

FILED
Court of Appeals
Division II
State of Washington
9/4/2018 4:33 PM

No. 50814-1-II

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

State of Washington,

Respondent,

v.

Mary Sandoval,

Appellant.

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

APPELLANT'S REPLY BRIEF

Sara S. Taboada
Attorney for Appellant

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT IN REPLY 1

1. The State failed to prove every essential element of possession of stolen property in the second degree (stolen access device) because the State relied on an erroneous interpretation of the term “access device” to prove that Ms. Sandoval was guilty of this crime..... 1

2. The State and the trial court’s erroneous interpretation of the access device statute also led them to issue a jury instruction that was both legally deficient and contained an impermissible comment on the evidence. 6

3. Ms. Sandoval’s counsel performed deficiently when he neglected to request a jury instruction regarding the affirmative defense of unwitting possession. 7

4. The State’s concession regarding the sentencing court’s imposition of discretionary LFOs is well-taken, and Ms. Sandoval asks this Court to accept the State’s concession. 11

B. CONCLUSION 12

TABLE OF AUTHORITIES

Washington Cases

In re Petersen, 138 Wn.2d 70, 980 P.2d 1204 (1999). 3
Matter of Arnold, 109 Wn.2d 136, 410 P.3d 1133 (2018)..... 3
Matter of Juveniles A, B, C, D, E, 121 Wn.2d 80, 847 P.2d 455 (1993) 1
State v. Bolar, 129 Wn.2d 361, 917 P.2d 125 (1996)..... 4
State v. Coristine, 177 Wn.2d 370, 300 P.3d 400 (2013) 9
State v. Engel, 166 Wn.2d 572, 210 P.3d 1007 (2009)..... 4
State v. Kyllo, 162 Wn.2d 856, 215 P.3d 177 (2009) 8
State v Larkins, 79 Wn.2d 392, 486 P.2d 95 (1971)..... 8
State v. Malone, 72 Wn. App. 429, 864 P.2d 990 (1994)..... 9
State v. Rose, 175 Wn.2d 10, 282 P.3d 1087 (2012) 1, 3
State v. Schloredt, 97 Wn. App. 789, 987 P.2d 647 (1999)..... 2, 4
State v. Van Fields, No. 500019, 2018 WL 834350 (Wash. Ct. App. Feb. 13, 2018) 2

Statutes

RCW 9A.56.010(1)..... 1

Court Rules

GR 14.1 3

A. ARGUMENT IN REPLY

- 1. The State failed to prove every essential element of possession of stolen property in the second degree (stolen access device) because the State relied on an erroneous interpretation of the term “access device” to prove that Ms. Sandoval was guilty of this crime.**

Police officers searched Mary Sandoval’s purse and found items that did not belong to her. RP 160-62, 203-05. According to Ms. Sandoval, she did not know she possessed the items, and she was shocked to learn her purse contained a bag with a stolen Target credit card and methamphetamine. RP 238. The discovery of the stolen credit card resulted in the State charging Ms. Sandoval with possession of stolen property in the second degree (access device).¹ CP 16.

Based on the plain meaning of the “access device” statute and our Supreme Court’s decision in *State v. Rose*, 175 Wn.2d 10, 282 P.3d 1087 (2012), the State bore the burden of proving the Target credit card could be used to obtain something of value at the time the police retrieved the card from Ms. Sandoval. Op. Br. at 7-15; CP 16; *see also Matter of Juveniles A, B, C, D, E*, 121 Wn.2d 80, 847 P.2d 455 (1993) (“when statutory language is used in an unambiguous manner, we will not look

¹ A credit card is an “access device.” RCW 9A.56.010(1).

beyond the plain meaning of the words”). But at the time the police discovered this access device, the card was long cancelled, and the State presented no evidence that the access device could be used to obtain anything of value on the date of its discovery (the date listed in the information). Op. Br. at 15. Accordingly, insufficient evidence supports Ms. Sandoval’s conviction for this charge, and this Court should dismiss the charge with prejudice. *Burks v. United States*, 437 U.S. 1, 11, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978).

Nevertheless, the State maintains its interpretation of the access device statute was correct, claiming (1) a Court of Appeals opinion that both pre-dates our Supreme Court’s decision in *Rose* and that was issued from a different division of this Court nearly 20 years ago compels this Court to adopt the State’s interpretation; (2) it would be “absurd” for this Court to adopt the plain meaning of the access device statute; and (3) this Court’s unpublished decision in *State v. Van Fields*, No. 500019, 2018 WL 834350 (Wash. Ct. App. Feb. 13, 2018) supports the State’s interpretation. Resp. Br. at 6-17. These arguments are unpersuasive, and this Court should reject them.

Division One’s ruling in *State v. Schloredt*, 97 Wn. App. 789, 987 P.2d 647 (1999) is not binding upon this Court for several reasons. First, this decision pre-dates our Supreme Court’s decision in *Rose*, which held

that if the access device in question is *not* tied to an *existing, active account*, the State *must* present affirmative evidence that the card can be used to obtain something of value for the State to satisfy its burden of proof. 175 Wn.2d at n.1. Because the Washington Supreme Court is the final arbiter of the meaning of Washington statutory law, the Supreme Court’s decision in *Rose* binds this Court, not *Schloredt*. *In re Petersen*, 138 Wn.2d 70, 80, 980 P.2d 1204 (1999).

Second, even if this Court believes *Rose* did not overrule *Schloredt*, the Court of Appeals’ decision in *Schloredt* is from a different division of this Court and therefore only serves as persuasive authority; it is not binding on this Court. *See Matter of Arnold*, 109 Wn.2d 136, 410 P.3d 1133 (2018) (“the divisions of the Court of Appeals have traditionally treated decisions from other divisions as persuasive rather than binding because it allows for rigorous debate and improves the quality of appellate advocacy and the quality of judicial decision making”) (internal citations and quotations omitted). For similar reasons, the State’s reliance on *Van Fields* is also misplaced. GR 14.1 (Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court...[they] may be cited as nonbinding authorities... and may be accorded such persuasive value as the court deems appropriate).

Third, the State's and *Schloredt's* interpretation of the access device statute is (1) contrary to the established principle that courts must follow the Legislature's plain and ambiguous choice of words; and (2) contrary to the established principle that the Legislature does not intend absurd results. *See State v. Bolar*, 129 Wn.2d 361, 366, 917 P.2d 125 (1996); *see also State v. Engel*, 166 Wn.2d 572, 580, 210 P.3d 1007 (2009) (rejecting a reading of the burglary in the second degree statute that would allow someone to be found guilty of the crime for trespassing in an unfenced and unmarked area because such a reading would be absurd). Under the State and *Schloredt's* reading of the access device statute, the State need only present evidence that the access device in question could be used to obtain something of value at the time the device was last in the possession of its true owner. 97 Wn. App. at 794; Resp. Br. at 11.

But it is unreasonable to presume the legislature intended to criminalize the possession of something that is worthless by the time the defendant possesses it. Under the State and *Schloredt's* interpretation of the statute, someone could be found guilty of the crime of possession of a stolen access device (a Class C felony) *years* after the device in question loses its ability to obtain anything of value. Because this interpretation is both contrary to the plain meaning of the statute and inapposite to the

judicial canon that statutes must not be read in a manner that creates absurd results, this argument is unpersuasive.

Additionally, the rule of lenity favors Ms. Sandoval's interpretation of the statute. Ms. Sandoval maintains the statute is plain and unambiguous, but if this Court disagrees, the rule of lenity requires this Court to interpret the statute in her favor. Under the rule of lenity, this Court reads an ambiguous statute in favor of the defendant. *See State v. Weatherwax*, 188 Wn.2d at 155 (applying the rule of lenity to an ambiguous statute and applying the sentence that would yield the lower of two possible sentences). Because Ms. Sandoval's reading of the statute would result in this Court's reversal of her conviction for possession of stolen property with prejudice, the rule of lenity also supports Ms. Sandoval's interpretation. *See also State v. Conover*, 183 Wn.2d 706, 712, 355 P.3d 1093 (2015).

The State presented zero evidence that on April 2, 2017, (the date listed in the information) Ms. Sandoval could use the Target credit card to obtain anything of value. CP 16. Accordingly, this Court should dismiss this conviction with prejudice. *Burks*, 437 U.S. at 11.

2. The State and the trial court's erroneous interpretation of the access device statute also led them to issue a jury instruction that was legally deficient and contained an impermissible comment on the evidence.

Based on its incorrect understanding of the access device statute, the court also issued a legally deficient jury instruction. Jury Instruction 20 is legally deficient because it allowed the jury to find Ms. Sandoval guilty of possession of stolen property in the second degree (stolen access device) based on an erroneous definition of the term "access device." CP 47. App. Br. at 16-17. Additionally, jury instruction 20 contains an impermissible comment on the evidence. App. Br. at 17-24.

Relying on its sufficiency arguments, the State maintains this instruction was both legally correct and did not amount to a comment on the evidence. Resp. Br. at 17-22. Alternatively, the State boldly claims that even if this instruction is legally deficient or amounts to a comment on the evidence, the State has met its burden in proving the instruction was harmless beyond a reasonable doubt "because at all times [the Target credit card] could be used to obtain something of value." Resp. Br. at 19.

Again, the State presented *zero* evidence that "at all times" the Target credit card could be used to obtain something of value. The State's

briefing fails to point to anywhere in the record supporting this claim. The State's unsupported claim is misplaced, and this Court should reject it.

Because the State cannot meet its heavy burden in proving that the court's issuance of Jury Instruction 20 was harmless beyond a reasonable doubt, this Court should reverse.

3. Ms. Sandoval's counsel performed deficiently when he neglected to request a jury instruction regarding the affirmative defense of unwitting possession.

Counsel's failure to request an instruction on Ms. Sandoval's sole affirmative defense to possession of methamphetamine—unwitting possession—constitutes deficient performance, and this deficient performance prejudiced Ms. Sandoval. Op. Br. at 24-35. However, the State argues counsel was not deficient because (1) it was a reasonable strategic decision for counsel to forego instructing the jury on Ms. Sandoval's only available means of acquittal; and (2) even if counsel performed deficiently, Ms. Sandoval cannot establish prejudice. Resp. Br. at 22-31. These arguments are unavailing.

Despite the State's claims to the contrary, no objectively reasonable strategic reason exists for an attorney to listen to his client admit on the stand that she possessed methamphetamine, but elect to forego an unwitting possession instruction in hopes that the jury will instead elect to engage in jury nullification. Resp. Br. at 24-30. While a

defendant may strategically and legitimately elect to forego an affirmative defense so that she may hold the State to its burden of proving its case beyond a reasonable doubt, this strategy quickly becomes objectively unreasonable when the defendant admits the State has already met its burden beyond a reasonable doubt. *See* Resp. Br. at 24. Ms. Sandoval admitted to possessing the methamphetamine in her purse. RP 246-47. Thus, the State met its burden in proving possession, as she had the methamphetamine in her physical custody. CP 14.

Only an unwitting possession instruction could have secured Ms. Sandoval's acquittal on this charge. And if her counsel was unaware such an instruction existed, this too amounts to deficient performance, as "reasonable conduct for an attorney includes carrying out the duty to research the relevant law." *State v. Kylo*, 162 Wn.2d 856, 862, 215 P.3d 177 (2009) (internal references omitted).

The State relies on no authority when it claims it is an objectively reasonable trial strategy for an attorney to hope that a jury will engage in jury nullification in a drug possession case when the police only find drug residue, as was the case here. Resp. Br. at 29. Any measurable amount of drugs, no matter how negligible, requires a jury to convict a defendant of possession of a controlled substance. *See State v Larkins*, 79 Wn.2d 392, 486 P.2d 95 (1971); *accord State v. Malone*, 72 Wn. App. 429, 864 P.2d

990 (1994). As such, the State’s arguments are misguided. Ms. Sandoval’s trial attorney performed deficiently when he neglected to request an unwitting possession instruction.

This deficient performance undoubtedly prejudiced Ms. Sandoval. App. Br. at 31-33. However, the State claims Ms. Sandoval cannot establish prejudice because the Washington Supreme Court never adopted the standard announced in *Powell*² to assess prejudice where an attorney fails to request an affirmative defense instruction. Resp. Br. at 30. The State claims that because the Washington Supreme Court in *Coristine* declared that a defendant can elect to forego an affirmative defense, then it follows that “*Powell*’s standard [for prejudice] is inoperative because challenging the State’s proof is always available as a defense.” Resp. Br. at 30.

But *Coristine* does nothing to advance the defendant’s argument. In *Coristine*, the defendant was aware of the affirmative defense available to him, but he knowingly and intelligently chose to forego it; however, the State and the trial court forced the affirmative defense upon him. *State v. Coristine*, 177 Wn.2d 370, 374, 300 P.3d 400 (2013). The Washington

² “Where defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial.” *In re Hubert*, 138 Wn. App. 924, 932, 158 P.3d 1282 (2007); *accord Powell*, 150 Wn. App. at 156.

Supreme Court found the court's decision was in error because defendants possess a Sixth Amendment right to knowingly and intelligently choose to forego an affirmative defense. *Id.* at 375. The Court did not state that *Powell* and *Hubert* were erroneously decided; instead it cited to both for the proposition that a distinction exists between failing to recognize a valid defense (which constitutes deficient performance) and validly waiving one. *Id.* at 379.

And even under the State's alternative standard for establishing prejudice (a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different),³ Ms. Sandoval readily establishes prejudice. Resp. Br. at 30. The jury was hung on the identity theft charge, which did not contain instructions that, essentially, instructed the jury to find Ms. Sandoval guilty of this crime. RP 321-23, CP 43-44; 50, 53. The State later dismissed the charge. RP 331. If Ms. Sandoval's trial counsel had requested an unwitting possession instruction, which would have allowed the jury to meaningfully assess her testimony regarding how she had no knowledge that she possessed the methamphetamine pipes, it is likely the jury would have also been hung on this charge. Thus, the State's argument to the contrary is misplaced.

³ *Kyllo*, 162 Wn.2d at 862.

4. The State's concession regarding the sentencing court's imposition of discretionary LFOs is well-taken, and Ms. Sandoval asks this Court to accept the State's concession.

The State concedes the trial court erred when it failed to conduct the required individualized inquiry into Ms. Sandoval's ability to pay before it imposed discretionary legal financial obligations (LFOs). Resp. Br. at 31; *see* App. Br. at 32-35. This concession is well-taken, and Ms. Sandoval asks this Court to accept the State's concession.

B. CONCLUSION

Based on arguments posed in this brief and in her opening brief, Ms. Sandoval asks this Court to dismiss with prejudice her conviction for possession of stolen property in the second degree (access device); alternatively, Ms. Sandoval asks this Court to reverse her conviction for possession of stolen property in the second degree and remand for a new trial.

Additionally, Ms. Sandoval asks this Court to reverse her conviction for possession of a controlled substance and remand for a new trial.

DATED this 4th day of September, 2018.

Respectfully submitted,

/s Sara S. Taboada
Sara S. Taboada – WSBA #51225
Washington Appellate Project
Attorney for Appellant

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

| | | |
|----------------------|---|----------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | |
| v. |) | NO. 50814-1-II |
| |) | |
| MARY SANDOVAL, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 4TH DAY OF SEPTEMBER, 2018, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION TWO** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

| | | |
|----------------------------------|-----|----------------------|
| [X] AARON BARTLETT, DPA | () | U.S. MAIL |
| CLARK COUNTY PROSECUTOR'S OFFICE | () | HAND DELIVERY |
| [prosecutor@clark.wa.gov] | (X) | E-SERVICE VIA PORTAL |
| PO BOX 5000 | | |
| VANCOUVER, WA 98666-5000 | | |
| | | |
| [X] MARY SANDOVAL | (X) | U.S. MAIL |
| 12800 NE 4 ST. | () | HAND DELIVERY |
| VANCOUVER, WA 98684 | () | _____ |

SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF SEPTEMBER, 2018.

X 

Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, Washington 98101
Phone (206) 587-2711
Fax (206) 587-2710

WASHINGTON APPELLATE PROJECT

September 04, 2018 - 4:33 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50814-1
Appellate Court Case Title: State of Washington, Respondent v. Mary E. Sandoval, Appellant
Superior Court Case Number: 17-1-00733-1

The following documents have been uploaded:

- 508141_Briefs_20180904163304D2398493_5735.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was washapp.090418-9.pdf

A copy of the uploaded files will be sent to:

- CntyPA.GeneralDelivery@clark.wa.gov
- aaron.bartlett@clark.wa.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Sara Sofia Taboada - Email: sara@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 701
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20180904163304D2398493