

COURT OF APPEALS

05 OCT 13 3:11:55

STATE OF WASHINGTON

No. 34653-2-II

BY YN  
CITY

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

**Charles Wiegard,**

Appellant.

---

Lewis County Superior Court

Cause No. 05-1-00635-2

The Honorable Judge Richard L. Brosey

**Appellant's Opening Brief**

Jodi R. Backlund  
Manek R. Mistry  
Attorneys for Appellant

**BACKLUND & MISTRY**  
203 East Fourth Avenue, Suite 404  
Olympia, WA 98501  
(360) 352-5316  
FAX: 740-1650

10/13/06

**TABLE OF CONTENTS**

**TABLE OF CONTENTS** ..... i

**TABLE OF AUTHORITIES** ..... iii

**ASSIGNMENTS OF ERROR** ..... v

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR** ..... v

1. Did the trial court err by denying Mr. Wiegard’s motion to dismiss? Assignments of Error No. 1, 2, 3. ..... v

2. Did the prosecutor fail to disclose material exculpatory evidence? Assignment of Error No. 1. ..... v

3. Did the trial court err by ruling that a prosecutor is not required to disclose exculpatory information known to the police unless the prosecutor also knows the information? Assignments of Error No. 1, 2, 3. ..... vi

4. Did the trial court err by imposing school bus stop enhancements that were not supported by sufficient evidence? Assignment of Error No. 4. ..... vi

5. Were the enhancements based on insufficient evidence as a matter of law because the measurements were not made from the place where the alleged transactions actually occurred? Assignment of Error No. 4. ..... vi

6. Were the enhancements based on insufficient evidence because the initial measurement did not terminate at a school bus stop? Assignment of Error No. 4. ..... vi

7. Were the enhancements based on insufficient evidence because no evidence established that the second measurement started at the termination point of the first measurement? Assignment of Error No. 4. ..... vi

8. Were the school bus stop enhancements based on insufficient evidence because there was no testimony establishing where the school bus stop was actually located? Assignments of Error No. 4. ..... vii

9. Did the trial court err by imposing the school bus stop enhancement in Count II? Assignment of Error No. 5. .... vii

10. Must an accomplice be present within 1000 feet of a school bus stop at the time of the alleged transaction in order to receive the enhanced penalty? Assignment of Error No. 5...... vii

**STATEMENT OF FACTS AND PRIOR PROCEEDINGS**..... 1

**ARGUMENT**..... 4

**I. The prosecutor failed to disclose material exculpatory evidence.**..... 4

**II. The school bus stop enhancements must be vacated because they were not supported by sufficient evidence.**  
..... 8

**A. The evidence was insufficient to establish that delivery occurred within 1000 feet of a school bus stop.** ... 8

**B. The school bus stop enhancement in Count II must be vacated because Mr. Wiegard was not within 1000 feet of the school bus stop when the delivery occurred.** ..... 10

**CONCLUSION** ..... 12

**TABLE OF AUTHORITIES**

**FEDERAL CASES**

*Banks v. Dretke*, 540 U.S. 668, 24 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004)  
..... 5

*Boss v. Pierce*, 263 F.3d 734 (7th Cir., 2001)..... 5, 6

*Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 10 L. Ed. 2d 215 (1963)4,  
5, 6

*Kyles v. Whitley*, 514 U.S. 419, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)  
..... 5, 6, 7, 8

*Strickler v. Greene*, 527 U.S. 263, 119 S. Ct. 1936, 144 L. Ed. 2d 286  
(1999)..... 6, 8

*United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481  
(1985)..... 5

**STATE CASES**

*State v. Chester*, 133 Wn.2d 15, 940 P.2d 1374 (1997)..... 10, 11

*State v. Clayton*, 84 Wn. App. 318, 927 P.2d 258 (1996)..... 9

*State v. Cramm*, 114 Wn.App. 170, 56 P.3d 999 (2002) ..... 10

*State v. G.S.*, 104 Wn.App. 643, 17 P.3d 1221 (2001) ..... 8

*State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998)..... 8

*State v. Keller*, 143 Wn.2d 267, 19 P.3d 1030 (2001), *cert. den. sub nom*  
*Keller v. Washington*, 534 U.S. 1130, 122 S.Ct. 1070, 151 L.Ed.2d 972  
(2002)..... 10

*State v. Silva-Baltazar* 125 Wn.2d 472, 886 P.2d 138 (1994)..... 11

STATUTES

RCW 69.50.401 ..... 11

RCW 69.50.435 ..... 8, 11

### **ASSIGNMENTS OF ERROR**

1. Mr. Wiegard was denied a fair trial because the prosecutor withheld exculpatory evidence.
2. The trial court erred by ruling that the prosecutor was not required to disclose exculpatory evidence known to the investigating detective but unknown to the prosecutor.
3. The trial court erred by denying Mr. Wiegard's motion to dismiss.
4. The trial court erred by imposing school bus stop enhancements based on insufficient evidence.
5. The trial court erred by imposing a school bus stop enhancement in Count II, where Mr. Wiegard was convicted as an accomplice but was not within 1000 feet of a school bus stop at the time of the offense.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Charles Wiegard was charged with two counts of delivery of methamphetamine. The prosecution alleged that he sold drugs to an informant on two occasions. Both alleged deliveries occurred in his house, which he'd previously shared with the informant.

During trial, the detective testified that the informant had returned to the house unsupervised on numerous occasions, before and after each transaction. This information was not disclosed to Mr. Wiegard prior to trial.

The trial court denied Mr. Wiegard's motion to dismiss, ruling that the prosecutor was not required to disclose information held by the detective unless the prosecutor personally knew the information.

1. Did the trial court err by denying Mr. Wiegard's motion to dismiss? Assignments of Error No. 1, 2, 3.
2. Did the prosecutor fail to disclose material exculpatory evidence? Assignment of Error No. 1.

3. Did the trial court err by ruling that a prosecutor is not required to disclose exculpatory information known to the police unless the prosecutor also knows the information? Assignments of Error No. 1, 2, 3.

The state alleged that both deliveries occurred within 1000 feet of a school bus stop. No measurements were taken from the actual places where the actual transactions occurred. Nor was any measurement taken from the home directly to a school bus stop.

The distance from the home to a nearby intersection was  $446 \pm 8$  feet. The distance from that intersection to a second intersection was approximately 398 feet. There was no testimony indicating where each measurement started or ended, how accurate the second measurement was, or where the actual bus stop was.

Mr. Wiegard was charged as an accomplice in Count II. He was not present when the second transaction took place, and there was no evidence that he himself was within 1000 feet of a school bus stop. Despite this, the court imposed the enhancement.

4. Did the trial court err by imposing school bus stop enhancements that were not supported by sufficient evidence? Assignment of Error No. 4.

5. Were the enhancements based on insufficient evidence as a matter of law because the measurements were not made from the place where the alleged transactions actually occurred? Assignment of Error No. 4.

6. Were the enhancements based on insufficient evidence because the initial measurement did not terminate at a school bus stop? Assignment of Error No. 4.

7. Were the enhancements based on insufficient evidence because no evidence established that the second measurement started at the termination point of the first measurement? Assignment of Error No. 4.

8. Were the school bus stop enhancements based on insufficient evidence because there was no testimony establishing where the school bus stop was actually located? Assignments of Error No. 4.

9. Did the trial court err by imposing the school bus stop enhancement in Count II? Assignment of Error No. 5.

10. Must an accomplice be present within 1000 feet of a school bus stop at the time of the alleged transaction in order to receive the enhanced penalty? Assignment of Error No. 5.

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

On August 3, 2005, Danielle Ortiz, who lived in her car, contacted law enforcement and offered to be a confidential informant. RP (3-28-06) 19. Prior to becoming homeless, she had lived with Charles Wiegard at 516 S. Cedar in Centralia, and she still had all of her belongings -- including a television, a couch, two or three beds, a microwave and stand, two dressers, a vanity, a nightstand and a washer -- stored at the home after she moved out. RP (3-28-06) 47, 78. She told the officers that she had personally sold methamphetamine out of that home when she resided there, and that she used and stored drugs in the room where her belongings were stored. RP (3-28-06) 43, 98.

On August 21, 2005, she met with police, went to the house, and came out with methamphetamine. RP (3-28-06) 24-28. On August 22, 2005, she again met with police, went to the house, and came out with methamphetamine. RP (3-28-06) 29-32. She was not wired and officers could not see her while she was inside the house. RP (3-28-06) 57, 63, 122, 129-130, 140. After these two transactions, the police obtained a search warrant, and a search of the house revealed methamphetamine. RP (3-28-06) 32; RP (3-29-06) 30-33.

Charles Wiegard was charged with two counts of Delivery of Methamphetamine, both with school zone enhancements, and one count of Possession of Methamphetamine. Supp. CP, Second Amended Information.

At Mr. Wiegard's jury trial, Ortiz testified that she had intended to purchase methamphetamine from Tim King. She told the jury she wanted to exact revenge because she was missing property and blamed King for taking it. RP (3-28-06) 79, 85. She also testified that she was mad at Mr. Wiegard. RP (3-28-06) 106. The detective confirmed that Ortiz was involved in a dispute with Wiegard regarding her furniture. RP (3-28-06) 61. When she arrived at the house, King was not there. RP (3-28-06) 79-81. She claimed that she purchased from Mr. Wiegard instead of Mr. King. RP (3-28-06) 29-30.

On the second purchase, Ortiz testified that she purchased methamphetamine from Rita Masters, and that Mr. Weigard was not at home. RP (3-28-06) 82-83. Masters testified that she sold Ortiz the methamphetamine on her own. RP (3-28-06) 146-148.

During trial, the lead detective revealed that Ortiz had visited the home several times without supervision, before and after the alleged transactions, in violation of her contract with law enforcement. RP (3-28-

06) 62-63. This was confirmed by Ortiz in her testimony. RP (3-28-06) 99-100.

The prosecution had not disclosed this favorable information prior to trial, and so Mr. Wiegard moved for dismissal. RP (3-29-06) 5-9. The court denied the motion, ruling that the prosecutor was not required to disclose information known to the detective unless the prosecutor personally knew the information as well. RP (3-29-06) 8-9.

To establish that the transactions occurred within 1000 feet of a school bus stop, the state presented the testimony of Dale Dunham. RP (3-29-06) 66-69. He testified that several buses stopped at the corner of Yew and Chestnut streets, but did not specify where the bus stopped in relation to the intersection. According to Mr. Dunham, no buses stopped at the corner of Yew and Cherry streets. RP (3-29-06) 66, 68.

Steve Spurgeon, an engineer with the City of Centralia, testified that the distance between the home on Cedar and the intersection of Yew and Cherry streets was 446.14 feet, plus or minus 2 feet per hundred feet. RP (3-29-06) 75. He did not indicate which part of the home was the starting point for this measurement, or where in the intersection his measurement terminated. RP (3-29-06) 69-76.

The prosecution also presented the testimony of a detective who measured the distance between the intersection of Yew and Cherry streets

and the intersection of Yew and Chestnut streets. According to the detective, the distance was 398 feet. RP (3-29-06) 77. The detective did not specify where he started and finished his measurements in relation to the two intersections. RP (3-29-06) 77-80. He also testified that he used a roller tape to make his measurements, but that he did not know the margin of error for the instrument, and did not know if it had been tested and certified as accurate. RP (3-29-06) 78-79.

The jury found Mr. Wiegard guilty of all the charges, and found that the deliveries took place within 1000 feet of a school bus stop. RP (3-30-06) 3. Mr. Wiegard was sentenced on April 3, 2006, and he appealed. CP 4-13, 3.

## ARGUMENT

### **I. THE PROSECUTOR FAILED TO DISCLOSE MATERIAL EXCULPATORY EVIDENCE.**

A prosecutor's failure to disclose material exculpatory evidence, whether intentional or inadvertent, violates a criminal defendant's constitutional right to due process. *Brady v. Maryland*, 373 U.S. 83 at 87, 83 S. Ct. 1194 10 L. Ed. 2d 215 (1963). Evidence is considered suppressed for *Brady* purposes if (1) the prosecution failed to disclose the evidence before it was too late for the defendant to make use of it, and (2) the evidence was not otherwise available to the defendant through the

exercise of reasonable diligence. *Boss v. Pierce*, 263 F.3d 734 at 740 (7th Cir., 2001). When the evidence is known to a witness but is not part of a report, it is not available through the exercise of reasonable diligence:

[T]he question is whether defense counsel [has] access to *Brady* material contained in a witness's head... Because mind-reading is beyond the abilities of even the most diligent attorney, such material simply cannot be considered available in the same way as a document... This stretches the concept of reasonable diligence too far.  
*Boss v. Pierce*, at 741.

Any evidence that is favorable to the defense falls within the rule, whether it is exculpatory or merely impeaching. *Banks v. Dretke*, 540 U.S. 668 at 691, 24 S. Ct. 1256, 157 L. Ed. 2d 1166 (2004). Evidence is material and reversal is required whenever there is a reasonable probability that disclosure would have led to a different result:

[The] touchstone of materiality is a “reasonable probability” of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A “reasonable probability” of a different result is accordingly shown when the government's evidentiary suppression “undermines confidence in the outcome of the trial.” *Kyles v. Whitley*, 514 U.S. 419 at 434, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995), quoting *United States v. Bagley*, 473 U.S. 667 at 678, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985).

The duty to disclose does not depend on a request by the defense. *Bagley*, at 676, 681-682. The prosecutor is responsible for any favorable

evidence known to others acting on the government's behalf in the case, including the police. *Strickler v. Greene*, 527 U.S. 263 at 275 n. 12, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999), citing *Kyles v. Whitley* at 437.

In this case, the prosecutor failed to disclose material information that was favorable to the defense. The detective knew that the paid informant had, on numerous occasions, visited the house where the alleged deliveries occurred, without supervision by an officer. RP (3-28-06) 62-63.

This information was "suppressed" within the meaning of *Brady* because the prosecutor did not provide it to defense counsel prior to trial. There was some suggestion that the information was reasonably available to the defense because the detective could have revealed the information during a defense interview; however, this would have required Mr. Wiegard's attorney to engage in mind-reading of the sort described in *Boss v. Pierce, supra*. Although revealed before the end of trial, the disclosure was nonetheless disclosed "too late for the defendant to make use of it." *Boss v. Pierce, supra* at 740. Without knowledge of the informant's visits to the house, Mr. Wiegard was unable to question prospective jurors on anything relating to the subject, and could not mention it in his opening statement. Furthermore, defense counsel was unable to prepare thorough cross-examination of the informant and of the

detective who supervised her. Finally, Mr. Wiegard was unable to instruct his investigator to examine the house for hiding places where the informant could have concealed the drugs that she later produced under supposedly controlled circumstances.

The exculpatory nature of the information was also readily apparent. The informant's unsupervised visits to the house provided opportunities to plant drugs, in preparation for a later staged "buy" under apparently controlled circumstances. The detective also knew that the informant was involved in a dispute with Mr. Wiegard regarding her furniture, and thus had some animus toward him. RP (3-28-06) 62.

Finally, the evidence was material. The informant's dispute with Mr. Wiegard, and her willingness to target another resident of the house because of a personal dispute suggest that she would have taken advantage of opportunities to plant evidence. The failure to disclose this fact until mid-trial hampered the Mr. Wiegard's opportunity to prepare for trial and present his case to the jury. Accordingly, the prosecutor's failure to disclose the information prior to trial could reasonably have affected the outcome of the trial. Confidence in the outcome is undermined, and Mr. Wiegard's convictions must be reversed and the case remanded for a new trial. *Kyles v. Whitley, supra*, at 434.

The trial court erroneously ruled that the prosecutor was not required to disclose evidence of which he was unaware. As the Supreme Court has made clear, however, evidence known to the police or to anyone else acting on the prosecution's behalf must be disclosed. *Strickler v. Greene, supra; citing Kyles v. Whitley, supra*. Thus the trial judge applied the wrong legal standard in evaluating Mr. Wiegard's argument for dismissal.

**II. THE SCHOOL BUS STOP ENHANCEMENTS MUST BE VACATED BECAUSE THEY WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE.**

A. The evidence was insufficient to establish that delivery occurred within 1000 feet of a school bus stop.

A challenge to the sufficiency of the evidence may be raised for the first time on appeal. *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998). Evidence is insufficient unless a rational jury could find the essential elements beyond a reasonable doubt. A reviewing court draws all reasonable inferences in favor of the State. *State v. G.S.*, 104 Wn.App. 643 at 651, 17 P.3d 1221 (2001).

Under RCW 69.50.435, a person convicted of delivering a controlled substance is subject to enhanced penalties if the delivery occurred "Within one thousand feet of a school bus route stop designated by the school district..." The measurement must be taken from the point

where the delivery actually took place. *State v. Clayton*, 84 Wn. App. 318 at 321-322, 927 P.2d 258 (1996). Under the reasoning used in *Clayton*, the end measurement must be the actual point where the school bus stops. *Clayton, supra*.

In this case, the state was required to prove beyond a reasonable doubt that Mr. Wiegard delivered methamphetamine within 1000 feet of a school bus stop. Mr. Spurgeon testified that the house was  $446 \pm 8$  feet from the corner of Yew and Cherry streets (where no buses stopped). RP (3-29-06) 66, 68, 75. He did not indicate which part of the home was the starting point for this measurement, or which corner of the intersection was his ending point. RP (3-29-06) 69-76. A detective testified that the distance between the intersection of Yew and Cherry streets and the intersection of Yew and Chestnut streets was 398 feet. RP (3-29-06) 77. The detective did not specify where he started and finished his measurements in relation to the two intersections. RP (3-29-06) 76-80. He also did not know how accurate the measuring device was, or what its margin of error was. RP (3-29-06) 78-79. Neither witness testified to the width of the intersections, and there was no testimony as to where the buses actually stopped at the corner of Yew and Chestnut.

This evidence was insufficient as a matter of law under *Clayton*, because no measurements were taken from the point where the alleged

deliveries actually took place. Furthermore, there were additional gaps in the testimony caused by the failure to measure to the correct intersection, the lack of evidence about where the first measurement terminated and the second measurement began, and the failure to determine the accuracy of the measuring device. No reasonable inferences can be drawn from the testimony, given these missing pieces of evidence. Accordingly, the evidence was insufficient to establish that the deliveries occurred within 1000 feet of a school bus stop. The enhancements must be vacated, and the case remanded for sentencing within the standard range. *Hickman, supra.*

- B. The school bus stop enhancement in Count II must be vacated because Mr. Wiegard was not within 1000 feet of the school bus stop when the delivery occurred.

In interpreting a statute, a court must assume that the Legislature means exactly what it says. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001), *cert. den. sub nom Keller v. Washington*, 534 U.S. 1130, 122 S.Ct. 1070, 151 L.Ed.2d 972 (2002). If the statute is clear on its face, its meaning is derived from the statutory language alone; an unambiguous statute is not subject to judicial interpretation. *State v. Cramm*, 114 Wn.App. 170 at 173, 56 P.3d 999 (2002); *State v. Chester*, 133 Wn.2d 15 at 21, 940 P.2d 1374 (1997). The court may not add language to a clearly

worded statute, even if it believes the Legislature intended more. *Chester, supra.*

RCW 69.50.401 provides that “Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance... [w]ithin one thousand feet of a school bus route stop designated by the school district,” is subject to enhanced penalties.

By its plain terms, the statute applies only to those who commit the offense within the specified geographic area. It does not apply to participants who are not within the area. The Supreme Court implicitly recognized this distinction in *State v. Silva-Baltazar*, when it limited its holding to accomplices who are present when the crime took place. *See State v. Silva-Baltazar* 125 Wn.2d 472, 886 P.2d 138 (1994):

All participants who are in areas in which the Legislature has determined that children are likely to be present pose an equal threat to the children in terms of exposure to drug activity... We hold that all participants who are liable for the substantive crimes referred to in RCW 69.50.435, and who are themselves participating in this criminal activity within a drug-free zone, are subject to the enhancement. *Silva-Baltazar*, at 483.

Because the statute is clear on its face, its meaning is derived from the statutory language alone and it is not subject to judicial interpretation.

*Chester, supra.*

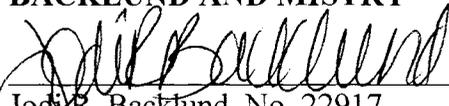
It is undisputed that Mr. Wiegard was convicted of Count II as an accomplice. The evidence established that he was absent from the house when the second delivery occurred, and there was no indication that he was within 1000 feet of the school bus stop. RP (3-28-06) 60, 154, 10-155; RP (3-29-06) 10-80. Accordingly, Mr. Wiegard's sentence cannot be enhanced for the delivery that occurred in Count II. The enhancement must be vacated and the case remanded for sentencing within the standard range.

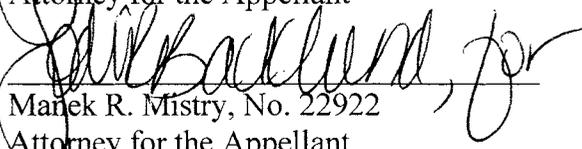
**CONCLUSION**

For the foregoing reasons, the convictions must be reversed and the case remanded to the trial court for a new trial. In the alternative, the school bus stop enhancements must be vacated and the case remanded for sentencing within the standard range.

Respectfully submitted on October 13, 2006.

**BACKLUND AND MISTRY**

  
\_\_\_\_\_  
Jodi R. Backlund, No. 22917  
Attorney for the Appellant

  
\_\_\_\_\_  
Manek R. Mistry, No. 22922  
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Charles Wiegard, DOC# 970474  
Airway Heights  
P.O. Box 1899  
Airway Heights, WA 99001-1899

and to:

Lewis County Prosecuting Attorney  
Ms:pro01  
360 NW North Street  
Chehalis, WA 98532-1925

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

All postage prepaid, on October 13, 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 October 13, 2006.



Jodi R. Backlund, No. 22917  
Attorney for the Appellant