

NO. 40834-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WAYNE JONES,

Appellant.

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Clerk of Court

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

The Honorable Frederick W. Fleming

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REVERSAL OF THE FIREARM ENHANCEMENT FOR UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT MUST UNANIMOUSLY AGREE TO ANSWER “NO” TO THE SPECIAL VERDICT AND THE ERROR WAS NOT HARMLESS.

The State’s argues that Jones cannot raise this issue for the first time on appeal because he failed to object to the special verdict instruction and “it is not of a constitutional nature” and even if the issue were preserved, “the error was harmless because absent the error, the verdict would have been the same.” Brief of Respondent at 8-12. The State’s argument is misguided and should be rejected.

The State agrees that State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010) “is the controlling law on the challenged special verdict instruction” but overlooks the significant fact that review was granted even though Bashaw did not object to the jury instruction given in her case. State v. Bashaw, 144 Wn. App. 196, 199,182 P.3d 451 (2008). In any event, Jones had no reason to object because the jury instruction followed WPIC 160¹ and Bashaw, which concluded that the instruction was an

¹ WPIC 160 provides in relevant part:

incorrect statement of the law, was decided on July 1, 2010, after Jones' trial.

Although the Washington Supreme Court commented in dictum that the nonunanimous jury rule is not compelled by constitutional protections against double jeopardy but by the common law, the Court's analysis focused on the fundamental right to due process. The Court concluded that "[t]he error here was the procedure by which unanimity would be inappropriately achieved" and "[t]he result of the flawed deliberative process tells us little about what result the jury would have reached had it been given the correct instruction." Bashaw, 169 Wn.2d at 147.

Importantly, the Court applied the constitutional harmless error test to determine whether the trial court's error was harmless. The Court determined that in order to hold that the jury instruction was harmless, "we must 'conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.'" Id. at 147 (citing State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002), which quoted Neder v. United States, 527 U.S. 1, 19, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)). The

Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form[s]. In order to answer the special verdict form[s] "yes," you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you unanimously have a reasonable doubt as to this answer, you must answer "no."

Court reversed the sentence enhancements, concluding that the error was not harmless:

[W]hen unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Id. at 147-48 (emphasis added).

Contrary to the Supreme Court's holding, the State argues that the error was harmless because "[t]he jury found that defendant was guilty beyond a reasonable doubt of two counts of unlawful possession of a firearm. . . . Since defendant possessed the controlled substance in the same act as he possessed the firearms, the jury had already found beyond a reasonable doubt that defendant was armed during the commission of all three crimes." Brief of Respondent at 12. The State appears to argue that because the jury found that Jones unlawfully possessed the firearms, it necessarily found that he unlawfully possessed the controlled substance while possessing the firearms. The State's argument obviously fails because the jury did not find that Jones unlawfully possessed the controlled substance while possessing both firearms. The record reflects that the jury found that Jones was not armed with a .22 caliber

semiautomatic but he was armed with a 9mm semiautomatic at the time of the commission of the crime. CP 106-07.

The sentence enhancement must be reversed because as the Washington Supreme Court concluded, the jury instruction stating that all 12 jurors must agree on an answer to the special verdict was an incorrect statement of the law and the error was not harmless. Godefroy v. Reilly, 146 Wn. 257, 259, 262 P. 539 (1928)(when the Supreme Court has once decided a question of law, that decision, when the question arises again, is binding on all lower courts); State v. Gore, 101 Wn.2d 481, 487, 681 P.2d 227 (1984)(it is error for the Court of Appeals not to follow directly controlling authority by the Supreme Court).²

2. REVERSAL OF JONES' CONVICTIONS OF UNLAWFUL POSSESSION OF A FIREARM AS CHARGED IN COUNT I AND UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE MUST BE REVERSED BECAUSE DEFENSE COUNSEL'S FAILURE TO PROPOSE AN UNWITTING POSSESSION INSTRUCTION AND AN INSTRUCTION THAT DIRECTED THE JURY TO CONSIDER THE EVIDENCE SEPARATELY FOR EACH COUNT CONSTITUTES DEFICIENT PERFORMANCE

² Division Three and Division One reached opposite conclusions on this issue, but in any case, this Court is bound by the decision of the Supreme Court. State v. Nunez, 160 Wn. App. 150, 165, 248 P. 3d 103 (2011)(because we are satisfied that the claimed instructional error was not manifest constitutional error, we will not review it for the first time on appeal); State v. Ryan, No. 64726-1-I, 2011 WL 1239796, at 2 (we are constrained to conclude that under Bashaw, the error must be treated as one of constitutional magnitude and is not harmless).

AND JONES WAS PREJUDICED BY THE
DEFICIENT PERFORMANCE.

The State argues that defense counsel was not ineffective for not requesting an unwitting possession instruction for the drug charge because “if defense counsel had requested such an instruction, it is unlikely that the court would have given the instruction as it was unsupported by the evidence. Brief of Respondent at 18-21.³ To the contrary, “[i]n 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).

The State asserts that Jones “admitted to Deputy Oetting that he knew that the 9-millimeter handgun was in the car.” Brief of Respondent at 19, citing RP 101. The State omits the fact that Deputy Oetting also

³ The State’s response that defense counsel was not ineffective for not requesting an unwitting possession instruction for the firearm charges is irrelevant because Jones’ ineffective assistance of counsel argument pertains only to the unlawful possession of a controlled substance charge. See Brief of Appellant at 10-13.

testified that Jones said the gun was not his. RP 101. The State misstates the record claiming, “In the trunk of the car, Detective Loeffholz found a magazine clip that was identical to the clip found in the 9-millimeter handgun.” Brief of Respondent at 19, citing RP 141-142, 192. Detective Loeffholz actually testified that the magazine in the trunk “appeared to be identical from the magazine I removed from the nine millimeter earlier.” RP 142. The record substantiates that the evidence was sufficient to permit a reasonable juror to find by a preponderance of evidence that Jones’ possession was unwitting, and in interpreting all the evidence most strongly in favor of Jones, the court would have given the instruction if defense counsel had requested it. State v. Buford, 93 Wn. App. 149, 152-53, 967 P.2d 548 (1998); May, 100 Wn. App. at 482. See Brief of Appellant at 10-13.

The State argues further that defense counsel was not ineffective because “the jury instructions, taken as a whole, properly instructed the jury on the law,” therefore “even if defense counsel should have requested an instruction to consider each count separately, the outcomes of the trial would not have changed.” Brief of Respondent at 21-25. The State asserts that State v. Bradford, 60 Wn. App. 857, 808 P.2d 174 (1991) supports its argument that an instruction directing the jury to decide each count separately was not required because the trial court gave the other

standard jury instructions. To the contrary, the Bradford Court did not have to decide whether WPIC 3.01 was necessary because the trial court gave the instruction. Bradford, 60 Wn. App. at 860. The trial court also responded to a jury instruction, stating, “The jury is free to determine the use to which it will put evidence presented during trial.” Division One of this Court concluded that the trial court’s response did not contradict [WPIC 3.01] and was not error:

In this case, there was evidence indicating dominion and control that was admissible on both counts. The jury was to decide each count separately and was free to consider any evidence relevant to count 1 in deciding count 1. It was free to consider any evidence relevant to count 2 in deciding count 2.

Bradford, 60 Wn. App. at 860-61 (emphasis added).

Misapprehending the holding in Bradford, the State asserts, “Defendant admitted he knew about the 9-millimeter handgun found under the driver’s seat which leads to the inference that he also knew about the matching magazine clip that was found with the methamphetamine in the trunk of the defendant’s car.” Brief of Respondent at 24-25. Aside from the fact that there was no evidence that Jones owned the car, the inference the State makes is precisely what WPIC 3.01 prohibits and guards against. State v. Standifer, 48 Wn. App. 121, 126-27, 737 P.2d 1308 (1987)(citing State v. Smith, 74 Wn.2d 744, 755, 446 P.2d 571 (1968)).

Reversal is required where the record substantiates that defense counsel's performance was deficient in failing to request an unwitting possession instruction and an instruction directing the jury to decide each count separately and Jones was prejudiced by counsel's deficient performance because there is a reasonable probability that if the jury had been properly instructed, the result of the trial would have been different. Stickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

3. REMAND FOR RESENTENCING IS REQUIRED BECAUSE JONES' SENTENCE EXCEEDS THE STATUTORY MAXIMUM IN VIOLATION OF RCW 9.94A.701(9).⁴

Misapprehending the Washington Supreme Court's holding in State v. Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009), the State argues that Jones' sentence is proper. Brief of Respondent at 25-26. Citing RCW 9.94A.715, the Court in Brooks observed that while a sentencing court is required to impose a determinate sentence that does not exceed the statutory maximum, the community custody provisions of the SRA make it impossible to determine with any certainty how much community custody a defendant will actually be required to serve until well after the court imposes the sentence. 166 Wn.2d at 671-72. The Court noted that

⁴ Effective June 10, 2010, RCW 9.94A.701(8) was recodified as RCW 9.94A.701(9). Laws of 2010, ch. 224, section 5.

under RCW 9.94A.715(4), the Department of Corrections determines when an offender will be discharged from community custody and where the term of community custody is imposed as a statutory range, the DOC will release the offender on a date it establishes that is within that range or at the end of the period of earned early release. *Id.* However, the Court pointed out that the legislature has repealed RCW 9.94A.715, effective August 1, 2009, and amended RCW 9.94A.701(8) as follows:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

116 Wn.2d at 672 (emphasis added).

Recognizing the “upcoming changes,” the Court concluded that while the trial courts await the amendment to take effect, it must direct the DOC to ensure that whatever release dates it sets, under no circumstances may the offender serve more than the statutory maximum. *Id.* at 672-73. As anticipated by the Court in Brooks, since the amendment has taken effect, the trial court must reduce Jones' term of community custody because the term of his confinement in combination with his term of community custody exceeds the statutory maximum. In light of the legislative amendment, it is no longer sufficient for the trial court to simply state in the judgment and sentence that “the total term of

confinement and community custody shall not exceed the statutory maximum.”

Generally, statutes are presumed to apply prospectively, unless there is some legislative indication to the contrary. Macumber v. Shafer, 96 Wn.2d 568, 570, 637 P.2d 645 (1981). Here, the legislature explicitly stated that the statute applies retroactively as well as prospectively:

This act applies retroactively and prospectively regardless of whether the offender is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department, or sentenced after the effective date of this section.

LAWS of 2009, ch. 375, section 20.

The statute therefore applies to Jones because he is currently incarcerated with a term of community custody.

Accordingly, remand is required for the trial court to remove the term of community custody and enter a corrected judgment and sentence consistent with RCW 9.94A.701(9).

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Mr. Jones' convictions of unlawful possession of a firearm as charged in count II and unlawful possession of a controlled substance, or in the alternative, reverse the sentencing enhancement and remand for resentencing.

DATED this 13th day of June, 2011.

Respectfully submitted,



VALERIE MARUSHIGE

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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.

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

DATED this 13th day of June 2011, in Kent, Washington.


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