

NO. 46952-9-II

IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION II

STATE OF WASHINGTON

Respondent,

v.

SANDRA LEE JOHNSTON,

Appellant.

BRIEF OF APPELLANT

MICHELLE BACON ADAMS
WSBA #25200
Attorney for Appellant

Law Offices of Michelle Adams, PLLC
623 Dwight Street
Port Orchard, WA 98366
(360) 876-9900

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I. Assignments of Error

1. The trial court erred by excluding evidence of the Appellant's morphine allergy.
2. The trial court erred when it excluded evidence supporting Appellant's trial defense.

II . Issues Pertaining to Assignments of Error

1. Where the Appellant raised an unwitting possession defense to the charge of possession of a controlled substance, did the trial court abuse its discretion by precluding her from presenting evidence of her allergy to morphine? (Assignment of Error No. 1)
2. Was the Appellant denied her right to a present a defense when the trial court excluded testimony about her medical condition? (Assignment of Error No. 2)

III. Statement of the Case

A. Procedural History

Appellant Ms. Johnston was charged by way of amended information with two counts of possession of a controlled substance. CP 6-9. Count one alleged possession of morphine. Id. Count two alleged possession of hydromorphone. Id. For purposes of this appeal, the transcript of the proceedings, the pre-trial hearing conducted on October 13, 2104, will be referred to as 1RP in this

brief. The transcript of the trial proceedings which occurred on October 15-16, 2014 will be referred to as 2RP. A jury trial was conducted in this matter with The Honorable Leila Mills presiding. 2RP 13-168. The jury found Ms. Johnston guilty of both counts of possession of a controlled substance. 2RP 160. Ms. Johnston was sentenced to a standard range period of confinement of eight months. CP 6-9. This appeal timely follows. CP 44-57.

B. Substantive Facts

Ms. Johnston resided in the basement room of Ms. Burdwood's residence with her fiancé, Mr. Kingston, and was moving out of that residence on December 11, 2013. 2RP 126-127, 129. The prior occupant of the basement room of the residence was Ms. Rhonda Goans. 2RP 119-120, 127. Ms. Goans was very ill and Ms. Burdwood was providing care for her. 2RP 127. Ms. Goans moved upstairs so that Ms. Burdwood could more easily provide care for Ms. Goans. 2RP 119. At the time Ms. Johnston and Mr. Kingston moved into the room, the room was cluttered. 2RP 120, 127. The room had three shelves with items on them at the time they moved in. 2RP 128. Ms. Johnston and Mr. Kingston had to move out abruptly on December 11, 2013. 2RP 128. They had to be out of the room within two hours. *Id.* Ms. Rhonda Goans had given permission for Ms. Johnston to take items that had been left on shelves, including paint.

2RP 128-129, 133. The shelves were cluttered with many items at the time they moved out. 2RP 134. Ms. Johnston had some of her belongings on the shelf as well. 2RP 133. Ms. Johnston swept the items from the shelves into her large purse. 2RP 129. The items from the shelves that did not fit into Ms. Johnston's purse were placed in a suitcase and/or boxes. 2RP 135. At trial Ms. Johnston indicated the pills must have been with the items she swept into her purse and she had no knowledge the pills were in her purse. 2RP 133-134.

Ms. Johnston was on active supervision with the Department of Corrections at the time of the alleged offense. 2RP 125. Ms. Johnston and Mr. Kingston worked quickly so they could make Ms. Johnston's appointment with her Department of Corrections officer. 2RP 129 Ms. Johnston was concerned that if she was late to her appointment she could be placed in jail. Id. Ms. Johnston and Mr. Kingston moved out of the residence because they had dogs, which were not allowed under Ms. Burdwood's lease of the residence. 2RP 121. Ms. Burwood recalled the move was chaotic. Id.

While on Department of Corrections supervision, Ms. Johnston was subject to searches. 2 RP 125. Ms. Johnston was aware that any purse or items she brought with her when reporting to the Department of Corrections could be searched. Id. Ms.

Johnston had been searched during a reporting meeting with her Department of Corrections officer prior to December 11, 2013, which was confirmed by Ms. Sinn. 2RP 135. During Ms. Sinn's testimony, she described the routine protocol for searching a bag brought in by a person reporting to the Department of Corrections, for officer safety reasons. 2RP36.

Ms. Johnston reported to her Department of Corrections officer, Ms. Sinn, on the afternoon of December 11, 2013. 2RP 129-130. During the meeting Ms. Johnston gave consent for her purse to be searched. 2RP 130. Ms. Johnston was on active supervision with the Department of Corrections at the time of the alleged offense. 2RP 130. The pills which are the subject of the charged offenses were found in Ms. Johnston's purse during the search conducted by Ms. Sinn 2RP 37. The pills found included three small orange pills and one purple pill. 2RP 38. Ms. Johnston was not aware she had four pills in her purse. Id. Ms. Sinn estimated Ms. Johnston's purse to be two feet by two feet in size. 2RP 37-38. Ms. Sinn described the bag as more of a travel bag. 2RP 38. There was no indication the pills were found in a container inside the bag 2RP 38-89. One pill tested was determined to contain morphine. 2RP 50. The other pill tested was found to contain hydromorphone 2RP 51. Both drugs are

part of the opiate family. 2RP 52. Hydromorphone is morphine combined with other materials. Id.

Mr. Kingston testified at trial as well 2RP 85-103. He recalled living in the basement room with Ms. Johnston. 2RP 86-87. Mr. Kingston recalled the basement room was cluttered with items, some of which did not belong to them. 2RP 97. Mr. Kingston also recalled that he and Ms. Johnston moved out in a hurry. 2RP 98. During the time they resided in the basement room other people came into the room. 2RP 102.

Ms. Burdwood testified at trial. 2RP 118-124. Ms. Burdwood indicated she had a sick friend (Ms. Goans) living in the basement room prior to Ms. Johnston and Mr. Kingston moving into the room. 2RP 119. Ms. Burdwood took care of Ms. Goans. Id. Ms. Burdwood described the basement room layout, including three shelves in the room, and the room was cluttered at the time Ms. Johnston and Mr. Kingston moved in 2RP 120. Ms. Burwood explained that while caring for Ms. Goans in the basement room, the shelves were the only place to put anything that she needed to care for Ms. Goans. 2RP 122. Ms. Burdwood testified there were a lot of pills in the house because Ms. Goans was sick. 2RP 123. Ms. Burdwood gave medication to Ms. Goans most of the time because Ms. Goans

reached the point she couldn't handle it. 2RP 123. Ms. Burdwood described administering medication to Ms. Goans as follows:

Q: Okay. And in the course of taking care of Ms. Goans, did you have occasion to give her some medicine?

A: Yes, I did.

Q: Did some of it come in the form of pills?

A: Yes.

2RP 120

Ms. Burdwood also confirmed that Ms. Johnston and Mr. Kingston had to move out quickly. 2RP 121.

The possession of the controlled substances was not in dispute. 2RP 148, 150. The defense to the charges presented to the jury was unwitting possession. 2RP 149. Ms. Johnston attempted to introduce into evidence her allergy to morphine. The trial court denied the admissibility of the evidence on relevancy grounds 2RP 106.

IV. Argument

A. The trial court erroneously excluded evidence of Ms. Johnston's allergy to Morphine.

The admissibility of evidence under relevancy grounds is set forth in ER 401 which reads as follows:

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401

Ms. Johnston raised the defense of unwitting possession.

Unwitting possession is an affirmative defense to the charge of possession of a controlled substance. State v. Cleppe, 96 Wn.2d 373, 381, 635 P.2d 435 (1981). To establish an unwitting possession defense, a defendant could show that (1) she did not know she was in possession of the controlled substance or (2) she did not know the nature of the substance she possessed. State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). When the defense of unwitting possession is raised in a prosecution for possession of a controlled substance, the defendant's knowledge is directly relevant to the defense of unwitting possession. City of Kennewick v. Day 142 Wash.2d 1, 11 P.3d 304 (2000)

The trier of fact must be satisfied by preponderance of evidence the circumstances of unwitting possession have been sufficiently established to exempt from criminal culpability a defendant charged with possession of a controlled substance. State v. Knapp (1989) 54 Wash.App. 314, 773 P.2d 134, *review denied* 113 Wash.2d 1022, 781 P.2d 1323. In other words, unwitting possession is an affirmative defense that may excuse the defendant's behavior, notwithstanding the defendant's violation of the letter of the statute. State v. Buford 93 Wash.App. 149, 967 P.2d 548(1998).

As stated in ER 401, relevant evidence is any evidence

directed at a fact which is important to an issue of the case and the evidence must make the existence of the important fact more or less probable. Relevant evidence may be excluded if the Court finds when balancing the defendant's right to present relevant evidence against the State's interest in precluding evidence, the evidence is so prejudicial it would disrupt the fairness of the fact-finding process. See Washington v. Texas, 388 U.S. at 14 (1967), State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); State v. Gallegos, 65 Wn.App. 230, 236-37, 828 P.2d 37, *review denied*, 119 Wn.2d 1024 (1992).

In the case at hand Ms. Johnston was charged with possession of morphine and hydromorphone. Hydromorphone is a morphine based controlled substance. 2RP 52. Ms. Johnston sought to introduce evidence of her allergy to morphine which would suggest she would be unlikely to intentionally possess a substance that would make her ill if ingested. 2RP 63-67. The trial court denied the admissibility of the evidence on relevance grounds. 2RP 106.

The parameters of relevant evidence is expanded when a defendant presents an unwitting possession defense. The Supreme Court of this State has determined evidence of a person's reputation for sobriety is admissible in the case of City of Kennewick v. Day, 142 Wash.2d 1, 11 P.3d 304 (2000). In that case the defendant (Mr. Day) was charge with possession of marijuana. Mr. Day raised the

defense of unwitting possession to the charge at trial. At trial Mr. Day indicated the drugs found did not belong to him and he had picked up the vehicle in which the drugs were found the day prior. City of Kennewick v. Day, 142 Wash.2d at 3. Mr. Day sought to present testimony about his reputation in the community for sobriety from drugs and alcohol. *Id.* The trial court did not allow Mr. Day to present that evidence. City of Kennewick v. Day, 142 Wash.2d at 4. The Supreme Court held that the trial court's decision to exclude the evidence was an abuse of discretion. City of Kennewick v. Day, 142 Wash.2d at 14-15.

As the defense of unwitting possession puts the defendant's knowledge at issue, the "universe of relevant evidence" expanded greatly. City of Kennewick v. Day, 142 Wash.2d at 11. The Supreme Court in Day determined the evidence of the defendant's reputation of sobriety tended to support his theory that he did not know drugs were in his vehicle and the evidence should have been admitted as character evidence under ER 404(a)(1). City of Kennewick v. Day, 142 Wash.2d at 10. Furthermore, in the case of State v. Pogue 104 Wn.App 981, 17 P.3d 1272 (2001), the Court of Appeals found error with a trial court's decision to allow evidence of a defendant's past possession of cocaine. The defendant in that case was charged with possession of cocaine and raised the defense of unwitting

possession. Similarly, in the case at hand, the evidence of Ms. Johnston's allergy to morphine should have been admissible.

As in the Day case, the trial court here abused its discretion by excluding important evidence. Although the allergy evidence in this matter was not classified as character evidence (as in the Day case), the evidence of the allergy was important to show Ms. Johnston would not have an incentive to possess a morphine based controlled substance. Just as Mr. Day would not have an incentive to possess a controlled substance because he was living a clean and sober lifestyle. Ms. Johnston had no motive to possess a drug that would make her ill. The trial court in this matter excluded the allergy evidence under relevancy grounds. 2RP 106. The trial court reasoned the issue of the allergy was not relevant to the issue of possession. 2RP 106.

Applying the standard for relevant evidence, ER 401 as outlined above, it is clear the evidence of the allergy should have been admitted. The standard for relevancy is low. If a defendant can show the evidence sought to be admitted is minimally relevant, the evidence must be admitted unless the State can demonstrate a compelling interest for excluding the evidence. State v. Hudlow, 99 Wn.2d 1, 16. 659 P.2d 514 (1983); State v. Reed, 101 Wn. App. 704, 709, 6 P.3d 43 (2000). In this case the evidence of the allergy was

relevant but not so prejudicial to the state that the fact finding process would be disrupted. While the evidence of the allergy would have bolstered Ms. Johnston's claim that she would not knowingly possess the controlled substances at issue, the evidence would not have been so prejudicial that exclusion was required. The trial court did not find that the evidence was so prejudicial as to require exclusion. The evidence of the allergy was relevant but was not overly prejudicial to the State. The trial court erred in excluding the evidence.

There is a reasonable probability that the Court's exclusion of the allergy materially effected the outcome of the case. The excluded evidence would have bolstered Ms. Johnston's claim that drugs must have been swept into her purse unknowingly while she was moving out of the basement room. The evidence would show that Ms. Johnston would have no reason to possess a substance that she could not ingest without becoming ill. Further, the proof that Ms. Johnston went from the residence she vacated to report with the Department of Corrections, where she knew she could be searched, tends to show that she had a motive to avoid unprescribed controlled substances. If Ms. Johnston was found to possess controlled substances without a prescription at her Department of Corrections appointment, she knew she would be sent to jail. Ms. Johnston

testified that she was motivated to stay out of jail which compelled her to be on time to her appointment to meet with her Department of Corrections officer. The evidence outlined above establishes a reasonable probability that the excluded evidence could have materially affected the trial outcome. The conviction should be reversed and the case should be remanded for a new trial. City of Kennewick v. Day, 142 Wn.2d at 15.

B. The trial court violated Ms. Johnston's Constitutional Rights when it excluded probative evidence supporting Ms. Johnston's defense.

Exclusion of Ms. Johnston's allergy to morphine was an improper and unnecessary restraint of Ms. Johnston's right to present a defense. The Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Section 22 of the Washington State Constitution guarantee the right to defend against the allegations brought by the State by presenting testimony in defense of the charges raised. The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed... and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favour, and to have the assistance of counsel for his defense."

The Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Article One, Section 22 provides:

"In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases..."

As argued above, the evidence of the allergy was relevant and should have been admitted into evidence. Admitting the evidence would have been far less disruptive to the fairness of the trial than exclusion of the evidence. Ms. Johnston provided a strong case for unwitting possession. Ms. Johnston presented two other witnesses that confirmed she moved out of the residence in a hurry. Ms. Burdwood confirmed that painkillers were given by her to the former occupant of the room, Ms. Goans. Ms. Goans had been ill and Ms. Burdwood provided care for her, including administering medication. Ms. Burdwood testified that she put items on the shelves in the room when caring for Ms. Goans. Testimony was presented at trial indicating the shelves were cluttered with items. Ms. Burdwood, Mr. Kingston, and Ms. Johnston all testified similarly about the condition of the room. The inference from the testimony of Ms. Sinns is the pills were found floating in Ms. Johnston's bag. The fact the pills were loose in the bag supports Ms. Johnston's claim the pills were inadvertently placed in her bag with the other items on the

shelves. The presence of the controlled substances in the room was explained, the requirement to move out of the room quickly was discussed at trial, and the condition of the room was also described. The evidence suggested Ms. Johnston's unwitting possession of the drugs was plausible.

By denying any mention of Ms. Johnston's allergy to morphine, the trial court greatly diminished Ms. Johnston's ability to present her defense of unwitting possession. Ms. Johnston was prepared to testify to the allergy and had a medical record available to confirm the allergy. 2RP 67. Had the evidence been admitted, it would have significantly bolstered Ms. Johnston's credibility, which in turn would have made Ms. Johnston's claim that she did not know the controlled substances were in her purse believable. Ms. Johnston would not have a motive to possess the pills. By excluding this evidence, the Court denied Ms. Johnston's constitutional right to a fair trial. As such, reversal of the convictions are required. State v. Hudlow, 99 Wn. 2d at 16.

V. Conclusion

For the reasons cited above, Ms. Johnston respectfully requests this court to reverse the convictions entered in this matter and remand the case to the trial court for a new trial.

Respectfully submitted this 2 day of July , 2015.

A handwritten signature in black ink, appearing to read "Michelle Bacon Adams", written over a horizontal line.

MICHELLE BACON ADAMS
WSBA No. 25200
Attorney for Appellant

NO. 46952-9-II

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

STATE OF WASHINGTON,

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SANDRA LEE JOHNSTON,

Appellant.

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Randall Sutton
Kitsap County Prosecuting Attorney's Office
614 Division Street, MS-35
Port Orchard, WA 98366

Copy of Brief of the Appellant and Declaration of Mailing Mailed To:

Sandra Lee Johnston
c/o Kitsap County Jail
614 Division Street, MS-33
Port Orchard, WA 98366-4614

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Karen Allen
Legal Assistant to Michelle Adams

KITSAP COUNTY PUBLIC DEFENDER

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kallen@cmpyd.com

michelleadamslaw@gmail.com