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Division II
State of Washington
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NO. 51582-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

CARL WARNER,

Appellant.

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

The Honorable Bryan E. Chushcoff, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Because the to-convict instruction did not identify the controlled substance appellant delivered, his case must be remanded for imposition of a class C felony.

Issue Pertaining to Assignment of Error

The to-convict instruction must include all essential elements of proof and, where the defendant is charged with delivery of a controlled substance, must identify the substance involved. Otherwise, the defendant may be wrongfully convicted of a class B felony rather than a class C felony. Where the to-convict in appellant's case did not identify the substance is remand for sentencing on a class C felony required?

B. STATEMENT OF THE CASE¹

1. Charge, verdict, and sentence

The State charged Carl Werner with one count of unlawful delivery of a controlled substance. It was alleged the substance was methamphetamine. CP 1; RCW 69.50.401(1)(2)(b). A jury found Werner guilty. CP 12.

The court entered a judgment of guilty of delivery of a controlled substance under RCW 69.50.401(2)(b) (methamphetamine, a class B

¹ In this brief RP refers to the verbatim reports of proceedings.

felony). CP 24. Werner was sentenced for that offense and given a standard range sentence of 75 months and 12 months of community custody based on a stipulated offender score of nine. CP 19-21, 26, 29.

2. Trial

Maxwell Criss, an investigator with the City of Lakewood Police Department, testified that a police informant told Criss she could buy drugs from a certain person. The informant was asked to contact the person and set up a “controlled buy.” RP 75 (1/30/2018).² It was decided the informant would attempt to purchase \$80.00 of methamphetamine from the person. Id. The informant telephoned the person she believed she could buy the drug from and Criss listened to the call. The informant arranged to buy the drug at noon on September 13, 2017, at a Taco Bell restaurant parking lot in Lakewood. RP 76-77, 81 (1/30/2018).

Criss testified he drove the informant to about 200 feet from the Taco Bell parking lot, searched the informant to make sure she had no drugs or money, gave the informant four twenty dollar bills that were pre-recorded, and watched the informant walk to the parking lot. RP 78, 79,

² A “controlled buy” is where police provide an informant with recorded money to purchase drugs from someone at a certain location. Police observe the transaction and after the transaction is completed the person who sold the drugs to the informant is arrested. RP 60-67 (1/30/2018).

100, 120-121 (1/30/2018). There were other Lakewood officers positioned near the parking lot and one, Sean Conlon, was sitting in a truck in the parking lot. 79-82. (1/30/2018).

Conlon testified while the informant was in the parking lot Werner approached her. RP 157 (1/30/2018). Conlon heard Werner tell the informant that he had "it" but not enough and he asked her to walk around the corner with him where he would get the rest. The informant refused. RP 158-160 (1/30/2018). Conlon said that Werner then made a phone call and heard him say "she won't leave" and asked the person he was talking to bring it to the Taco Bell. Werner then told the informant it would be there in seven minutes. RP 161 (1/30/2018). A few minutes later a white Lincoln Town Car drove into the parking lot. Werner got into the front passenger seat and less than a minute later he walked back over to the informant and handed her a plastic baggie and she gave Werner the money. RP 163 (1/30/2018). The informant gave a pre-arranged signal indicating she made a "good buy." RP 89, 164 (1/30/2018).

The informant then walked back to where Criss was parked and gave Criss a baggie which was later analyzed and found to contain 3.4 grams of methamphetamine. RP 91-95, 196-200 (1/30/2018). She was again searched, and she did not have any other drugs or money. RP 91 (1/30/2018).

After the informant gave the “good buy” signal Lakewood police Sergeant David Crommes followed Werner, who was walking, and arrested him. Werner was searched and Crommes found one twenty dollar bill in his pocket and three twenty dollar bills in his hand. RP 165, 185 (1/30/2018). The bills matched those given to the informant by police. RP 166 (1/30/2018). Crommes testified that Werner was polite and cordial, and he told Crommes that he met a woman at Taco Bell who owed him money. She paid him back with the bills he had. RP 185-187 (1/30/2018).

Police also stopped the Lincoln that Werner had gotten into while at the Taco Bell parking lot. Joshua Rodgers, the driver, was arrested. RP 100-101 (1/30/2018). Police searched the Lincoln. They found a scale, baggies and methamphetamine. RP 108, 116-117, 201 (1/30/2018). Some baggies found in the Lincoln had the same markings as the baggie Werner gave to the informant. RP 129-130 (1/30/2018).

C. ARGUMENT

THE FAILURE TO IDENTIFY IN THE TO-CONVICT INSTRUCTION THE SUBSTANCE WERNER DELIVERED REQUIRES REMAND FOR IMPOSITION OF A CLASS C SENTENCE.

A to-convict instruction must contain all essential elements of the charged crime and reviewing courts may not rely on other instructions to supply a missing element. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d

1000 (2003). “When the identity of a controlled substance increases the statutory maximum sentence which the defendant may face upon conviction, that identity is an essential element.” State v. Clark-El, 196 Wn. App. 614, 618, 384 P.3d 627 (2016) (citing State v. Goodman, 150 Wn.2d 774, 778, 83 P.3d 410 (2004); State v. Sibert, 168 Wn.2d 306, 311-312, 230 P.3d 142 (2010) (plurality opinion)). Moreover, omission of this element from the to-convict can be raised for the first time on appeal. Clark-El, 196 Wn. App. at 619.

In Clark-El, the defendant was charged and convicted of delivering methamphetamine, although the to-convict instruction simply required proof that he “delivered a controlled substance” without identifying that substance. Id. at 618-619. The Clark-El Court held:

When a defendant is charged with delivering a controlled substance, the identity of the substance is an essential element that must be stated in the to-convict instruction if it increases the maximum sentence the defendant will face upon conviction. In such a case, omission of the essential element is subject to harmless error analysis as to the conviction but not as to the sentence.

Id. at 617. Because methamphetamine was the only controlled substance proved, jurors could only have based their verdict on that substance, and the failure to identify it in the to-convict was deemed harmless as to Clark-El’s conviction. Id. at 620. However, delivery of a substance other than methamphetamine could result in conviction for a class C felony (rather than

the class B for delivering methamphetamine), and because the jury’s verdict did not authorize the sentence imposed, the error was not harmless as to sentencing, and the case was remanded for resentencing on a class C felony. Id. at 624-625

In State v. Gonzalez, 2 Wash.App.2d 96, 408 P.3d 743 (2018), this Court recently extended Clark-El’s reasoning and holding for delivery cases to cases involving possession of a controlled substance. This Court ruled, “[w]ithout a finding regarding the nature of the controlled substance, the jury’s verdict did not provide a basis upon which the trial court could impose a sentence based on possession of methamphetamine,” authorizing only the lowest possible sentence for possession of a controlled substance. Id. at 114, (citing Clark-El, 196 Wn. App. at 624). This Court, like the Clark-El court, ruled the issue of the missing element—the identity of the substance—can be raised for the first time on appeal. Id. at 105 (citing State v. Richie, 191 Wn. App. 916, 927, 365 P.3d 770 (2015)). And, like the Clark-El court, it too remanded for imposition of a misdemeanor sentence. Id. at 114.

The reasoning and holdings in Clark-El and Gonzalez require the same outcome here. The to-convict instruction at Werner’s trial provides:

To convict the defendant of the crime of delivery of a controlled substance, each of the following elements of the crime must be proven beyond a reasonable doubt:

- (1) That on or about the 13th day of September, 2017, the defendant possessed a controlled substance; and
- (2) That the defendant knew that the substance delivered was a controlled substance; and
- (3) That the acts occurred in the State of Washington.

CP 25 (instruction 12). Additional instructions indicated methamphetamine is a controlled substance. CP 23 (instruction 9).

The to-convict instruction did not require jurors to find, beyond a reasonable doubt, that the substance involved was methamphetamine. This is a critical omission because, like in Clark-El, the maximum authorized punishment for the crime of possession with intent to deliver turns on the identity of the substance. Under RCW 69.50.401(2)(c), possession with intent to deliver a controlled substance other than methamphetamine could result in conviction for a class C felony (rather than a class B felony mandated under RCW 69.50.401(2)(b)). See RCW 69.50.401(2)(b), (c); Clarke-El, 196 Wn. App. at 618.

Because there was no dispute that the substance was methamphetamine, the failure to identify the substance in the to-convict was harmless as to Werner's conviction. Clarke-El, 196 Wn. App. at 620. However, as to sentencing, because the court imposed a sentence as if the jury had found all elements for a class B felony, the error is not harmless, and Werner must be resentenced for a class C felony and its lower maximum

sentence. Id. at 624-625; Gonzalez, 2 Wn. App. at 114; RCW 9A.20.021(1)(c)
(maximum authorized sentence for class C felony is five years).

D. CONCLUSION

This Court should vacate the conviction and sentence and remand for
sentencing on a class C felony.

Dated this ___ day of August 2018.

Respectfully submitted,

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