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COURT OF APPEALS

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STATE OF WASHINGTON

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Nº. 34953-1-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
Respondent,

v.

JEFFREY MICHAEL FOSTER,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 04-1-04724-4
The Honorable Frederick W. Fleming, Presiding Judge

Reed Speir
WSBA No. 36270
Attorney for Appellant
3800 Bridgeport Way W., Ste. A #23
(253) 722-9767

ORIGINAL

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to convict Mr. Foster of any count of unlawful delivery of a controlled substance.
2. There was insufficient evidence to convict Mr. Foster of bail jumping.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is there sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that Mr. Foster sold the confidential informant methamphetamine where the only evidence that Mr. Foster sold the methamphetamine to the informant came from the informant and the informant admitted that his only reason for cooperating with police was to make money and that the informant made more money when his work with the police lead to a conviction?
2. Is there sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that Mr. Foster commit the crime of bail jump on January 5, 2005, where Mr. Foster had two hearings scheduled, one in the morning and one in the afternoon, appeared for the afternoon hearing, and testified that he failed to appear for the morning hearing only because he misread his scheduling order?

C. STATEMENT OF THE CASE

Factual and Procedural Background

In 2003, Michael Turner was released from jail. RP 91. Prior to Mr. Turner being released, Puyallup Police Officer Michael Clark had spoken to Mr. Turner about being a confidential informant. RP 91. Mr. Turner decided that he would become a confidential informant in order to make money. RP 91.

Mr. Turner testified that he knew Mr. Foster because Mr. Foster supplied drugs to an acquaintance of Mr. Turner named Louie Wilson. RP 92-93.

Mr. Turner began working with the Puyallup Police Department as a confidential informant in June or July of 2004. RP 91. Mr. Turner worked with Officer Clark conducting marijuana buys near where Mr. Turner lived in Puyallup. RP 91. Mr. Turner would receive 50 to 150 dollars for performing a buy. RP 92. Mr. Turner also worked for Officer Don Gill. RP 93.

During this time Officer Gill was working as an undercover narcotics detective and was working with confidential informants. RP 45-48. Officer Gill paid his informants more money than most other narcotics detectives. RP 51. Officer Gill came into contact with Mr. Turner after Mr. Turner had made numerous phone calls to Officer Gill offering to be an informant. RP 50-51.

At some point prior to working with Mr. Turner, Officer Gill had gone undercover with Mr. Wilson to a residence located at 817 7th Avenue to purchase narcotics. RP 57-58. After this visit, Officer Gill wanted to go into the house and make a purchase from the occupants to identify the person selling narcotics, so on September 15, 2004, Officer Gill and

Officer Clark sent Mr. Turner into the residence to perform a controlled buy of methamphetamine. RP 34-36, 59-60, 94-96.

Under the observation of Officers Gill and Clark as well as other police officers, Mr. Turner entered the residence at 817 7th Avenue. RP 60. Several minutes after entering the house Mr. Turner exited the house in the company of Mr. Wilson and they walked a short distance to the Cavalier Apartments. RP 36-37, 60-62, 95. Mr. Turner entered apartment number 31 and exited a while later with a bag of methamphetamine. RP 37-38, 62.

Mr. Turner testified that he went into an apartment belonging to Mike Smith and spoke with Mr. Smith about purchasing drugs. RP 95. Mr. Turner testified that Mr. Smith then told Mr. Turner to "Hang on a minute" and then Mr. Foster walked into the room. RP 95. Mr. Turner testified that Mr. Foster and Mr. Smith then went in to the bedroom then called Mr. Turner into the bedroom. RP 95-96. Mr. Turner testified that he then observed Mr. Foster pour some drugs on a scale, put them in a baggie, and hand the baggie to Mr. Smith. RP 96. Mr. Turner testified that he then gave money to Mr. Smith and Mr. Smith gave him the drugs. RP 96. Mr. Turner testified that he then exited the apartment and contacted Officer Clark. RP 96.

Neither Officer Clark nor Officer Gill observed Mr. Turner purchase the drugs on September 15, 2004 or saw Mr. Foster either at the house or at the apartment. RP 42-43, 83-84.

On September 29, 2004, Officer Gill was working undercover with Mr. Turner. RP 63-64. Officer Gill took Mr. Turner to a trailer located at 7910 River Road, space 23, which he believed was Mr. Foster's address.¹ RP 63-64. Mr. Turner got out of the truck Officer Gill had driven to the location and a person told Officer Gill where to "get some." RP 98. Mr. Turner testified that he then went to the trailer of a person named Auggie or Auddie and Mr. Foster was in the trailer. RP 98-99. Mr. Turner had told Auggie that he needed some crank so Auggie told Mr. Turner to go to the trailer. RP 99.

Mr. Turner testified that Auggie told Mr. Foster that Mr. Turner needed some "stuff." RP 99-100. Mr. Turner testified that Mr. Foster told a girl named Crystal to go to a little blue car parked away from the trailer and bring some drugs back to the trailer. RP 99. Mr. Turner testified that he gave Mr. Foster some money and that Mr. Foster gave Mr. Turner the drugs. RP 99. Mr. Turner then exited the trailer and got back into the

¹ Officer Gill gave conflicting testimony. Initially he testified that the trailer in space number 23 was Mr. Foster's residence (RP 64) but then testified that Mr. Foster lived in a trailer in space number 16. RP 66.

truck with Officer Gill and handed him the methamphetamine. RP 73, 99-100.

Officer Gill did not observe Mr. Turner purchase the drugs on September 29, 2004. RP 84.

On October 8, 2004, Mr. Foster was charged with two counts of unlawful delivery of a controlled substance. CP 1-4.

On December 1, 2004, Mr. Foster signed a Scheduling Order which set a omnibus hearing for the morning of January 5, 2005 and set a motion to continue on the afternoon docket also on January 5, 2005. RP 125, CP 16.

On January 7, 2005, a bench warrant was issued for Mr. Foster for failing to appear in court on January 5. RP 127, CP 18-19.

On April 5, 2005, the charges against Mr. Foster were amended to two counts of unlawful delivery of a controlled substance and two counts of bail jumping. CP 21-24.

In June of 2005, Mr. Turner was interviewed by counsel for Mr. Foster. RP 107, 109. During this interview, Mr. Turner described Mr. Foster as having a shaved head and a white beard, white goatee, and white elongated mustache. RP 107-108.

At trial, Mr. Foster confirmed that he had once lived in the trailer park Officer Gill and Mr. Turner went to. RP 167. Mr. Foster testified

that an individual named Billy Smith also lived in the trailer park. RP 168. Mr. Foster testified that Billy Smith was bald and had a grayish white goatee. RP 169.

At trial, Mr. Foster presented the testimony of Mr. Michael Smith. RP 158. In September of 2004, Mr. Smith lived in apartment 31 at the Cavalier Apartments. RP 158-159. Mr. Smith was initially charged as a co-defendant with Mr. Foster and Mr. Wilson. RP 159. Mr. Smith did not know Mr. Foster and did not meet him until they were in jail in October of 2004. RP 159-160. Mr. Smith confirmed that he sold drugs to Mr. Wilson (RP 163), but Mr. Smith denied ever purchasing drugs through Mr. Foster. RP 162. Mr. Foster denied ever having been to Mr. Smith's apartment or even knowing where the Cavalier Apartments were (RP 173) and confirmed that the first time he met Mr. Smith was in jail. RP 172-173.

On September 27, 2005, a jury found Mr. Foster guilty of both counts of unlawful delivery of a controlled substance and one count of bail jumping based on his failure to appear in court on January 5, 2005. RP 212-215, CP 52, 53, 55.

Notice of appeal was timely filed on June 2, 2006 and June 26, 2006. CP 57, 81-84.

D. ARGUMENT

1. **There was insufficient evidence for a rational jury to find beyond a reasonable doubt that Mr. Foster delivered methamphetamine where the only evidence Mr. Foster delivered methamphetamine was the testimony of a paid confidential informant who admitted he worked with the police for money, was paid more by the police when a conviction resulted from his information and assistance, and had received over \$1300 from the police including \$300 for his testimony in a deposition by defense counsel**

This Court reviews challenges to sufficiency of evidence by determining whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could find the essential elements of the charged crimes beyond a reasonable doubt. *State v. Zakel*, 61 Wn. App. 805, 811, 812 P.2d 512 (1991), *affirmed*, 119 Wn.2d 563, 834 P.2d 1046 (1992), citing *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990).

Here, the only evidence that Mr. Foster sold Mr. Turner the methamphetamine was the testimony of Mr. Turner. September 15th purchase- RP 95-96, September 29th purchase- RP 97-100. Both Officer Clark and Officer Gill testified that did not observe Mr. Turner purchase the methamphetamine. RP 42-43, 83-84.

“Where a case stands or falls on the credibility of essentially one witness, that witness’ credibility or motive must be subject to close

scrutiny.” *State v. Egelston*, 129 Wn.App 418, ¶86, 118 P.3d 959 (2005), citing *State v. Roberts*, 25 Wn.App. 830, 834, 611 P.2d 1297 (1980).

Mr. Turner’s testimony was insufficient to establish beyond a reasonable doubt that Mr. Foster sold Mr. Turner the methamphetamine

Here, the only person who allegedly observed Mr. Foster sell the methamphetamine was the confidential informant, Mr. Turner. Mr. Turner testified that his motivation in cooperating with the police was to make money. RP 91. Officer Gill testified that he paid his informants higher than most narcotics detectives (RP 51), and that he paid his informants on a sliding scale based on how useful the informant was to Officer Gill. RP 51-52. Officer Gill testified that he paid his informants a \$300 bonus when the informants information led to a successful search warrant (RP 52) and Mr. Turner testified that Officer Gill paid him \$300 just for being interviewed by counsel for Mr. Foster. RP 109. Mr. Turner testified that he received \$100 per buy (RP 109) and that he had completed ten to fifteen buys as an informant. RP 90. This means that by the time of trial, Mr. Turner had been paid at least \$1300 to \$1800 by the police.

Mr. Turner’s testimony identifying Mr. Foster as the man who sold him methamphetamine was directly contradicted by both Mr. Foster and Mr. Smith. No other evidence was presented to establish that Mr. Foster ever sold drugs to Mr. Turner.

The unsubstantiated paid testimony of Mr. Turner is contradicted by the uncontroverted testimony of Mr. Smith and Mr. Foster. Mr. Smith denied ever purchasing drugs from or selling drugs to Mr. Foster, and the description of the man who sold Mr. Turner the drugs given by Mr. Turner does not Mr. Foster, but does describe Billy Smith. Mr. Turner's paid testimony was not sufficient evidence to allow a rational jury to find beyond a reasonable doubt that Mr. Foster sold Mr. Turner methamphetamine.

2. **There was insufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that Mr. Foster knew he had to be in court on the morning of January 5, 2005.**

RCW 9A.76.170(1) provides,

Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

The knowledge element of the crime of bail jumping requires that state prove beyond a reasonable doubt that a defendant knew, or was aware, that he was required to appear at a scheduled hearing. *State v. Ball*, 97 Wn.App. 534, 535-536, 987 P.2d 632 (1999). The knowledge element is met when the State

proves that the defendant has been given notice of the required court dates. *State v. Fredrick*, 123 Wn.App. 347, 353, 97 P.3d 47 (2004).

Mr. Foster was charged with bail jumping due to his failure to appear in court for the morning hearing scheduled for January 5, 2005. CP 21-24, RP 125, 179-180. Mr. Foster testified that he misread the scheduling order and believed he only had one hearing scheduled for 1:30 in the afternoon. RP 179-180. Mr. Foster did, in fact, appear for the 1:30 hearing (RP 180) and waited for over two hours until he was the last person in the courtroom, at which time Judge Orlando asked Mr. Foster who he was and informed Mr. Foster that there was a bench warrant for his arrest for his failing to appear for the morning hearing. RP 180-181.

Mr. Foster freely admitted he was aware of the afternoon hearing and he appeared for that hearing. He testified that he misread the scheduling order and the motion for continuance and believed that the only hearing he had scheduled for January 5, 2005 was the afternoon hearing. RP 180. The fact that Mr. Foster appeared for the afternoon hearing and sat patiently until he was the last remaining person in the courtroom indicates that had Mr. Foster known he had a hearing in the morning, he would have appeared. It is illogical that a person would

knowingly miss a hearing scheduled for the morning but appear for a hearing scheduled on the afternoon of the same day.

The State failed to present sufficient evidence to establish that Mr. Foster knew he had to appear in court on the morning of January 5, 2005.

E. CONCLUSION

For the reasons stated above, this court should vacate Mr. Foster's convictions and dismiss the case.

DATED this 6th day of October, 2006.

Respectfully submitted,



Reed Speir, WSBA No. 36270
Attorney for Appellant

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the ~~28th~~ ^{6th} day of ~~July~~ ^{October}, 2006, I delivered a true and correct copy of the Brief of Appellant to which this certificate is attached by United States Mail, to the following:

Mr. Jeffrey Foster DOC# 954441
Airway Heights Corrections Ctr.
P.O. Box 2109
Airway Heights, WA 99001

And, I delivered via legal messenger a true and correct copy of the Brief of Appellant and the Verbatim Report of Proceedings to which this certificate is attached, to

Pierce County Prosecuting Attorney's Office
930 Tacoma Avenue South
Tacoma, WA 98402

Signed at Tacoma, Washington this 6th day of October, 2006.



Reed Speir, WSBA No. 36270

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