

FILED
COURT OF APPEALS
DIVISION II

09 FEB 12 AM 11:32

STATE OF WASHINGTON
BY cm
DEPUTY

NO. 37766-7-II
IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

NATHAN D. GONCALVES,
Appellant.

BRIEF OF RESPONDENT

PETER S. BANKS
Prosecuting Attorney
for Skamania County, Washington

Respectfully Submitted By: 

PETER S. BANKS
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WSBA #7174

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T A B L E

Table of Contents

STATEMENT OF THE CASE Pg. 1

ARGUMENT Pg. 1

I. Jury Found Proof Beyond Reasonable Doubt
. Pg. 1

II. Defendant Convicted of Lessor Included Pg. 4

CONCLUSION Pg. 4

TABLE OF AUTHORITIES

Table of Cases

Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct.
2781, 2797, 61 L.Ed.2d 560 (1979) Pg. 2

State v. Taplin, 9 Wn.App. 545, 513 P.2d 549
(1973) Pg. 2

State v. Collins, 2 Wn.App. 757, 759, 470 P. 2d
227, 228 (1970) Pg. 2

State v. Johnson, 12 Wn.App. 40, 527 P.2d 1324
(1974) Pg. 2

STATUTES

RCW 10.61.010 Pg. 4

Table of Court Rules

OTHER

WSP Crime Lab Report R.P. p.27 L.21-22 . . . Pg. 1

Washington Pattern Jury Instruction No.5.01 Pg. 3

STATEMENT OF THE CASE

Although generally in agreement with the appellant's statement of the record, the Respondent believes some important points should be clarified.

The defense interviewed the informant on Thursday, May 8th, not Friday, May 9th.

Contrary to the defense assertion, the Washington State Patrol crime lab report was not excluded by the trial court. R.P. p.27, L. 21-22.

I am unable to locate anything in the record before this court which would indicate that the trial court was presented with a motion for arrest of judgment, or for a new trial. The trial court did deny the Appellant's motion for a judgment as a matter of law. R.P. pps.112-115

ARGUMENT

I. Jury Found Proof Beyond A Reasonable Doubt

"Substantial evidence" in the context of a criminal case means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is

directed." State v. Taplin, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting State v. Collins, 2 Wn.App. 757, 759, 470 P. 2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence "that the defendant was the one who perpetrated the crime." State v. Johnson, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether "after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar, the jury clearly found the defendant guilty beyond a reasonable doubt. The evidence, both direct and circumstantial, was substantial. The informant had no drugs before meeting with the defendant. He traveled with the defendant to a secondary location. Upon the defendants return to the informant's vehicle, they traveled back to the defendant's original

location. The informant then left and gave the drugs to the detectives.

As set forth in Instruction No. 4.

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

Washington Pattern Jury Instruction 5.01. Based on the over whelming circumstantial evidence, the jury found the defendant guilty beyond a reasonable doubt. The finding should not be overturned on appeal.

II. DEFENDANT CONVICTED OF LESSOR INCLUDED OFFENSE

The State acknowledges that the conviction of the Appellant must be for the lesser included offense of Possession with Intent to Deliver Methamphetamine, rather than Delivery as charged. The Information in this case is not deficient, and gave the defendant notice of the charge. And pursuant to RCW 10.61.010, the defendant could be convicted of the lesser included offense of Possession with Intent to Deliver Methamphetamine.

The Appellant can elect to be re-sentenced under the lesser, or to seek a new trial on the original information.

CONCLUSION

The Appellant was properly convicted, based on substantial evidence, of the lesser included offense of Possession with Intent to Deliver Methamphetamine. He may elect to seek either a new trial on the original charge, or amendment of the Judgment and Sentence to reflect the correct conviction. Because both the original charge and the lesser are level II offenses, the sentence will not change.

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AFFIDAVIT OF SERVICE

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I certify that on February 9th, 2009, I served the **Brief of Respondent** in Case No. **37766-7-II** by placing a true copy thereof in first class mail to opposing counsel: John Hays, Attorney at Law, 1402 Broadway, Longview, WA 98632 and to Nathan Goncalves, DOC#770022, Washington State Penitentiary, 8 - B - 11, 1313 N. 13th Avenue, Walla Walla, WA 99362.


PETER S. BANKS, WSBA #7174

Subscribed and sworn before me on this 9th day of February, 2009.


Pamela K. Bell
Notary Public for the State of Washington
Residing at Carson
My commission expires: 01/09/2012