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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY
DEPUTY

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

37504-4-II

STATE OF WASHINGTON
RESPONDENT,

VS.

ANDREW O'CONNOR
APPELLANT.

BRIEF OF RESPONDENT

DAVID J. BURKE
PROSECUTOR
WSBA #16163

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pm 10-6-08

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES..... ii-iii

A. STATE'S RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR.....1

B. STATE'S RESPONSE TO ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR.....2

C. STATEMENT OF THE CASE.....3

D. ARGUMENT.....3-14

E. CONCLUSION.....15

TABLE OF AUTHORITIES

Page

State Cases

State v. Bello,
142 Wash. App. 930
176 P.3d 554 (2008).....6,8,9

State v. Camarillo,
115 Wash. 2d 60
794 P.2d 850 (1990).....13

State v. Handran,
113 Wash. 2d 11
775 P.2d (1989).....11

State v. Hill,
123 Wash. 2d 641
870 P.2d 313 (1994).....7

State v. Jackson
107 Wash. App. 646
27 P.3d 689 (2001).....6

State v. King,
75 Wash. App. 899
878 P.2d 466 (1994).....9,10
14

State v. Kitchen.
110 Wash. 2d 403
756 P.2d 105 (1988).....13

State v. Love,
80 Wash. App. 357
908 P.2d 395 (1996).....11,12

State v. Parker
139 Wash. 2d 486
987 P.2d 73 (1999).....4,5

State v. Petrich,
101 Wash. 2d 566
683 P.2d 173 (1984).....13

Other Rules & Regulations

Article 1, section 7
Washington State Constitution.....2,3
9

A.

STATE'S RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR

1. The trial court did not err in allowing Andrew O'Conner to be convicted based on evidence that was obtained during a search incident to the arrest of a passenger in a pickup truck which was driven by Mr. O'Conner.

2. The trial court did not err in denying defense counsel's second motion to suppress.

3. The trial court did not err in failing to give a unanimity instruction to the jury.

B.

STATE'S RESPONSE TO ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The arrest of a passenger of a vehicle constitutes a sufficient ground to search the vehicle. Assignment of Error 1.

2. The glove which Deputy Byrd searched was not an item that he knew or should have known belonged to Mr. O'Connor, and the item was in the immediate control of Mr. O'Connor's passenger prior to the arrest. Therefore, no violation of Article 1, section 7 of the Washington State Constitution occurred. Assignment of Error 2.

3. The trial court did not err in failing to give a unanimity instruction to the jury where the State did not elect to rely on one of the two methamphetamine pipes to prove

that Mr. O'Connor possessed methamphetamine. Assignment of Error 3.

C.

STATEMENT OF THE CASE

The State accepts the Statement of the Case as delineated by Andrew O'Connor.

D.

ARGUMENT

1. THE TRIAL COURT DID NOT ERR IN FAILING TO SUPPRESS THE SEARCH OF THE RUBBER GLOVE.

At the outset, the State does not contest that the Appellant has automatic standing to challenge the validity of the search of the truck Mr. O'Connor was driving and of its contents. The real question here is whether the search conducted by the police violated Article 1, section 7 of the Washington State Constitution. The seminal case involving

searches of items in a vehicle where there is a non-arrested person is State v. Parker, 139 Wash. 2d 486, 987 P.2d 73 (1999). In Parker the Washington State Supreme Court announced "a straightforward rule allowing police officers to assume all containers within the vehicle may be validly searched, unless officers know or should know the container is a personal effect of a passenger who is not independently suspected of criminal activity and where there is no reason to believe contraband is concealed within the personal effect prior to the search." Id. at 503.

Here, the holding in Parker makes it abundantly clear that the search of the glove in this case was proper. Mr. O'Connor was the driver of a vehicle in which Deputy Byrd had discovered a pipe that he recognized based on his training and experience to be used for smoking methamphetamine RP (January 25, 2008) 9, 10. Deputy

Byrd then located a second pipe in a rubber glove. RP (January 25, 2008) 10. Parker allows the officer to validly search all containers in the vehicle unless the officer knows or should know that the container is personal effect of the non arrested individual. Based on the record in this case, Mr. O'Connor cannot show that Deputy Byrd knew or should have known that the glove belonged to Mr. O'Connor. The glove in question could have belonged to the arrested passenger. The glove was located between the arrested passenger and Mr. O'Connor. RP (January 25, 2008) 22. Nothing in the record shows that the glove was clearly and closely associated with Mr. O'Connor. To the contrary, at no time during the suppression hearing did Mr. O'Connor or the arrested passenger ever claim ownership of the glove. [1]

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[1] The failure of Mr. O'Connor or the passenger to claim ownership of the glove directly relates to whether Deputy Byrd knew or should have known

Furthermore, Deputy Byrd was not obligated to show the glove to Mr. O'Connor and verify his claim of ownership before Deputy Byrd was entitled to examine the glove. State v. Jackson, 107 Wash. App. 646, 650-651, 27 P.3d 689 (2001). Although Deputy Byrd recognized the glove as a "fishing" glove and knew that Mr. O'Connor worked in the fishing industry (Appellant's Brief at 14-15), these facts do not provide a sufficient nexus to conclude that Deputy Byrd knew or believed that the glove belonged to Mr. O'Connor.

In addition, the trial court did not make such a finding after the first suppression hearing. The absence of an explicit finding of fact which states that Deputy Byrd believed that the glove belonged to Mr. O'Connor indicates that the trial court rejected such a finding. Consequently, at this

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that the glove belonged to Mr. O'Connor. The absence of any claim of ownership militates against the claim that Deputy Byrd's actions were proscribed under Parker. See, e.g., State v. Bello, 142 Wash. App. 930, 941, 176 P.3d 554 (2008).

juncture, the Court of Appeals should not substitute its judgment for the judgment of the trial court on a factual matter. The Court of Appeals must give deference to the trial court's findings of fact and not disturb those findings provided that there is substantial evidence to support those findings. State v. Hill, 123 Wash. 2d 641, 644-647, 870 P.2d 313 (1994). Because there is substantial evidence to support the trial court's findings, the Court of Appeals should not accept as fact the inference proffered by the Appellant, i.e., Deputy Byrd believed that the glove belonged to Mr. O'Connor. Since this supposition goes beyond the findings of fact of the trial court, the assertion by the Appellant that Deputy Byrd needed a warrant to search the glove should be rejected. Appellant's Brief at 15.

Even if the court were to determine that Deputy Byrd knew or should have known that the glove belonged to Mr.

O'Connor, the search would still be valid pursuant to Parker. The fact that Deputy Byrd found a methamphetamine pipe within the reach of Mr. O'Connor provided Deputy Byrd with an independent suspicion the Mr. O'Connor was engaged in the criminal activity of possession of methamphetamine. Also, Deputy Byrd had a reason to believe contraband was concealed within the glove immediately prior to the search. Deputy Byrd observed the passenger making furtive movements close to the location of the glove. RP (January 25, 2008) 8.

In this connection, Division One of the Court of Appeals recently held that evidence was lawfully seized when police officers found contraband in the portion of the passenger compartment that the arrested passenger could reach immediately before his arrest. State v. Bello, 142 Wn. App. 930, 176 P.3d 554 (2008). The facts of Bello are

remarkably similar to the case at hand. In Bello, neither the driver nor the arrested passenger gave any indication that the contraband in question belonged to them. Equally important, the contraband was within the span of control of the passenger immediately prior to his arrest. The Bello court found that this search did not violate Article 1, Section 7 of the Washington State Constitution. Because the analysis contained in Bello is directly germane to the present case, the Appellant's claim should be rejected.

2. THE TRIAL COURT DID NOT ERR IN FAILING TO INSTRUCT THE JURY ON UNANIMITY

Mr. O'Connor argues that a unanimity instruction should have been given to the jury. He likens his case to State v. King, 75 Wash. App. 899, 878 P.2d 466 (1994). Such reliance is misplaced, however, because there are significant factual differences between King and the instant case. In

King, police officers found cocaine in the car in which King was a passenger and later found cocaine on his person after he was taken to the police station. He was charged with only one count of possession. The State argued both constructive and actual possession and failed to elect, after asserting it would do so, the theory upon which it would rely. King, 75 Wash. App. at 903. A unanimity instruction should have been given in King because the evidence supported two different types of possession that occurred at different times, in different places, and involved different containers. Id.

In this case, the State only argued constructive possession. The evidence supported a theory of constructive possession that occurred at the same time and the same place. The substances in this case were found in two different places in the vehicle. However, both of the

substances were within reach of Mr. O'Connor while he was driving the vehicle. RP (January 25, 2008) at 21,22.

Where the evidence of two or more criminal acts indicates a continuing course of conduct, neither election of a particular act nor a unanimity instruction is required. State v. Handran, 113 Wash. 2d 11, 17, 775 P.2d 453 (1989). In determining whether the conduct in question constitutes one continuing act, a court should look at the facts "in a commonsense manner." Id. If a defendant has a single objective and commits several different acts while trying to meet that objective, the acts usually have been characterized as a continuing course of conduct. Cf. State v. Love, 80 Wash. App. 357, 908 P.2d 395 (1996), where the police found cocaine on the defendant's person and in his home; the actions in Love were deemed to further the objective of drug trafficking and therefore constituted a continuing

course of conduct. Similarly, the facts of the present case involve a defendant who constructively possessed two pipes that contained methamphetamine. While the objective in Love was drug trafficking, the proximity of the pipes in this case indicates an objective to possess and use both of these pipes to smoke methamphetamine.

Moreover, like Love, Mr. O'Connor asserted a single defense that related to both instances of possession, i.e., he did not know of the existence of the pipes. RP (March 4, 2008) 100,101, 105. In other words, Mr. O'Connor's defense involved an "all or nothing" proposition. It would have been logically inconsistent for the trier of fact to believe that Mr. O'Connor possessed one pipe without possessing the other. Thus, the evidence in this case is best characterized as a continuing course of conduct that does not require a

unanimity instruction under State v. Petrich, 101 Wash. 2d 566, 683 P.2d 173 (1984).

3. EVEN IF MR. O'CONNOR WERE ENTITLED TO A UNANIMITY INSTRUCTION, THE ERROR WAS HARMLESS.

The failure to give a unanimity instruction is not harmless in a multiple acts case if "a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt." King, 75 Wash. App. at 903. To find the error harmless, a court must conclude that if a rational trier of fact believed the testimony about one pipe, it would necessarily believe the testimony about the other pipe. See State v. Camarillo, 115 Wash. 2d 60, 70-72, 794 P.2d 850 (1990); State v. Kitchen, 110 Wash. 2d 403, 411, 756 P.2d 105 (1988). Since Mr. O'Connor did not assert a distinct defense for each incidence of possession, a rational trier of fact who convicted Mr.

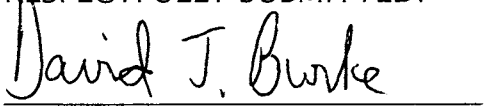
O'Conner would have to base the conviction on both incidents of possession. See King, 75 Wash. App. at 904. Since an appellate court has no basis to question the factual determinations of a rational jury, and there is nothing in the record to indicate that the jury in this case did not act rationally, any error in failing to give a unanimity instruction was harmless.

E.

Conclusion

For the reasons listed above, the Appellant's assignments of errors should be rejected and relief sought by the Appellant should be denied. The Appellant's conviction should be upheld.

RESPECTFULLY SUBMITTED:



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STATE OF WASHINGTON, Respondent. vs. ANDREW O'CONNOR, Petitioner.	))))))))))	NO 37504-4-II AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) ss.
COUNTY OF PACIFIC)

DAVID J. BURKE, being first duly sworn on oath, deposes and says:

I am the Prosecuting Attorney for Pacific County, Washington.

That on October 6, 2008, I mailed two copies of the State's Brief of Respondent to PETER B. TILLER, Attorney for Appellant at the following address:

Peter B. Tiller
Attorney at Law
P.O. Box 58
Centralia, WA 98531

DAVID J. BURKE

SUBSCRIBED & SWORN to before me this 6th day of October, 2008.

NOTARY PUBLIC in and for the State of Washington, residing at: