black's Law Dictionary* defines "maintain" as "'hold or preserve in any particular state or condition" and "'sustain'" or "'uphold.'" *State v. Ceglowski, 103 Wn. App. at 350* (quoting BLACK'S LAW DICTIONARY 953 (6th ed. 1990)). The ordinary meaning of "maintain" encompasses this concept of continuing conduct: "'to keep or keep up; continue in or with; carry on.'" *State v. Ceglowski, 103 Wn. App. at 350* (quoting WEBSTER'S NEW WORLD DICTIONARY 854 (2d College ed. 1976)).

¶11 "Knowingly maintaining" a place under the federal crack house statute, former *21 U.S.C. § 856(a)(1) (1986)*, includes acts evidencing control, duration, and continuity. *United States v. Morgan, 117 F.3d 849, 857 (5th Cir. 1997)*; *United States v. Clavis, 956 F.2d 1079, 1090-91*, *amended on reh'g*, *977 F.2d 538 (11th Cir. 1992)*. Still, a small quantity of drugs or evidence found on only a single occasion can be sufficient to show a crime of a continuing nature. *State v. Ceglowski, 103 Wn. App. at 353*. Federal courts have held that this element requires proof that a substantial purpose for maintaining the premises was to conduct the drug activity. *United States v. Verners, 53 F.3d 291, 296 (10th Cir. 1995)*; *United States v. Clavis, 956 F.2d at 1093-94*. *State v. Ceglowski* followed the test of "substantial purpose." *103 Wn. App. at 350-52*.

¶12 In *State v. Ceglowski, 103 Wn. App. 346 (2000)*, the State charged Michael Ceglowski with utilizing a tackle and bait shop for using and selling drugs. Officers found 0.9 grams of methamphetamine in Ceglowski's desk drawer. Still, the State presented evidence of only a single drug sale being conducted in the shop. The State also produced "pay and owe" sheets, which may or may not have been drug related. Nevertheless, nothing tied the records to sales on the premises. This court reversed Ceglowski's conviction.

¶13 In *State v. Fernandez, 89 Wn. App. 292, 948 P.2d 872 (1997)*, the State prosecuted three defendants for operating a drug house. During trial, officers testified about five controlled buys at the defendants' residence, and three neighbors testified to a dramatic increase in pedestrian and vehicular traffic on their street after the defendants occupied the home. Visitors stayed inside the house for two to ten minutes. One neighbor estimated as many as fifteen cars an hour coming and going from the house. The defendants leaned into cars that stopped on the street. The police executed a search warrant and discovered twenty-four grams of cocaine, a scale, sandwich bags, and weapons. The *Fernandez* court found sufficient evidence to prove the defendants maintained the house to sell or store drugs, but no evidence to support a finding that drug users resorted to the house for the purpose of using cocaine. The record contained insufficient evidence that anyone other than those maintaining the house used drugs on the premises.

¶14 The case on review includes substantial evidence that people other than Rodney Menard used drugs in the house. The evidence supports ongoing drug use and the use of controlled substances being a substantial purpose for the home. Two witnesses testified that ten to fifteen people each day entered the home to imbibe drugs. When police executed the search warrant, fourteen people, some of whom admitted to use of methamphetamine, occupied the premises. One resident rested methamphetamine near her pillow. Officers found drug devices scattered throughout the home. When asked if people who visit take drugs, Menard answered: "[M]ost people do." CP at 24.

CONCLUSION

¶15 We reverse the dismissal of charges against Rodney Menard for maintaining a drug dwelling. We remand for further proceedings.

KORSMO and LAWRENCE-BERREY, JJ., concur.

Reconsideration denied April 11, 2017.

Annotated Revised Code of Washington by LexisNexis

APPENDIX B

Renee S. Townsley
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

April 11, 2017

E-mail
Joseph Anthony Brusic
Tamara Ann Hanlon
Yakima County Prosecuting Attorney's Off
128 N 2nd St Rm 329
Yakima, WA 98901-2621

Kenneth H Kato
Attorney at Law
1020 N Washington St
Spokane, WA 99201-2237
khkato@comcast.net

CASE # 339441
State of Washington v. Rodney Clifford Menard
YAKIMA COUNTY SUPERIOR COURT No. 151010901

Counsel:

Enclosed is a copy of the Order Denying Motion for Reconsideration.

A party may seek discretionary review by the Supreme Court of the Court of Appeals' decision. RAP 13.3(a). A party seeking discretionary review must file a Petition for Review, an original and a copy of the Petition for Review in this Court within 30 days after the Order Denying Motion for Reconsideration is filed (may be filed by electronic facsimile transmission). RAP 13.4(a). The Petition for Review will then be forwarded to the Supreme Court.

If the party opposing the petition wishes to file an answer, that answer should be filed in the Supreme Court within 30 days of the service.

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:sh
Attachment

FILED
APRIL 11, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. RODNEY CLIFFORD MENARD, Appellant.	)	No. 33944-1-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of February 23, 2017 is hereby denied.

PANEL: Judges Fearing, Korsmo, Lawrence-Berrey

FOR THE COURT:

GEORGE B. FEARING, Chief Judge