

NO. 39654-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

PABLO ANTONIO CARBO CISNEROS,

Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Waldo F. Stone
Judge Pro Tempore

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in refusing to give a jury instruction on unwitting possession where the evidence presented sufficiently supported the instruction.

2. The trial court erred in admitting inadmissible hearsay denying appellant his constitutional right to a fair trial.

3. The trial court erred in failing to properly classify appellant's out-of-state offenses.

4. The judgment and sentence erroneously states that the maximum term for Count I, Unlawful Delivery of a Controlled Substance, is twenty years; erroneously states that Count II, Unlawful Possession of a Controlled Substance was committed on September 5, 2008; and erroneously lists Count II as criminal history with the incorrect date.

Issues Pertaining to Assignments of Error

1. Did the trial court err in refusing to give a jury instruction on the affirmative defense of unwitting possession where the evidence presented sufficiently supported the instruction?

2. Did the trial court err in admitting inadmissible hearsay prejudicial to appellant's defense thereby denying appellant his constitutional right to a fair trial?

3. Is a remand for resentencing required where the trial court failed to properly classify appellant's out-of-state offenses by comparing the elements of his Nevada offenses to potentially comparable Washington crimes as required under the Sentencing Reform Act?

4. Is remand for correction of the judgment and sentence required because it erroneously states that the maximum term for Count I, Unlawful Delivery of a Controlled Substance, is twenty years contrary to RCW 69.50.401(2)(a); erroneously states that Count II, Unlawful Possession of a Controlled Substance, occurred on September 5, 2008; and erroneously lists Count II as criminal history with the incorrect date?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On October 2, 2008, the State charged appellant, Pablo Antonio Carbo Cisneros, with one count of unlawful delivery of a controlled substance and one count of unlawful possession of a controlled substance. CP 1-2; RCW 69.50.401(1)(2)(a), 69.50.4013(1). The State amended the information on March 16, 2009, adding the enhancement of committing the crime of unlawful delivery of a controlled substance within 1000 feet of a school bus route stop. CP 3-4; RCW 69.50.435, 9.94A.533(6).

¹ There are eleven volumes of verbatim report of proceedings: 1RP - 10/29/08; 2RP - 02/17/09 - 06/03/09; 3RP - 06/22/09; 4RP - 06/23/09; 5RP - 06/24/09; 6RP - 06/25/09; 7RP - 07/06/09; 8RP - 07/07/09; 9RP - 07/08/09; 10RP - 07/09/09; 11RP - 07/31/09.

Following a trial before the Honorable Waldo F. Stone, Judge Pro Tempore, a jury found Cisneros guilty as charged. CP 57-58, 60, 61, 62; 9RP 9-10. On July 31, 2009, based on an offender score of five, the court sentenced Cisneros to 64 months in confinement and 9 to 12 months of community custody. CP 33-34; 11RP 15. Cisneros filed this timely appeal. CP 63-77.

2. Substantive Facts

Officer Kenneth Bowers testified that he conducted a controlled buy investigation on September 5, 2008. 3RP 35. A confidential informant, Cleveland Phillips, notified Bowers that Cisneros contacted him and offered to sell him crack cocaine. 3RP 35-36. Phillips was brought to the police station where he was searched and wired with an audio recording device. 3RP 39-40. Bowers directed Phillips to call Cisneros and “they brokered a crack cocaine transaction over the phone.” 4RP 16-17. After providing Phillips with a hundred dollars of prerecorded buy money, Bowers and Officer Sugai drove Phillips to the intersection of South 19th and South Union in Tacoma, a location selected by Cisneros. 4RP 17-20. Bowers dropped Phillips off at a bus stop close to the intersection and parked in a nearby parking lot. 4RP 21.

In about fifteen minutes, Cisneros arrived in a red Toyota and Phillips crossed the street and met him in a parking lot. 4RP 21-23.

Bowers could only see the top of Cisneros' car but heard Phillips and Cisneros on a portable audio device. 4RP 38-39. It was "very hard" to ascertain what Cisneros was saying but "it sounded to us as if they were brokering a crack cocaine deal inside the car." 4RP 39. Within five minutes, Phillips got out of the car and when Bowers saw the car leave he picked Phillips up in the parking lot. 4RP 40. Phillips gave Bowers a "plastic wrapper with a few rocks of what appeared to be crack cocaine." 4RP 41-42. After being searched, Phillips was paid a hundred dollars cash for arranging the controlled buy. 4RP 43. Bowers placed the suspected crack cocaine into the property room. 4RP 44. On September 18, 2008, Bowers met with Phillips and he identified who sold him the crack cocaine from a photo montage. 4RP 69-70, 75.

On October 1, 2008, Bowers received information that Cisneros was staying at a motel in Fife. While patrolling the area, Bowers saw "the same Toyota Camry that I observed on the 5th of September during the controlled buy" in front of a motel. 4RP 46-47. Bowers called for assistance and upon learning that Cisneros was registered at the motel, officers maintained surveillance and Cisneros eventually came out of his room and drove off in his car. 4RP 47-49. Officer Sugai followed Cisneros and stopped him on I-5 near the Tacoma Dome where he arrested him. Officers searched Cisneros and recovered two hundred dollars and a

cell phone. 4RP 60-61, 64. Sugai detained Cisneros in the patrol vehicle and his car was driven to the Tacoma Dome parking lot. 4RP 49-50. During a search of Cisneros' car, Bowers found a "very small piece of crack cocaine" on the driver's side floorboard.² 4RP 50-51. Bowers retrieved the suspected crack cocaine and placed it in the property room. 4RP 52.

Cleveland Phillips, a crack cocaine dealer, who was facing an 87 month sentence for escape charges, agreed to work for Bowers as a confidential informant. 5RP 12-14, 44. Phillips testified that he signed a contract to be paid for arranging controlled buys, "My job is to be wired, to call a drug dealer, ask them 'can you get any cocaine or crack cocaine,' set up a date, a place and a time. It's video taped or it's tape recorded. I'm searched before and after." 5RP 15-16. On September 5, 2008, Phillips met Bowers at the police station, underwent a search, and got wired to arrange a controlled buy with Cisneros. 5RP 17-19. When Phillips called Cisneros, he asked Phillips to meet him at 19th and Union. 5RP 22.

Phillips was provided with a hundred dollars of prerecorded buy money and Bowers drove him to the intersection of 19th and Union. 5RP

² During a 3.5 hearing, a Spanish translator testified that he was called to the scene by the police to assist in communicating with Cisneros. The translator explained that Cisneros waived his Miranda rights and consented to the search of his car and motel room. 6RP 20-26, 31.

19, 23. After waiting at a bus stop for about ten minutes, Phillips saw Cisneros approaching in a burgundy Toyota or Mazda. 5RP 23-24. He crossed the street and got into Cisneros' car. 5RP 24. A male who Phillips did not know was sitting in the front passenger seat. 5RP 26. Cisneros asked Phillips for the money and asked the male passenger "for a couple of rocks to go along with the rocks that he was giving me." 5RP 25-26. Phillips recognized that the amount of crack cocaine that they gave him was worth less than a hundred dollars, but he did not question Cisneros because "I just needed to make this deal." 5RP 27. The deal took about five minutes then Phillips got out of the car and reported back to Bowers. He gave the crack cocaine to Bowers and was dropped off after being searched. 5RP 27-28. Phillips identified an audio recording of his transaction with Cisneros which was admitted into evidence and played for the jury. 5RP 30-32. Cisneros acknowledged that portions of the recording were unclear. 5RP 56.

Detective Barry McColeman testified that he and Detective Krause participated in a controlled buy investigation with Officer Bowers on September 5, 2008. 8RP 27. At police headquarters, McColeman placed a transmitter on a confidential informant who called "a known suspect" to arrange a narcotics buy. 8RP 27-28. McColeman listened to the call in a separate room with a receiver and "[i]t was garbled, but we were able to

get 19th and Union out of it.” 8RP 30. Using a surveillance vehicle, McColeman and Krause drove to the location and parked in a parking lot close to the intersection. 8RP 30-31.

When Cisneros arrived, he drove into the same parking lot and parked directly behind the surveillance vehicle. 8RP 32. Krause said that the car was pulling up behind them but McColeman could not see the car or anyone in the car. 8RP 32, 40. McColeman turned on the recorder when Krause told him that the informant was walking over to the parking lot. 8RP 32-33. The informant got into the car and McColeman heard talking in the car. He could not recall what was said but “[i]t was a narcotics transaction.” 8RP 36. After a short time, the informant got out of the car and when the car drove away, he went back to meet with Bowers. 8RP 36. McColeman returned to police headquarters with Krause and placed the tape recording into evidence. 8RP 36.

Officer Craig Sugai assisted Officer Bowers with a controlled buy investigation on September 5, 2008 and arrested Cisneros on October 1, 2008. 5RP 86, 91-94. Sugai testified that after Bowers located Cisneros at a Fife motel, he followed Cisneros when he left the motel in a maroon Camry and stopped him on I-5 near the Tacoma Dome. 5RP 92. Sugai placed Cisneros in the back of his patrol vehicle and drove him to the Tacoma Dome parking lot. 5RP 93. Bowers talked to Cisneros which led

Sugai to believe that Cisneros consented to the search of his motel room and car. 5RP 94. Sugai took Cisneros back to the motel and searched his room but “didn’t find anything.” 5RP 97-98.

Rick Kennedy, a property officer with the Pierce County Sheriff’s Department testified that he received and processed evidence in the case. 5RP 72-78. Rebecca Brewer, a forensic scientist with the Washington State Patrol, analyzed evidence recovered by the police. 5RP 104-06. Brewer testified that she tested a substance sealed in an evidence bag and residue sealed in another evidence bag. 5RP 106-08. She performed a microcrystalline test as well as a gas chromatograph-mass spectrometer test and concluded that the substance and residue contained cocaine. 5RP 106, 08. Maude Kellehar, a lead router for the Tacoma School District Transportation Department, identified South 19th and South Union on a map and testified that the intersection is located within 1000 feet of a bus stop for Franklin Elementary School. 8RP 46-49.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN REFUSING TO GIVE A JURY INSTRUCTION ON UNWITTING POSSESSION WHERE THE EVIDENCE PRESENTED SUFFICIENTLY SUPPORTED THE INSTRUCTION.

The trial court erred in refusing to give a jury instruction on the affirmative defense of unwitting possession where the evidence presented

was sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that Cisneros unwittingly possessed the cocaine. The court's error requires reversal of Cisneros' conviction for unlawful possession of a controlled substance.

In general, a trial court must give an instruction on a party's case theory if the law and the evidence support the instruction and the court's failure to give such an instruction constitutes reversible error. State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009). "In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury." State v. May, 100 Wn. App. 478, 482, 997 P.2d 956, review denied, 142 Wn.2d 1004 (2000). A trial court must consider all of the evidence that is presented at trial, without regard to which party presented it, when it is deciding whether an instruction should be given. State v. Fernandez-Medina, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000); State v. Olinger, 130 Wn. App. 22, 26, 121 P.3d 724 (2005), review denied, 157 Wn.2d 1009 (2006).

"Unwitting possession is a judicially created affirmative defense that may excuse the defendant's behavior, notwithstanding the defendant's violation of the letter of the statute." State v. Balzer, 91 Wn. App. 44, 67,

954 P.2d 931 (1998). The Washington Supreme Court adopted the defense to “ameliorate the harshness of the almost strict criminal liability our law imposes for unauthorized possession of a controlled substance. If the defendant can affirmatively establish that his ‘possession’ was unwitting, then he had no possession for which the law will convict.” City of Kennewick v. Day, 142 Wn. 2d 1, 11, 11 P.3d 304 (2000)(quoting State v. Cleppe, 96 Wn.2d 373, 381, 635 P.2d 435 (1981). The defense of unwitting possession is supported by a showing that the defendant did not know he was in possession of the controlled substance or that he did not know the nature of the substance he possessed. State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). To establish the defense, the defendant must prove, by a preponderance of the evidence, that his possession of the unlawful substance was unwitting. Blazer, 91 Wn. App. at 67 (citing State v. Riker, 123 Wn.2d 351, 368, 869 P.2d 43 (1994)).

Here, during the State’s case in chief, Officer Bowers testified that after Cisneros was stopped in his car and arrested, officers conducted a search of the car:

A. I was standing outside the vehicle at the time.

Q. Okay. Do you know if anything was found?

A. **A very small piece of crack cocaine was located on the driver’s side floorboard.**

- Q. Did you observe it?
- A. Yes.
- Q. Could you describe exactly on the floorboard -- you said the driver's side floorboard --
- A. Yes.
- Q. -- where exactly it was, for instance, going towards under the seat or going up toward the pedals.
- A. **It would, basically, be right where your feet would be placed on the floorboard in front of the seats, almost on the center portion of the carpet.**

4RP 51 (emphasis added).

During cross-examination, Bowers reiterated that he found a small amount of cocaine “[a]bout the size of pencil lead.” 4RP 87-88. Forensic scientist, Rebecca Brewer described the amount of cocaine as “residue” and explained that she did not weigh it because the amount was less than .1 gram. 5RP 111. Confidential informant, Cleveland Phillips, testified that during the controlled buy, a male passenger in Cisneros’ car provided some of the crack cocaine that Cisneros sold to Phillips. 5RP 26-27.

When interpreting the totality of the evidence most strongly in favor of Cisneros, as required under May, 100 Wn. App. at 482 and Otis, 151 Wn. App. at 578, the evidence presented supported an instruction on unwitting possession in light of the minute amount of cocaine residue

found on the floorboard and testimony that someone else in Cisneros' car had possession of crack cocaine. In contrast, the fact that a small amount of cocaine residue was recovered in State v. Buford, 93 Wn. App. 149, 967 P.2d 548 (1998), did not sufficiently support an unwitting possession instruction. The State charged Buford with possession of cocaine based on a small amount of cocaine residue found in a crack pipe that the police seized from under Buford's hat. Id. at 150. Division One of this Court concluded that the evidence, without more, did not support an inference that Buford unwittingly possessed the cocaine. Id. at 153. Buford is clearly distinguishable because without further evidence, a juror could not reasonably find that a person did not know that a crack pipe kept under his hat contained cocaine residue, but a juror could reasonably find that a person did not know about cocaine residue on an area of the car floorboard covered by his feet. Unlike in Buford, Cisneros was entitled to an unwitting possession instruction because the evidence presented at trial was sufficient "to permit a reasonable juror to find, by a preponderance of the evidence, that the defendant unwittingly possessed the contraband." Id. at 153.

The record reflects that defense counsel proposed an unwitting possession instruction but the trial court refused to give the instruction:³

MR. HILL: Is the Court making the ruling on the unwitting possession?

THE COURT: I am declining to give the unwitting. I don't think it fits. I don't think it fits. I still think that fits. Well, there is one case there where the drug paraphernalia that it might fit and I think it also fits where the mule takes the suitcase through the security at the airport and doesn't know what's inside. As I say, I may not be the smartest guy around but I like to think I don't lack courage.

8RP 68.

Unlike the court in Buford, 93 Wn. App. at 151, that refused to give the instruction because “[t]here is no evidence by which the trier of fact could infer or determine that the possession was unwitting,” it is evident from the court’s confusing explanation here that the court refused to give the instruction based on its misapprehension of the law. Reversal is required because the trial court erred in failing to give the unwitting

³ WPIC 52.01 provides:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

possession instruction when the evidence presented sufficiently supported the instruction. Otis, 151 Wn. App. at 578.

2. THE TRIAL COURT ERRED IN ADMITTING INADMISSIBLE HEARSAY PREJUDICIAL TO CISNEROS' DEFENSE THEREBY DENYING CISNEROS HIS RIGHT TO A FAIR TRIAL.

Article I, section 21 of the Washington State Constitution and the Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to a fair trial and impartial jury. State v. Johnson, 152 Wn. App. 924, 934-35, 219 P.3d 958 (2009). Reversal of Cisneros' conviction for unlawful delivery of a controlled substance is required because the trial court erred in admitting inadmissible hearsay prejudicial to Cisneros' defense thereby denying Cisneros his constitutional right to a fair trial.

"Hearsay" is a statement, other than one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. ER 801(c). A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion. ER 801(a). Absent an exception, hearsay is inadmissible. ER 802. An out-of-court statement is hearsay when offered to prove the truth of the matter asserted even if it was made by someone who is now an in-court witness. State v. Sua, 115 Wn. App. 29, 41, 60 P.3d 1234 (2003).

Hearsay is inadmissible because the witness repeating it has no personal knowledge of the truth of the matter asserted. State v. Babich, 68 Wn. App. 438, 447, 842 P.2d 1053, review denied, 121 Wn.2d 1015 (1993).

The record substantiates that the trial court erroneously admitted inadmissible hearsay over defense counsel's objections during Officer Bowers' testimony. Bowers claimed that on the day of the controlled buy, his confidential informant, Cleveland Phillips, provided him with Cisneros' phone number. 3RP 35-37. When the prosecutor asked Bowers if "there was a number that Mr. Phillips was supposed to call to contact Pablo," defense counsel objected on the basis of hearsay. 3RP 38. The trial court overruled the objection and allowed Bowers to reply that "[t]he telephone number he was supposed to contact Pablo was (253) 970-0288." 3RP 38. Subsequently, Bowers testified that on the day that Cisneros was arrested and searched, his cell phone rang several times. 4RP 64-65. Bowers claimed that he answered Cisneros' phone and "[o]n two of the occasions, I was able to broker two crack cocaine deals," which prompted an objection from defense counsel on the basis of hearsay. 4RP 65. The court overruled the objection and allowed Bowers to testify that the two callers he brokered cocaine deals with asked for Cisneros. 4RP 66-67. Over defense counsel's objection, the court allowed Bowers to state that

he checked the number of Cisneros' cell phone and it was (253) 970-0288. 4RP 67.

Bowers' testimony constituted inadmissible hearsay because the statements by Phillips and the alleged callers were made out of court and offered in evidence to prove the truth of the matter asserted and did not fall within any recognized exception to the hearsay rule. ER 801, 802, 803. Moreover, the statements were hearsay because neither making of the statements nor the resulting police action was at issue as in State v. Lowrie, 14 Wn. App. 408, 411-12, 542 P.2d 128 (1975), review denied, 86 Wn.2d 1010 (1976), where the trial court allowed a detective to testify about statements made by an informant implicating Lowrie. Division Three of this Court concluded that when neither making of the statement nor the resulting police action is at issue, an out-of-court statement is only relevant to the truth of the matter asserted and consequently inadmissible hearsay. Id. at 412-13.

Furthermore, the trial court's erroneous admission of inadmissible hearsay was not harmless error because there is a reasonable possibility that use of the inadmissible evidence was necessary to reach a guilty verdict given that Phillips was the only witness to testify that Cisneros sold him the cocaine. Officer Bowers, Officer Sugai, and Detective McColeman never saw Cisneros during the controlled buy. 4RP 38, 5RP

89, 8RP 40. It is evident from the State's closing argument that Phillips' testimony standing on its own raised reasonable doubt:

You have more than just Mr. Phillips' word. You have the phone call setting it up, the cell phone number, they matched. Officer Bowers when he arrested the defendant on October 1st of 2008, the Defendant had the cell phone with the same phone number. And don't forget while Officer Bowers was conducting that investigation on October 1st of 2008 while the Defendant's car had been searched and the hotel room was searched, Officer Bowers received phone calls from people wanting to buy drugs from Pablo or Cuba were both the names that were used by people on the phone. He was able to broker a couple of deals. This is important supporting evidence.

8RP 118.

The record substantiates that the tainted evidence shored up Phillips' testimony. The trial court erred in admitting inadmissible hearsay which the State emphasized as "important supporting evidence" and the court's error was not harmless where the untainted evidence was not so overwhelming that it necessarily led to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 425-46, 705 P.2d 1182 (1985). Reversal is required because the court's admission of inadmissible hearsay prejudicial to Cisneros' defense denied him his constitutional right to a fair trial.

3. REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE TRIAL COURT FAILED TO PROPERLY CLASSIFY CISNEROS' OUT-OF-STATE OFFENSES AS REQUIRED UNDER THE SENTENCING REFORM ACT.

To properly calculate a defendant's offender score, the SRA requires that sentencing courts determine a defendant's criminal history based on his prior convictions and the level of seriousness of the current offense. State v. Wiley, 124 Wn.2d 679, 682, 880 P.2d 983 (1994). The SRA also requires that prior out-of-state convictions "be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). Classification is a mandatory step in the sentencing process under the SRA. State v. Ford, 137 Wn.2d 472, 483, 973 P.2d 452 (1999). To properly classify an out-of-state conviction, the court must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998).

Under the SRA, the State has the burden to prove by a preponderance of the evidence the existence and comparability of a defendant's prior out-of-state convictions. State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999). However, a defendant's affirmative acknowledgment that his prior out-of-state convictions are properly included in his offender score satisfies the SRA. State v. Ross, 152 Wn.2d

220, 230, 95 P.3d 1225 (2004). A defendant does not “acknowledge” the State’s position regarding classification absent an affirmative agreement beyond merely failing to object. Ford, 137 Wn.2d at 483. If out-of-state convictions are used to calculate a defendant’s offender score and the defendant neither objects to nor affirmatively agrees to their comparability, waiver is not found. In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 877, 123 P.3d 456 (2005).

At sentencing here, the State asserted that “defendant’s offender score is five. I’ve handed forward his previous convictions. His prior convictions add up to four, four counts.” 11RP 6. The State discussed Cisneros’ prior convictions and made its recommendation as to sentencing. 11RP 6-9. The record reflects that defense counsel did not object or agree with the State’s calculation of Cisneros’ offender score. 11RP 9-12. After giving Cisneros an opportunity to speak on his own behalf, the court sentenced him to 64 months in confinement. 11RP 12-15. The judgment and sentence indicates that Cisneros had two convictions in Clark, Nevada which were included in his offender score. CP 30.

The record substantiates that the court imposed sentence without properly classifying Cisneros’ out-of-state convictions in violation of the SRA. Consequently, a remand for resentencing is required because “[t]o uphold procedurally defective sentencing hearings would send the wrong

message to trial courts, criminal defendants, and the public.” State v. Lopez, 147 Wn.2d 515, 523, 55 P.3d (2002)(quoting Ford, 137 Wn.2d at 484).

4. REMAND IS REQUIRED BECAUSE THE JUDGMENT AND SENTENCE ERRONEOUSLY STATES THAT THE MAXIMUM TERM FOR COUNT I, UNLAWFUL DELIVERY OF A CONTROLLED SUBSTANCE, IS TWENTY YEARS; ERRONEOUSLY STATES THAT COUNT II, UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, OCCURRED ON SEPTEMBER 5, 2008; AND ERRONEOUSLY LISTS COUNT II AS CRIMINAL HISTORY WITH THE INCORRECT DATE.

The amended information charges Cisneros under Count I with Unlawful Delivery of a Controlled Substance. In relevant part, the information states that Cisneros unlawfully, feloniously, and knowingly delivered to another “a controlled substance, to-wit: cocaine, a narcotic, classified under Schedule II of the Uniform Controlled Substance Act, contrary to RCW 69.50.401(1)(2)(a).” CP 3. RCW 69.501.401(2)(a) provides in relevant part that a “controlled substance classified in Schedule I or II which is a narcotic drug or flunitrazepam, including its salts, isomers, and salts of isomers, classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years.” Under Count II, the information states in relevant part that “on or about the 1st day of October, 2008,” Cisneros unlawfully and

feloniously possessed a controlled substance, to-wit; cocaine. CP 4. The jury found Cisneros guilty as charged.

Cisneros' judgment and sentence erroneously states that for Count I, the maximum term is "20 YRS," erroneously states that Count II was committed on "09/05/08," and erroneously lists Count II as criminal history with the incorrect date. CP 29-30. Accordingly, a remand is required to amend the judgment and sentence to correctly indicate that the maximum term for Count I is ten years and that Count II was committed on October 1, 2008 and delete Count II from the criminal history.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Cisneros' convictions for unlawful delivery of a controlled substance and unlawful possession of a controlled substance. In any event, a remand is required for the court to properly classify Cisneors' out-of-state convictions and to correct the judgment and sentence.

DATED this 23rd day of April, 2010.

Respectfully submitted,


VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant, Pablo A. Carbo Cisneros

DECLARATION OF SERVICE

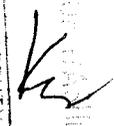
On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Pablo Antonio Carbo Cisneros, DOC # 335426, Airway Heights Corrections Center, P.O. Box 2049, Airway Heights, Washington 99001-2049.

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

DATED this 23rd day of April, 2010 in Kent, Washington.



Valerie Marushige
Attorney at Law
WSBA No. 25851

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