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COURT OF APPEALS
DIVISION II

NO. 37520-6-II

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

STATE OF WASHINGTON
~~WASHINGTON~~
DEPUTY

STATE OF WASHINGTON, Respondent

v.

JOEL P. REESMAN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN P. WULLE
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-00090-9

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 insubstantial evidence of a nexus between the defendant's possession of methamphetamine and possession of a firearm. This appears to be related to Count 4 of the Information charging him with Possession of a Controlled Substance – Methamphetamine while armed with a firearm under RCW 69.50.4013(1). (Information, CP 1; Felony Judgment and Sentence, CP 118).

The defendant had waived jury trial and this matter was tried to the Bench. The trial court subsequently entered Findings of Fact and Conclusions of Law on Bench Trial. That particular document has not been ordered and the State has supplemented its request of clerk's papers through the Court of Appeals in the belief that it would further clarify the court's rulings concerning this matter in question. The Findings of Fact and Conclusions of Law on Bench Trial were entered on May 1, 2008,

after the time that the defendant had filed his Notice of Appeal and Designation of Clerk's Papers, but before any briefing had been done. The State requests the supplementation be granted.

When a defendant challenges the sufficiency of evidence in a criminal case, the appellate court draws all reasonable inferences from the evidence in favor of the State and interprets all reasonable inferences from the evidence strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-907, 567 P.2d 1136 (1977). Circumstantial evidence is no less reliable than direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Finally, the appellate court will defer to the trier of fact on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

The defendant, in his brief, (Brief of Appellant, Page 20-21) admits that there is direct evidence that the defendant had actual possession of a firearm at the time that the police entered his house. His claim is though that there is no nexus between the methamphetamine found in the defendant's house and the firearm.

The trial court, after hearing the evidence in the case, made the following observations in its ruling:

THE COURT: ...The possession of the controlled substance, methamphetamine, is – it's what we used to argue to a jury. The evidence in this case is beyond a

shadow of a doubt that he was in possession of methamphetamine. It's in his room. He admits he's been injected with it, it's present on the scales, it's present on the spoon, it's present in bulk form. Possession, bingo, easy. It's the easiest one of them all. He's in possession of meth. Okay? It's in his area of custody and control. I mean, it's not even constructive, it's actual construction – actual control.

The trick for this whole thing boils down to the question of the firearm enhancement. At least for this court, it goes to the firearm enhancement question. “A person is armed with a firearm if at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use.” That's straight out of WPIC. That's WPIC 2.10.01. Okay?

Now, Ms. Blanchard was very convincing in that regard. This is what I know, and I'll give you some inferences from that. He's walking around the house while he's being injected, while he has the knowledge and presence of all these drugs, and he's got this Smith and Wesson, what is commonly referred to as the silver handgun, in his belt. He's carrying it around, he's got it in his hand.

Now, I certainly would agree with you, Mr. Ikata, that under the analysis of what the case law tells us, it certainly does appear that the shotgun is readily available to be used for offensive and defensive purposes. And I think that that – I could rest on that and find the enhancement based on that.

But for me, it's the inferences of the other actions that make it clear what's going on. Here he says to Ms. Blanchard when she identifies the police in the neighborhood, quote, “he'd do what he had to do,” end quote. That I draw the inferences is that he intends to engage the police, who are about to come into his home, to grab his drugs, and he's going to use the gun on them. Clearly, he intends to use it for offensive or defensive purposes. He's going to shoot a cop. Okay? To protect his

interest in what's going on in the home. And I think that's a reasonable inference to get.

He's also found with the weapon at his feet by the police when they finally subdue it. This is the key for me. The beauty of this whole scenario is that the police used the SWAT team and flash/bangs that changed this dynamic from one of offensive actions against a police officer knocking on his door to an offensive action on the part of the police to take control of the scene.

I believe that the reasonable inference is that he would have used this gun on any policeman that came to his door but for the entry – the trained SWAT entry with flash/bangs and officers, so that he could not offensively use it, he had to get rid of it. And that's why he got rid of it. I think this would have been a whole different scenario if SWAT wasn't involved. I think the defendant would have harmed a police officer in the commission of his crime. So I clearly find that he was armed with a firearm at the time of the possession of methamphetamine.

-(RP 396, L20 – 399, L4)

The court went on to further clarify the nexus as he saw it from the evidence that he had heard over the last several days:

THE COURT: When I said that his intent, the reasonable inference from his actions and his statements made that I found were credible from Ms. Blanchard, his intent was to use it in the commission of the possession of the methamphetamine. He was going to shoot a cop. I mean, I can't be any more clear than that, Counselor. That's a pretty strong nexus in my opinion. But for the entry and manner of entry of the SWAT team, and them taking the offensive, they defused the situation or put him on the defensive, where he couldn't do that. So I think there was an overwhelming nexus between the two. Okay? And I don't know how else to state it, except for that plain

language about what it really means. And I think that's exactly what the law and the case law is talking about. Okay?

-(RP 400, L1-15)

The majority of the matters that the court had discussed in its conclusions dealt with the testimony of Amber Blanchard, who was present during the entire occasion, witnessed the defendant's behavior, and further was involved in assisting him in ingesting the methamphetamine that was found in his home and also discussed in detail the firearms and the statements by the defendant as to how those firearms were going to be used. (RP 150-162).

To establish that a defendant was armed for the purposes of the sentencing enhancement (as the court found in Count 4 of the Information), the State must prove that a weapon was easily accessible and readily available for use and that there was a nexus or connection between the defendant, the crime, and the weapon. State v. Gurske, 155 Wn.2d 134, 138-139, 118 P.3d 333 (2005); State v. Eckenrode, 159 Wn.2d 488, 491, 150 P.3d 1116 (2007).

The statutes relating to weapons enhancements do not define what it means to be "armed". The Supreme Court however, has found that the concept of being armed means that "a person is armed if a weapon is

easily accessible and readily available for use, either for offensive or defensive purposes”. State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). The question, therefore, outlined by the judge in our case was limiting the inquiry to whether there was sufficient evidence for any rational trier of fact to find beyond a reasonable doubt that the defendant was armed. As the court indicated, it found a connection or nexus between the defendant, the silver 9mm handgun, and the crime of Possession of Controlled Substance – Methamphetamine. The reasonable inference from the facts and circumstances is that the defendant intended to use the silver handgun while he was in commission of possessing a controlled substance – methamphetamine, to shoot a law enforcement officer, but for the manner of entry by the SWAT team officers into the defendant’s residence which put the defendant on the defensive and prevented him from attempting to use the weapon to protect the controlled substances. This conduct by the defendant was witnessed by an independent witness who testified at trial. Further, it is consistent with her recollection of statements that he made concerning what he was going to do if the officers tried to get into the residence. The State submits that there has been a showing of a nexus between the weapon and the controlled substance for purposes of the sentencing enhancement.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim that the waiver of jury trial was not properly done and that there is no showing that the defendant knowingly, intelligently, and voluntarily waived his right to a jury. Specifically, the claim is that, because of the shortness of the colloquies and the cursory nature of the written waivers, the State failed to prove that the trial court adequately informed the defendant of the nature of the jury waiver. (Brief of Appellant, Page 25). A similar type of issue was raised in Division III just recently in State v. Ashue, 145 Wn. App. 492, 188 P.3d 522 (2008). As the court indicated in Ashue:

Validity of Waiver. Next, Ms. Ashue contends that she did not knowingly, intelligently, and voluntarily waive her constitutional rights when she entered into the stipulation and waiver agreement. While Ms. Ashue concedes that the trial court conducted a colloquy with her before allowing her to enter into the diversion agreement, she argues that it did not provide an adequate explanation of the specific constitutional rights she was surrendering and did not establish that she understood that she was waiving those rights. Ms. Ashue also maintains that defense counsel failed to fully explain the waiver to her. On appeal, Ms. Ashue requests that we find that her waiver of the right to a jury trial was invalid.

It is well established that constitutional rights are subject to waiver by an accused if he or she knowingly, intentionally, and voluntarily waives them. State v. Forza, 70 Wn.2d 69, 71, 422 P.2d 475 (1966). The burden to establish a valid

waiver is upon the prosecution. State v. Wicke, 91 Wn.2d 638, 645, 591 P.2d 452 (1979).

“The validity of any waiver of a constitutional right, as well as the inquiry required by the court to establish waiver, will depend on the circumstances of each case, including the defendant's experience and capabilities.” State v. Stegall, 124 Wn.2d 719, 725, 881 P.2d 979 (1994). The court's inquiry will also differ depending on the nature of the constitutional right at issue. *Id.* However, “a court must indulge every reasonable presumption against waiver of fundamental rights.” City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984).

A criminal defendant may waive his right to a jury trial if the written waiver requirement of CrR 6.1(a) is satisfied. Under CrR 6.1(a), “[c]ases required to be tried by jury shall be so tried unless the defendant files a written waiver of a jury trial, and has consent of the court.”

Our Supreme Court held that “[w]here a defendant is demonstrably aware of the constitutional right to a jury and has expressly waived that right in writing, the waiver will be effective.” Acrey, 103 Wn.2d at 208. The Court of Appeals in State v. Brand, 55 Wn. App. 780, 785, 780 P.2d 894 (1989) found that “[t]o date, no Washington case has required more than a written waiver. The claim that an extended colloquy on the record is required for jury waiver has been rejected each time it has been presented.” And, the decision to grant or deny a motion to withdraw a previously executed jury waiver is within the trial court's discretion. City of Seattle v. Williams, 101 Wn.2d 445, 452, 680 P.2d 1051 (1984).

-(Ashue, 145 Wn. App. at 502-503)

In our case, the defendant has actually entered two waivers of jury trial. The first one that he entered (CP 16) he later withdrew and wanted a

jury trial. He then changed his mind and a second waiver of jury trial was entered (CP 101). A copy of the written waiver of jury trial, filed March 12, 2008 (CP 101) is attached hereto and incorporated by this reference. Counsel, as part of his appellate brief, sets forth the colloquy between the court and the defendant and the defense attorney concerning this particular waiver. (RP 6-7). The trial defense attorney makes it clear to the court that he spent a lot of time going over this with the defendant and felt that he made an intelligent and knowing waiver of his constitutional right to a jury trial.

It is further to be noted that at no time during the proceedings, either at the beginning of the trial or at the end was there any claim of the defendant that he wished to have a jury trial or that he wished to withdraw the waiver that he had entered into and had been approved of by the court. This matter only comes up on appeal.

The State submits that this is a written waiver of a known constitutional right. It was discussed in detail by the defense attorney and the court also entered into a colloquy before approving the written waiver by the defendant. The State submits that this is sufficient.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant is a claim that the trial court erred when it found the defendant's Oregon conviction for Second Degree Robbery was comparable to a Washington conviction for Robbery in the Second Degree. It appears from the lengthy discussion by the defense that the claim ultimately is that absent a taking or retaining of the property "from the person of another or in his presence against his will," there is no robbery under the Washington statute. (Brief of Appellant, Page 32).

This particular argument that the taking be "from the person of another or in his presence" RCW 9A.56.190 was rejected by the Court of Appeals, Division II in State v. McIntyre, 112 Wn. App. 478, 482, 49 P.3d 151 (2002). In the McIntyre case, the Superior Court had determined that the Oregon conviction for a Third Degree Robbery was the equivalent to a Second Degree Robbery conviction under Washington law. That matter was appealed to Division II and Division II affirmed the judgment. It is interesting to note in the McIntyre case that Division II did not have to go further in its inquiry into examining the proven facts from the out of state record because it found that the elements of the Oregon crime and the Washington crime were the same. McIntyre, 112 Wn. App. at 483.

Because the elements of the out of state crime and the Washington counterpart are the same, the out of state court necessarily found each fact necessary to liability for the Washington crime and, “thus, the foreign conviction...count...as if it were the equivalent Washington offense.” (cites omitted). Because the out of state crime does not contain alternative elements, our inquiry ends without examining the proven facts from the out of state record. (cite omitted).

-(McIntyre, 112 Wn. App. at 483)

The McIntyre court went through in detail the statutes dealing with the concepts of robbery in both the states of Oregon and Washington and made a determination that the lesser robbery (Robbery in the Third Degree) is the equivalent of a Washington Robbery in the Second Degree. In our situation the defendant had convictions for both Robbery in the First Degree and Robbery in the Second Degree from the State of Oregon. Certified copies were produced at the time of the pretrial matters, but also at the time of the sentencing (Sentencing Exhibits Nos. 1 and 2).

The State submits that there has been a sufficient showing of the comparability of the robbery crimes in both states.

V. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 13 day of Jan, 2009.

Respectfully submitted:

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SUPERIOR COURT OF WASHINGTON IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON)
Plaintiff)
vs)
Joel P. Reardon)
Defendant)

No. 07-1-00090-9

WAIVER OF JURY TRIAL

I understand that under the Constitutions of the United States and the State of Washington, the statutes of the State of Washington and criminal rules for Superior Court, I am entitled to a trial by a jury of my peers who would determine my guilt or innocence. I do hereby voluntarily and with knowledge of the above rights waive my right to a jury trial and consent to the trial of this case by the court.

DATED and SIGNED this 12th of April, 2008

Joel P. Reardon
Defendant

[Signature]
Attorney for Defendant 4/12/08

I have questioned the defendant and find that he intelligently and knowingly waived his right to a jury trial and was competent to do so.

[Signature]
Superior Court Judge

80 (kb)

