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NO. 62839-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM FIFE,

Appellant.

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

The Honorable Ira J. Uhrig, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE WARRANTLESS SEARCH OF FIFE'S CAR WAS UNLAWFUL UNDER ANY LEGAL THEORY.

All the evidence against Fife was either obtained during or derived from a search of his car purportedly conducted under the 'search incident to arrest' exception to the warrant requirement. The State concedes that Gant¹ applies retroactively and renders a search incident to Fife's arrest unconstitutional on these facts.

But the State claims the search was lawful on three alternative grounds: (1) independent probable cause; (2) inevitable discovery; and (3) good faith. Brief of Respondent (BOR) at 6. Gant does permit a search contemporaneous with an arrest, provided "another exception to the warrant requirement applies." Id. at 1723-24. All of the State's proposed grounds here are meritless, however.

a. No Probable Cause²

The police had no legitimate reason to search Fife's car. They had not observed any contraband when they began the unlawful search. They did not observe "anything out of the ordinary" going on in Fife's car. RP

¹ Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), adopted in Washington by State v. Patton, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 3384578 (Slip Op. filed October 22, 2009), Slip Op. at 7.

² The State claims Fife is not entitled to the protection of the Washington Constitution because he relied primarily on a federal case. BOR at 11, n.7. But Fife argued both state and federal authorities. Brief of Appellant (BOA) at 6-12.

29. They detected no odor of intoxicants and observed no drugs before they arrested Fife, and the arrest occurred *after* he was removed from the car and handcuffed preparatory to being placed in the patrol car. RP 32-33, 49, 53. Moreover, when Polinder told Fife he was going to search the car, he asked if there was anything illegal in there, which shows no contraband was in plain sight. RP 52. Polinder was asked whether he was looking for anything in particular when he began the search. He testified:

Just typically again anything illegal we often find drugs inside a vehicle in searching it so just looking for illegal drugs, anything that's going to present a hazard to us, guns, or, you know, weapons, safety, anything like that.

RP 126. In other words, not with probable cause based on something in plain view. It was standard police procedure to search *every* arrestee's vehicle after securing the scene. RP 32, 120.

The State claims Fife's statement that Polinder would find pills and needles during an unjustified warrantless search created a probable cause exception, because the statement was "voluntary." This is wrong.

First, Fife's statement was not voluntary. Polinder coerced it by saying he was going to search the car under a false claim of authority. Individuals are required to yield to a show of police authority. State v. Patton, *supra*, Slip Op. at 3, citing State v. Young, 135 Wn.2d 498, 957 P.2d 681 (1998).

Second, focusing on the voluntariness of Fife's statement mischaracterizes the issue and conflates Fourth and Fifth Amendment analysis. See State v. Byers, 88 Wn.2d 1, 7, 559 P.2d 1334 (1977), overruled on other grounds by State v. Williams, 102 Wn.2d 733, 741, 689 P.2d 1065 (1984). Voluntariness is a test of admissibility under the common-law prohibition of compulsory self-incrimination. Byers, 88 Wn.2d at 7, citing State v. McCullum, 18 Wash. 394, 51 P. 1044 (1897); 3 J. Wigmore, Evidence § 826 (1970). Its constitutional relevance is to the Fifth and Fourteenth Amendments, and it does not affect the search and seizure question of whether a statement was obtained unlawfully Id., citing Wong Sun v. United States, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); McNear v. Rhay, 65 Wn.2d 530, 541, 398 P.2d 732 (1965) (an admission must be excluded even if voluntary, if it is fruit of a poisonous tree.)

Fife statement was inadmissible based on Const. Art 1, §7 and the Fourth Amendment, not Const. Art. 1, §9 and the Fifth Amendment. If a statement is obtained in violation of constitutionally-protected rights, it is inadmissible in Washington courts for all purposes. State v. Chenoweth, 160 Wn.2d 454, 473, 158 P.3d 595 (2007); State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982). Voluntary or not, a statement clearly derived from an unlawful intrusion "must fall with it." Byers, 88 Wn. 2d at 7.

The statement cannot justify the unconstitutional intimidation that gave rise to it. Wong Sun, 371 U.S. at 488; Byers 88 Wn.2d at 8. Evidence tainted by unlawful government action must be excluded unless it was ultimately obtained under a valid warrant or other lawful means independent of the unlawful action. State v. Gaines, 154 Wn.2d 711, 718, 116 P.3d 993 (2005).

Here, Fife's statement to Polinder resulted from Polinder's claiming authority to conduct a warrantless search. Whether it was voluntary or not is immaterial.

The State next claims Fife's lethargic appearance and his statement he injected drugs earlier that day created probable cause to search his car. This is wrong.

This contradicts Polinder's testimony (see above) that Polinder did not know what he was looking for. Also, Fife did not say he injected himself in the car. He acquired the car just shortly before his arrest, not earlier in the day. Therefore, any prior consumption was unrelated to the car and did not create probable cause to search.

Moreover, prior consumption does not establish present possession of a substance, much less its current location. State v. Hornaday, 105 Wn.2d 120, 126-27, 713, P.2d 71 (1986) (once a substance enters the system, it is assimilated by the body, ending the power of possession or

control.) Therefore, evidence that Fife previously assimilated a controlled substance is not probable cause to search for that substance in his car. Id.

The State disputes that Fife's wallet was in the car, but Polinder testified to this. RP 277. Even if the wallet was in his pocket, however, carrying cash is not probable cause to suspect criminal activity. State v. Neth, 165 Wn.2d 177, 185, 196 P.3d 658, 663 (2008).

b. No Inevitable Discovery:

The State claims police would inevitably have discovered drugs in the car pursuant to a lawful inventory search. This is wrong. The car was not subject to lawful impoundment, and searching the trunk and closed containers exceeded the lawful scope of an inventory search.

Chapter 45.20 RCW permits police to impound a vehicle if the driver is either physically impaired or unlicensed. Police may lawfully impound, however, only where certain conditions are met.

(a) If the car is evidence – believed stolen, for example or used to commit a felony.

(b) Under the police “community caretaking function” if –

(i) the vehicle is impeding traffic, threatens public safety, or is likely to be vandalized AND

(ii) no suitable person is available to move the vehicle.

State v. Simpson, 95 Wn.2d 170, 189, 622 P.2d 1199 (1980). Neither of these circumstances was present here.

The car was safely off the road in a commercial parking lot. RP 28. The identity of the registered owner was known. RP 41-42. The stop occurred within a couple of minutes of a 911 call from the owner's home. RP 19-22. Therefore, standard practice would have been to secure the vehicle and leave it for the owner to pick up. In State v. Ringer,³ for example, the police properly asked a DWLS arrestee what he would like done with the vehicle and complied with his request to leave it for a friend to pick up. 100 Wn.2d at 688. The police testified it was impounded because of the drugs in the car. RP 142, 276-77. The record suggests no legitimate reason to impound.

Moreover, even if the car were lawfully impounded, the lawful scope of an inventory search is limited. Absent a manifest necessity, police may not search an impounded vehicle's trunk. White, 83 Wn. App. at 772. Closed containers are also beyond the scope, unless the prosecutor makes a record of police policy regarding closed containers found during inventory searches. Otherwise, the search is "not sufficiently regulated" to survive a warrant challenge. State v. Mireles, 73 Wn. App. 605, 612, 871 P.2d 162 (1994).

³ 100 Wn.2d 686, 674 P.2d 1240 (1983).

No such record exists here, yet the police searched the trunk. RP 361-62. And, except for the scales, the evidentiary items were in a closed container – the yellow tool box in the trunk space. RP 152-53, 168, 176, 185, 194, 364-65.⁴

The facts in the record are sufficient for this Court to evaluate the legality of an inventory search and to determine that impounding Fife's car cannot support a Gant exception.

c. Good Faith Is Irrelevant:

The State argues extensively for a good faith exception to the retroactive application of Gant. BOR 15-26. The argument is meritless on its face, however, and quickly disposed of.

The State's own authorities clearly hold that new criminal rules apply retroactively to cases pending on direct review, *with no exception for new rules that constitute "a clear break with the past."* BOR at 7-8, citing In re St. Pierre, 117 Wn.2d 321, 326, 823 P.2d 492 (1992); State v. McCormick, ___ Wn. App. ___ 216 P.3d 475, 476 (2009); Teague v. Lane, 489 U.S. 288, 302-04, 109 S. Ct. 1060, 103 L. Ed. 2d 334 (1989) (emphasis added).

⁴ Paraphernalia was loose in the car. RP 166-67. But possession of paraphernalia is not a crime. State v. George, 146 Wn. App. 906, 920, 193 P.3d 693 (2008).

Washington has never recognized a good faith exception to the exclusionary rule under our state Constitution. State v. White, 97 Wn.2d 92, 109-10, 640 P.2d 1061 (1982). “Article I, section 7 is unconcerned with the reasonable belief of the police officers.” State v. Eisfeldt, 163 Wn.2d 628, 636, 185 P.3d 580 (2008). See also, State v. Counts, 99 Wn.2d 54, 58, 659 P.2d 1087 (1983), citing United States v. Johnson, 457 U.S. 537, 556 n.16, 102 S. Ct. 2579, 73 L. Ed. 2d 202 (1982), Griffith v. Kentucky, 479 U.S. 314, 328, 107 S. Ct. 708, 93 L. Ed. 2d 649 (1987). Even the federal good faith exception does not excuse officer reliance on decisions the Supreme Court reversed or overturned while a case was on review. McCormick, 216 P.3d at 478, citing U.S. v. Gonzalez, 578 F.3d 1130, 1132 (9th Cir, 2009), and U.S. v. Buford, 623 F. Supp. 2d 923, 927 (M.D.Tenn., 2009).

In summary, no “other exception” can rescue this warrantless search after Gant. Therefore, any evidence recovered during the search of the car or obtained as a direct result of it is inadmissible, and any resulting convictions must be reversed.

2. THE REMEDY IS TO REVERSE.

With no legal authority to uphold the search, the State moves this Court to invoke RAP 9.11(a) and remand for additional fact-finding to

supplement the appellate record, instead of reversing the conviction for a possible new trial. BOR 27. This is not an option.

First, the Court should strike the State's motion because it is not permitted by appellate rules. Chapter 17 of the RAP governs motions. "A party may include in a brief only a motion which, if granted, would preclude hearing the case on the merits. RAP 17.4(d). Here, the State is asking the Court to eventually decide the merits but to postpone the decision and reopen the trial record under RAP 9.11(a). On its face, this contravenes RAP 17.4(d).

Moreover, the plain language of RAP 9.11(a) applies solely to the Court, not parties. If parties could invoke the rule, it would say the Court "on its own initiative or on motion of a party" may invoke it, as does RAP 9.10 which immediately precedes it. RAP 9.11(a) does not say this.

Not only does RAP 9.11(a) contemplate only a request by the Court for the taking of additional evidence, parties also are foreclosed by RAP 9.9 from supplementing the record once it is transmitted to the Court. Likewise, the Court may invoke RAP 9.10 on motion of a party, but that authority is limited to ordering transmittal of existing record that for some reason was not designated on appeal.

Moreover, even if RAP 9.11(a) applied, the requirements of the rule are not met. First, the record before the Court must be insufficient for

review. RAP 9.11(a)(1). As discussed above, the Fife record is sufficient to dispose of the State's proposed alternative grounds for a warrantless search, assuming the officers testified truthfully at trial and would have testified consistently pretrial. This Court has all the record it needs.

Supposing the record were insufficient, the Court could then remand to supplement for equitable reasons. RAP 9.11(a)(3) and (6). No such reason exists, however. The State may be excused for failing to present alternative grounds evidence at trial, but Fife is entitled to the usual remedy, *i.e.*, reversal. Counts, 99 Wn.2d at 61, 64.

Finally, RAP 9.11(a)(5) would permit the Court to consider the cost of retrial versus supplementing an insufficient record. The State does not argue that financial considerations should take precedence over an accused's right to a timely decision on the merits, and the case presents no unusual circumstances that would justify the Court in departing from established appellate procedure.

The State's motion should be denied. If the State wishes to remedy defects in the prosecution, it may seek a new trial. Counts, 99 Wn.2d at 64.

3. THE POSSESSION STATUTE'S PLAIN LANGUAGE REQUIRES PROOF THERE WAS NO PRESCRIPTION.

The State asserts the existence of a valid prescription is an affirmative defense to a charge of unlawful possession of a prescription drug, so that the to-convict instruction need not list the absence of a valid prescription as an element the jury must find in order to convict. BOR at 30. The State is wrong. The State's reliance on State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994), and State v. Brown, 33 Wn. App. 843, 658 P.2d 44, review denied 99 Wn.2d 1012 (1982), is misplaced.

Staley and Brown hold that under former RCW 69.50.401(a) and (d), the only essential elements of unlawful possession are that the substance is a controlled substance and that the defendant possessed the substance. Staley, 123 Wn.2d at 798; Brown, 33 Wn. App. at 848. These authorities are not controlling, however.

The substance at issue in Staley was cocaine, of which possession is unlawful in itself, and the allegedly omitted element was intent. 123 Wn.2d at 797. The Court held intent was not an element and unwitting possession was an affirmative defense. 123 Wn.2d at 799. The Brown court did say the State need not prove lack of a prescription, but the only

authorities Brown cites are two cases involving the non-elements of intent and guilty knowledge. Brown, 33 Wn.App. at 848.⁵

The dispositive authority here is State v. Clausing, 147 Wn.2d 620, 56 P.3d 550 (2002). In Clausing, the Court recognized that the absence of a prescription was “the single essential element of the offense of unlawful delivery, which the State had to prove beyond a reasonable doubt.” 147 Wn.2d at 627, citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

The same is true here. The absence of a prescription is the single fact that makes possession of pharmaceuticals unlawful. Just as in Clausing, the propriety of Fife’s conduct is not at issue, only whether the instructions informed the jury of the elements that made his conduct criminal under the statute. Clausing, 147 Wn.2d at 627. Just like unlawful delivery, it is the absence of a prescription – and nothing else – that renders possession of pharmaceuticals ‘unlawful.’

The State claims the existence of a prescription is an “exception or exemption” constituting an affirmative defense under RCW 69.50.506(a). BOR 29-30. This is wrong.

⁵ Citing State v. Cleppe, 96 Wn.2d 373, 381, 635 P.2d 435 (1981), cert. denied, 456 U.S. 1006, 102 S. Ct. 2296, 73 L. Ed. 2d 1300 (1982), and State v. Sainz, 23 Wn. App. 532, 539, 596 P.2d 1090 (1979).

It is not clear what the terms “exception” and “exemption” mean in this context. The term “exemption” appears in the statutory definition of substances otherwise defined as “controlled substance analogs” for which an “exemption” may apply. RCW 69.50.101(e)(2)(iii) & (iv). “Exceptions” are discussed in various places, including the section following that under which Fife was charged. RCW 69.50.4013(2). The State cites State v. Lawson, 37 Wn. App. 539, 540, 681, 867 (1984). BOR at 31. Lawson interprets an unlawful consumption of alcohol statute, the plain language of which includes “exceptions.” That statute provides:

Except in the case of liquor given or permitted to be given to a person under the age of twenty-one years by his parent or guardian for beverage or medicinal purposes, or administered to him by his physician or dentist for medicinal purposes . . . It is unlawful for any person under the age of twenty-one years to acquire or have in his possession or consume any liquor *except* as in this section provided and *except* when such liquor is being used in connection with religious services.

RCW 66.44.270. The statute Fife was convicted under includes no comparable language.

Regardless, Clausing is controlling in holding that due process precludes the State from convicting a person for an act that is unlawful without a prescription without proving the lack of a prescription beyond a reasonable doubt. Fife claims neither an exception nor an exemption to

RCW 69.50.4013(1). He simply asserts the State failed to prove the essential element that his possession was unlawful.

To the extent the statute is ambiguous, the Rule of Lenity gives the accused the benefit of the doubt. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005). At best, RCW 69.50.4013(1) is ambiguous. Undefined terms in a statute carry their common legal, or ordinary dictionary meaning. State v. Chester, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997). “Exception” and “exemption” are undefined. RCW 69.50.101. Neither means “affirmative defense,” however. See Webster’s Third New International Dictionary at 791, 795; Black’s Sixth Ed. at 559, (that which is excluded, free from certain legal obligations). To create an exception or exemption here, the statute would say it is unlawful to possess without a prescription, except for such-and-such exemption.

Regardless, as in Clausing, it is precisely the absence of a prescription – and nothing else that would render Fife’s possession of the pills ‘unlawful.’

4. JURY UNANIMITY WAS NOT ASSURED.

To avoid unanimity problems, the State should have elected the conduct it was relying on to prove the possession element of the heroin count, or instructed the jury that it had to be unanimous as to which conduct it was relying on. State v. King, 75 Wn. App. 899, 902, 878 P.2d

466 (1994), citing State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). There was no unanimity instruction given, but the State now claims the prosecutor made an election to rely on Fife's admitted prior consumption. BOR at 32-37. The record shows otherwise.

The prosecutor almost elected, but not quite. He said Fife used up "most of" the heroin from earlier in the day, leaving some on the scales in the car. RP 378-79. Moreover, some of the jurors may have perceived that a person cannot control or otherwise possess a substance hours after ingesting it. If so, some but not all of the jurors would have convicted based on the alleged heroin traces on the scales, denying Fife a unanimous verdict. Reversal is required.

5. THE STATE DID NOT PROVE POSSESSION OF HEROIN.

A conviction for possession requires proof of present possession, not past possession. Once a controlled substance is in a person's system, power to control, possess, use, dispose of, or cause harm with is beyond human capabilities. Without the essential element of control, evidence a controlled substance has been assimilated in a person's blood does not establish present possession or control. State v. Hornaday, 105 Wn.2d 120, 126-27, 713, P.2d 71 (1986).

Fife's statement that he injected himself with heroin earlier in the day did not establish present possession, even leaving aside the inherent reasonable doubt regarding the basis of Fife's knowledge of the nature of the substance he injected.

As to the spot of alleged heroin on the scales in the car, (a) it was inadmissible because of the unlawful search; and (b) it was not positively identified. The only witness with the credentials to identify the substance resolutely declined to do so. RP 246.

The State did not prove either the nature of the substance alleged to be heroin or that Fife possessed it. Retrial following reversal for insufficient evidence is prohibited. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The Court should reverse and dismiss.

6. THE COURT ABUSED ITS DISCRETION BY IMPOSING CONSECUTIVE SENTENCES WITHOUT EXPLANATION.

A sentencing court has broad discretion under the SRA generally and RCW 9.94A.589(3) in particular. State v. Champion, 134 Wn. App. 483, 486-87, 140 P.3d 633 (2006), rev. den. 160 Wn.2d 1006, cert. den. 128 S. Ct. 510 (2007). That discretion, however, is not unfettered. Rather, a court abuses even the broadest discretion when it determines the length of a sentence without considering the facts. State v. Grayson, 154 Wn.2d 333, 341, 111 P.3d 1183 (2005) (sentencing court abused its

discretion by proclaiming, “I’m not going to give a DOSA, so that’s it.”). The judge must exercise some sort of meaningful discretion. Grayson, 154 Wn.2d at 335.

The court here abused its discretion by rejecting presumptively concurrent sentences for no apparent reason. The Court should remand for resentencing.

7. THE STATE FAILED TO PROVE FIFE HAD AN OUT-OF-STATE CONVICTION FROM 1976.

Due process may, as the State asserts, allow proof of a foreign conviction without a certified judgment and sentence. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). But the State must show the best evidence is unavoidably unavailable. State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609 (2002). That did not happen here. Therefore, the 1976 Nevada offense should not have been included in Fife’s offender score. Resentencing is required.

B. CONCLUSION

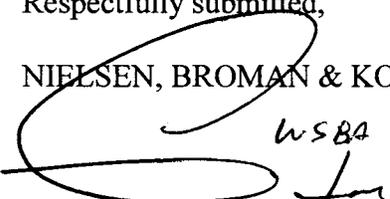
For the reasons stated, this Court should reverse Fife's convictions and dismiss the prosecution with prejudice.

DATED this 12th day of November 2009.

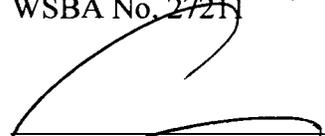
Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC.

WSBA 25097



JORDAN B. McCABE
WSBA No. 27211



~~CHRISTOPHER H. GIBSON~~
WSBA No. 25097
Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
vs.)	COA NO. 62839-9-1
)	
WILLIAM FIFE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 12TH DAY OF NOVEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] WHATCOM COUNTY PROSECUTOR'S OFFICE
WHATCOM COUNTY COURTHOUSE
311 GRAND AVENUE
BELLINGHAM, WA 98227

- [X] WILLIAM FIFE
DOC NO. 244153
OLYMPIC CORRECTIONS CENTER
11235 HOH MAINLINE
FORKS, WA 98331

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF NOVEMBER, 2009.

X *Patrick Mayovsky*