

NO. 29708-0-III

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

**FILED**

**AUG 04 2011**

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER TAYLOR,

Appellant.

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

The Honorable Evan E. Sperline, Judge  
The Honorable John Antosz, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied his right to unanimous jury verdicts in violation of his rights under the Sixth Amendment and Wash. Const. art. 1, §22.

2. The trial court erred in failing to enter Findings of Fact and Conclusions of Law pursuant to CrR 3.6(b).

Issues Pertaining to Assignments of Error

1. Appellant was charged with one count of possession of heroin and one count of use of drug paraphernalia. There was evidence presented at trial of several items that may have contained heroin Appellant could have possessed. There was also evidence presented at trial regarding several items that could have qualified as drug paraphernalia that may have been used by Appellant. When the State failed to elect which item containing heroin, or which item of drug paraphernalia it was relying on to convict Appellant of the charges, and where the jury was never instructed it had to be unanimous as to which item or items it relied on to convict, was Appellant denied his right to unanimous jury verdicts?

2. Where a trial court fails to enter written findings of fact and conclusions of law as required by CrR 3.6(b), is remand for entry of findings and conclusions required?

B. STATEMENT OF THE CASE

1. Procedural History

The Grant County Prosecutor charged Appellant Christopher Taylor with possession of heroin and use of drug paraphernalia. CP 1-2; RCW 69.50.412(1) & .4013.<sup>1</sup> Following a pretrial hearing October 20-21, 2010, before the Honorable John Antosz, Taylor's motion to suppress the physical evidence against him was denied. 1RP<sup>2</sup> 250-56. Following a jury trial December 29-30, 2010, before the Honorable Evan E. Sperline, Taylor was convicted of both charges. CP 124-25; 3RP. On February 1, 2011, the court imposed standard range sentences and Taylor appeals. CP 128-48; 4RP.

2. Substantive Facts

On the evening of June 12, 2009, Moses Lake Police Officer Aaron Hintz stopped a Dodge Neon for having defective equipment. 3RP 104-07. Aside from the driver, there were three passengers in the car; Taylor was in the front passenger seat, and a man and women were in the

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<sup>1</sup> The prosecutor also charged Taylor with possession of oxycontin, but did not prosecute that charge. CP 1-2.

<sup>2</sup> There are six volumes of verbatim report of proceedings referenced as follows: **1RP** - two-volume consecutively paginated set for June 8, July 12, 19 & 26, August 3, September 22, and October 19, 20 & 21, and December 13 & 28, 2010; **2RP** - August 31, 2010; **3RP** - two-volume consecutively paginated set for December 29 & 30, 2010; and **4RP** - February 1, 2011 (sentencing).

back seat. 3RP 94, 97, 108-09, 127. Hintz eventually arrested the driver and placed him in his patrol car. 3RP 109

Officer Luke Sitton assisted Hintz with the stop. 3RP 89-90. While Hintz was taking the driver into custody, Sitton observed the passengers. 3RP 91. According to Sitton, he saw Taylor "digging around under his seat with . . . his left hand." 3RP 93-94. Sitton claimed Taylor ignored orders to stop and show his hands. 3RP 94. After a threat to be subdued with a taser, however, Taylor raised and showed his hands, which held syringes. 3RP 94-95, 110-11.

When Taylor was told to drop the syringes, he discharged their contents onto his shorts and then threw them out of the car. 3RP 95, 112. Taylor was removed from the car, handcuffed, and detained in Sitton's car without incident. 3RP 95-96, 99-100, 112-13.

After Taylor was detained, Hintz had the two remaining passengers get out and he searched them and the car.<sup>3</sup> 3RP 97, 113, 128. Neither passenger actually possessed drugs or drug paraphernalia. 3RP 127.

In his search of the car, however, Hintz found a sticky-brown-residue-stained spoon in the front right corner of the front passenger seat, and two pill bottles with Taylor's name on them on the floor behind the front passenger seat. 3RP 129-31. Inside the pill bottles were pills, plastic

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<sup>3</sup> By pre-trial ruling, the search of the car by Hintz was deemed constitutional because it was reasonably necessary under the circumstances to ensure officer safety. 1RP 250-56.

bags containing a black tar substance later determined to contain heroin, and a baggy containing green vegetable matter. 3RP 154; Exs 12, 13 & 14, 16.<sup>4</sup>

In his closing, the prosecutor highlighted for the jury the evidence that there was potential heroin on the spoon (Officer Hintz testified the spoon smelled like heroin, 3RP 130), that the brown residue found on the syringes was consistent with it being heroin (Officer Hintz testified he saw brown residue on the syringes, and that black tar heroin is processed for use by melting it in a spoon and then drawing it into a syringe for injection, 3RP 132, 138), and the lab test showing the substance in the plastic bags in one of the pill bottles contained heroin. 3RP 218-19. Without identifying which of those items he wanted the jury to rely on to convict Taylor of possessing heroin, the prosecutor merely concluded, "The state proved the possession, proved the elements of possession of a controlled substance beyond a reasonable doubt." 3RP 219.

Similarly, the prosecutor highlighted in closing the instruction defining what constitutes "drug paraphernalia," noting that "it includes, but is not limited to containers and other objects used or intended for use, or designed for use in storing or concealing controlled substances. . .".

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<sup>4</sup> Exhibit 16 is a lab report stating that the black tar substance in the plastic bags contains heroin. 3RP 140; Ex. 16. Neither the spoon, syringes, or Taylor's shorts were analyzed by the crime lab.

3RP 220 (quoting CP 120 (Instruction 7)). The prosecutor then argued that the jury, in considering the drug paraphernalia charge, should note "that a syringe, a spoon, a pill bottle, plastic baggies, these can all be drug paraphernalia. All these items [were] used by Mr. Taylor that night." 3RP 220.

C. ARGUMENTS

1. TAYLOR WAS DENIED HIS CONSTITUTIONAL RIGHT TO UNANIMOUS JURY VERDICTS

To convict Taylor of possession of a controlled substance as charged and tried, the State had to prove beyond a reasonable doubt that "on or about June 12, 2009," he possessed heroin. CP 1 (information specifically charged heroin possession); CP 117 (Instruction 4). To this end, the prosecutor introduced evidence of the heroin in the plastic bag inside the pill bottle with Taylor's name on it, evidence the heroin on the spoon, and evidence of the heroin in syringes Taylor squirted onto his shorts.

To convict Taylor of use of drug paraphernalia, the prosecutor had to convince a jury beyond a reasonable doubt that "on or about June 12, 2009," Taylor "used drug paraphernalia to prepare, store, contain, or conceal a controlled substance, or to inject, ingest, inhale or otherwise introduce a controlled substance into the human body". CP 119

(Instruction 6). To this end, the prosecutor introduced evidence of the syringes, the spoon, the pill bottles and the plastic bags.

The jury, however, was never instructed that to convict on either charge it had to be unanimous on which item or items of physical evidence it was relying. Nor did the State ever elect which item or items on which it was relying. See 3RP 210-21 (prosecutor's closing argument); 3RP 231-33 (prosecutor rebuttal closing argument). Because individual jurors may have relied on different items to find Taylor guilty on both charges, it cannot be said Taylor's constitutional right to unanimous jury verdicts was satisfied and therefore reversal of both convictions is required.

A defendant may only be convicted when a unanimous jury concludes the act charged has been committed. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); Wash. Const. art. 1, §22; U.S. Const. Amend 6. Where different acts could form the basis for the charge: 1) the State must elect the act on which it will rely for conviction; or 2) the trial court must instruct the jury to agree unanimously, beyond a reasonable doubt, on a specific criminal act as the basis of conviction. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984); State v. Vander Houwen, 163 Wn.2d 25, 37-38, 177 P.2d 93 (2008). This is an issue of constitutional magnitude that can be raised for the first time on appeal. State v. Watkins, 136 Wn. App. 240, 244, 148 P.3d 1112 (2006),

review denied, 161 Wn.2d 1028 (2007), cert. denied, 128 S. Ct. 1707 (2008); Vander Houwen, 163 Wn.2d at 38.

Here, there was no unanimity instruction given to the jury and the State never elected which items it was on to convict Taylor of the charges. To the contrary, in closing the prosecutor specifically noted the multitude of items the jury could rely on for each of the charges. 3RP 218-20. The lack of either proper elections or a unanimity instruction was error.

This error was not harmless and therefore reversal is required. See Vander Houwen, 163 Wn.2d at 38-40 (standard is whether such error is harmless beyond a reasonable doubt); Kitchen, 110 Wn.2d at 409, 411-12 (same). The jurors could have relied on the syringes, the spoon or the black tar substance found in the baggy inside the pill bottle to convict Taylor of possession of heroin because there was evidence that each contained heroin. Similarly, the jurors could have relied the syringes, the spoon, the pill bottles or the plastic bags to convict Taylor for use of drug paraphernalia because each arguably met the definition of drug paraphernalia used by Taylor. But there was also a basis for any particular juror to conclude the prosecution failed to prove beyond a reasonable doubt that any particular item Taylor "possessed" contained heroin or that any particular item he used constituted "drug paraphernalia." See CP 118

(Instruction 5, defining "possession"); CP 120 (Instruction 7, defining "drug paraphernalia").

For example, Officer Hintz's testified that based on his experience and training, the brown sticky residue on the spoon smelled like heroin, and as such indicated it had been used in preparing black tar heroin for use. 3RP 129-30. A juror could conclude from this evidence that the spoon both contained heroin and that it also constituted "drug paraphernalia," and that given where it was found (i.e., where Taylor was sitting when the car was stopped), it belonged to Taylor and that he had used it. 3RP 129-30. Other jurors, however, could have concluded Taylor's mere proximity to the spoon was not enough to conclude beyond a reasonable doubt that he used it, or that the heroin on it was his.

Similarly, neither the syringes nor the shorts Taylor allegedly discharged their contents on to were ever tested by the crime lab, but Officer Hintz's testimony was sufficient to support findings that they contained heroin and were used to injected heroin into the body. 3RP 138, 149-50. As such, although some jurors could have convicted Taylor of both charges based on the syringes, other jurors could have concluded they were just as likely used for storing or injecting something other than a controlled substance into a human body.

The same is true for the pill bottles, the plastic bags, and the black tar substance contained in those bags. There was a basis to conclude they were used by Taylor to store or conceal heroin. But some jurors may have concluded the State failed to prove it was Taylor who placed the items in them and therefore failed to prove beyond a reasonable doubt that Taylor "used" them for the unlawful purpose, or that he "possessed" the heroin found in them. CP 117, 119 (Instructions 4 & 6).

What cannot be established is which of the many items presented was relied on by the jury to convict, or whether all of the jurors agreed on any particular item. Thus, the State cannot prove that its failure to elect which item or items it was relying on for each charge and the court's failure to instruct the jury on the unanimity requirement was harmless error because the possibility exists that some jurors relied one item to convict Taylor while others relied on another. Therefore, reversal is required. Vander Houwen, 163 Wn.2d at 38-40; Kitchen, 110 Wn.2d at 409, 411-12.

2. THE COURT'S FAILURE TO COMPLY WITH CrR 3.6(b) WARRANTS REMAND FOR ENTRY OF THE REQUIRED WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW.

After a hearing on a motion to suppress evidence, the trial court must enter written findings of facts and conclusions of law. CrR 3.6(b).

Written findings and conclusions are mandatory. State v. Cunningham, 116 Wn. App. 219, 227, 65 P.3d 325 (2003). The trial court and the prevailing party share the responsibility to see that appropriate findings and conclusions are entered. State v. Vailencour, 81 Wn. App. 372, 378, 914 P.2d 767 (1996) (regarding analogous CrR 6.1 (d), which requires entry of written findings of fact and conclusions of law after bench trial).

Here, the trial court held a hearing on Taylor's motion to suppress the evidence seized by police from the Neon. CP 82-84; 1RP 130-256. The court denied the motion, but failed to enter written findings of fact and conclusions of law. 1RP 250-56.<sup>5</sup>

The purpose of written findings and conclusions is to promote efficient and precise appellate review. State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996); see State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998) (written findings necessary to simplify and expedite appellate review). The absence of written findings and conclusions prohibits effective appellate review.

Although the trial court entered oral findings, such findings are not a suitable substitute; a court's oral opinion is not a finding of fact. State v. Hescoc, 98 Wn. App. 600, 605-06, 989 P.2d 1251 (1999). Rather, a

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<sup>5</sup> The prosecutor filed "Proposed Findings of Fact and Conclusions of Law for 3.6 Hearing", but the trial court never signed and entered a final version. CP 151-55 (a supplemental designation of clerk's papers was filed on August 1, 2011, and these are the expected Clerk's Paper index numbers for this document).

court's oral opinion is merely an expression of the court's informal opinion when rendered. Head, 136 Wn.2d at 622. An oral opinion is not binding unless it is formally incorporated in the written findings, conclusions and judgment. Id., citing State v. Mallory, 69 Wn.2d 532, 533, 419 P.2d 324 (1966).

A trial court's failure to enter written findings and conclusions requires remand for entry of the required findings. Head, 136 Wn.2d at 624. Here, because the trial court failed to enter written findings and conclusions, remand is the appropriate remedy.

D. CONCLUSION

This Court should reverse Taylor's convictions because he was denied his right to unanimous jury verdicts. Also, because the trial court failed to follow CrR 3.6 (b), this Court should remand for entry of written findings of fact and conclusions of law.

DATED this 2nd day of August 2011.

Respectfully submitted,

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