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Court of Appeals
Division II
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NO. 53376-6-II

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

STATE OF WASHINGTON, Respondent

v.

JEFFREY JAMES PALMER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.19-1-00981-06

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. There is no knowledge requirement in RCW 69.50.4013.**
- II. The State agrees and concedes there is insufficient evidence to sustain Palmer's conviction for being a prisoner or jail inmate in possession of marijuana.**
- III. The State agrees that Palmer's judgment and sentence contains a scrivener's error which should be corrected.**

STATEMENT OF THE CASE

The State charged Jeffrey Palmer (hereafter 'Palmer') with Possession of a Controlled Substance by Prisoners or Jail Inmate, Possession of a Controlled Substance – Methamphetamine, Criminal Trespass in the Second Degree, and Obstructing a Law Enforcement Officer. CP 5-6. The evidence at trial shows the following:

On April 5th, 2019, Palmer had been admitted to Legacy Salmon Creek Hospital in Vancouver, WA. RP 156. Before finishing his necessary treatment, Palmer vacated his room and a nurse requested the assistance of hospital safety and security officer, Kenneth MacDonald (hereafter MacDonald), to escort Palmer. RP 156-57, 252. MacDonald offered his assistance and Palmer requested to use the restroom. RP 158. MacDonald pointed Palmer in the direction of the restroom and Palmer stood outside the restroom then decided he didn't want to use the restroom anymore and wanted to call a cab instead. RP 159. MacDonald escorted Palmer to the

emergency department lobby where there was a courtesy phone that Palmer could use to call a cab. RP 159. Palmer stood by the phone and decided he did not want to make a phone call and requested to use the bathroom again. RP 159. MacDonald pointed to a public restroom at the end of the emergency department lobby. RP 160. Palmer did not move towards the bathroom, he fidgeted where he was and told MacDonald that he wanted to catch a bus instead. RP 160.

MacDonald attempted to escort Palmer to the bus stop, but Palmer did not want to exit the hospital. RP 160. Instead he stood indecisively just outside the lobby for a moment then tried to walk back into the hospital. RP 160-61. MacDonald stopped Palmer from entering the hospital and told him "It's time to leave. You have no more business here." RP 161. Palmer had not requested additional medical assistance up to that point. RP 161. Palmer exited the hospital, walked part way into the parking lot then came back to the hospital and said he did not want to take a bus anymore. RP 161. MacDonald told Palmer he needed to leave or he would be placed under arrest for trespassing. RP 161. Palmer did not leave. RP 162. MacDonald told Palmer he was under arrest, placed him in handcuffs, and awaited the arrival of a Deputy from the Clark County Sheriff's Office. RP 162.

Deputy Alan Earhart of the Clark County Sheriff's Office arrived at the hospital where he was advised of the situation by MacDonald. RP 175-76. Deputy Earhart placed Palmer under arrest and searched his person incident to the arrest. RP 176. Inside Palmer's pockets, Deputy Earhart found a glass pipe, a black plastic container from a marijuana dispensary, aluminum foil with burn marks, an aluminum can with burn marks, and marijuana. RP 176. Deputy Earhart transported Palmer to the parking lot of the Clark County jail. RP 181. While in the parking lot, Deputy Earhart was filling out a "Prebook" form and a probable cause statement when Palmer told Deputy Earhart that he needed to use the bathroom, urgently. RP 182. Deputy Earhart asked Palmer if he could wait fifteen minutes while he finished his forms and Palmer told him "No." RP 182. In an effort to accommodate Palmer's emergency situation, Deputy Earhart did not finish his "Prebook" form or probable cause statement, did not investigate the items he had found in Palmer's pockets, and escorted Palmer into the jail. RP 183. Palmer was stripped down to one layer of clothing, given an initial pat down by corrections Deputy Luke Hatcher, and was escorted to a toilet he could use in the presence of Deputy Earhart. RP 183-84, 216.

Palmer stood in front of the toilet, moved around a lot and appeared to be positioning things in his groin area. RP 184. Palmer urinated very little

and continued to move things around until he was stopped by Deputy Earhart because it appeared he was not going to urinate any more. RP 184. Deputy Earhart advised Palmer that it appeared he was hiding something, he told Palmer it is a felony crime for an inmate to smuggle contraband into the jail, and if he was in possession of such things he should disclose them. RP 184-85. Palmer did not disclose any contraband to Deputy Earhart at that time. RP 185.

Corrections Deputy Luke Hatcher advised Palmer that he was going to conduct a strip search and that if Palmer had anything on him he should hand it over. RP 218. Palmer did not disclose anything to Deputy Hatcher at that time. RP 218. Deputy Hatcher escorted Palmer to a dressing room and began his strip search. RP 219. Inside Palmer's pants was a black canister and inside Palmer's underwear was a latex glove tied in a knot. RP 219. The glove and the black canister both contained marijuana. RP 185, 220. After the strip search, Deputy Earhart investigated the items he had obtained during his initial search incident to arrest. RP 191-92. Inside the black canister found on Palmer's person at the hospital, Deputy Earhart discovered a baggie with a crystal like substance which was later determined to be methamphetamine. RP 191-92, 237.

Before Palmer could be booked, he told Deputy Earhart that he had eaten a razor blade. RP 197-98. Deputy Earhart advised Palmer that he

believed this was a manufactured claim to avoid being booked into the Clark County jail; that it was against the law to delay Deputy Earhart in his duties to book Palmer into the jail; and that he would transport Palmer back to the hospital to have him examined to determine whether he actually had a razor blade in him or not. RP 198. Deputy Earhart transported Palmer back to the Salmon Creek Legacy Hospital. RP 199.

While waiting to be examined, Palmer requested to use the restroom twice. RP 199. Both times, Palmer urinated a small amount into a hand-held bottle and left it in the bathroom. RP 199. The x-ray determined that there was no razor blade in Palmer's stomach. RP 200. Palmer then told Deputy Earhart that the razor blade must have evacuated his system when he defecated. RP 200. Deputy Earhart told Palmer that he had not defecated during their time together, which had been about two and a half to three hours. RP 200. Palmer replied that the razor blade must have come out when he vomited. RP 201. Palmer had not vomited during his time with Deputy Earhart. RP 201.

After being discharged, Palmer was placed in Deputy Earhart's patrol vehicle where he showed Deputy Earhart a wire he had taken from the hospital. RP 201-02. A piece of the wire had been cut off and Palmer told Deputy Earhart he had eaten it. RP 201-02. Deputy Earhart found the missing piece of the wire tucked in Palmer's waistband. RP 202. Deputy

Earhart confirmed with hospital staff that no additional pieces of the wire were missing. RP 202. Palmer claims that there were two wires and he had eaten a part of the other wire and flushed the rest down the toilet while he was in the restroom when he was waiting to be examined for the razor blade. RP 279. According to Deputy Earhart's testimony, Palmer never flushed the toilet when he was using the bathroom. RP 301. Deputy Earhart escorted Palmer to the Clark County jail for booking. RP 203.

After trial, a jury convicted Palmer of Possession of a Controlled Substance by a Prisoner or Jail Inmate, Possession of a Controlled Substance – Methamphetamine, and Obstructing a Law Enforcement Officer. CP 63-64, 66. He was sentenced to a standard range sentence. CP 70. Palmer timely appeals.

ARGUMENT

I. There is no knowledge requirement in RCW 69.50.4013

Palmer claims the State failed to prove he knowingly possessed methamphetamine and that there is a required mental state of knowledge in RCW 69.50.4013, the statute criminalizing possession of certain drugs. However, RCW 69.50.4013 is a strict liability statute and proof of knowledge is not required. The existence of a strict liability offense does not violate due process and Palmer was properly convicted of possession

of methamphetamine in violation of RCW 69.50.4013. Palmer's claim fails.

In a prosecution for simple possession of a controlled substance there is no intent requirement. *State v. Vike*, 125 Wn.2d 407, 412, 885 P.2d 824 (1994). "The State need not prove either knowledge or intent to possess." *Id.* (citing *State v. Staley*, 123 Wn.2d 794, 872 P.2d 502 (1994)). Consequently, "possession is a strict liability crime." *Id.* (citation omitted). Thus, the State must only prove two elements: "the nature of the substance and the fact of possession by the defendant." *Staley*, 123 Wn.2d at 798. This area of the law is well-settled. *See State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981) (holding that the mere possession statute does not contain a mens rea element); *State v. Bradshaw*, 152 Wn.2d 528, 534, 98 P.3d 1190 (2004) (refusing to overrule *Cleppe* and noting that in the 22 years "[s]ince *Cleppe* the legislature has amended [the drug possession statute] seven times and has not added a mens rea element").

The legislature has wide latitude in creating and defining criminal offenses. *See Lambert v. California*, 355 U.S. 225, 228, 78 S.Ct. 240, 2 L.Ed.2d 228 (1957). This includes the authority to create strict liability crimes that do not include a culpable mental state. *State v. Schmeling*, 191 Wn.App. 795, 801, 365 P.3d 202 (2015); *Bradshaw*, 152 Wn.2d at 532; *State v. Anderson*, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000); *State v.*

Rivas, 126 Wn.2d 443, 452, 896 P.2d 57 (1995). The legislature intentionally created a strict liability offense when it criminalized the possession of methamphetamine. *Bradshaw*, 152 Wn.2d at 534-38; *State v. Cleppe*, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981).

Our Supreme Court has already addressed the issue Palmer raises in his appeal. In *State v. Bradshaw, supra*, the defendant argued that the possession of a controlled substance statute violated due process because it criminalized potentially innocent behavior. *Bradshaw*, 152 Wn.2d at 539. The Supreme Court rejected this argument without discussion. *Id.* In *State v. Cleppe, supra*, the Supreme Court held that the legislature deliberately omitted knowledge and intent elements of the crime of unlawful possession of a controlled substance and that there was no implied existence as to those elements. *Cleppe*, 96 Wn.2d at 380-81; *see also Bradshaw*, 152 Wn.2d at 534-38.

This Court has also weighed in on this issue. In *State v. Schmeling, supra*, this Court addressed the same argument that Palmer now raises – that there is an implied element in the possession statute which requires proof of knowledge in order to sustain a conviction. This Court cited our Supreme Court’s continued approval of the legislature’s adoption of a strict liability offense and affirmed Schmeling’s conviction for possession of a controlled substance, finding his conviction did not violate due

process. *Schmeling*, 191 Wn.App. at 802. This Court should decline Palmer's invitation to depart from long-settled law and find that possession of a controlled substance requires a knowledge *mens rea*.

II. The State agrees and concedes there is insufficient evidence to sustain Palmer's conviction for being a prisoner or jail inmate in possession of marijuana.

Palmer argues the State failed to prove an essential element of the crime of possession of a controlled substance by a prisoner or jail inmate. The State agrees that it failed to present evidence that Palmer was confined in a county or local correctional institution at the time the police found the marijuana in his possession. Accordingly, the conviction for possession of a controlled substance by a prisoner or jail inmate should be vacated.

RCW 9.94.041(2) prohibits possession of a controlled substance by a person confined in a county or local correctional institution. The elements presented at trial included that Palmer was confined in a county or local correctional institution. CP 47. The evidence showed Palmer was not yet booked into the jail facility at the time the police found the marijuana on him. Even when taken in the light most favorable to the State, this evidence is insufficient to show that Palmer was confined in a county or local correctional institution. The State agrees with Palmer that the remedy is vacation of the conviction.

III. The State agrees that Palmer's judgment and sentence contains a scrivener's error which should be corrected.

Palmer's judgment and sentence contains an order that interest shall accrue on all legal financial obligations until they are paid in full. CP 31. However, interest shall no longer accrue on non-restitution financial obligations. RCW 10.82.090. Thus the provision in Palmer's judgment and sentence that orders interest to accrue on all legal financial obligations is in error. The matter should be remanded to the trial court to strike this provision from the judgment and sentence.

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CONCLUSION

The law is well-settled that the legislature is capable of creating strict liability offenses and that is what it chose to do in the possession of a controlled substance statute. Accordingly, the State had no obligation to prove a knowledge element in Palmer's conviction for RCW 69.50.4013. Palmer's conviction for possession of a controlled substance should be affirmed. The State, however, agrees with Palmer that his possession of a controlled substance by a prisoner or jail inmate conviction should be vacated and that the provision in his judgment and sentence ordering interest to accrue on non-restitution legal financial obligations should be stricken.

DATED this 13th day of February, 2020.

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