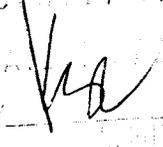


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COURT OF APPEALS

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STATE OF WASHINGTON

BY  CLERK

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

No: 34054-2-II

In re:

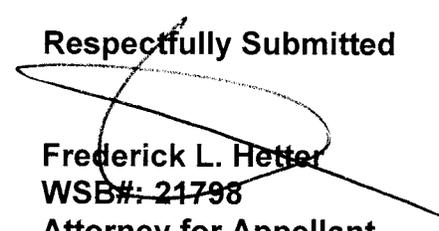
STATE OF WASHINGTON,
Appellee/Plaintiff

v.

ROBERT HUNTER,
Appellant/Defendant.

BRIEF OF APPELLANT

Respectfully Submitted


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WSB#: 21798
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Steilacoom, WA 98388

I. TABLE OF AUTHORITIES

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A. ASSIGNMENTS OF ERROR

The appeal is based upon a guilty verdict entered on October 12, 2005 and the denial of a Motion for JNOV and New Trial and other relief on December 5, 2005.

NO.1 The Court erred in not granting a JNOV and/or not granting a New Trial based on the lack of evidence of intent on December 5, 2005.

NO. 2 The Court erred in permitting the state to argue that purchasing pseudoephedrine unlawfully constitutes the preparation element of manufacture.

NO. 3. The Court erred in permitting an accomplice instruction where none existed in Instruction number 5 and 7.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS:

1. Could the jury convict the defendant and/or the Court not grant a Motion JNOV based on the evidence presented at trial?
2. Does a prosecutor's argument that "preparation" as provided in RCW 69.50.101 to comprise the purchase of ephedrine, reduce the state's burden of proof and warrant a new trial?
3. Does the inclusion of an accomplice instruction (Instructions Number 5 and 7) when there was no alleged accomplice relieve the state of its burden of proof and warrant a new trial?

B. STATEMENT OF THE CASE

On April 21, 2005, Mr. Hunter and Mr. Cornish drove to three local stores and purchased ephedrine while under police observation. (CP 1; CP 8; CP 10) Mr. Hunter purchased 5 boxes of ephedrine in violation of RCW 69.43.110. (CP 10). At one location they threw away the boxes and placed the blister packs into a bag and hid them under the hood of their car. (CP 10) During a search of the car the police only found an old receipt for the purchase of Xylene, one of many chemicals an officer testified can be used in the process of manufacturing methamphetamine. (CP 8; CP 10)

During trial, the defense attempted to prevent the State from arguing to the jury that "Preparation" as used in the definition of manufacturing methamphetamine encompassed purchasing the ingredients. (CP 3 #10; CP 10). Defendant also sought to preclude an accessory instruction because there were no accessories or other principals. Defendant sought to prevent the jury from convicting defendant for being an accomplice to someone who would later manufacture methamphetamine with the ephedrine he purchased. *Id.*

Procedurally, the state argued that the broad definition of manufacture included the purchase of ephedrine as a step in preparation per the statutory definition. (CP 3 #10) The argument to the jury required a conviction if the jury could find that the Defendant purchased ephedrine in violation of RCW 69.43.110 a misdemeanor. (CP 8)

The state argued and obtained an accomplice instruction. (CP 3 #7)

The state argued that Defendant Hunter could be an accomplice to some unknown person who would probably later make methamphetamine with the 5 boxes of ephedrine Hunter purchased. (CP 8)

The jury convicted Defendant Hunter and the Court denied all of the Defendant's Motions i.e. JNOV, New Trial, DOSA, and Exceptional Sentence Downward. (CP 5; CP 8; CP 10)

C. ARGUMENT

ISSUE 1. Is the Verdict supported by the evidence?

There existed no evidence that Mr. Hunter intended to manufacture methamphetamine with the pseudo ephedrine he purchased. (CP 1; CP 2; CP 10). The evidence presented at trial showed that Defendant Hunter intended to sell or exchange the ephedrine. (CP 10). The state's argument suggested Defendant Hunter was the first link in a chain of the production of methamphetamine by buying a precursor ingredient for the manufacture of drugs. (CP 6; CP 7) There being no further of evidence of intent to manufacture, the Court should have granted Defendant Hunter's Motion JNOV.

The legal test is whether, assuming that Mr. Hunter purchased the ephedrine and had an old receipt, could the jury find him guilty of intent to manufacture beyond a reasonable doubt. State v. McPherson, 111 Wn. App.

747, 755; 46 P.3rd 284 (2002). There is absolutely too much reasonable doubt assuming all evidence in favor of the State. The Court needed to grant the Motion JNOV and dismiss the charge without a link to manufacturing. State v. Whalen 131 Wn. App.58, 126 P. 3d 55 (2005)

In Whalen, Whalen stole seven boxes of pseudoephedrine from a Target store and hid them in another box while under observation. He then retrieved the boxes and exited the store Id @ 56. He attempted to escape from store security, but store security detained him. Whalen related he took the ephedrine to satisfy a debt.

The Court of Appeals held that the acquisition of ephedrine violated RCW 69.43.110 and drew the distinction between the violations of RCW 69.43.110 and RCW 69.50.440 and the respective punishments.

A similar analysis took place in State v. Zunker, 112 Wn.2d 130 (2002), however there was methamphetamine, an anhydrous ammonia tank, a scale, and ground up pseudoephedrine. In that case, the Court held that sufficient evidence existed to support a finding that by grinding up the ephedrine the Defendant started the manufacture process, drawing the distinction between the facts in this case against Mr. Hunter.

There is no reasonable inference Mr. Hunter started to prepare materials for manufacture, that he ever intended to or knew how to manufacture drugs or that he would be part of a scheme to manufacture drugs.

The only undisputed evidence on point pertains to his desire to exchange the blister packs to a dealer who would likely sell them to another.

ISSUE 2. Does the purchase of 5 boxes of cold capsules constitute the manufacture of methamphetamine?

RCW 69.50.101 Definitions (p) "Manufacture" mean the production, **preparation** (added), propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly, or by extraction, from the substances

Here, the State argued and the Defense objected to the state telling the jury that purchasing pseudoephedrine alone constituted "directly or indirectly preparing" to manufacture drugs. The State argued that all the jury needed to determine was whether Mr. Hunter purchased the ephedrine for a lawful purpose, and if not, must convict.

Statutes are designed to use common meanings and reflect a common sense interpretation. Courts are not to stretch a definition to encompass conduct that would not normally be considered criminal. Reversal is appropriate when the state makes an argument that confuses a jury into extending criminal liability. State v. Carter 154 Wn. 2d 71 (2005)

If the argument is permitted, then the jury would be permitted to avoid the "intent to manufacture" element necessary to connect possession of pseudoephedrine with intent to manufacture. Whalen at 57.

ISSUE 3. Does an accomplice instruction lessen the burden of proof or confuse a jury where there is no accomplice?

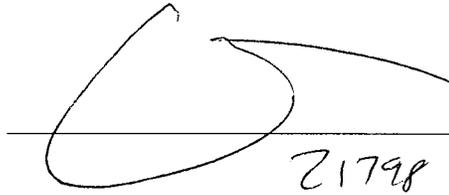
Instruction 5 and Instruction 7 should not have included any accomplice liability. There was no argument that Mr. Hunter acted as an accomplice. The state argued that Mr. Hunter was the principal or acted as an accomplice to someone who might later have been a principal to which Mr. Hunter might then have been an accomplice. (CP 10).

In Order for the state's argument not to have been misleading it would have needed proof of the underlying crime. i.e. a person actually possessed the ephedrine with the intent to manufacture. *Id.* at 82.; State v. Mora, 110 Wn. App 850 (2002). State v. Dault, 25 Wn. App. 568 (1980); US v. Mann, 811 F.2d 495 (CA 9 Wash). Since the instruction relieved the state in its burden of proof, manifest error occurred. State v. Stein 144 Wn. 2d 236, 240 (2001).

In this case there is potential that the chemicals Mr. Hunter purchased would wind up in the hands of someone who might manufacture drugs with them. But upon arrest, there is no possibility that anyone other than Mr. Hunter could have possessed the chemicals with the intent to manufacture, thus the accomplice instruction constitutes manifest error.

D. CONCLUSION

This is a case of scant evidence. A man buys five boxes of ephedrine while being watched by the police and the state charges intent to manufacture. From the evidence in a light most favorable to the state there are insufficient facts absent a mischaracterization of the events or the law. Here, the state stretched their legal authority beyond the scope of fairness and a new trial is warranted based on a fair statement of the law.

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COURT OF APPEALS

06 MAR 17 PM 2:19

STATE OF WASHINGTON

BY _____
ATTORNEY

PIERCE COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON

NO. 05-1-10927-3
34054-2-II

Plaintiff,

and

DECLARATION OF SERVICE

ROBERT HUNTER,

Defendant.

TO: CLERK OF THE ABOVE ENTITLED COURT

AND TO WASHINGTON STATE PROSECUTOR:

The attorney for the defendant hereby declares under penalty of perjury under the laws of the State of Washington that on or before the 29th day March 2006 he served by personal delivery to the Pierce County Prosecutor's Office the Brief of Appellant.

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COURT OF APPEALS
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06 MAR 23 PM 3:26

STATE OF WASHINGTON

BY _____
DEPUTY

PIERCE COUNTY SUPERIOR COURT
STATE OF WASHINGTON

STATE OF WASHINGTON

Plaintiff,

and

ROBERT HUNTER,

Defendant.

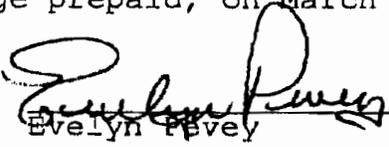
NO. 05-1-10927-3
34054-2-II

DECLARATION OF SERVICE

TO: CLERK OF THE ABOVE ENTITLED COURT

AND TO WASHINGTON STATE PROSECUTOR:

I, Evelyn Pevey, hereby declares under penalty of perjury under the laws of the State of Washington that I mailed a copy of the Brief of Appellant to Robert Hunter #624490, Appellant, at the address of Coyote Ridge Correction Center, ^{PO BOX 769} 1201 No. Ephrata Avenue, Connel, WA 98326, postage prepaid, on March 23, 2006.


Evelyn Pevey

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