

69642-4

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NO. 69642-4-1

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

REC'D  
APR 15 2013  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

KYLE HEWSON,

Appellant.

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

The Honorable Cheryl Carey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The evidence is insufficient to support appellant's conviction for possessing methadone with intent to deliver.

Issue Pertaining to Assignment of Error

Although the State alleged that appellant possessed methadone pills with intent to deliver them, law enforcement failed to ever test the pills (field test or lab test) and appellant never admitted the pills contained methadone. Did the State prove beyond a reasonable doubt that the pills contain methadone?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged Kyle Hewson with one count of possession of a controlled substance (methadone) with intent to manufacture or deliver. CP 1-6. Hewson was permitted to participate in drug diversion court.<sup>1</sup> Successful completion of all drug court requirements would result in dismissal of the charge with prejudice. CP 11.

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<sup>1</sup> Drug courts are authorized under RCW 2.28.170.

As a condition of participation, Hewson waived several constitutional rights, including his right to trial by jury. CP 7. He also agreed that, should he fail to comply with any conditions of drug court:

a hearing will be held at which the State will present evidence related to this/these charge(s) including but not limited to the police report and the results of any law enforcement field test. I stipulate that the field test used in this case was accurate and reliable, and is admissible.<sup>2</sup> This stipulation is not an admission of guilt, and is not sufficient, by itself, to warrant a finding of guilt. I understand that the judge will review the evidence presented by the State and will decide if I am guilty or not guilty of this charge based solely on that evidence. . . .

CP 7.

After more than a year in the program, Hewson voluntarily terminated his participation. CP 13. The State then asked the court to find Hewson guilty of the charged offense based on documentary evidence. RP 1. This evidence includes the Certification of Probable Cause, police reports, documents and photographs pertaining to the search of the car in which Hewson was a passenger

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<sup>2</sup> This appears to be stock language for drug court agreements. There was no field test in Hewson's case.

and a cell phone he had used, and the transcript of an interview with a confidential witness (CW) involved in Hewson's arrest. CP 14-88.

According to this evidence, on August 31, 2010, King County Sheriff's Deputy Anthony Mullinax received a phone call from a paid CW, who had previously assisted law enforcement and shown himself reliable. CP 23. The CW indicated that "Kyle" had sent him a text message offering to sell 10 methadone pills ("dones") for \$60.00. CP 23, 51. Mullinax determined that "Kyle" was Kyle Hewson. CP 23. The CW arranged to meet Hewson near Pacific Raceway. Hewson indicated he would be in a red Geo Metro. Deputy Mullinax and a detective then staked out the area by parking nearby. CP 23, 25.

A red Geo Metro entered the area and parked. Hewson was a passenger; his girlfriend, Amanda Meehan, was driving. CP 23, 25. Both were taken into custody and interviewed. Neither was carrying any contraband, but officers could see paraphernalia – aluminum foil and tubes for smoking OxyContin – inside the car. CP 23, 25. Hewson claimed they were there to meet someone he was

going to “hook up,” but then explained he simply planned to steal the other person’s money. Meehan said they were there to meet a friend and then find that friend some weed. She also claimed that Hewson had mentioned stealing the friend’s money and the two had argued about it in the car. CP 23.

Hewson denied there were any pills in the car but neither he, nor Meehan, would consent to a search of the car. CP 23, 25. He admitted using Meehan’s cell phone. The number assigned to that phone was the same number associated with the text messages between Hewson and the CW. CP 24.

Deputy Mullinax obtained a warrant to search the car. CP 24, 27-33. Inside the car, deputies found paraphernalia for smoking OxyContin and a marijuana pipe. CP 24-25. In Meehan’s purse, which was on the front passenger side floorboard, Mullinax found a small plastic box containing 13 pills. Using photographs from the “2010 drug bible,” Mullinax concluded that 10 of the pills were methadone and 3 were Ativan. CP 24, 43, 45-46. Text messages and recent calls on the cell phone appeared to pertain to drug deals. CP 24, 50-51, 65-73.

In an interview of the CW conducted two days after Hewson's arrest, the CW explained how he knew Hewson and Meehan. CP 36-37. The CW described Hewson as both a user and a dealer. CP 37-38. On August 31, Hewson texted the CW "out of the blue" and asked if he wanted some "dones," meaning methadone pills. CP 38. The CW inquired how much, and Hewson texted back ten pills for \$60.00. This was a typical method Hewson had used in the past for deals. CP 39-40.

At the hearing to determine whether these documents established Hewson's guilt, defense counsel argued that because there had been no field test of the suspected methadone and no lab test, either, the State had failed to prove the substance was, in fact, methadone. RP 1-4. Despite this argument, the Honorable Cheryl Carey concluded that the State had proved the pills were methadone beyond a reasonable doubt.<sup>3</sup> RP 4. Judge Carey imposed a standard range sentence of 12 months plus 1 day, which Hewson had already satisfied. RP 4-14; CP 90, 92.

Hewson timely filed his Notice of Appeal. CP 97-104.

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<sup>3</sup> Apparently, in drug court, no written trial findings and conclusions are entered. See CP 7 ("I waive my right under Criminal Rule 6.1(d) to written findings of fact and conclusions of law."). Since written findings are usually helpful, and often critical,

C. ARGUMENT

THE EVIDENCE IS INSUFFICIENT TO SUPPORT HEWSON'S CONVICTION.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

A criminal defendant in drug court who agrees to have his guilt determined based on documentary evidence does not waive his right to have that determination established beyond a reasonable doubt. The State retains its usual burden of proof. State v. Colquitt, 133 Wn. App. 789, 795-796, 137 P.3d 892 (2006).

Hewson was charged with possession of methadone with intent to manufacture or deliver. CP 1. Below, he challenged

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on appeal, this is an unwise practice.

sufficiency of the evidence that the substance found in Meehan's purse was, in fact, methadone. RP 1-4. And that is his challenge here. Division Two's opinion in Colquitt controls the outcome.

In Colquitt, the defendant possessed a small plastic bag with several white, rock-like items inside. The arresting officer believed it was cocaine and a field test confirmed the officer's suspicion. Colquitt, 133 Wn. App. at 792. Colquitt was charged with unlawful possession of cocaine and offered admission into drug court. Upon Colquitt's termination from the program, the trial court found him guilty based on the police reports. Id. at 792-794.

Division Two reversed. The Court noted that by not having a substance tested at a crime laboratory, prosecutors risk failing to prove the identity of that substance at a defendant's stipulated trial. Id. at 802. And while it is still possible – in the absence of lab testing – to prove the identity of a substance through other circumstantial evidence, the prosecution had not done so in Colquitt's case. Id. at 796-802.

The Colquitt court compared the circumstances to those in State v. Roche, 114 Wn. App. 424, 59 P.3d 682 (2002) and In re Personal Restraint of Delmarter, 124 Wn. App. 154, 101 P.3d 111 (2004).

In Roche, a search of the defendant's home disclosed a pouch containing what appeared to be methamphetamine; a razor blade and rolled paper commonly used to ingest methamphetamine; several baggies that appeared to contain additional methamphetamine; a ledger of past drug sales; a scale; and \$3,000.00 in cash. Moreover, a deputy concluded the substance looked like methamphetamine, was packaged in a manner common in the trade, and field tests indicated it was methamphetamine. Roche, 114 Wn. App. at 431-432. Although lab tests confirmed the substance was methamphetamine, those tests were later deemed untrustworthy. And in the absence of the lab tests, Division One concluded that Roche would not even have been tried under the prosecutor's own standards. Id. at 439-440.

In contrast, in Delmarter, not only were there field tests indicating the substances at issue were cocaine and heroin, but Delmarter admitted the substances were cocaine and heroin. Delmarter, 124 Wn. App. at 157-158. In light of these confessions and preliminary test results, the evidence was sufficient to support findings the substances were what the State alleged even without confirmation from reliable laboratory tests. Delmarter, 124 Wn. App. at 163-164.

The circumstances in Hewson's case are more similar to Colquitt and Roche than Delmarter. Unlike Delmarter, Hewson never admitted possessing or intending to deliver methadone. In fact, he denied possessing any pills and claimed he only intended to steal money from the prospective buyer. Moreover, unlike Delmarter (or even Colquitt or Roche), there was not a field test in Hewson's case. Instead, Deputy Mullinax decided to simply compare the pills with pictures in a book.

Colquitt identifies several factors that can be examined to determine whether the State has proved beyond a reasonable doubt the identity of a substance through circumstantial evidence. These include:

- (1) testimony by witnesses who have a significant amount of experience with the drug in question, so that their identification of the drug as the same as the drug in their past experience is highly credible;
- (2) corroborating testimony by officers or other experts as to the identification of the substance;
- (3) references made to the drug by the defendant and others, either by the drug's name or a slang term commonly used to connote the drug;
- (4) prior involvement by the defendant in drug trafficking;
- (5) behavior characteristic of use or possession of the particular controlled substance; and
- (6) sensory identification of the substance if the substance is sufficiently unique.

Colquitt, 133 Wn. App. at 801 (citing State v. Watson, 231 Neb. 507, 514-517, 437 N.W.2d 142 (1989)).

In Hewson's case, the State failed to present evidence concerning most of these factors.

As to factors (1) and (2), there was no testimony or evidence from anyone who claimed significant experience with methadone; Mullinax was forced to rely on photos in a book in his attempt to identify the pills. CP 24, 43, 45-46.

Regarding factor (3), Hewson or Meehan did refer to "drones" in the text messages, an apparent reference to methadone pills. CP 23, 51.

Factor (4) is prior involvement in drug trafficking. Hewson had not previously been arrested for trafficking; he had only been arrested for possession, and the drug was OxyContin, not methadone. CP 16. And while the CW indicated Hewson had been trafficking for at least two months, and had provided pills to the CW in the past, the CW did not clearly indicate he had previously purchased methadone from Hewson. CP 37-40.

Factor (5) is "behavior characteristic of use or possession of the particular controlled substance," which includes such circumstances as "testing, weighing, cutting, and particular ingestion." Watson, 437 N.W.2d at 147. There was no evidence presented on this factor.

And, finally, factor (6) is “sensory identification of the substance if the substance is sufficiently unique.” There is no evidence the pills found in Meehan’s purse are so unique as to be identifiable based on appearance, touch, smell, taste, or any other sensory perception.

Ultimately, the evidence reveals Hewson was involved in the illicit sale of controlled substances, he or Meehan offered to sell the CW “drones,” and the confiscated pills looked like photographed methadone pills. But without an admission, without field-testing, and without lab tests or any other confirming evidence, this Court should find the evidence insufficient to establish the pills were, in fact, methadone.

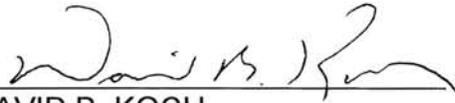
D. CONCLUSION

This Court should vacate Hewson's conviction. See State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (dismissal with prejudice proper remedy for failure of proof).

DATED this 15<sup>th</sup> day of April, 2013.

Respectfully submitted,

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DIVISION ONE

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STATE OF WASHINGTON, )

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COA NO. 69642-4-1

**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 15<sup>TH</sup> DAY OF APRIL 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KYLE HEWSON  
22912 SE 266<sup>TH</sup> STREET  
MAPLE VALLEY, WA 98038

SIGNED IN SEATTLE WASHINGTON, THIS 15<sup>TH</sup> DAY OF APRIL 2013.

X *Patrick Mayovsky*

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