

NO. 70016-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

LYNNETTE J. JOHNSON,

Appellant.

2015 SEP -3 PM 1:35

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION I
[Signature]

BRIEF OF RESPONDENT

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I. ISSUES

Did the trial court correctly instruct the jurors that they had a “duty to return a verdict of guilty” if they found the elements of the crime proved beyond a reasonable doubt?¹

II. STATEMENT OF THE CASE

On January 6, 2011, police arrested Kathleen Allenbaugh. She told police that she could set up a drug deal. She then made a phone call to the defendant, Lynnette Johnson. Police listened to this conversation. Ms. Allenbaugh ordered methamphetamine from the defendant. The defendant agreed to meet with her at a boat launch area. During the conversation, the officer could hear the defendant talking to Dan Briggs. The officer was aware that the defendant was “in a relationship” with Mr. Briggs. 1 RP 54-58.

There were two subsequent phone conversations between Ms. Allenbaugh and the defendant. Both were again overheard by police. In the first conversation, the delivery location was changed to an RV park on Ben Howard Road. 1 RP 59. In the second conversation, the defendant said that she didn’t want to meet Ms. Allenbaugh, because she had heard something going on on her

¹ Identical issues are pending in State v. Critchell, no. 69247-0-1, and State v. Hubbard, no. 69801-0-1.

police radio scanner. The defendant said that her boyfriend would come. 1 RP 69-71.

An officer was dispatched to the RV park. As he was trying to find it, he saw a car registered to the defendant drive by. He stopped that car. It was driven by Dale Johnson, the defendant's ex-husband. Daniel Briggs was a passenger. 1 RP 79-80, 84. A search of the car disclosed a baggie of methamphetamine. 1 RP 87.

The defendant was charged with possession of a controlled substance with intent to deliver. 1 CP 87. The court instructed the jury on the elements of that crime. The instruction contained the following language:

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 60, inst no. 8. No objection was raised to this instruction. 1 RP 110-11.

III. ARGUMENT

ALL THREE DIVISIONS OF THIS COURT HAVE APPROVED THE “DUTY TO CONVICT” LANGUAGE IN THE STANDARD JURY INSTRUCTIONS.

For the first time on appeal, the defendant argues that the “duty to convict” language in the jury instructions violates his constitutional right to a jury trial. Identical arguments have been rejected by all three divisions of this court. State v. Meggyesy, 90 Wn. App. 693, 958 P.2d 319, review denied, 136 Wn.2d 1098 (1998) (Division One); State v. Brown, 130 Wn. App. 767, 124 P.3d 663 (2005) (Division Two); State v. Wilson, 2013 WL 4176077 (8/15/13) (Division Three). The Meggyesy opinion includes a detailed analysis of the factors set out in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). Meggyesy, 90 Wn. App. at 701-04.

The result of these cases is consistent with Article 4, §16 of the Washington Constitution Under that section, judges have the duty to “declare the law” to juries. By statute, “it is unlawful for any person to ... possess with intent to manufacture or deliver, a controlled substance.” RCW 69.50.401(1). The statute does not say that it “may be unlawful.” If a judge were to instruct a jury explicitly or implicitly that it “may” convict on proof of the necessary facts, it would not be carrying out its duty to “declare the law.”

The defendant relies on the *power* of a jury to disregard its instructions in return a verdict of acquittal. This power exists equally for other kinds of verdicts. In both civil and criminal cases, the court is precluded from probing the jurors' thought processes State v. Crowell, 92 Wn.2d 143, 146, 594 P.2d 905 (1979); Gardner v. Malone, 60 Wn.2d 840, 841, 376 P.2d 651 (1962). This means, among other things, that the court will not consider whether the jury actually made the findings required by the instructions.

In one criminal case, for example, the defendant was charged with conspiracy to deliver marijuana. The jurors were instructed that to convict, they had to find that the defendant intended to deliver marijuana. The jury found the defendant guilty. After trial, the defendant presented affidavits from several jurors. They said that they had never found that the defendant intended to deliver marijuana. The trial court refused to consider these affidavits and denied a new trial. This court affirmed. The affidavits could not be considered because they involved matters that inhered in the verdict. State v. Hughes, 14 Wn. App. 186, 189-90, 540 P.3d 439 (1975).

A similar result occurred in a civil case. The plaintiff was injured when a cable attached to a tree pulled the tree down onto

him. The jury was instructed that the only question of negligence was whether the tree was of a sufficient size and strength to withstand the pull of the cable. The jury returned a verdict for the plaintiff. After trial, the defendant presented affidavits from five jurors. They said that the jury had not considered the size of the tree. Instead, the verdict was based on failure to warn. Under the instructions, this was not a proper basis for finding the defendant negligent. Nonetheless, the trial court denied a new trial, and the Supreme Court affirmed. Again, the affidavits could not be considered because they inhaled in the verdict. Ralton v. Sherwood Logging Co., 54 Wash. 254, 103 P 28 (1909).

These cases demonstrate that in *any* case that is properly submitted to a jury, the jurors have the *power* to ignore their instructions. So long as the evidence would *support* the necessary findings, courts will not inquire whether the jurors actually *made* those findings. The duty to convict ultimately rests within the jurors' consciences. But the same is true of the duty to acquit, or the duty to render a verdict for plaintiff or defendant in a civil case. In all such cases, the jurors can ignore their instructions and reach a verdict contrary to their findings, with no fear of adverse consequences.

In short, the State constitution imposes on judges the duty to “declare the law.” Judges fulfill that duty by informing jurors of what facts must be proved to justify a particular verdict. The judges then tell jurors that they have a duty to reach an appropriate verdict in light of their determinations concerning those facts. These instructions properly reflect both the judge’s duty to declare the law and the jury’s duty to determine the facts. As all three Divisions of this court have recognized, such instructions are proper.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on August 29, 2013.

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By: 

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August 29, 2013

Richard D. Johnson, Court Administrator/Clerk
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STATE OF WASHINGTON
COURT OF APPEALS
CLERK'S OFFICE
SEATTLE, WA
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**Re: STATE v. LYNNETTE J. JOHNSON
COURT OF APPEALS NO. 70016-2-1**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

Seth A. Fine

SETH A. FINE, #10937
Deputy Prosecuting Attorney

cc: Nielsen, Broman & Koch
Appellant's attorney

29th August 13
[Handwritten signature]

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

THE STATE OF WASHINGTON,

Respondent,

v.

LYNNETTE J. JOHNSON,

Appellant.

No. 70016-2-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 29th day of August, 2013, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH
1908 EAST MADISON STREET
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 29th day of August, 2013.



DIANE K. KREMENICH
Legal Assistant/Appeals Unit