

FILED

MAR 29 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

NO. 290867-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JOHNNY CARLOS MENDOZA, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-01127-7

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

ARTHUR J. BIEKER, Deputy
Prosecuting Attorney
BAR NO. 3894
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

FILED

MAR 29 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. 290867-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

JOHNNY CARLOS MENDOZA, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-01127-7

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

ARTHUR J. BIEKER, Deputy
Prosecuting Attorney
BAR NO. 3894
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

1. THERE IS NO DUE PROCESS VIOLATION
CONCERNING THE PLACE OF THE DRUG
DELIVERIES IN THE INSTANT CASE 1

 A. Eaton does not apply 1

 B. The instant case is controlled
 instead by *State v. Coria*, 120
 Wn.2d 156, 166-169, 839 P.2d 890
 (1992) 2

2. THE NOTION THAT THE OFFICERS OF THE
METRO DRUG TASK FORCE CHOSE THE PLACE
OF DELIVERY IS NOT SUPPORTED BY THE
RECORD. 3

 A. There was no prosecutorial
 misconduct 3

 B. The sentence of the defendant was
 correct as a matter of law 4

CONCLUSION 6

TABLE OF AUTHORITIES

WASHINGTON CASES

In re Brooks,
166 Wn.2d 664, 211 P.3d 1023 (2009) 4, 5

State v. Cantu,
156 Wn.2d 819, 132 P.3d 725 (2006) 1

State v. Coria,
120 Wn.2d 156, 839 P.2d 890 (1992) 2

State v. Eaton
168 Wn.2d 476, 229 P.3d 704 (2010) 1

WASHINGTON STATUTES

RCW 9A.20.021 5

ARGUMENT

1. **THERE IS NO DUE PROCESS VIOLATION CONCERNING THE PLACE OF THE DRUG DELIVERIES IN THE INSTANT CASE.**

A. *Eaton* does not apply.

The defendant relies on *State v. Eaton*, 168 Wn.2d 476, 229 P.3d 704 (2010), for the proposition that the State has failed to prove that the defendant volitionally delivered drugs inside the enhancement zone. *Eaton* dealt with a defendant who was charged with possession of a controlled substance within a jail. *Eaton* was arrested for DUI and transported to a second county where drugs were found on his person at the jail. The jail enhancement was invoked, and the Court held the State did not prove that *Eaton* volitionally possessed drugs inside the enhancement zone, because law enforcement took him there. *Id.* at 488.

In *State v. Cantu*, 156 Wn.2d 819, 822, 132 P.3d 725 (2006), the Court found a permissive

inference, because such an inference does not relieve the State of it's burden of proof.

B. The instant case is controlled instead by *State v. Coria*, 120 Wn.2d 156, 166-169, 839 P.2d 890 (1992).

Coria dealt with the issue of the unconstitutionality of the school bus zone enhancement based on notice to the drug dealer of where the zones were and what the drug dealer knew when he delivered drugs inside a school bus zone. The Court held:

[T]he type of conduct RCW 69.50.435 proscribes is clear. The absence of a requirement that the drug dealer knew he was in proximity to a school bus route stop does not offend the due process requirement of fair notice. Nor is due process offended by the fact that the statute places on drug dealers the burden of determining by readily understandable and available means the proximity of their illegal activities to school bus route stops. We therefore reject the defendants' contention that RCW 69.50.435 is unconstitutionally vague.

Id. at 169.

2. THE NOTION THAT THE OFFICERS OF THE METRO DRUG TASK FORCE CHOSE THE PLACE OF DELIVERY IS NOT SUPPORTED BY THE RECORD.

Defendant relies on a statement made by Detective Steve Caughey to the effect that the Confidential Informant may make contact with the target, arranging to meet the target, and that there might later be text messages between the target and the defendant, further settling where the delivery is to take place. (RP 60-61). Nothing in that record states that there is anything other than negotiation between the parties to buy drugs.

A. There was no prosecutorial misconduct.

Taken as a whole, the argument was not "vouching" for the witness. The prosecutor began in opening argument informing the jury that they alone were to decide what happened in the case. (RP 103-104).

In response to defendant's anticipated argument to the effect that the police officers lacked objectivity, the prosecutor made contrast between what the police could have testified to had they lacked objectivity and their actual testimony. (RP 103-110, 120). As argument, the prosecutor said, "Given the testimony of these officers and their refusal to put any sharp edges on it that don't belong, I think that you have to find them credible." (RP 109-110). This is not the same thing as "You must find" or "I believe." In context it is argument, and defendant's removal of a snippet of the record out of context is not well taken.

B. The sentence of the defendant was correct as a matter of law.

The sentencing in this matter is controlled by *In re Brooks*, 166 Wn.2d 664, 211 P.3d 1023 (2009), as set out by the defendant. *Brooks* requires that the term of confinement taken together with the term of community supervision not exceed the statutory maximum, and that the

Judgment and Sentence so provide. *Id.* The Judgment and Sentence in the instant matter provides as follows:

*The above term of community custody or community placement shall be reduced by the court whenever an offender's term of confinement, in combination with the term of community custody or community placement exceeds the statutory maximum for the crime provide in RCW 9A.20.021. **The term of confinement shall be completed when the defendant has served the confinement imposed herein or is released from custody pursuant to any earned early release credits.** (Emphasis added.)*

(CP. 78).

Since the term of custody has not yet been determined and may be shorter than 108 months, and that eventually is provided for in the Judgment and Sentence, the defendant's contention that this sentence exceeds the statutory maximum is premature. (App. Brief at 8). The requirements of *Brooks* and RCW 9A.20.021 are not met, and no reformation of the sentence is required.

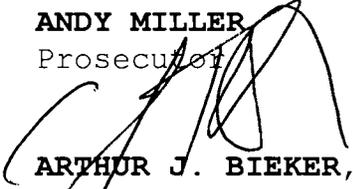
CONCLUSION

The State did not choose the place of the transaction as set out by the defendant. Had the State chosen the place of the transaction, there would have been no due process violation with respect to the school bus zone enhancement. Further, no prosecutorial misconduct occurred, and the Judgment and Sentence imposed is proper under the controlling statutory and case law authority.

RESPECTFULLY SUBMITTED this 28th day of
March 2011.

ANDY MILLER

Prosecutor



ARTHUR J. BIEKER, Deputy

Prosecuting Attorney

Bar No. 3894

OFC ID NO. 91004

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

NO. 290867

vs.

DECLARATION OF SERVICE

JOHNNY CARLOS MENDOZA,

Appellant.

I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Brief of Respondent* and this *Declaration of Service*, on March 28, 2011.

Janet G. Gemberling
Gemberling & Dooris PS
P.O. Box 9177
Spokane, WA 99209-9166

- U.S. Regular Mail, Postage Prepaid
- Legal Messenger
- Facsimile

JOHNNY CARLOS MENDOZA
#865850
STAFFORD CREEK CORRECTION CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

- U.S. Regular Mail, Postage Prepaid
- Legal Messenger
- Facsimile

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Kennewick, Washington, on March 28, 2011.



PAMELA BRADSHAW