

FILED
Oct 05, 2011
Court of Appeals
Division III
State of Washington

No. 29708-0-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

State of Washington, Respondent,

v.

Christopher Taylor, Appellant.

BRIEF OF RESPONDENT

GRANT COUNTY PROSECUTOR'S OFFICE
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Table of Contents

Statement of the Issues.....	3
A. Issue 1	3
B. Issue 2.....	3
Statement of the Case.....	3
A. Procedural History	3
B. Statement of Facts.....	4
Argument	6
A. <u>The constitutional right to a unanimous verdict was not violated</u> ..	6
1. Unanimity was maintained because the Defendant’s acts constituted a continuous course of conduct	7
2. Even if the acts were distinct, any unanimity error was harmless because a rational trier of fact could have found each incident proved beyond a reasonable doubt.....	10
B. <u>It was harmless error when the court did not enter written findings of fact and conclusions of law after the CrR 3.6 hearing</u>	11
1. The trial court’s lack of written findings and conclusions is harmless error because the court’s oral findings and conclusions are sufficient to permit appellate review.....	12
Conclusion	13

Table of Authorities

State Cases

State v. Adel, 136 Wn.2d 629, 965 P.2d 1072 (1998)..... 10

State v. Apodaca, 67 Wn. App. 736, 839 P.2d 352 (1992)..... 11

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990)..... 6

State v. Crane, 116 Wn.2d 315, 804 P.2d 10 (1991)..... 8

State v. Craven, 69 Wn. App. 581, 849 P.2d 681 (1993) 8

State v. Cunningham, 116 Wn. App. 219, 65 P.3d 325 (2003)..... 11

State v. Glossbrener, 146 Wn.2d 670, 49 P.3d 128 (2002) 12

State v. Handran, 113 Wn.2d 11, 775 P.2d 453 (1989)..... 6, 8

State v. Kennedy, 107 Wn.2d 1, 726 P.2d 445 (1986) 12

State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994) 7

State v. Loehner, 42 Wn. App. 408, 711 P.2d 377 (1985)..... 6

State v. Love, 80 Wn. App. 357, 908 P.2d 395 (1996) 7-8

State v. Naillieux, 158 Wn. App. 630, 241 P.3d 1280 (2010)..... 8

State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984) 6

State v. Riley, 69 Wn. App. 349, 848 P.2d 1288 (1993)..... 11

State v. Tvedt, 153 Wn.2d 705, 107 P.3d 728 (2005) 10

State Rules

WA CrR 3.6 11

I. STATEMENT OF THE ISSUES

- A. Under the constitutional requirement that a jury reach a unanimous verdict, were the guilty verdicts for both possession of heroin and unlawful use of drug paraphernalia unanimous when the State noted there were multiple heroin substances and items of paraphernalia that were interrelated to each other, consistent with each other, and all found on or near the Defendant at the same time, place, and date?

- B. Under CrR 3.6, was there harmless error when the court did not make written findings of fact and conclusions of law but did issue a clear and comprehensive oral ruling laying out the court's findings of fact and conclusions of law?

II. STATEMENT OF THE CASE

Procedural History

The Defendant was charged with possession of heroin and unlawful use of drug paraphernalia, CP 1-2, and he was subsequently convicted of both charges after a jury trial on December 29-30, 2010, CP 124-125. Before trial, the Honorable John Antosz made an extensive oral ruling denying the Defendant's motion to suppress physical evidence. 1RP 250-56.

Statement of Facts

On June 12, 2009, Moses Lake Police Officer Aaron Hintz stopped a vehicle for having defective equipment. 3RP 104-07. Besides the driver, there were three other passengers in the car including the Defendant who was sitting in the front passenger seat and two other individuals sitting in the rear seat. 3RP 94, 97, 108-09, 127. The driver was subsequently arrested. 3RP 109.

Moses Lake Police Officer Luke Sitton assisted Officer Hintz with the stop. 3RP 89-90. Officer Sitton observed the Defendant digging under his seat. 3RP 93; Officer Sitton told him to “stop digging under your seat, get your hands up,” which the Defendant ignored until Officer Hintz ordered Officer Sitton to tase the Defendant. 3RP 94. At this point, the Defendant brought his hands up holding hypodermic needles. 3RP 94-95. Shortly thereafter, the Defendant discharged the liquid in the syringes onto his shorts before throwing them onto the ground. 3RP 95. Some of the liquid splattered onto Officer Sitton and some onto the Defendant’s hands. 3RP 96. At this point, the Defendant was removed from the car and detained. 3RP 95-96, 99-100, 112-13.

During a search of the car, Officer Hintz looked around the area where the Defendant had been sitting and reaching. 3RP 129. He found a spoon in the front right corner of the seat with a brown stick residue on it; based

on his training and experience, Officer Hintz the substance looked and smelled like black tar heroin. 3RP 129-30. Officer Hintz also found a few plastic baggies with a black tar substance later determined to contain heroin and a baggy containing green vegetable matter. 3RP; Exs 12-14, 16. Finally, Officer Hintz examined the syringes that were thrown away by the Defendant. 3RP 132. Inside the needles was a brown fluid residue that Officer Hintz believed was heroin. 3RP 132. The brown substance found in the baggies tested positive for heroin. Ex 16.

Officer Hintz testified how all the items found near or in front of the Defendant related to heroin use. 3RP 137-39. He stated that the most common method of heroin use is via injection. 3RP 137. He also testified that heroin comes in a brown tar-like substance initially, and that a user generally will eat it up, thus converting it to liquid form, and then put it into a syringe for injection. 3RP 138. Officer Hintz stated a common technique for heating the heroin is to place it on a spoon and use a lighter or other heat source underneath the spoon. 3RP 138-39.

III. ARGUMENT

A. The constitutional right to a unanimous verdict was not violated.

Although a jury must reach a unanimous verdict on one particular incident where several distinct acts are presented, this rule does not apply where the evidence indicates a “continuing course of conduct.” *State v. Handran*, 113 Wn.2d 11, 12, 775 P.2d 453, 457 (1989), *citing to State v. Petrich*, 101 Wn.2d 566, 571, 683 P.2d 173 (1984). If the court finds that there was no continuous course of conduct (i.e., that there were multiple distinct acts), then the court must determine whether the error was harmless. In this context, the error is harmless if no rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. *State v. Loehner*, 42 Wn. App. 408, 411, 711 P.2d 377 (1985), *quoted by State v. Camarillo*, 115 Wn.2d 60, 65, 794 P.2d 850 (1990).

Thus a two part analysis is required to determine whether a reversible error occurred with respect to the constitutional right to a unanimous verdict: (1) determine whether the acts were distinct or a “continuous course of conduct”; and (2) if the acts were distinct, determine whether no rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt.

1. Unanimity was maintained because the defendant's acts constituted a continuous course of conduct.

As mentioned above, an election or *Petrich* instruction is unnecessary where the acts indicated a continuous course of conduct. *Handran* at 12. To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner. *Petrich* at 571.

Two cases in particular define “continuing course of conduct” in the context of drug possession charges. *State v. Love*, 80 Wn. App. 357, 908 P.2d 395 (1996); *State v. King*, 75 Wn. App. 899, 878 P.2d 466 (1994). In *King*, the court held that there was not a continuous course of conduct for possession of cocaine. *King* at 903. However the court based this holding on the fact that the instances of cocaine possession occurred “at different times, in different places, and involving two different containers . . . one alleged possession was constructive, the other actual.” *Id.*

In the later case of *State v. Love*, the court held that there was a continuous course of conduct for possession of cocaine while distinguishing the facts from those in *King*. *Love* at 362. In *Love*, the defendant possessed some cocaine on his person and some in his residence. *Id.* In holding there was a continuous course of conduct, the

court stated “Love’s possession of the five rocks of cocaine on his person and the 40 rocks in his residence, when considered in conjunction with the other evidence of an ongoing drug trafficking operation found in Love’s residence, reflect his single objective to make money by trafficking cocaine; thus both instances of possession constituted a continuous course of conduct.” *Id.*

The court has defined “continuous course of conduct” in a number of other contexts as well. *See State v. Crane*, 116 Wn.2d 315, 804 P.2d 10 (1991) (holding that multiple acts of assault over a two hour time period resulting in the death of a child constituted a continuous course of conduct); *State v. Handran*, 113 Wn.2d 11, 775 P.2d 453 (1989) (holding that there was a continuous course of conduct rather than distinct acts when the conduct occurred in one place during a short period of time between the same aggressor and victim); *State v. Naillieux*, 158 Wn. App. 630, 640, 241 P.3d 1280, 1284 (2010) (holding that there was a continuous course of conduct with respect to the crime of manufacturing methamphetamine where the defendant took a number of steps in Washington and Oregon to prepare and produce meth); *State v. Craven*, 69 Wn. App. 581, 849 P.2d 681 (1993) (holding that unanimity instruction was not required because there was a “continuing course of conduct” where the defendant had abused the victim over a three-week period).

In the present case, the Defendant's acts constituted a continuous course of conduct for both of the charged crimes. First and most importantly, all the paraphernalia items and heroin were found at the same time, at the same location (in very close proximity to one another), and on or near the same person (the defendant). 3RP 94-130. As noted in the cases cited above, one of the key factors courts look at when determining whether acts were distinct or continuous was whether they occurred on the same date, time, and location; this factor is met in this case.

Second, the individual items of drug paraphernalia are interlinked with each other just as the various locations where heroin was located are interlinked with each other. With respect to the heroin, and taking Officer Hintz's testimony into account, it appears that each location that the heroin was found at represented a different stage in the process of preparing the heroin for injection. 3RP 130-33, 137-39. Similarly, each item of paraphernalia assisted in different stages of heroin storage, processing or consumption. 3RP 130-33, 137-39. Both the multiple items of paraphernalia and multiple locations where heroin was found are mere aspects of the larger purpose: to store, process, and consume/inject heroin. This interdependence indicates a continuous course of conduct.

And third, a helpful reference point for this analysis is whether charging each incident would have violated the defendant's protection

from double jeopardy. Given that the heroin was found in the same location and at the same time, charging one count per location would almost certainly violate double jeopardy. It is less clear what the unit of prosecution is on the unlawful use of drug paraphernalia charge. However it should be noted that “if the legislature fails to define the unit of prosecution or its intent is unclear, under the rule of lenity any ambiguity must be resolved against turning a single transaction into multiple offenses.” *State v. Tvedt*, 153 Wn.2d 705, 711, 107 P.3d 728 (2005), quoting *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). This double jeopardy analysis, although not definitive, supports the conclusion that the multiple items and locations in question indicate a continuous course of conduct.

2. Even if the acts were distinct, any unanimity error was harmless because a rational trier of fact could have found each incident proved beyond a reasonable doubt.

Even if the acts are characterized as distinct, the error is nevertheless harmless if no rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. *Camarillo* at 65.

In this case, the items of heroin and drug paraphernalia are so closely linked together that it would be very difficult for a rational trier to

conclude either that (1) one of the substances was heroin and another was not or that (2) one of the items was drug paraphernalia and the other was not. As discussed supra, Officer Hintz testified that each paraphernalia item played a role in the storage and consumption of heroin. 3RP 130-33, 137-39. He also testified that all the substances he identified as heroin appeared very similar and consistent with one another. 3RP 130-33, 137-39.

B. It was harmless error when the court did not enter written findings of fact and conclusions of law after the CrR 3.6 hearing.

Although CrR 3.6(b) states that “the court shall enter written findings of fact and conclusions of law after an evidentiary hearing is conducted,” the lack of written findings and conclusions is harmless error as long as the trial court’s oral findings are sufficient to permit appellate review. *State v. Riley*, 69 Wn. App. 349, 353, 848 P.2d 1288, 1291 (1993). In *Riley*, the court held that the failure to enter written findings and conclusions was harmless error “because the court’s oral decision sufficiently set forth its reasons for denial [of Riley’s motions to suppress].” *Id.* See also *State v. Cunningham*, 116 Wn. App. 219, 226, 65 P.3d 325, 328 (2003) (holding that the failure to enter written findings required by CrR 3.5 was harmless error because the court’s oral findings were sufficient to permit appellate review); *State v. Apodaca*, 67 Wn. App.

736, 739, 839 P.2d 352, 354 (1992) (holding that the failure to enter written findings was harmless error because “the court’s oral opinion [was] comprehensive.”)

1. The trial court’s lack of written findings and conclusions is harmless error because the court’s oral findings and conclusions are sufficient to permit appellate review.

In this case, the Honorable John Antosz made an extensive and complete oral ruling denying the Defendant’s motion to suppress. 1RP 250-56. First, the court adopted the State’s recitation of the facts, noting the prosecutor “had all the facts just right on point, and they were all as I heard the testimony and as I would find . . . so that would simply be my findings of fact.” 1RP 251. Next, the judge moved on to his conclusions of law. He ruled that Officer Hintz’s search of the vehicle was lawful because it was a frisk of the immediate area for safety reasons following a lawful Terry stop. In support of this ruling, the judge cited to two cases in particular: *State v. Kennedy*, 107 Wn.2d 1, 726 P.2d 445 (1986) and *State v. Glossbrener*, 146 Wn.2d 670, 49 P.3d 128 (2002). 1RP 251-256. Specifically, the judge found that Officer Hintz had a reasonable belief that there were weapons in the area that the Defendant had been reaching (under the seat). 1RP 255. He also found that because Officer Hintz had this reasonable belief, he was then justified in looking in the area where he

believed the weapons to be (and where heroin and paraphernalia were subsequently found). 1RP 255.

Because the trial court laid out comprehensive findings of fact and conclusions of law that are more than sufficient for an appellate court to review, any error in the lack of written findings and conclusions is harmless.

IV. CONCLUSION

For the reasons set out above, the State respectfully requests that the Court affirm the trial court's convictions.

DATED: September 27, 2011

Respectfully submitted:
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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 29708-0-III
)	
vs.)	
)	
CHRISTOPHER TAYLOR,)	DECLARATION OF SERVICE
)	
Appellant.)	
_____)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Christopher H. Gibson
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That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Brief of Respondent in the above-entitled matter.

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Dated: October 5, 2011.



Kaye Burns