

FILED
COURT OF APPEALS
JUN 15 11:45
STATE OF WASHINGTON
BY *JW*

No. 34611-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Albert Nickols,

Appellant.

Lewis County Superior Court

Cause No. 05-1-00823-1

The Honorable Judge Richard L. Brosey

Appellant's Reply Brief

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PM 11/14/06

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ARGUMENT

I. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT METHAMPHETAMINE HYDROCHLORIDE IS A SALT OR ISOMER OF METHAMPHETAMINE.

Respondent contends that the evidence was sufficient to establish that Mr. Nickols delivered a controlled substance, arguing that Mr. Nickols' unrecorded statement to the police was sufficient to prove the nature of the substance. Brief of Respondent, p. 3-4.

But the state's expert testified that the substance seized and tested was methamphetamine hydrochloride, not methamphetamine. RP (1-19-06) 80. If the state had produced even the thinnest evidence showing that methamphetamine hydrochloride is a salt or isomer of methamphetamine, the evidence would have been sufficient. The state did not present any evidence establishing the relationship between the two substances. RP (1/18/06) 11-109.

Even when taken together and considered in a light most favorable to the state, none of the evidence proves beyond a reasonable doubt that the delivery involved methamphetamine or any of its salts or isomers. Accordingly, the conviction must be reversed and the case dismissed with prejudice. *State v. Smith*, 155 Wn.2d 496, 120 P.3d 559 (2005).

II. THE COURT'S "KNOWLEDGE" INSTRUCTION VIOLATED MR. NICKOLS' CONSTITUTIONAL RIGHT TO DUE PROCESS.

Respondent asserts that the court's "knowledge" instruction was not "significantly different from the statutory language." Brief of Respondent, p. 7. This is incorrect; this Court has found identical language in an instruction to be "confusing." *State v. Goble*, 131 Wn.App. 194 at 203, 126 P.3d 821 (2005).

Respondent also argues that Mr. Nickols "cannot show that this instruction affected the trial's outcome." Brief of Respondent, p. 8. But since the instruction defines a term in the "to convict" instruction, the burden is on the state to establish that the error was harmless beyond a reasonable doubt. *State v. Brown*, 147 Wn.2d 330 at 341, 58 P.3d 889 (2002); *see also* Brief of Respondent, p. 6 n. 17, *citing State v. Clausing*, 147 Wn.2d 620 at 628, 56 P.3d 550 (2002).

Respondent has made no effort to establish that the error was harmless beyond a reasonable doubt. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Goble, supra*.

III. DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE DEFECTIVE "KNOWLEDGE" INSTRUCTION.

Mr. Nickols stands on the argument made in his opening brief.

IV. THE TRIAL FAILED TO PROPERLY DETERMINE MR. NICKOLS' OFFENDER SCORE.

Respondent suggests that Mr. Nickols waived the same criminal conduct issue by failing to object, failing to offer an alternative offender score calculation, and by signing the judgment and sentence. Brief of Respondent, p. 10-14. Respondent discusses at length *State v. Anderson*, 92 Wn.App. 54, 960 P.2d 975, review denied 137 Wn.2d 1016, 978 P.2d 1099 (1999), to support its waiver argument. Brief of Respondent, p. 12-14. But in *Anderson*, the Court of Appeals reached the merits of the issue, finding no waiver. *Anderson, supra, at 62.*

Respondent also discusses *State v. Nitsch*, 100 Wn.App. 512, 997 P.2d 1000, review denied 141 Wn.2d 1030, 11 P.3d 827 (2000). Brief of Respondent, p. 11-12. In *Nitsch*, the defendant affirmatively waived the issue by explicitly agreeing to the offender score. *Nitsch*, at 520. Without citation to authority, Respondent suggests that "this factor does not distinguish it from the present case." Brief of Respondent, p. 14. Where no authority is cited, this court may presume that counsel, after diligent search, has found none. *Oregon Mut. Ins. Co. v. Barton*, 109 Wn.App. 405 at 418, 36 P.3d 1065 (2001).

Furthermore, Respondent's reasoning is flawed. A failure to object does not preclude review, because the burden at sentencing is on the state. As the Supreme Court held in *State v. Ford*:

The State does not meet its burden through bare assertions, unsupported by evidence. Nor does failure to object to such assertions relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA but would result in an unconstitutional shifting of the burden of proof to the defendant.
State v. Ford, 137 Wn.2d 472 at 482, 973 P.2d 452 (1999).

The burden is on the state to establish that multiple prior convictions do not stem from the same criminal conduct. *State v. Dolen*, 83 Wn.App. 361 at 365, 921 P.2d 590, *review denied at* 131 Wn.2d 1006, 932 P.2d 644 (1997). The state failed to meet this burden. The only argument made by the state concerning the merits of Mr. Nickols' claim is apparently that the argument should be rejected for the same reasons the defendant's argument was rejected in *Anderson*. In that case, the Court of Appeals had a factual record upon which to review the trial court's exercise of discretion. *See Anderson*, at 56-57. In this case, the prosecutor established that Mr. Nickols had four prior convictions for Possession of Stolen Property in the Second Degree and one prior conviction for Possession of a Controlled Substance, all occurring on April 29, 2005. CP 5; Sentencing Exhibit 1, Supp. CP. Based on this record, the state did not establish that the offenses were separate criminal

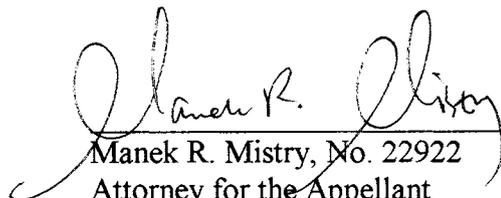
conduct. Accordingly, the merits here are not controlled by *Anderson*.
Because of this, the sentence must be vacated, and the case remanded for
sentencing.

CONCLUSION

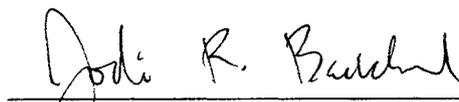
Mr. Nickols' convictions must be reversed and the case dismissed.
In the alternative, the case must be remanded for a new trial. If the
convictions are not reversed, his sentence must be vacated and the case
remanded for a new sentencing hearing.

Respectfully submitted on November 14, 2006.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to BY _____
REPLY

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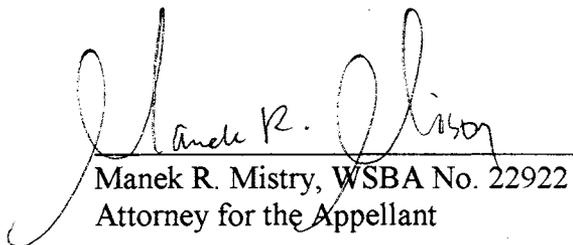
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on November 14, 2006.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF
THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE
AND CORRECT.

Signed at Olympia, Washington on November 14, 2006.


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