

FILED
Court of Appeals
Division II
State of Washington
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No. 51195-9-II

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

STATE OF WASHINGTON, Respondent

v.

JACOB TREASURE, Appellant

APPEAL FROM THE SUPERIOR COURT
OF CLARK COUNTY
THE HONORABLE DAVID E. GREGERSON

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
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TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR.....1

ISSUE PERTAINING TO ASSIGNMENT OF ERROR.....1

II. STATEMENT OF FACTS.....1

III. ARGUMENT.....3

The Trial Court Erred When It Gave A Definitional Instruction on Knowledge Which Allowed The Jury To Convict Based On An Objective Reasonable Person Standard Rather Than Subjective Actual Knowledge By the Defendant.....3

IV. CONCLUSION.....7

TABLE OF AUTHORITIES

Washington Cases

City of Kennewick v. Day, 142 Wn.2d 1, 11 P.3d 304 (2000) 4

State v. Balzer, 91 Wn.App. 44, 954 P.2d 931 (1998)..... 4

State v. Hathaway, 161 Wn.App. 634, 251 P.3d 253 (2011)..... 4

State v. Sheldon, 38 Wn.App. 195, 684 P.2d 1350 (1984) 5, 6

State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994) 4

I. ASSIGNMENT OF ERROR

The trial court committed prejudicial error when it gave a jury instruction defining “knowledge” in the context of a defense of unwitting possession of a controlled substance.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Is it error to instruct the jury that it may convict the defendant if a reasonable person would have known the controlled substance was in the vehicle?

II. STATEMENT OF FACTS

Clark County prosecutors charged Jacob Treasure by amended information with one count of possession of a controlled substance. CP 15. Mr. Treasure asserted an unwitting possession defense. RP 122.

Mr. Treasure struggled with a heroin addiction for five years, beginning at age 19. He was under the care of addiction specialist Dr. Lanchild, who had prescribed Suboxone¹ for him. RP 163-64, 171. Mr. Treasure reported he had not used heroin since December 2016. RP 171.

¹ Suboxone is a medication that is used for opioid addiction. It blocks and activates the receptors to provide relief from symptoms and prevention of withdrawal. RP 164.

On February 16, 2017, Mr. Treasure spent the majority of the day inside his apartment. RP 170. Early that evening he took etizolam², a medication he had obtained over the internet. RP 174. Around 9 p.m. he got in his car to drive to Mary Jane's on Mill Plain to purchase marijuana. RP 174-175.

Officer Griffith, a City of Vancouver police officer, called 911 to report a vehicle drifting between lanes and driving recklessly. RP 125-127. Officer Skollingsberg responded to the dispatch and stopped Mr. Treasure. RP 133.

Skollingsberg gave *Miranda* warnings to Mr. Treasure and then asked about a baggie he saw on the passenger floorboard, that to him looked like it contained heroin. RP 134, 137. Mr. Treasure was surprised it was there saying, "...if it was his it was from when he had been using in the past." RP 137-138, 171. He was particularly surprised there would be heroin on the floorboard because in the past he kept his heroin in either his wallet or cigarette pack. RP 171. He reported that between December 2016 and February 2017 he had transported numerous people in his car, some of whom used heroin. RP 172. He said, "If I had known it [heroin]

² Etizolam is a benzodiazepine used to treat anxiety disorders and withdrawal symptoms from Suboxone and heroin. RP 186.

was there, being a heroin addict I would have done something with it.”

RP 173.

Over defense objection, the court gave jury instruction 11-B:

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result. It is not necessary that the person know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.

If a person has **information that would lead a reasonable person** in the same situation to believe that a fact exists, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

When acting knowingly as to a particular fact is required to establish an element of a crime, the element is also established if a person acts intentionally as to that fact.

CP 48; RP 198 (Emphasis added).

Mr. Treasure was found guilty and sentenced to 40 days of work release. CP 51; 59. He was found indigent for purposes of appeal and makes this timely appeal. CP 71, 73.

III. ARGUMENT

The Trial Court Erred When It Gave A Definitional Instruction on Knowledge Which Allowed The Jury To Convict Based On An Objective Reasonable Person Standard Rather Than Subjective Actual Knowledge By the Defendant.

In a prosecution for unlawful possession of a controlled substance, the State is required to establish two elements: the nature of the substance

and the fact of possession by the defendant. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). There is no requirement for proof of either knowledge of or intent to possess. *Id.* at 799. It is at heart a strict liability crime.

This matter concerns the jury instruction given on the affirmative defense of unwitting possession of a controlled substance. The defense excuses a defendant's violation of the letter of the law, based on lack of knowledge. *State v. Balzer*, 91 Wn.App. 44, 67, 954 P.2d 931 (1998). It "ameliorates the harshness of the almost strict liability our law imposes for unauthorized possession of a controlled substance." *State v. Hathaway*, 161 Wn.App. 634, 649, 251 P.3d 253 (2011). If a defendant can affirmatively establish that his possession of a controlled substance was unwitting, there is no possession for which the law will convict. *City of Kennewick v. Day*, 142 Wn.2d 1, 10, 11 P.3d 304 (2000).

"When the defense of unwitting possession is raised, the defendant's knowledge is directly relevant to the defense of unwitting possession." *Day*, 142 Wn.2d at 311. Here, the trial court gave instruction 11-B, which allowed the jury to convict based on an objective standard of knowledge:

A person knows or acts knowingly or with knowledge with respect to a fact, circumstance, or result when he or she is aware of that fact, circumstance, or result. It is not necessary that the person

know that the fact, circumstance, or result is defined by law as being unlawful or an element of a crime.

If a person has **information that would lead a reasonable person in the same situation to believe that a fact exists**, the jury is permitted but not required to find that he or she acted with knowledge of that fact.

CP 48.

It has been long-standing case law that the highlighted portion of the above instruction results in prejudicial error in the context of unwitting possession. *State v. Sheldon*, 38 Wn.App. 195, 684 P.2d 1350 (1984). In *Sheldon*, the defendant was suspected of being responsible for missing drugs at the hospital where she worked as a nurse. The hospital staff planted “phony” drugs in a hospital cart and then observed after she left that the drugs were missing. *Id.* at 196. The following day the staff again planted phony drugs on the cart, and this time a police officer observed the same activity by the defendant. Police executed a search warrant and found the missing drugs in the defendant's purse. The defendant raised the defense of unwitting possession. At trial, the court gave the following jury instruction:

A person knows or acts knowingly or with knowledge when:
(1) he or she is aware of a fact, facts or circumstances or result described by law as being a crime; or
(2) he or she had **information which would lead a reasonable person in the same situation to believe that facts exist** which facts are described by law as being a crime.

Knowledge means actual knowledge. You are permitted, but not required, to find knowledge if you find that the defendant has information which would lead a reasonable person in the same situation to believe that that [*sic*] facts exist which facts are described by the law as being a crime.

Sheldon, 38 Wn.App. at 197-98.

The Court held the instruction allowed the jury to apply an objective standard to determine knowledge. *Id.* at 198. The defendant had denied knowledge of the drugs found in her purse: the jury could have concluded that a reasonable person would have known they were in the handbag. The inclusion of the instruction resulted in prejudicial error. *Id.*

Here, like the defendant in *Sheldon*, Mr. Treasure denied knowing the drugs were in his car. While possession of a controlled substance does not require a mental state, the affirmative defense requires that the defendant prove by a preponderance of the evidence that he did not know the controlled substance was in his possession. The knowing is a subjective knowledge standard (actual knowledge) and not the objective standard (reason to know).

Instructing the jury on the option of convicting based on an objective standard resulted in prejudicial error to Mr. Treasure. This matter should be reversed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Treasure respectfully asks this Court to reverse his conviction.



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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on April 25, 2018, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Clark County Prosecuting Attorney at cntypa.generaldelivery@clark.wa.gov and to Jacob Treasure, 7806 NE 61st Circle, Vancouver, WA 98662



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