

NO. 37024-7-II

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

STATE OF WASHINGTON, Respondent

v.

RANDY KEVIN ERWIN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT A. LEWIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-00614-1

BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

The State accepts the Statement of the Facts as set forth by the appellant.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that there was insufficient evidence to support his conviction under Count 1 of the Amended Information for Possession of Methamphetamine with Intent to Deliver.

The Amended Information filed in this matter (CP 13) charged the defendant in Count 1 with Unlawful Possession of a Controlled Substance with Intent to Deliver- Methamphetamine. The statutory elements of Possession of Controlled Substance with Intent to Deliver are (1) Unlawful Possession of (2) a Controlled Substance with (3) Intent to Deliver. RCW 69.50.401(a)(1)(ii); State v. Atsbeha, 142 Wn. 2d 904, 918, 16 P. 3d 626 (2001); State v. Sims, 119 Wn. 2d 138, 141, 829 P. 2d 1075 (1992).

As the appellant has set forth in his brief on page 11, in the case we have here the police seized the following items:

- A short plastic straw;
- A small measuring spoon;

- Two plastic bags containing under 40 grams of marijuana;
- 11 small plastic bags with white crystalline substance in them of weights from .3 and 1.2 grams, one of which was confirmed to contain Methamphetamine;
- A plastic bag with approximately 21 grams of white crystalline substance containing Methamphetamine;
- Empty plastic bags;
- A camel cigarette “hard pack” with 1.6 grams of Methamphetamine in it along with cigarettes;
- A digital scale seized from the defendant’s person.

Concerning the digital scales that were seized from the defendant, the State called Jason Dunn, a Forensic Scientist with the Washington State Patrol Crime Laboratory located in Vancouver. (RP 69). He tested the various items found in the vehicle and determined the drug content and that Methamphetamine was in fact present in many of these objects. He also checked the digital scales that were found in his pocket. He described the digital scales as “a plastic digital scale bearing residue.” (RP 87, L. 4 – 5). He described for the jury the testing that he did to determine that it had Methamphetamine residue on it. He indicated as follows:

A. (Jason Dunn): There were some small crystals. I actually had to break apart some of the – the balance, the scale, to get to some of the crystals that were hiding inside of it. But you could see some of them, its just similar to having spilt, you know, salt on a counter, you would see some crystals lying there.

-(PR 88, L. 6 – 11).

He further concluded that based on his testing of the residue that it contained Methamphetamine. (RP 88).

The test for Possession of Controlled Substance with Intent to Deliver has been repeatedly set forth. A nice synopsis of the rule is found in State v. Goodman, 150 Wn. 2d 774 83 P. 3d 410 (2004). The test is as follows:

Goodman primarily argues "that a sizeable amount of drugs must be a starting point in any analysis of intent to deliver." Br. of Appellant at 11; Pet. for Review at 12-13. This argument lacks merit. First, it has never been suggested by any court that a large amount of a controlled substance is required to convict a person of intent to deliver. *Accord State v. Zunker*, 112 Wn. App. 130, 136, 48 P.3d 344 (2002), *review denied*, 148 Wn.2d 1012, 62 P.3d 890 (2003). It is firmly established Washington law that mere possession of a controlled substance is generally insufficient to establish an inference of intent to deliver. *State v. Darden*, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002); *see also State v. Brown*, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993). Rather, at least one additional factor must be present. *Zunker*, 112 Wn. App. at 136. In *Zunker* the Court of Appeals affirmed the conviction of a man arrested while possessing only 2.0 grams of methamphetamine. *Id.* at 133. While recognizing the amount of methamphetamine was insufficient by itself to prove the intent to deliver element, the court cited the "scales bearing meth residue, notebooks with names and credit card numbers, a cell phone battery, and meth ingredients" as sufficient evidence to support a conviction. *Id.* at 136. Even though evidence may be consistent with personal use, it is the duty of the fact finder, not the appellate court, to weigh the evidence. *Id.* at 136-37
-(State v. Goodman, 150 Wn. 2d at 782 – 783).

As the preceding quote indicates numerous Washington cases have held that an inference of intent to deliver requires at least one factor indicative of distribution in addition to the drugs. State v. Hagler, 74 Wn. App. 232, 236, 872 P. 2d 85 (1994). In our situation you have not only the additional baggies and the amount of drugs recovered, but you also have digital scales that were found on the person of the defendant and those digital scales contained residue of Methamphetamine.

The issue raised by the appellant is sufficiency of the evidence. In reviewing a challenge to the sufficiency of the evidence, the appellate court views the evidence in a light most favorable to the State to determine whether a rational trier of fact could find the elements of the offense beyond a reasonable doubt. State v. Green, 94 Wn. 2d 216, 220 – 221, 116 P. 2d 628 (1980). The State must show more than bare possession to support a conviction for Possession with Intent to Deliver. State v. Brown, 68 Wn. App. 480, 485, 843 P. 2d 1098 (1993). At least one other factor must be present. State v. Harris, 14 Wn. App. 414, 542 P. 2d 122 (1975). (Additional Factor of Scales); State v. Simpson, 22 Wn. App. 572, 575 – 576, 590 P. 2d 1276 (1979)(additional factors of balloons an unusual amount of drugs and cutting agent); State v. Lane, 56 Wn. App. 286, 298, 786 P. 2d 277 (1989)(additional factors of scales and large

amount of cash). In our situation the officers found digital scale and numerous small plastic baggies with Methamphetamine. The presence of the scale and packaging could lead a rational trier of fact to find intent to deliver. The State submits that there has been sufficient evidence shown to allow this matter to go to the jury.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim that the court erred when it imposed a community custody condition that was not authorized by the legislature and that was so vague that it violated the defendant's right to due process. Specifically, the defendant claims that the community custody condition violated due process because it is void for vagueness. The section that the defendant complains of is as follows:

Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electric scheduling or data storage devices.
-(Felony Judgment and Sentence, CP 62, Page 8).

The defendant maintains that this particular provision of the defendant's sentence is "hopelessly vague". (Brief of Appellant, page 14). Further, he maintains that this matter should be heard at this time and is ripe for decision.

A statute or condition is void of vagueness if it fails to define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prescribed. City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). The appellate court presumes that statutes are constitutional and the defendant has a heavy burden of proving that a statute is unconstitutional beyond a reasonable doubt. State v. Smith, 111 Wn.2d 1, 5, 759 P.2d 372 (1988). The fact that some terms in a statute are not defined does not necessarily mean the statute or condition is void for vagueness. Douglass, 115 Wn.2d at 180. Impossible standards of specificity are not required, and a statute "is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct." City of Seattle v. Eze, 111 Wn.2d 22, 27, 759 P.2d 366 (1988).

The State submits that this identical argument and claim was raised recently in State v. Motter, 139 Wn. App. 797, 162 P.3d 1190 (2007). In the Motter case, the defendant challenged the identical provision of his judgment and sentence. He attacked it for vagueness and for the reasons

also raised in this appeal. Division II, in the Motter case, indicated as follows:

B. Prohibition on Paraphernalia Possession and Use

Second, Motter challenges the trial court's order that he: shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, cellular phones, police scanners, and hand held electronic scheduling and data storage devices. CP at 149. This condition does not order affirmative conduct. And, as demonstrated above, Motter's crime was related to his substance abuse. Thus, forbidding Motter from possessing or using controlled substance paraphernalia is a "crime-related prohibition" authorized under RCW 9.94A.700(5)(e). Thus, this condition is valid.

Motter argues that "almost any item can be used for the ingestion of controlled substances, such as knives, soda cans, or other kitchen utensils." Br. of Appellant at 29. A community custody condition may be void for vagueness if it fails to define specifically the activity that it prohibits. State v. Riles, 86 Wn. App. 10, 17-18, 936 P.2d 11 (1997), aff'd, 135 Wn.2d 326, 957 P.2d 655 (1998). But Motter fails to cite to authority and his argument consists of one unhelpful sentence in the context of a complex constitutional legal doctrine.

Moreover, Motter's challenge is not ripe. In State v. Massey, 81 Wn. App. 198, 200, 913 P.2d 424 (1996), the defendant challenged a condition that he submit to searches. This court held that the judicial review was premature until the defendant had been subjected to a search he thought unreasonable. And in State v. Languard, 42 Wn. App. 287, 292-93, 711 P.2d 1039 (1985), we held that the question of a law's constitutionality is not ripe for review unless the challenger was harmed by the law's alleged error. Here, Motter claims that the court order

could prohibit his possession of innocuous items. But Motter has not been harmed by this potential for error and this issue therefore is not ripe for our review. It is not reasonable to require a trial court to list every item that may possibly be misused to ingest or process controlled substances, items ranging from “pop” cans to coffee filters. Thus, we can review Motter's challenge only in context of an allegedly harmful application of this community custody condition. This argument is not properly before this court and we will not address it.

-(Motter, 139 Wn. App. at 804).

The State submits that nothing has been added in this brief to undermine that Motter determination.

Finally, the defendant maintains that under the WAC provisions that this matter would not come back before the court nor would there be an opportunity for review of the conditions once they do become “ripe”. However, the State would submit that since this matter is not ripe at this time, that when it becomes ripe, the defendant would have the opportunity to file a personal restraint petition to seek some type of other relief at that time. It would not make any sense to forestall him at that point from raising it.

A petitioner who has had no previous or alternative avenue for obtaining state judicial review need only satisfy the requirements under RAP 16.4. E.g., In Re Personal Restraint of Cashaw, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994) (a personal restraint petition (PRP) challenging

a decision of the Indeterminate Sentence Review Board concerning parole need not meet the threshold requirements for constitutional and nonconstitutional errors because the policy of finality underlying those requirements is absent where the prisoner has had no previous or alternative avenue for obtaining state judicial review of the board decision); see also In Re Personal Restraint of Shepard, 127 Wn.2d 185, 191, 898 P.2d 828 (1995); In Re Personal Restraint of Mattson, 124 Wn. App. 130, 172 P.3d 719 (2007).

Personal restraint petitions are not a substitute for direct review. Petitioners challenging a court judgment and sentence must do more than show legal error; they must either show constitutional error that caused actual and substantial prejudice or nonconstitutional error that inherently caused a complete miscarriage of justice. In re Pers. Restraint of Lord, 152 Wn.2d 182, 188, 94 P.3d 952 (2004) (quoting In re Pers. Restraint of Cook, 114 Wn.2d 802, 812, 792 P.2d 506 (1990)). But when, as here, direct review is not available, we apply a more lenient standard. Dalluge can prevail if he can show he is under “unlawful” (as meant by RAP 16.4(c)) “restraint” (as meant in RAP 16.4(b)). In re Pers. Restraint of Isadore, 151 Wn.2d 294, 299, 88 P.3d 390 (2004) (citing In re Pers. Restraint of Garcia, 106 Wn. App. 625, 628, 24 P.3d 1091, 33 P.3d 750 (2001)). Petitioners are restrained if, among other things, they are confined or are “under some other disability resulting from a judgment or sentence in a criminal case.” RAP 16.4(b); see also In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 149, 866 P.2d 8 (1994).
-(In Re Personal Restraint of Dalluge, 162 Wn.2d 814, 817, 177 P.3d 675 (2008)).

The State submits that Motter is the controlling case law and should be applied in this circumstance.

IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 17th day of August, 2008.

Respectfully submitted:

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Clark County No. 07-1-00614-1

DECLARATION OF MAILING

STATE OF WASHINGTON)

: ss

COUNTY OF CLARK)

On August 11, 2008, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to counsel for Appellant, containing a copy of the document to which this Declaration is attached.

TO: DAVID PONZOHA CLERK COURT OF APPEALS DIVISION II 950 BROADWAY SUITE 300 TACOMA WA 98402-4454	JOHN A HAYS ATTORNEY AT LAW 1402 BROADWAY SUITE 103 LONGVIEW WA 98632
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DOCUMENT(S): Verbatim Report of Proceedings - 2 volumes

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.


Date: 8/11, 2008.
Place: Vancouver, Washington