

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT.....1

I. The convictions in Counts I and IV were based on insufficient evidence.....1

A. The evidence was insufficient to prove that Mr. Bennett personally delivered methamphetamine to a person under 18. 1

B. Division II should not impose felony liability for possession of less than a measurable quantity of controlled substance.....3

II. The trial court violated both Mr. Bennett’s and the public’s right to an open and public trial by conducting proceedings behind closed doors.3

III. The trial judge erroneously admitted irrelevant and prejudicial evidence that painted Mr. Bennett in a negative light.3

IV. Mr. Bennett’s multiple convictions are based on the same acts, and thus violate his double jeopardy rights under the Fifth and Fourteenth Amendments and Wash. Const. Article I, Section 9.....3

V. RCW 69.50.435 does not authorize the sentencing enhancement imposed in Count I.....3

VI. The trial court abused its discretion by failing to determine whether or not counts two and three scored as the same criminal conduct.....4

VII. Mr. Bennett was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel. 5

CONCLUSION5

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Smalis v. Pennsylvania</i> , 476 U.S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).....	2
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WASHINGTON STATE CASES

<i>Coluccio Constr. v. King County</i> , 136 Wash.App. 751, 150 P.3d 1147 (2007).....	4
<i>State v. Bahl</i> , 164 Wash.2d 739, 193 P.3d 678 (2008).....	4
<i>State v. Campbell</i> , 59 Wash. App. 61, 795 P.3d 750 (1990).....	1, 2
<i>State v. Davenport</i> , 100 Wash.2d 757, 675 P.2d 1213 (1984)	1
<i>State v. Malone</i> ; 72 Wash.App. 429, 864 P.2d 990 (1994)	3
<i>State v. Rowell</i> , 138 Wash.App. 780, 158 P.3d 1248 (2007).....	3

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V	3
U.S. Const. Amend. VI.....	5
U.S. Const. Amend. XIV	3, 5
Wash. Const. Article I, Section 9	3

WASHINGTON STATUTES

RCW 69.50.204	4
RCW 69.50.401	4
RCW 69.50.406	4

RCW 69.50.4104
RCW 69.50.4353, 4

OTHER AUTHORITIES

Davila v. State, 664 S.W.2d 722 (Tex. 1984).....2

ARGUMENT

I. THE CONVICTIONS IN COUNTS I AND IV WERE BASED ON INSUFFICIENT EVIDENCE.

- A. The evidence was insufficient to prove that Mr. Bennett personally delivered methamphetamine to a person under 18.

Because the jury was not instructed on accomplice liability, Mr. Bennett could only be convicted as a principal. Court's Instructions to the Jury, CP 31-55; *State v. Davenport*, 100 Wash.2d 757, 760, 675 P.2d 1213 (1984). The prosecution did not prove that Mr. Bennett personally delivered methamphetamine to Hensley (who was under 18). RP (8/24/10) 71-74. Accordingly, the evidence was insufficient for conviction on Count I. *Id.*

Respondent does not argue that Mr. Bennett could be found guilty as an accomplice, or that he personally gave methamphetamine to Hensley. Brief of Respondent, p. 12 ("Whether or not Bennett actually passed the pipe to Ms. Hensley is irrelevant.") Instead, Respondent suggests that Mr. Bennett was guilty under a theory of constructive transfer, relying on a 1990 case from Division I. Brief of Respondent, pp. 11-12 (citing *State v. Campbell*, 59 Wash. App. 61, 795 P.3d 750 (1990)).¹

¹ *Campbell*, in turn, relied upon two decisions from Texas appellate courts. *Campbell*, at 63.

According to Division I, constructive transfer occurs when the substance is transferred ““by some other person or manner at the instance or direction of the defendant.”” *Campbell*, at 63 (quoting *Davila v. State*, 664 S.W.2d 722, 724 (Tex. 1984)).

Respondent is mistaken. Even assuming the *Campbell* court correctly defined the phrase ‘constructive transfer,’ the prosecution failed to produce evidence that Penfield acted at the instance or direction of Mr. Bennett.² RP (8/24/10) 71-74. Without proof that Mr. Bennett directed Penfield to give the drugs to Hensley, the evidence was insufficient to prove beyond a reasonable doubt that he constructively transferred methamphetamine to a person under 18.

Mr. Bennett’s conviction in Count I is not supported by sufficient evidence. Accordingly, the conviction must be reversed and the charge dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

² Furthermore, the definition adopted by the *Campbell* court does not necessarily reflect the intent of the legislature. Instead, the legislature most likely intended the phrase ‘constructive transfer’ to mean the relinquishment of control by one in constructive possession of a controlled substance.

- B. Division II should not impose felony liability for possession of less than a measurable quantity of controlled substance.

For the reasons set forth in Mr. Bennett's Opening Brief, Division II should not follow the decisions³ of Divisions I and III. *See* Appellant's Opening Brief, pp. 9-16.

II. THE TRIAL COURT VIOLATED BOTH MR. BENNETT'S AND THE PUBLIC'S RIGHT TO AN OPEN AND PUBLIC TRIAL BY CONDUCTING PROCEEDINGS BEHIND CLOSED DOORS.

Mr. Bennett relies on the argument set forth in his Opening Brief.

III. THE TRIAL JUDGE ERRONEOUSLY ADMITTED IRRELEVANT AND PREJUDICIAL EVIDENCE THAT PAINTED MR. BENNETT IN A NEGATIVE LIGHT.

Mr. Bennett relies on the argument set forth in his Opening Brief.

IV. MR. BENNETT'S MULTIPLE CONVICTIONS ARE BASED ON THE SAME ACTS, AND THUS VIOLATE HIS DOUBLE JEOPARDY RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS AND WASH. CONST. ARTICLE I, SECTION 9.

Mr. Bennett relies on the argument set forth in his Opening Brief.

V. RCW 69.50.435 DOES NOT AUTHORIZE THE SENTENCING ENHANCEMENT IMPOSED IN COUNT I.

Under the plain terms of RCW 69.50.435, sentencing enhancements may only be imposed upon persons convicted of violating

³ *See State v. Rowell*, 138 Wash.App. 780, 786, 158 P.3d 1248 (2007); *State v. Malone*, 72 Wash.App. 429, 438-440, 864 P.2d 990 (1994).

RCW 69.50.401, RCW 69.50.410, and RCW 69.50.204. RCW 69.50.435(1). In Count I, Mr. Bennett was convicted of violating RCW 69.50.406. Accordingly, the enhancement statute does not apply to him.

Respondent does not argue that Mr. Bennett was convicted of violating RCW 69.50.401; instead, Respondent suggests that the enhancements set forth in RCW 69.50.435 may be imposed even if a person is not convicted of one of the listed crimes. Brief of Respondent, p. 32-33. Respondent cites no authority for this novel interpretation.

Where no authority is cited, counsel is presumed to have found none after diligent search. *Coluccio Constr. v. King County*, 136 Wash.App. 751, 779, 150 P.3d 1147 (2007). RCW 69.50.435 does not authorize imposition of a school bus stop enhancement for violations of RCW 69.50.406. Accordingly, the sentence enhancement must be vacated and the case remanded for a new sentencing hearing. *State v. Bahl*, 164 Wash.2d 739, 745, 193 P.3d 678 (2008).

VI. THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO DETERMINE WHETHER OR NOT COUNTS TWO AND THREE SCORED AS THE SAME CRIMINAL CONDUCT.

Mr. Bennett relies on the argument set forth in his Opening Brief.

VII. MR. BENNETT WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Bennett relies on the argument set forth in his Opening Brief.

CONCLUSION

For the foregoing reasons, Counts I and IV must be dismissed with prejudice, and the remaining counts remanded for a new trial. In the alternative, enhancement imposed on Count I must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on August 8, 2011.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on August 8, 2011.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 8, 2011.



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