

Cross Res. Reply

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.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

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

The Honorable Waldo F. Stone
Judge Pro Tempore

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN FAILING TO GIVE THE UNWITTING POSSESSION INSTRUCTION WHEN THE EVIDENCE PRESENTED SUFFICIENTLY SUPPORTED THE INSTRUCTION.

The State argues that there was nothing in the facts to support an instruction of unwitting possession because “[t]he defendant did not testify and the defense put on no case.” Brief of Respondent at 11. The State’s argument fails because Cisneros is not required to present evidence. As the State Supreme Court concluded, 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).

The State argues further, “Nor was there any evidence presented by the State’s case that would permit the defendant to meet his burden and prove by a preponderance of the evidence that the possession was unwitting.” Brief of Respondent at 11. To the contrary, the testimonies of Officer Bowers and forensic scientist, Rebecca Brewer, describing the minute amount of cocaine residue found on the floorboard of the car sufficiently supported an unwittingly possession instruction, especially when interpreting the evidence most strongly in favor of Cisneros. State v.

May, 100 Wn. App. 478, 482, 997 P.2d 956, review denied, 142 Wn.2d 1004 (2000).

Reversal is required because the trial court erred in failing to give the unwitting possession instruction and its refusal was based on its misapprehension of the law. See Brief of Appellant at 8-14.

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

The State argues that Officer Bowers' statements were admissible because the statements were not assertions as defined in Webster's Dictionary. The State claims that in order for a statement to constitute hearsay, it must be a "declaration that something is the case." Brief of Respondent at 14. The State argues further that Bowers' statements were not hearsay because he was not repeating an out-of-court statement. Brief of Respondent at 15-16, 18, 20. The State's narrow interpretation of hearsay is misplaced.

In State v. Martinez, 105 Wn. App. 775, 781-82, 20 P.3d 1062, (2001), overruled on other grounds, 119 Wn. App. 494, 81 P.3d 157 (2003), Division Three of this Court concluded that an out-of-court statement relevant only to the truth of the matter asserted constitutes hearsay even if the officer does not testify to what was actually said but

testifies to the nature of his understanding from the out-of-court statement. In State v. Johnson, 61 Wn. App. 539, 547, 811 P.2d 687 (1991), Division One of this Court held that where the inescapable inference from the testimony is that a non-testifying witness furnished the police with evidence of the defendant's guilt, the testimony is hearsay, notwithstanding that the actual statements made by the non-testifying witnesses are not repeated. In State v. Lowrie, 14 Wn. App. 408, 411-12, 542 P.2d 128 (1975), review denied, 86 Wn.2d 1010 (1976), Division Three of this Court held that when neither the 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.

The record substantiates that neither the making of the statements nor the resulting police action was at issue here and Officer Bowers' testimony clearly implied guilt and was relevant only to the truth of the matter asserted. As the State emphasized during closing argument, Officer Bowers provided "important supporting evidence." 8RP 118. Reversal is required because the trial court's admission of inadmissible hearsay prejudicial to Cisneros' defense denied him his constitutional right to a fair trial. See Brief of Appellant at 14-18.

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

The State argues that the trial court “did not err when it included the defendant’s out-of-state convictions especially where their inclusion was moot.” Brief of Respondent at 20-26. To the contrary, classification of out-of-state convictions is mandatory under the SRA. RCW 9.94A.525(3). The judgment and sentence indicates that Cisneros had two convictions in Clark, Nevada which were included in his offender score. CP 30. However, the court did not conduct a comparability analysis to properly classify the out-of-state convictions before imposing sentence. 11RP 2-22. 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). The court’s failure to comply with the SRA requires a remand for resentencing. See Brief of Appellant at 18-20.

4. REMAND IS REQUIRED TO CORRECT THE JUDGMENT AND SENTENCE.

The State claims that when “a defendant is being sentenced on a drug offense, and has a prior conviction for a drug offense, the statutory maximum of the current offense is doubled.” Brief of Respondent at 26-

27, citing RCW 69.50.408. The State has misread the statute which provides in relevant part:

Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

RCW 69.50.408 (1) (Emphasis added.)

The statute allows the court to double the maximum term but the record reflects that the trial court did not do so in this case. 11RP 2-22. Consequently, remand is required to correct the maximum term and as acknowledged by the State, the date of the offense for Count II must be corrected. Furthermore, Count II, which is a current offense, should not be listed as "criminal history." See Brief of Appellant at 20-21.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Mr. Cisneros' convictions and accordingly remand for resentencing and correction of the judgment and sentence.

DATED this 20th day of September, 2010.

Respectfully submitted,


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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 Stephen Trinen, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

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

DATED this 20th day of September, 2010 in Kent, Washington.


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