

NO. 34414-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

GENE JONES,

Appellant.

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STATE OF WASHINGTON
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ORIGINAL

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-00546-5

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL AVERY SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

pm 2-22-07

SERVICE

James Reese
612 Sidney Ave.
Port Orchard, WA 98366

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED February 22, 2007, Port Orchard, WA
[Signature]
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether evidence, based on measurements and estimates extrapolated therefrom was sufficient to present a jury question as to whether the crime was committed within 1000 feet of a school-bus stop. ?

2. Whether the offenses of possession of marijuana with intent to deliver and methamphetamine with intent to deliver are different in law and fact such that convictions of both do not violate double jeopardy?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On April 26, 2005, Gene Jones was charged by information filed in Kitsap County Superior Court with possession of methamphetamine with intent to manufacture or deliver. CP 1. A first amended information was filed on July 1, 2005, adding a special allegation to the methamphetamine charge that Jones was armed with a firearm, and adding a second count, of possession of a sawed-off shotgun. CP 5.

The State filed a second amended information on July 27, 2005, which added a second special allegation to the methamphetamine charge – that the crime was committed in a school zone. The information also added a third count – possession of marijuana with intent to manufacture or deliver, also with school-zone and firearm enhancement allegations. CP 16. Jones

objected on grounds of double jeopardy. RP (7/27) 4. No plea was entered at that time, and the issue was set over for the next hearing. RP (7/27) 6. Jones, however, failed to appear for the next hearing on September 2, 2005, and a bench warrant was issued. RP (9/2) 4. He also failed to appear for court on November 2, 2005. 4RP 252.

On the day of trial, January 4, 2006, the State filed a third amended information. CP 44. In addition to the three charges in the second amended information, it added two counts of bail-jumping. CP 44. Jones renewed his objection to the marijuana count, 1RP 3, and the trial was recessed for briefing on the issue. 1RP 20. The following day, after considering the parties' briefing, the trial court concluded that the proper test under double-jeopardy jurisprudence was the same-evidence test, not the unit-of-prosecution test upon which Jones was relying. 2RP 34. Under that analysis, it concluded that both charges would properly go forward. 2RP 34.

After trial, the jury convicted Jones as charged on Counts I through IV, and acquitted him of Count V, the November 2 bail-jump. CP 91, 93.

At sentencing, the trial court found that the marijuana and methamphetamine charges constituted same criminal conduct and therefore the former charge was not counted in the offender score. The trial court ran all the base sentences and the school-zone enhancements concurrently, and

imposed the firearm enhancements on Counts I and III consecutively the base sentences and to each other. RP (sentencing) 12-13; CP 97.

B. FACTS

On April 25, 2005, the West Sound Narcotics Enforcement Team (WestNET) executed a search warrant at 6458 Geneva Street in Suquamish. 3RP 87. When the warrant was served, the police found Jones in the master bedroom. 4RP 192. The bedroom was locked. 4RP 194. Magdalena Turrieta, Jones' long-term girlfriend, was also in the bedroom. 4RP 196, 216-17, 260.

In the master bedroom was a closed-circuit television monitor next to the bed. 3RP 89. The camera connected to the monitor was attached to the outside of the house. 3RP 95. Also in the room were night-vision binoculars and a police scanner. 4RP 190-91.

The police found a locked bank bag under the mattress. 3RP 110. The key was on the table just inside the door to the room. 3RP 110. In the bank bag were digital scales and marijuana. 4RP 187-89, 252.

On or near the table holding the closed-circuit TV monitor were two methamphetamine pipes and several baggies. 3RP 119. One of the baggies contained 9.87 grams of methamphetamine. 3RP 132. A second baggie contained .03 grams of methamphetamine. 3RP 134.

In between the bed and the closet, there was a blue bag with \$900.00 and Jones' Washington State identity card in it. 3RP 89-90, 96, 105.

In the closet was a small shotgun and some rifles. 3RP 90. The overall length of the shotgun was 15½ inches, and the barrel was 10¾ inches. 3RP 146. There was a rifle leaning against the wall by the monitor. 3RP 120. That rifle had a .22 round in the chamber. 3RP 142.

There is a school-bus stop at Columbia and Brockton in Suquamish. 3RP 136. Detective Weiss measured from the corner of Columbia and Brockton west to the corner of Geneva and Brockton, which was 410 feet. 4RP 166. He then measured north on Geneva to Jones' driveway, which was 595 feet. 4RP 167. The house was 50 to 75 feet from the road. 4RP 167. Weiss estimated the distance at approximately 750 feet "as the crow flies." 4RP 169.

Jones stipulated that he had received notice to appear in court on September 2, and November 2, 2005, and had failed to do so, and that he had been charged with a Class B felony at the time. 4RP 252-53.

The defense presented testimony from Turrieta and Jones to the effect that the drugs, guns, and paraphernalia belonged to Turrieta for both personal use and sale, and that Jones knew nothing about them. 4RP 256-58, 266-67. Jones also testified that he was confused about whether he had to appear on

September 2 and that he thought the November 2 order said November 7.
4RP 268-69.

III. ARGUMENT

A. THE EVIDENCE SUPPORTS THE JURY'S FINDING THAT THE CRIME OCCURRED WITHIN 1000 FEET OF A SCHOOL-BUS STOP.

In his first claim, Jones argues that the trial court should have granted his motion to dismiss the school-zone enhancements. This claim is without merit because based on Detective Weiss' estimate that the distance was 750 feet, the evidence was more than sufficient.

Preliminarily, the State notes that Jones complains of the trial court's denial of his motion to dismiss. Once a jury verdict has been rendered, however, a motion to dismiss is not appealable. Only the sufficiency of the evidence may be challenged. *See, e.g., State v. Zakel*, 61 Wn. App. 805, 811 n. 3, 812 P.2d 512 (1991), *aff'd on other grounds*, 119 Wn.2d 563 (1992). The evidence here was sufficient.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even

if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Jones cites only to cases that hold that the relevant distance under the school-zone enhancement is the radius from the school property or bus stop to the scene of the crime. *E.g.*, *State v. Shannon*, 77 Wn. App. 379, 892 P.2d 757 (1995); *State v. Wimbs*, 74 Wn. App. 51, 874 P.2d 193 (1994). None of these cases holds that that distance must be proved with absolute scientific certainty.

Nonetheless, the officer here measured along the first street to the west 410 feet and then turned to the right, presumable at an angle of roughly 90 degrees, as he said it was to the north, and measured another 595 feet to Jones' driveway. 4RP 166-67. He then estimated that it was about 750 feet "as the crow flies" between the two points. 4RP 169. Regardless of the trial court's unwillingness to take judicial notice of the Pythagorean theorem, or that basic geometric principle is well known. *See, e.g., Jones v. Goord*, 435 F. Supp. 2d 221, 237 n.10 (S.D.N.Y. 2006) ("The Pythagorean theorem states that the sum of the squares of the sides of a right triangle equals the square of the hypotenuse. For a triangle with sides a and b and hypotenuse c, therefore: $a^2 + b^2 = c^2$."). The jury surely could have applied the formula, which is a basic tenet of middle-school geometry, itself. And applying that formula to the officer's measurements yields a hypotenuse of 722.582 feet. Even allowing that the corner angle could have been off a few degrees from square, it thus supports the officer's estimate of 750 feet.

The officer further estimated that that the distance from the road to the house was 50 to 75 feet. 4RP 167. There was no evidence suggesting that that estimate was incorrect. Jones cites no case whatsoever that has ever held that a distance of 50 to 75 feet is not within the competence of a qualified police officer, or for that matter any other citizen, to visual determine. These two estimates bring the distance to at most 825 feet.

Finally, the evidence also showed that the house was a relatively small older wooden single-story structure of three or four rooms. 3RP 88, 4RP 173. The front door opened into a living room, which in turn lead to a “very small hallway” that opened on to the bedroom where the crime was committed. 3RP 101. There is no suggestion, either in the testimony or in the photographs introduced into evidence that the living room and “very small hallway” of this house were combined more than 175 feet long.

While the jury was free to reject Detective Weiss’ measurements observations, and the resulting estimates based on those measurements and observations, the evidence was sufficient to support the verdict if accepted by the jury. *See State v. Byrd*, 83 Wn. App. 509, 514, 922 P.2d 168 (1996), *review denied* 130 Wn.2d 1027 (1997) (holding that estimate that distance was “at most 900 feet” obtained by transposing locations of school and crime scene onto a map was sufficient to support jury finding of school-zone enhancement). This contention should be rejected.

B. JONES' DOUBLE JEOPARDY RIGHTS WERE NOT VIOLATED BY CHARGING HIM IN SEPARATE COUNTS WITH POSSESSION WITH INTENT TO MANUFACTURE OR DELIVER TWO DIFFERENT CONTROLLED SUBSTANCES – MARIJUANA AND METHAMPHETAMINE.

Jones' second claim is that the trial court erred in refusing to dismiss the marijuana charge on double jeopardy grounds. In his third claim he asserts, on the same basis, that the court also erred in instructing the jury on the both the methamphetamine and marijuana charges. Both of these claims lack merit because even if the charges were duplicative, that would be grounds for abatement of the marijuana charge after the verdict, not dismissal beforehand. As his final claim, Jones asserts, also because of the alleged double-jeopardy violation, that the firearms enhancement imposed on the marijuana count should be vacated. Since there is no double-jeopardy violation, however, this final claim also lacks merit.

Even if Jones were correct he could not be separately punished for the two offenses at issue here, he would be incorrect that his double jeopardy rights were infringed when the State charged and tried him for both offenses.

The state constitutional rule against double jeopardy, Const. art. I, § 9, offers the same scope of protection as its federal counterpart. *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995). The double jeopardy

clause of the Fifth Amendment offers three separate constitutional protections:

It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

Gocken, 127 Wn.2d at 100.

Thus the *trial in the same proceeding*, as distinguished from the imposition of convictions and sentences, for offenses that are the same in law and fact does not offend double jeopardy protections. Jones was not subjected to a second prosecution after acquittal because the prosecutions were concurrent (and there was no acquittal). He also was not subject to a second prosecution after conviction, again because the prosecutions were concurrent. The Supreme Court has thus rejected the notion that a defendant may not be charged and tried *in the same proceeding* for duplicative offenses:

It is important to distinguish between charges and convictions -- the State may properly file an information charging multiple counts under various statutory provisions where evidence supports the charges, even though convictions may not stand for all offenses where double jeopardy protections are violated.

State v. Calle, 125 Wn.2d 769, 777 n.3, 888 P.2d 155 (1995) (*citing Ball v. United States*, 470 U.S. 856, 860, 105 S. Ct. 1668, 1671, 84 L. Ed. 2d 740 (1985)).

Thus the only question is whether, after the guilty verdict, the trial

court could impose convictions and sentences for both offenses. *See State v. Trujillo*, 112 Wn. App. 390, 408-410, 49 P.3d 935 (2002). The legislature has the power to define criminal conduct and to specify punishment. *Calle*, 125 Wn.2d at 776. If the legislature has authorized cumulative punishments for both crimes, then double jeopardy is not offended:

Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense.

State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). If the relevant statutes do not expressly authorize multiple convictions, or, if the legislative intent is unclear, the inquiry is not at an end. Instead, the court next applies the *Blockburger* "same evidence" test. *Freeman*, 153 Wn.2d at 773; *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

Under this "same evidence" test, a defendant's double jeopardy rights are violated only if he or she is convicted of offenses that are identical in fact and law. *Calle*, 125 Wn.2d at 777. But, "if each offense, as charged, includes elements not included in the other, the offenses are different and multiple convictions can stand." *Calle*, 125 Wn.2d at 777; *see also State v. Vladovic*, 99 Wn.2d 413, 423, 662 P.2d 853 (1983). When applying the *Blockburger* test, a court does not consider the elements of the crime on an

abstract level. Elements of the offenses are different where each requires proof of a fact, within the context of the case, which the other does not. *Freeman*, 153 Wn.2d at 772.

Here, each offense required proof of a fact that the other did not: in Count I that the substance Jones possessed was methamphetamine and in Count III that the substance he possessed was marijuana.

Jones' reliance on *State v. Adel*, is thus misplaced. In that case, the Court held that the *Blockburger*/same-evidence test is inapplicable to multiple prosecutions for violations of the same statutory provision. *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998) In such circumstances the question presented is the "unit of prosecution" that the legislature intended. *Id.* Where, however, violations of different statutory provisions are charged, the same-evidence test, not the unit of prosecution analysis, applies:

The State charged O'Connor with one count of possession with intent to deliver and a separate count of simple possession. The Court of Appeals appropriately applied the same in law and same in fact analysis, *since the two charges were based upon different statutory subsections.*

Adel, 136 Wn.2d at 639 (*discussing State v. O'Connor*, 87 Wn. App. 119, 940 P.2d 675 (1997)) (emphasis supplied).

Here, in Count I, Jones was convicted of with violating RCW 69.50.401(2)(b). In Count III, Jones was convicted of violating RCW

69.50.401(2)(c). The offenses are not even of the same class, the former being a Class B felony and the latter being a Class C. RCW 69.50.401(2)(b); RCW 69.50.401(2)(c). Since these are not the same statutory provisions, the trial court properly applied the same evidence test rather than unit of prosecution analysis.

Likewise, although *State v. O'Connor* prescribes the correct test, it does not, as Jones alleges, dictate the result that should be reached here. In *O'Connor*, the two offenses were possession with intent to deliver and simple possession of the *same* substance. Under those circumstances, the simple possession was a lesser included offense of the possession with intent. As such, the lesser was the same in law and in fact as the greater, and the conviction therefore violated double jeopardy. See *State v. Brown*, 132 Wn.2d 529, 576-77, 940 P.2d 546 (1997). Here the offenses are different in law and in fact since each requires possession of a *different* controlled substance. As such double jeopardy is not violated by Jones' two convictions.

This does not mean, of course, that the offenses may not constitute the same criminal conduct under RCW 9.94A.589(1)(a), as held in *State v. Garza-Villarreal*, 123 Wn.2d 42, 864 P.2d 1378 (1993). Indeed, the State conceded, and the trial court ruled, that the offenses were the same criminal conduct, and the marijuana conviction was not included in Jones' offender

score. RP (sentencing) 3; CP 97. Any attempt by Jones to read *Garza-Villarreal* beyond the context of sentencing, however, is misplaced. Moreover, regardless of whether the offenses constitute the same criminal conduct, the trial court had no choice but to run the firearms enhancements consecutively. *State v. Callihan*, 120 Wn. App. 620, 622, 85 P.3d 979 (2004).

Finally, if the marijuana and methamphetamine charges were duplicative, then Jones' contention regarding the firearms enhancement would be correct. A sentencing enhancement, such as a weapon enhancement, is added to the base sentence to reach a single sentence for the particular offense, and the enhancement itself is not a separate sentence. *State v. Flett*, 98 Wn. App. 799, 806, 992 P.2d 1028, *review denied*, 141 Wn. 2d 1002, 10 P. 3d 404 (2000). Since, however, these charges may be separately prosecuted, Jones sentence should be affirmed as well.

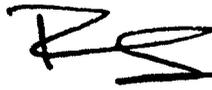
IV. CONCLUSION

For the foregoing reasons, Jones's convictions and sentence should be affirmed.

DATED February 22, 2007.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

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