

FILED  
COURT OF APPEALS

06/01/06 AM 10:52 NO. 33786-0-II

STATE OF WASHINGTON

BY TAN

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

STATE OF WASHINGTON,

Respondent,

v.

BRIAN P. JUSZCZYK,

Appellant.

APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
CAUSE NO. 04-1-02264-2

HONORABLE CHRIS WICKHAM, Judge

RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUES

1. Whether there was substantial evidence at trial to prove beyond a reasonable doubt that the defendant committed the alleged crime within one thousand feet of a "school bus route stop", as that term was defined in the jury instructions.

2. Whether the defendant was appropriately sentenced in accordance with RCW 69.50.401(2)(b)

B. STATEMENT OF THE CASE

The State is satisfied with the Statement of the Case in Appellant's Brief. Additional details from the record of this case are referred to in the course of the argument below, and are appropriately identified.

C. ARGUMENT

1. Under the doctrine of the law of the case, the State having failed to object to a jury instruction defining the phrase "school bus route stop", and the court having given that instruction to the jury, the State assumed the burden of proving the alleged special enhancement in the case in accordance with that instruction, and failed to do so.

On appeal, the defendant contends that the evidence at the trial of this cause was not sufficient for a rational trier of fact to find it proved beyond a reasonable doubt the special

allegation that the defendant committed the crime of unlawful possession of a controlled substance with intent to deliver within one thousand feet of a school bus route stop. The evidence is sufficient to prove such an allegation if, viewed in the light most favorable to the State, it is enough to permit a rational trier of fact to find that it was proved beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency requires that all reasonable inferences from the evidence be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). It is also the function of the fact finder, and not the appellate court, to discount theories which are determined to be unreasonable in the light of the evidence. State v.

Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In this case, the defendant was charged by a First Amended Information in the following manner:

In that the defendant, BRIAN PAUL JUSZCZYK, in the State of Washington, on or about the 19<sup>th</sup> day of October, 2004, as principle or accomplice, did unlawfully possess a controlled substance with intent to deliver, to wit: Methamphetamine. And further, that the aforesaid offense did occur within one thousand feet of a school bus route stop designated by the school district.

CP 12. With regard to the special allegation set forth in the charging document, the trial court instructed the jury that:

"School bus route stop" means a school bus stop as designated on maps submitted by school districts to the Office of the Superintendent of Public Instruction.

Jury Instruction No. 27 in CP 64-92. Thus, the jury instruction added to what was alleged in the charging document by specifying that, to qualify as a school bus route stop as alleged, the bus stop must have been designated on maps submitted to the Office of the Superintendent of Public

Instruction. The State did not object to the giving of this instruction. Trial RP 173.

This jury instruction was not an accurate statement of the law. As of the time relevant to the case, RCW 69.50.435 provided the following definition for the special allegation:

"School bus route stop" means a school bus stop as designated by a school district.

RCW 69.50.435(6)(c). However, under the law of the case doctrine, a jury instruction not objected to becomes the law of the case. Thus, having failed to object to Jury Instruction No. 27, the State had the burden of proving the special allegation in accordance with that instruction. State v. Hickman, 135 Wn.2d 97, 101-103, 954 P.2d 900 (1998); State v. Leohner, 69 Wn.2d 131, 134, 417 P.2d 368 (1966).

At trial in this case, Ron McCarty, Director of Transportation for North Thurston Public Schools, testified concerning the bus stops for that school district. He testified concerning the process by which a bus stop is designated. Trial RP 81-83. However, he did not indicate whether

such a designation is submitted to the Superintendent of Public Instruction.

McCarty also testified that there was a specific bus stop at the intersection of 13<sup>th</sup> Street and Union Mills as of October 19, 2004. Trial RP 83. Through his testimony, Exhibit 16 was admitted into evidence. Trial RP 85. This exhibit was a business record of the school district. It showed that a bus stop was designated for the intersection of Union Mills and 13<sup>th</sup> Avenue South for students attending one of the elementary schools in that district, and included a map showing the location of that bus stop and other bus stops for that school. McCarty confirmed that this record was kept in the offices of the school district. However, again he did not indicate whether it had been submitted to the Superintendent of Public Instruction. Trial RP 85.

Thus, it is correct that there was no evidence submitted at the trial of this cause which indicated whether the school bus stop at

issue here constituted a "school bus route stop" as defined by the law of this case. It therefore cannot be said that the State proved the defendant committed his crime within one thousand feet of a "school bus route stop" as alleged. The State agrees the defendant must be re-sentenced to a term of confinement excluding the school bus stop sentence enhancement.

5. The defendant was properly sentenced in accordance with the provisions of RCW 69.50.401(2)(b).

The defendant contends that he was improperly sentenced under RCW 69.50.401(a)(2)(b), pertaining to the manufacture of methamphetamine, and instead should have been sentenced under RCW 69.50.401(2)(c), pertaining to other controlled substances, because the jury never found it proved that he had manufactured methamphetamine base, as opposed to a salt or isomer of methamphetamine. His argument is that the term "methamphetamine" as used in RCW 69.50.401(a)(2)(b), refers only to methamphetamine base.

However, the contrary was held to be the law

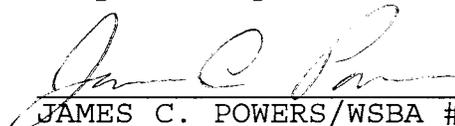
in State v. Cromwell, 157 Wn.2d 529, 140 P.3d 593 (2006). The State Supreme Court held that the term "methamphetamine" in RCW 69.50.401(a)(1)(ii), now RCW 69.50.401(2)(b), was intended to encompass all forms of methamphetamine, including the salts and isomers of this controlled substance. Cromwell, 157 Wn.2d at 535. Thus, the defendant was properly sentenced in accordance with the provisions of RCW 69.50.401(2)(b).

D. CONCLUSION

Based on the above, the State respectfully requests that this court affirm the respondent's conviction for unlawful possession of a controlled substance and find that he was properly sentenced in accordance with RCW 69.50.401(2)(b). However, the State concurs that he should be re-sentenced without the school bus stop enhancement.

DATED this 27th day of October, 2006.

Respectfully submitted,



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JAMES C. POWERS/WSBA #12791  
DEPUTY PROSECUTING ATTORNEY

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NO. 33786-0-II

STATE OF WASHINGTON  
BY *JN* IN THE COURT OF APPEALS  
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STATE OF WASHINGTON,	)	
Respondent	)	DECLARATION OF
	)	MAILING
v.	)	
	)	
BRIAN P. JUSZCZYK,	)	
Appellant	)	

STATE OF WASHINGTON	)	
	)	ss.
COUNTY OF THURSTON	)	

James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 27th day of October, 2006, I caused to be mailed to appellant's attorney, THOMAS E. DOYLE, a copy of the Respondent's Brief, addressing said envelope as follows:

Thomas E. Doyle,  
Attorney at Law  
P.O. Box 510  
Tacoma, WA 98340-0510

I certify (or declare) under penalty of perjury  
under the laws of the State of Washington that the  
foregoing is true and correct to the best of my  
knowledge.

DATED this 27<sup>th</sup> day of October, 2006 at Olympia,  
WA.

  
\_\_\_\_\_  
James C. Powers/WSBA #12791  
Senior Deputy Prosecuting Attorney