

NO. 49421-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

GUSTAVO ALLEN,

Appellant.

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

The Honorable David Gregerson, Judge
The Honorable Suzan Clark, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT

Issue 1: The search warrant affidavit fails to establish probable cause to search the Battle Ground residence.

The state argues the rationale in *State v. Mejia*, 111 Wn.2d 892, 766 P.2d 454 (1989), and *State v. G.M.V.*, 135 Wn. App. 366, 144 P.3d 358 (2006), validates the warrant used in Mr. Allen's case. They do not.

In *Mejia*, a confidential informant (CI) working with the police arranged for a middleman to buy cocaine. *Mejia*, 111 Wn.2d at 894. The police kept a close eye on the CI and the middleman and watched the CI meet with the middleman. *Id.* at 894-95. While maintaining control of the CI's activities, they followed the middleman to a residence. *Id.* The middleman assured the CI the residence was where he would meet the cocaine supplier. *Id.* The police watched the middleman enter and leave the residence and followed the middleman to where he met the CI and provided cocaine. *Id.* Once the middlemen left, they retrieved the cocaine from the CI. The police repeated that buying process a second time. *Id.* at 894-96.

After the second buy, the police obtained a search warrant in part on the middleman's assurance to the CI that a bucket of cocaine remained in the supply house. *Id.* at 896. With these tight controls in place, on

appeal, the court affirmed the validity of the warrant to search the supply house. Id. at 899-901.

In *G.M.V.*, the police, through a tightly controlled CI, made two controlled buys of marijuana from G.M.V.'s boyfriend, Ivan Longoria. *G.M.V.*, 135 Wn. App. at 369. In the first instance, the police watched Longoria leave G.M.V.'s house and followed him to his meeting with their CI. Id. at 369. Once the deal was made, they followed Longoria back to G.M.V.'s home. In the second instance, Longoria came to the buy from another direction, but again immediately returned directly to G.M.V.'s house after selling the CI marijuana and while under constant surveillance by the police. Id.

The police received a search warrant and searched G.M.V.'s house. Id. On appeal, G.M.V. challenged the warrant claiming Longoria's activities lacked an adequate nexus with G.M.V.'s house. Id. at 371. Given the police observations of their CI and Longoria's comings and goings from the house, the appellate court affirmed the search warrant's connection with G.M.V.'s house. Id. at 372.

Mejia's and *G.M.V.'s* tight controls do not mirror the lax controls used in Mr. Allen's case.

The search warrant affidavit in Mr. Allen's case provided information about two heroin sales to a police monitored CI. CP 24-25. The first instance happened about 10 days before the police sought their warrant. CP 25. The police provided no information about where Sanchez-Luna started from. Instead, the affidavit started with Sanchez-Luna leaving the location of a controlled buy and driving to 26001 NE 9th Avenue, Ridgefield. He drove a silver Honda Accord and parked at that address. The police could not see Sanchez-Luna's movements and discovered the Honda gone about 10 minutes later. They had no idea where Sanchez-Luna went after leaving the Ridgefield property. CP 25.

The second instance occurred about 72 hours before the police sought their warrant. CP 24-25.

Through the use of aerial surveillance, the police observed a blue Econovan parked at 22807 NE 72nd Avenue, Battleground. CP 25. Approximately 10 minutes later, the same blue Econovan arrived at the buy location with Sanchez-Luna driving. CP 25. Where Sanchez-Luna had been during that 10 minute window was unknown. The affidavit did not specify that the drive from the Battleground house to the buy location was a 10 minute drive. CP 24-25. It was also unknown if Sanchez-Luna was the driver when the van left the Battleground house because the affidavit did

not provide that information. CP 24-25. Once the buy was complete, Sanchez-Luna drove to the Ridgefield property and parked. Sanchez-Luna got out carrying a blue backpack and walked into an outbuilding. CP 25. After several minutes, Sanchez-Luna returned to the van and drove it to the Battleground house where he parked on the property, walked into a grove of trees and hulk vehicles, then emerged several minutes later and went into the house. CP 25.

These facts are markedly different than *Mejia* and *G.M.V.* In *Mejia*, the police tightly controlled their CI when the CI met the middleman than followed the middleman to and from the supply house. Sanchez-Luna was never subject to tight controls. He was never followed from the Battleground house to the CI meeting place. CP 24-25. The police saw Sanchez-Luna return to the Battleground house only one time but his route included stops to access the Ridgefield property and the grove of trees and hulk cars next to the Battleground house. CP 24-25. What Sanchez-Luna did at either of those stops, or who he might have met, was seemingly unknown to the police because they provided not detail in the search warrant affidavit. CP 24-25.

In *G.M.V.*, the police in one instance followed Longoria from the supply house to the CI buy location. After that buy and a second buy, the

police followed Longoria back to the supply house. G.M.V., 135 Wn. App at 369. By contrast, the police never saw Sanchez-Luna leave the Battleground house. CP 24-25. They only saw him return to the Battleground house once but not before he stopped first at the Ridgefield outbuilding and again at the grove of trees and hulk vehicles proximate to the Battleground house. CP 24-25.

The search warrant affiant noted:

I know upper level sellers rarely keep quantities of drugs at their residence. Large quantities of drugs are usually kept in “stash” houses or other locations so to avoid detection. I know that stash houses are often maintained by co-conspirators or criminal associates. These associates are commonly employed by or receive benefit from the seller. The locations of these stash houses are carefully chosen; often on dead end roads or rural settings that intentionally make them difficult for law enforcement to surveil.

CP 21. Based on Sanchez-Luna’s activities, as documented by the search warrant affidavit provided the police – possibly - with probable cause to search the Ridgefield outbuilding and the Battleground grove of trees and hulk vehicles. Nothing about the search warrant affidavit suggests that this was one of those rare situations where, as noted in the search warrant affidavit, a residence was being used to keep quantities of drugs. CP 21.

Issue 2: The plain language of a felony firearm offense under RCW 9.41.010(8), requires that Mr. Allen be remanded to strike the felony firearm offender registration requirement.

RCW 9.41.010(7) specifies

"Felony firearm offender" means a person who has previously been convicted . . . in this state of any felony firearm offense.

And RCW 9.41.010(8) specifies "felony firearm offense" means

...

(e) Any felony offense if the *offender* was armed with a firearm in the commission of the offense. (Emphasis added.)

By the plain language of the statute, a felony firearm offense does not include accomplices to an otherwise qualifying crime.

Here the state chose to instruct the jury Mr. Allen could be armed for firearm enhancement purposes if he or an accomplice was armed with a firearm when possessing methamphetamine with intent to deliver. CP 41, 127 (Jury Instruction 19). That is a correct statement of the law for imposing a firearm enhancement. RCW 9.94A.825; RCW 9.94A.533(3). A firearm enhancement is allowed when a person, or an accomplice, commits an offense with a firearm. But that is not the language of the felony firearm registration requirement. Only if the *offender was armed* is a person eligible for felony firearm registration status. RCW 9.41.010(8)(e).

That state chose not to go that route in Mr. Allen's case prioritizing instead the applicability of a firearm enhancement to a principal or an accomplice.

On this record, there was no factual basis by which the court could designate Mr. Allen a felony firearm offender with the requisite registration requirement because the record only suggested he was an accomplice to the possession of the shotgun and rifle located in another person's bedroom. CP 76-77. The trial court abused its discretion in imposing the felony firearm registration requirement.

Issue 3: The state concedes Mr. Allen's sentence exceeds the statutory maximum.

The state concedes the trial court erred in sentencing Mr. Allen to a sentence over the ten year statutory maximum for possession of methamphetamine.

Possession of methamphetamine with intent to deliver is a Class B felony, for which a defendant "upon conviction may be imprisoned for not more than ten years[.]" RCW 69.50.401(1)(b); RCW 9A.20.021(1)(b).

The court ordered Mr. Allen to serve 51 months of standard range confinement, plus a consecutive 24 months school zone enhancement, and a consecutive 36 month firearm enhancement. RP III 463, 466; CP 81. Besides those combined 111 months, the court added 12 additional

months of community supervision, for a total of 123 months. RP III 463, 466; CP 81-82. Mr. Allen was ordered to serve 3 months over the statutory maximum.

A sentencing court must reduce a term of community custody whenever the standard range sentence of confinement in combination with community custody would exceed the statutory maximum. *State v. Hernandez*, 185 Wn. App. 680, 688, 342 P.3d 820 (2015), *review denied*, 185 Wn.2d 1002 (2016).

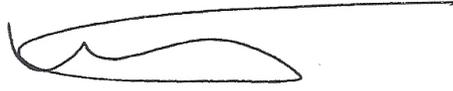
Mr. Allen's case must be remanded for correction of his sentence.

B. CONCLUSION

Because the search warrant did not establish probable cause to search the Battleground home, all of the evidence obtained as a result of the warrant service must be suppressed and the charges consequently reversed and dismissed.

In the alternative, Mr. Allen's case must be remanded to strike the felony offender registration requirement and for resentencing within the standard range on the possession with intent to deliver methamphetamine.

Respectfully submitted September 5, 2017.

A handwritten signature in black ink, appearing to read "Lisa E. Tabbut". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

LISA E. TABBUT/WSBA 21344
Attorney for Gustavo Allen

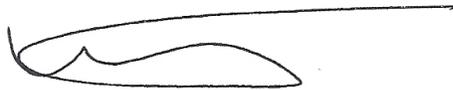
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares:

On today's date, I filed the Reply Brief of Appellant to (1) Clark County Prosecutor's Office, at cntypa.generaldelivery@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Gustavo Allen, DOC#392458, Washington Corrections Center, PO Box 900, Shelton, WA 98584.

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

Signed September 5, 2017, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', written over a horizontal line.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Gustavo Allen, Appellant

LAW OFFICE OF LISA E TABBUT

September 05, 2017 - 12:49 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49421-3
Appellate Court Case Title: State of Washington, Respondent v Gustavo Allen, Appellant
Superior Court Case Number: 15-1-02116-8

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