

NO. 40695-1-II
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STATE OF WASHINGTON
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NO. 40695-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

REED LEROY STONE, Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. Stone was deprived of due process when he was convicted of possession of pseudoephedrine with intent to manufacture without sufficient evidence.
2. The trial court erred in imposing consecutive school bus stop enhancements.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the State fail to provide sufficient evidence of possession of pseudoephedrine with intent to manufacture where there is no evidence of a future intent to manufacture and no evidence of possession beyond that already used in the first phase of manufacture?
2. RCW 9.94A.533 is ambiguous as to whether or not school bus enhancements should run consecutively where the enhancements are added to two underlying sentences that run concurrently and therefore the rule of lenity requires the court to sentence Stone to concurrent sentencing for the enhancements.

III. STATEMENT OF THE CASE

On April 14, 2009, the Pierce County Sheriff's Department served a warrant at a home in Bonney Lake, Washington, owned by Reed Stone and his estranged wife. RP 303-4. Breaking in the early morning, the deputies found Stone and his girlfriend, Natasha Penland still asleep in bed. RP 307. The deputies were looking for evidence of the sale of methamphetamine, based on a controlled purchase the day before of a pipe with methamphetamine residue.¹ RP 310, 497, 526. Instead, they found what they believed to be evidence of the extraction of methamphetamine in the kitchen. RP 378-97.

Stone and Penland were immediately arrested without incident. RP 308. Penland admitted selling the crack pipe the day before under pressure from the informant, because, she said, \$40 for the pipe was too good to pass up. RP 497. Penland also readily admitted that she was addicted to methamphetamine. RP 498. Both Stone and Penland denied engaging in manufacturing methamphetamine. RP 512, 569.

Stone and his tenant, Thomas Bolander, testified that two women had been in the house early in the morning of the raid. RP 872-3. Stone said he yelled at the women and threw them out, then went to bed without

¹ The State later dropped the charges against Stone and Penland relating to the sale of methamphetamine.

fully investigating what they were doing. RP 897-8. He knew the women—they were friends of his estranged wife—and had “run-ins” with them in the past. RP 898, 904. He did not know what they were doing in the kitchen, and assumed they were just visiting without permission, as they had before. RP 898. He did not see the pseudoephedrine on the counter. RP 900.

Bolander confirmed that he saw the two women running from the house after hearing Stone yelling. RP 872-3. Penland, who had been in bed with a bad back since morning, heard Stone yelling in the early morning, but had not seen the women or been in the kitchen since the previous morning. RP 854-5, 858, 860.

Only a very small amount of methamphetamine (.7g) was found at the home, along with paraphernalia consistent with methamphetamine use. RP 391, 392, 800-803, 804. In the kitchen the deputies found refined pseudoephedrine and its byproduct indicating there had been an extraction. RP 378-97, RP 780, 781, 794, 789, 792, 802, 806-7. Other than the extracted pseudoephedrine, only three small tablets of pseudoephedrine were found. RP 807.

Stone and Penland were charged with unlawful manufacturing of methamphetamine, unlawful possession of pseudoephedrine with intent to

manufacture, and unlawful possession of methamphetamine with intent to deliver, all with school bus stop enhancement.² CP 3-5.

The jury did not reach agreement on the delivery charge, convicting instead only of simple possession of methamphetamine. RP 1016-18. Stone and Penland were however convicted as charged of manufacturing and possession with intent to manufacture. RP 1016-18.

Stone was sentenced to 68 months each for the manufacturing and possession with intent to manufacture, along with 24 months enhancement added to each, and 6 months for the possession of methamphetamine. CP 64. This appeal timely follows.

IV. ARGUMENT

ISSUE 1: THE STATE FAILED TO PROVIDE SUFFICIENT EVIDENCE OF POSSESSION OF PSEUDOEPHEDRINE WITH INTENT TO MANUFACTURE BECAUSE THERE IS NO EVIDENCE OF A FUTURE INTENT TO MANUFACTURE AND NO EVIDENCE OF POSSESSION BEYOND THAT ALREADY USED IN THE FIRST PHASE OF MANUFACTURE.

Stone was convicted of both manufacturing methamphetamine and possession of pseudoephedrine with intent to manufacture. The State's evidence related to the presence of an "extraction" operation at the house. Extraction is the process of refining pseudoephedrine tablets to remove the

² A school district official testified that the front door of the home was 965 feet from an unmarked school bus stop. RP 720.

binders before the manufacture of methamphetamine. RP 767, 768-69. It is not a necessary step to manufacturing methamphetamine, but it makes the process “easier”. RP 768-69. In the kitchen of the home, the State found various containers containing processed pseudoephedrine: ground up, dissolved, and refined. RP 378-97, 780, 781, 794, 789, 792, 802. The only pseudoephedrine found at the home that had not already been “refined” was three small red tablets in a pouch in the kitchen. RP 806-7.

The question presented here is not whether the State presented sufficient evidence to support the manufacture charge, but whether there was evidence of possession of pseudoephedrine with intent to manufacture *in the future*. The answer is there is not sufficient evidence to support the possession with intent charge because there is insufficient evidence to prove a future intent to manufacture.

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“Convictions for possession with intent ... are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession.” *State v. Brown*, 68 Wn.App. 480, 485, 843 P.2d 1098 (1993). “Generally, bare possession of a controlled substance is not enough to support a conviction of intent to deliver or manufacture.” *State v. McPherson*, 111 Wn.App. 747, 759, 46 P.3d 284 (2002); see also *State v. Goodman*, 150 Wn.2d 774, 783, 83 P.3d 410 (2004). At least one additional factor must be present. *Id.* The additional factor must be suggestive of manufacture as opposed to mere possession in order to provide substantial corroborating evidence of intent to manufacture. *McPherson*, 111 Wn.App. at 759. The State is not permitted to turn every possession of a controlled substance into possession with intent to manufacture. *Cf. State v. Campos*, 100 Wn.App. 218, 225, 998 P.2d 893 (citing *Brown*, 68 Wn.App. at 485), *review denied*, 142 Wn.2d 1006 (2000).

RCW 60.50.440(1) provides that:

It is unlawful for any person to possess ephedrine or any of its salts or isomers or salts of isomers, pseudoephedrine or any of its salts or isomers or salts of isomers, pressurized ammonia gas, or pressurized ammonia gas solution with intent to manufacture methamphetamine, including its salts, isomers, and salts of isomers.

Possession with intent to manufacture requires a future intent, while manufacturing does not require proof of future intent because the crime was committed in the present or recent past. *See State v. Maxfield*, 125 Wn.2d 378, 886 P.2d 123 (1994)(manufacturing marijuana involved past and present intent, but possession of packaged marijuana involved future intent); *State v. Burns*, 114 Wn.2d 314, 788 P.2d 531 (1990)(possession of a large quantity of drugs in defendant's van supported a finding that the defendant intended to sell drugs in the future and was distinct from defendant's intent to sell drugs in the present).

In this case, the State provided evidence that pseudoephedrine was, in the past, possessed with intent to manufacture, and that this had been done by refining the pseudoephedrine in the extraction phase. But there is no proof in this case of future intent to manufacture.

In *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005), the court held there was sufficient evidence to support a conviction for possession of pseudoephedrine with intent to manufacture where: (1) the defendants possessed 440 loose pseudoephedrine pills; (2) the pills had been removed from their blister packs; (3) defendants had purchased the maximum allowable tablets for several days; and (3) there was evidence of past manufacturing. In *Moles*, the defendants were not convicted of manufacturing, only possession with intent. In this case, by contrast,

Stone did not possess sufficient pseudoephedrine tablets to manufacture in the future and he was also convicted of manufacturing for the tablets he had allegedly used for the extraction phase. Thus, this illustrates the insufficiency of the evidence in this case of possession with intent to manufacture distinct from the manufacturing conviction.

The only unprocessed pseudoephedrine found at the house was three small red tablets. RP 806-7. The State's expert testified that these three tablets, once refined, would yield, in total, only 90 milligrams of pseudoephedrine, which, at best, could be manufactured only into one tenth of a gram of methamphetamine. RP 832. Detective Hickman testified that methamphetamine is most often sold in quantities of 1.7 grams or more. RP 490. Thus, the three tablets could not have been manufactured into a saleable amount of methamphetamine, not to mention that no reasonable person would engage in the complicated process of manufacturing methamphetamine to produce that miniscule amount. Three tablets of pseudoephedrine is a reasonable amount for a private person to have on hand for legal use—such as treating a cold. This amount cannot reasonably be used to manufacture methamphetamine. Thus, there is insufficient proof that Stone or Penland intended to manufacture in the future.

Because there is insufficient proof of a future intent to manufacture methamphetamine, it violated due process for Stone to be convicted of possession of pseudoephedrine with intent to manufacture. The court should therefore remand for dismissal of that conviction and its enhancement.

ISSUE 2: RCW 9.94A.533 IS AMBIGUOUS AS TO WHETHER OR NOT SCHOOL BUS ENHANCEMENTS SHOULD RUN CONSECUTIVELY WHERE THE ENHANCEMENTS ARE ADDED TO TWO UNDERLYING SENTENCES THAT RUN CONCURRENTLY AND THEREFORE THE RULE OF LENITY REQUIRES THE COURT TO SENTENCE STONE TO CONCURRENT SENTENCING FOR THE ENHANCEMENTS.

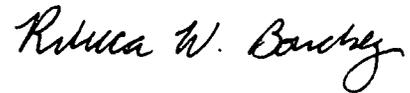
Pursuant to RAP 10.1(g)(2), appellant Stone hereby incorporates by reference the arguments, authorities and attachments set forth on pages 12 through 17 of co-appellant Penland's opening brief. The claimed error and prejudice discussed in co-appellant Penland's brief applies equally to Stone's case because he, like Penland, was sentenced to school bus enhancements on both underlying charges and the enhancements were ordered to be consecutive to each other.

V. CONCLUSION

The court should reverse Stone's conviction for possession of pseudoephedrine with intent to manufacture methamphetamine because the State failed to provide sufficient evidence of a future intent to

manufacture distinct from the prior manufacturing that formed his
unlawful manufacture conviction.

DATED: March 21, 2011

A handwritten signature in black ink, reading "Rebecca W. Bouchey". The signature is written in a cursive style with a large, looping initial 'R'.

Rebecca Wold Bouchey #26081
Attorney for Appellant

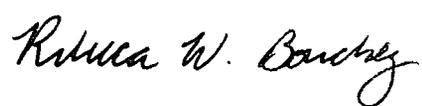
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CERTIFICATE OF SERVICE

I certify that on March 21, 2011, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail

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