

NO. 36006-3-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ALONZO W. BAGGETT,

Appellant,

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
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BY: *urb*

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Richard D. Hicks, Judge
Cause No. 06-1-00881-6

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in failing to give Baggett's proposed instruction on additional factor required where intent to deliver is inferred from possession of a large quantity of controlled substance.
02. The trial court erred in calculating Baggett's offender score when it included three of his alleged prior juvenile criminal convictions in determining his offender score.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether it was reversible error for the trial court to fail to give Baggett's proposed instruction on additional factor required where intent to deliver is inferred from possession of a large quantity of controlled substance?
[Assignment of Error No. 1].
02. Whether the trial court erred in calculating Baggett's offender score when it included three of his alleged prior juvenile criminal convictions in determining his offender score?
[Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Alonzo W. Baggett (Baggett) was charged by fourth amended information filed in Thurston County Superior Court on February 20, 2007, with attempting to elude a pursuing police vehicle, count I, unlawful possession of a controlled substance with intent to

deliver while armed with a firearm, count II, discharging a firearm, count III, unlawful possession of a firearm in the first degree, count IV, and possession of a stolen firearm, count V, contrary to RCWs 69.50.401(1)(2)(b) and/or (c), 9.94A.602, 9.94A.533(3), 9.41.230(1)(b), 9.41.401(1)(a) and 9A.56.310, respectively. [CP 36-37].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 16]. Trial to a jury commenced on February 20, the Honorable Richard D. Hicks presiding.

The jury returned verdicts of guilty as charged on counts I-IV, with a special verdict that Baggett was armed during the commission of count II, and not guilty on count V. [CP 86, 87, 88, 91-93].

Baggett was sentenced within his standard range, including enhancement, and timely notice of this appeal followed. [CP 61-76].

02. Substantive Facts: Convicted Offenses

02.1 Attempting to Elude: Count I

On May 14, 2006, at 1:11 a.m., patrol officer Dwaine Hinrichs was dispatched to the scene of reported gunshots. [RP Vol. I 22-23]. He was in uniform and driving a fully marked patrol vehicle equipped with lights and siren. [RP Vol. I 23-24]. Upon arriving

at the scene, he observed a vehicle backing out of the area. [RP Vol. I 24-26]. Hinrichs exited his patrol vehicle in an attempt to contact the driver of the vehicle, coming close enough, 20 feet, to notice Baggett as the driver and sole occupant. [RP Vol. I 26-27]. “We made eye contact.” [RP Vol. I 27].

Baggett took off down the road and Hinrichs returned to his patrol vehicle, turned on the emergency lights and siren, and began the pursuit. [RP Vol. I 29-29]. The two vehicles eventually covered a distance of 1.7 miles, reaching speeds in excess of 80 miles-an-hour, all occurring in a 35 miles-an-hour zone. [RP Vol. I 30-31, 41]. At one point, Baggett’s vehicle, while negotiating a turn, drove into the oncoming lanes and actually hit the sidewalk on the opposite side of the road before regaining control. [RP Vol. I 31]. The chase ended when Baggett went through a stop sign while failing to negotiate another turn and shot across the intersection into some trees. [RP Vol. I 34-36].

In a statement given to the police, Baggett said “he knew it was the police. He saw our lights. He heard the sirens.” [RP Vol. I 71]. He did not have an answer as to why he didn’t stop. [RP Vol. I 92].

02.2 Possession with Intent to Deliver: Count II

A search of Baggett incident to his arrest produced one plastic bag containing 95 and a half pills, samples of which

subsequently tested positive for methamphetamine and methylenedioxymethamphetamine, also known as MDMA or Ecstasy. [RP Vol. I 66, 73; RP Vol. II 164-66]. Officer Jacob Brown initially testified that Baggett had no money on him before saying he had \$160 in twenties that was not seized nor mentioned in the officer's written report. [RP Vol. I 74-75; RP Vol. II 147-50, 153]. In a statement given to the police, Baggett said the pills "were his, but he said he wasn't selling. He said they were just for his recreational use [RP Vol. I 71](,)" adding that he was "not a dealer." [RP Vol. I 93].

Detective Paul Bakala testified that, based on his training and experience, personal use of Ecstasy usually involves between one to three tablets per dose or per use, that the tablets are often sold without packaging, that 100 tablets would represent a dealer quantity and that the price per tablet runs between \$15 to \$30, less for larger quantities, which, based on 90 tablets purchased individually, equals between \$1,300 to \$2,700. [RP Vol. II 188-197, 201, 212-13].

02.3 Discharging a Firearm: Count III

There were six cartridges found in the gun taken from Baggett's vehicle, three of which were spent. [RP Vol. I 54-55]. In a statement given to the police, Baggett said he had been at a party, had been jumped by two to four people and in self-defense

pulled a firearm out and fired two to three times in the air, and he was hoping that was going to scare them so that they'd stop fighting with him. He said it worked. They backed off, and then he kind of got freaked out and panicked and ran to his car and took off, and that's about where we picked it up as far as the police go.

[RP Vol. I 70].

18-year-old Phillip Young was at the party and heard an argument inside the house before everybody went outside. [RP Vol. I 81]. He later heard several shots. [RP Vol. I 83].

02.4 Unlawful Possession Firearm: Count IV

After Baggett's arrest, Hinrichs found a fully operational "handgun laying on the passenger's seat" of the car Baggett had been driving. [RP Vol. I 49; RP Vol. II 138-39]. In a statement given to the police, Baggett said that he had been convicted of a serious crime, a felony, and that he was not suppose to possess a firearm. [RP Vol. I 71, 94; RP Vol. II 124]. Additionally, the parties stipulated that Baggett had a felony conviction for a serious offense that prohibited him from possessing a firearm. [RP Vol. II 215].

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D. ARGUMENT

01. IT WAS REVERSIBLE ERROR FOR THE TRIAL COURT TO FAIL TO GIVE BAGGETT'S PROPOSED INSTRUCTION ON ADDITIONAL FACTOR REQUIRED WHERE INTENT TO DELIVER IS INFERRED FROM POSSESSION OF A LARGE QUANTITY OF CONTROLLED SUBSTANCE.

Baggett proposed the following instruction and took exception to the court's failure to give it. [RP Vol. III 229].

Where intent to deliver is inferred from possession of a large quantity of controlled substance, some additional factor consistent with intent to deliver beyond the mere possession of a controlled substance must be present.

[CP 39].

While conceding that the instruction was "a correct statement of the law," the trial court declined to give it. [RP Vol. III 229].

All right. Thank you, and I declined to give that instruction, although that's a correct statement of the law, and you may certainly argue that to the jury. But the reason it wasn't given is because the instructions as they're presently composed do allow you to argue that theory of the case, and here depending upon the evidence the jury believes, there were additional factors besides quantity. There was testimony about cash. There was testimony about a gun. There's the officer's opinion, which by itself wouldn't be sufficient I agree, but you'll be free to argue all of those factors.

[RP Vol. III 229-30].

A defendant is entitled to have his or her theory of the case submitted to the jury under the appropriate instructions. State v. Finley, 97 Wn. App. 129, 134, 982 P.2d 681, review denied, 139 Wn.2d 1027 (2000) (citing State v. Washington, 36 Wn. App. 792, 793, 677 P.2d 786, review denied, 101 Wn.2d 1015 (1984)). And there is no doubt that jury instructions must properly inform the jury of the applicable law. State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). A proper jury instruction “states the law, is not misleading, and permits counsel to argue his theory of the case.” State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). This court reviews a trial court’s decision to reject a jury instruction for an abuse of discretion. State v. Hall, 104 Wn. App. 56, 60, 14 P.3d 884 (2000) (citing State v. Picard, 90 Wn. App. 890, 902, 954 P.2d 336, review denied, 136 Wn.2d 1021 (1998)).

What the trial court did not recognize, or chose not to recognize, is that Baggett was entitled to have his theory of the case – that Detective Bakala’s opinion that the 95 pills represented more drugs than for personal use was insufficient to establish intent to deliver – submitted to the jury under the appropriate instruction. State v. Finlay, supra. Exactly. That is the law. A police officer’s opinion that the defendant possessed a greater

amount of drugs than normal for personal use is insufficient to establish intent to deliver; however, such intent may be inferred from possession of a large quantity of a controlled substance plus additional corroborating evidence. State v. Campos, 100 Wn. App. 218, 222, 998 P.2d 893, review denied, 142 Wn.2d 1006 (2000); State v. Lopez, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995).

The trial court's denial of the proposed instruction plays down the significance that there was no other instruction that addressed the problem, contrary to the court's ruling that Baggett was good to go without the instruction. This is not irrelevant. The prosecutor, while mentioning the gun and the \$160 that wasn't there but then was there, emphasized the point in closing:

Ladies and gentlemen, the testimony of Detective Bakala and the opinions that he rendered about drug trafficking and drug dealing, I would like you to call to mind - - or recall that he wasn't just talking about 150 or 200 investigations he's been involved in the last, oh, 2 years or so. But he was talking from the - - his basis of knowledge was informants, drug users and drug dealers that he has dealt with in hundreds, if not thousands of one-on-ones for the past ten or eleven years. His testimony was uncontroverted. His testimony was that this was a dealer amount; this was not a personal use amount, and he knows that because he's dealt with users of drugs, including Ecstasy.

[RP Vol. III 305-06].

Who wouldn't run with this unless instructed otherwise? Based on this record, it was reversible error for the trial court to fail to give Baggett's proposed instruction.

02. THE TRIAL COURT MISCALCULATED BAGGETT'S OFFENDER SCORE WHEN IT INCLUDED THREE OF HIS ALLEGED PRIOR JUVENILE CRIMINAL CONVICTIONS IN DETERMINING HIS OFFENDER SCORE.

Without objection or acknowledgment, the trial court included three of Baggett's alleged prior juvenile criminal convictions in determining his offender score. [RP 03/02/07 3-11; CP 95-98, 104-08].

One of the following must occur for a trial court to include prior convictions in a defendant's criminal history: (1) the State proves the prior convictions with the required evidence; (2) the defendant admits to the prior convictions;¹ (3) the defendant acknowledges the prior convictions by failing to object to their inclusion in a presentence report. RCW 9.94A.500(1); RCW 9.94A.530(2).

Since none of the above happened during Baggett's sentencing [RP 03/02/07 3-11], the trial court erred in including three of his alleged prior juvenile criminal convictions in determining his offender score. While

¹ As set forth in Statement of the Case herein, Baggett also had a fourth prior juvenile criminal conviction, which he stipulated to at trial. [RP Vol. II 215].

issues not raised in the trial court may not generally be raised for the first time on appeal, State v. Moen, 129 Wn.2d 535, 543, 919 P.2d 69 (1996), illegal or erroneous computations of an offender score that alter the defendant's standard sentence range may be challenged for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). If Baggett's three alleged prior juvenile criminal convictions were improperly included in his offender calculation, his standard range, including enhancement, would drop from 3 to 8 months to 2 to 5 months for count I (attempting to elude), from 56+ to 96 months to 48+ to 56 months for count II (possession with intent, including enhancement) and from 36 to 48 months for count IV (unlawful possession firearm). RCWs 9.94A.525(11), 9.94A.517 and 9.94A.525(7); CP 95, 104-05].

At sentencing, the State bears the burden of proving all prior convictions before those convictions can be used in an offender score or otherwise. See State v. Ford, 137 Wn.2d at 479-80. A defendant does not acknowledge an incorrect offender score simply by failing to object at sentencing. State v. Ford, 137 Wn.2d at 481-82.

Baggett's sentence should be remanded for resentencing under the general rule that the State is held to the existing record on remand. State v. McCorkle, 88 Wn. App. 485, 500, 945 P.2d 736 (1997). At the sentencing hearing, given that the State presented no evidence to prove Baggett's

alleged prior convictions here at issue, there was nothing to object to in this regard. Unlike the facts in State v. Ford, 137 Wn.2d at 485, where our Supreme Court remanded for an evidentiary hearing to permit the State to prove the disputed matters because “defense counsel has some obligation to bring deficiencies of the State’s case to the attention of the sentencing court(,)” 137 Wn.2d at 485, here there was no “State’s case.” Nothing occurred that could possibly have warranted an objection from Baggett’s counsel.

In In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 123 P.3d 456 (2005), a three-strikes case where Cadwallader had failed to object to his criminal history at sentencing, and thereby failed to put the sentencing court on notice that one of his prior strike convictions had washed out, our Supreme Court ruled that the State would be held to the existing record on remand, stating, “(g)iven that Cadwallader had no obligation to disclose his criminal history, it follows that he had no obligation to object to the State’s failure to include the 1985 Kansas theft conviction in his criminal history.” Id. at 876.

Here, because Baggett was under no obligation to prove his alleged prior convictions here at issue – that being the State’s exclusive burden – he was under no obligation to object to the State’s failure to present any evidence to establish these convictions. In short, since there was no

“State’s case” vis-à-vis these convictions, and thus nothing warranting an objection from Baggett, his sentencing on this issue should be remanded and the State held to the existing record.

E. CONCLUSION

Based on the above, Baggett respectfully requests this court to reverse and dismiss or to remand for resentencing consistent with the arguments presented herein.

DATED this 9th day of September 2007.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing same in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 9th day of September 2007.

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