FILED
May 13, 2014
Court of Appeals
Division III
State of Washington

31794-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LARRY G. MARQUETTE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

APPELLANT'S ASSIGNMENTS OF ERROR.....1

ISSUES PRESENTED.....2

STATEMENT OF THE CASE.....2

ARGUMENT.....5

A. THE REQUISITE FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR THE CrR 6.1 HEARING HAVE BEEN REDUCED TO WRITTEN FORM AND FILED 5

B. THE REQUISITE FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR THE CrR 3.5 HEARING HAVE BEEN REDUCED TO WRITTEN FORM AND FILED 6

C. THE DEFENDANT HAS NOT SHOWN THAT THE LOWER COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS.....6

D. THE EVIDENCE PRESENTED WAS AMPLE TO PERMIT A RATIONAL TRIER OF FACT TO FIND THE DEFENDANT GUILTY AS CHARGED 13

CONCLUSION.....15

TABLE OF AUTHORITIES

WASHINGTON CASES

BROWN V. GENERAL MOTORS CORP., 67 Wn.2d 278,
407 P.2d 461 (1965)..... 11

STATE V. BONISISIO, 92 Wn. App. 783,
964 P.2d 1222 (1998), *review denied*,
137 Wn.2d 1024 (1999) 13

STATE V. CAMPBELL, 103 Wn.2d 1,
691 P.2d 929 (1984)..... 11

STATE V. DELMARTER, 94 Wn.2d 634,
618 P.2d 99 (1980)..... 13

STATE V. FERRIER, 136 Wn.2d 103,
960 P.2d 927 (1998)..... 7

STATE V. HEAD, 136 Wn.2d 619,
964 P.2d 1187 (1998)..... 5

STATE V. JOY, 121 Wn.2d 333,
851 P.2d 654 (1993)..... 13

STATE V. LUNA, 71 Wn. App. 755,
862 P.2d 620 (1993)..... 13

STATE V. ROBBINS, 68 Wn. App. 873,
846 P.2d 585 (1993)..... 13

STATE V. SLIGHTE, 157 Wn. App. 618,
238 P.3d 83 (2010)..... 14

SUPREME COURT CASES

MIRANDA V. ARIZONA, 384 U.S. 436,
86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) 7

FEDERAL CASES

GALLEGO V. UNITED STATES, 276 F.2d 914 (9th Cir.1960) 11

COURT RULES

CrR 3.5 ..... 6, 7, 8, 9, 10, 12

CrR 3.6 ..... 6, 7, 8, 9, 10, 12

CrR 6.1 5

I.

APPELLANT'S ASSIGNMENTS OF ERROR

A. The trial court violated CrR 6.1(d) by failing to enter written findings of fact and conclusions of law in support of its finding of guilt.

B. The court erred when it failed to enter written findings of fact and conclusions of law required by CrR 3.5(c) following a suppression hearing.

C. The court erred when it entered CrR 3.6 Conclusion of Law 4: "Deputy Thurman advised the defendant of his *Miranda* and *Ferrier* warnings. The defendant consented to the search of the car. The evidence was seized after the defendant gave consent to search. There was no violation of *Arizona v. Gant.* CP 131.

D. The court erred when it denied Mr. Marquette's motion to suppress evidence removed from his vehicle.

E. The evidence was insufficient to sustain a conviction for possession of a controlled substance with intent to deliver.

II.

ISSUES PRESENTED

A. Is this issue moot because the trial court has entered CrR 6.1 findings of fact and conclusions of law?

B. Is this issue moot because the trial court has now entered findings of fact and conclusions of law for the CrR 3.5(c) hearing?

C. Is the defendant's suppression argument completely fallacious because the defendant used facts from the CrR 3.5 hearing to formulate his arguments attacking the previous CrR 3.6 hearing?

D. Did the trial court err in denying the CrR 3.6 motion to suppress?

E. Was the evidence sufficient for a rational trier of fact to find the defendant guilty as charged?

III.

STATEMENT OF THE CASE

On April 4, 2012, Deputy Jeff Thurman was traveling eastbound on Interstate 90 (I-90) approaching the Argonne Exit in Spokane County. Deputy Thurman noticed a 1997 Dodge turn onto the off-ramp of the freeway without signaling. 4/15/13 RP 73. After the vehicles exited I-90, Deputy Thurman activated his emergency lights to stop defendant's car. 4/15/13 RP 73. The driver of the vehicle (later identified as the defendant), began to make several furtive

movements underneath his driver's seat. 4/15/13 RP 73. Deputy Thurman requested another unit as " backup" because he was concerned for his safety. 4/15/13 RP 73.

Trooper Chris Stone arrived to assist the deputy. 4/15/13 RP 74. Deputy Thurman approached the driver side door and opened the door. 4/15/13 RP 74. Deputy Thurman had the defendant step out of his car and asked Trooper Stone to conduct a protective sweep for weapons under the driver's seat. 4/15/13 RP 74. Trooper Chris Stone came back to where the deputy was detaining the defendant and told the deputy that he did not enter the vehicle but did see a baggie of what appeared to be methamphetamine on the driver's side floorboard next to a knife. 4/15/13 RP 75.

Deputy Thurman advised the defendant that he was under arrest and placed him in custody. 4/15/13 RP 75. Deputy Thurman then read the defendant his *Miranda* rights. 4/15/13 RP 75.

Deputy Thurman requested consent to search the defendant's car using the information on a Sheriff's Office search consent card. 4/15/12 RP 72. The defendant gave consent for Deputy Thurman to search the car and its contents. 4/15/13 RP 79. Deputy Thurman recovered two baggies of white crystal substance from the front driver's side floorboard. 4/15/13 RP 80. The substance tested positive for methamphetamine on a field test. Deputy Thurman also noted of the same white crystal substance on the driver's seat. 4/15/13 RP 81. During his

search of the car the deputy found a bag hidden behind the car's stereo. 4/15/13 RP 82. The bag contained two small baggies of a white crystalline substance. 4/15/13 RP 82. The bag also contained a scale upon which there was a white residue. 4/15/13 RP 82. Deputy Thurman located several more empty baggies inside a black case on the passenger seat. 4/15/13 RP 81.

When the deputy asked the defendant about the items the deputy had discovered, the defendant admitted that he had been selling methamphetamine for approximately one month to make ends meet. The defendant indicated that he had made approximately $2000 selling methamphetamine. 4/15/13 RP 97.

A cell phone removed from the defendant during the search incident to arrest continued to ring in excess of ten times while the deputy spoke with the defendant. 4/15/13 RP 99.

Trooper Chris Stone testified that he arrived at the vehicle stop shortly after Deputy Thurman. 4/15/13 RP 118. Trooper Stone recalled that as he approached the defendant's car, the deputy had just gotten the defendant out of the car. 4/15/13 RP 119. Trooper Stone looked in the car through the driver's door which was still open. He saw a small plastic zip lock clear plastic baggie. There was a ball of a substance that looked as if it had been tied. 4/15/13 RP 119. Trooper Stone did not go into the car but informed Deputy Thurman what he had seen. 4/15/13 RP 120. Trooper Stone was present when *Miranda* warnings were

given to the defendant and also when the consent to search card was read. 4/15/13 RP 120.

Trevor Allen testified that he is employed as a forensic scientist at the Washington State Patrol Crime Laboratory. 4/16/13 RP 139. Mr. Allen explained to the trial court the procedures for testing various substances and informed the court that the substances submitted in this case were methamphetamine. 4/16/13 RP 140 -157.

The defendant proceeded to a bench trial and was convicted of possession of a controlled substance with intent to deliver. CP 220. This appeal followed. CP 234-239.

IV.

ARGUMENT

A. THE REQUISITE FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR THE CrR 6.1 HEARING HAVE BEEN REDUCED TO WRITTEN FORM AND FILED.

The Findings of Fact and Conclusions of Law have been completed and filed in the court file. Copies were sent to the defendant on the same day as the filing. The Findings of Fact and Conclusions of Law covering CrR 6.1 issues were filed May 1, 2014. (CP 256-260). The court in *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998), stated, "We will not infer prejudice, however, from delay in entry of written findings of fact and conclusions of law.

B. THE REQUISITE FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR THE CrR 3.5 HEARING HAVE BEEN REDUCED TO WRITTEN FORM AND FILED.

The Findings of Fact and Conclusions of Law pertaining to the CrR 3.5 hearing have been completed and are filed in the Superior Court file. The Findings of Facts and Conclusions of Law were filed on May 1, 2014. (CP 252-255). As noted above, The Washington State Supreme Court has stated that it will not infer prejudice from a delay in the entry of written Findings of Facts and Conclusions of Law.

C. THE DEFENDANT HAS NOT SHOWN THAT THE LOWER COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO SUPPRESS.

The defendant claims that his consent to search his car was not voluntary. The defendant's argument is confusing, procedurally strange and without support. As is apparent in the record, the CrR 3.6 suppression hearing happened some time before the actual trial. The defendant's arguments were found by the trial judge to be unpersuasive and the motion to suppress was denied.

At trial, the defense attempted to "backdoor" the long completed CrR 3.6 hearing and place the question before the trial judge.[1] The trial judge refused to address the results of the previous suppression hearing heard by another judge.

---

[1] "I'm asking the Court to re-visit the issue of whether the fruits of the search…." 4/15/13 RP 65.

On appeal, the defendant attacks the lower court's findings of fact and conclusions of law using a series of facts and some arguments that appear logical – until one notices that the citations to the record used by the defendant are citations to the CrR 3.**5** confession hearing, not the CrR 3.6 hearing. This attempted "cross-use" of testimony from one hearing to attack a different kind of hearing (previously decided) is procedurally strange. The defendant fails to mention that he is using testimony from officers in the CrR 3.5 hearing to support his appellate arguments regarding the earlier CrR 3.6 hearing. The approach used here also puts the State at a disadvantage as the prosecutor at trial had no idea that the defendant would attempt to use testimony from the CrR 3.5 hearing to support an attack on the CrR 3.6 hearing on appeal. It is doubtful that any prosecutor would couch his or her questions at the CrR 3.5 hearing using the assumption that the defendant would use the testimony from the CrR 3.5 hearing to attack the previously completed CrR 3.6 hearing.

The defendant signed both his *Miranda*[2] warnings card and the *Ferrier*[3] consent to search card. Trooper Stone testified that he was present when Deputy Thurman advised the defendant of his *Miranda and Ferrier* rights. 10/18/12 RP 39. Deputy Thurman testified:

---

[2] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[3] *State v. Ferrier*, 136 Wn.2d 103, 118, 960 P.2d 927 (1998).

> A. Then I obtained consent to search the vehicle.
> Also gave him a consent to search card, which advised him he has the right to refuse, restrict or revoke the search. He understood and he also gave consent to search the vehicle.
> Q. Okay.
> A. I unhandcuffed his hand at that time and allowed him to sign both cards.

10/18/12 RP 64-65.

At the time of the trial, the suppression issue was a "done deal." If the defendant had wanted to attack the previous finding of the lower court, he should have used the same facts as were viewed by the deciding court. The defendant does not cite to any authority for the proposition of attacking a CrR 3.6 suppression hearing using testimony from the CrR 3.5 hearing occurring some weeks *after* the CrR 3.6 hearing was decided.

The voluntariness of the "consent to search" given by the defendant is the core issue in this section. The defendant engages in rampant speculation when he claims: "[a]ware that Mr. Marquette was struggling financially and concerned about his mother, the officer was not merely advising Mr. Marquette of the consequences of refusal, he used the claim to pressure Mr. Marquette to consent." The defendant constructs this speculation based on the defendant's testimony in the CrR 3.5 hearing at trial. The defendant testified extensively at the CrR 3.6 hearing and said nothing about his mother being ill or the officer coercing him. The defendant asserts several different "coercion" type arguments with no factual support.

The actual testimony from Deputy Thurman was quite the opposite of what the defendant portrays it to be. The defendant, using CrR 3.5 testimony would like to maintain that the deputy forced the defendant to agree to a consent search of his car by various artifices. Deputy Thurman's testimony indicated that he went out of his way to help the defendant:

> Mr. Marquette, was telling me he was down on his luck, his wife's ill – or his mother's ill and dying and he asked if I could –
>
> MR. HEINTZ: Your Honor, I'm gonna object to this; this isn't a response to the question, and if it is, it's not relevant.
>
> MS. BRADY: Well, we've talked about the length of the stop.
>
> THE COURT: And obviously somebody was going to raise the issue about what happened to the car and how long that took. So you may proceed. Go ahead.
>
> THE WITNESS: So he requested if I could let one of his friends come pick it up because they have a tow truck. It took us awhile to get a hold of his friend on the cell phone. He finally got a hold of his friend, and I allowed them to come tow the vehicle so it wasn't left on the side of the road.

10/18/13 RP 82.

Trooper Stone testified at the CrR 3.6 hearing and testified regarding the removal of the defendant from his car. "There wasn't any force involved so it wasn't anything that raises my suspicion or awareness. 10/18/13 RP 38.

Deputy Thurman testified that "I told Mr. Marquette to show me his hands. He complied and showed me his hands. I opened the door and told him to get out. As soon as he got out, I took control of his hands." 10/18/13 RP 76. The

defendant was not pulled from the car as the defendant claims. Brf. of App. 18. The defendant states in his brief that the deputy told him, "…if he would consent to the search he would 'see what he could do for him.'" There is no such testimony in the record of the CrR 3.6 hearing.

There is nothing in the suppression hearing record, except the defendant's claim that the deputy "opened the car door, pulled Mr. Marquette out, and put him in an arm–bar as he marched him toward and against the patrol car. There is nothing in either officers' testimony that the deputy "pulled" the defendant from the car. Likewise, there is nothing in the record that the deputy put the defendant in an "arm bar" and "marched the defendant to the deputy's car. The word "march" or "marched" does not appear in the record except in referencing the month of March. This portion of the defendant's argument is a distortion and exaggeration of the record. The defendant's testimony at the CrR 3.6 hearing does not mention being pulled from the car.

The defendant does not put forth any applicable factual bases for his arguments. The defendant's assertions on page 18 of the appellant's brief are not supported by anything except the defendant's bald claims which were apparently prompted by the defendant's testimony at the unrelated CrR 3.5 hearing.

"Before a physical object connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed."

State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929, 941 (1984). (*citing Brown v. General Motors Corp*., 67 Wn.2d 278, 285, 407 P.2d 461 (1965); *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir.1960)). "The proponent need not identify the evidence with absolute certainty and eliminate every possibility of alteration or substitution." *Campbell, supra* at 21. "The trial court is necessarily vested with a wide latitude of discretion in determining admissibility, which will not be disturbed absent clear abuse." *Campbell, supra* at 21.

Deputy Thurman testified as to how the baggies of substance were handled and placed in the police locked property room. Likewise, the detective that transported the exhibits to the laboratory and to court testified as to the condition of the exhibits being the same or substantially the same as when he transported them. There was testimony from each stage of the handling and transport of the exhibits.

The defense countered that there had to be a problem with the chain of custody because the weight of the drugs as reported by Deputy Thurman was approximately four grams less than the weight measured at the crime lab. The State postulated possible explanations for this discrepancy, such as Dep. Thurman mis-reading his scale, improperly recording the number etc. The defense objected to the admission of the drugs, alleging more nefarious reasons for the weight discrepancy. The defense alleged that the drugs in question were not the same as found in the defendant's car or perhaps Deputy Thurman had contaminated the

drugs by not cleaning his scale when he "zeroed" the scale at the beginning of the weighing process. Four grams would have been a lot of residue for Deputy Thurman to overlook. The witnesses showed that the chances of tampering were unlikely.

Ultimately, this entire defense argument is pointless. The "chain of custody" argument goes to weight not admissibility. The defendant told the arresting officer, "…he's been selling meth for the last month, made approximately $2,000, sells a gram here and there." 10/15/12 RP 97. From that statement alone, a trier of fact could find that the substances found in the defendant's car were, in fact, methamphetamine and that the defendant had sold methamphetamine. There really is no question of contamination… even the defendant stated that the material in the baggies was methamphetamine.

The questions raised by the defendant, both at trial and again on appeal go to weight, not admissibility.

The defendant has shown no reason why the CrR 3.6 hearing judge would *not* find the consent to search the defendant's car was anything but consensual. The defendant was treated fairly by the officer, advised of his rights and the defendant signed the consent to search card. The spurious information extracted by the defendant from his CrR 3.5 hearing at trial cannot be used to impugn the prior suppression hearing judge's decisions.

D. THE EVIDENCE PRESENTED WAS AMPLE TO PERMIT A RATIONAL TRIER OF FACT TO FIND THE DEFENDANT GUILTY AS CHARGED.

The defendant attacks the sufficiency of the evidence for a conviction on the charge of possession with intent deliver a controlled substance. The relevant inquiry on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Luna*, 71 Wn. App. 755, 862 P.2d 620 (1993).

Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

When analyzing a sufficiency of the evidence claim, the court will draw all inferences from the evidence in favor of the State and against the defendant. *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993). The reviewing court will defer to the jury (trial judge in this case) on the credibility of witnesses and the weight of the evidence. *State v. Bonisisio*, 92 Wn. App. 783, 794, 964 P.2d 1222 (1998), *review denied*, 137 Wn.2d 1024 (1999).

The defendant relies heavily on *State v. Robbins*, 68 Wn. App. 873, 876, 846 P.2d 585 (1993) for the proposition that the defendant here possessed drugs but there was insufficient proof that the defendant intended to sell drugs.

The *Robbins* case is not on all fours with this case. In *Robbins* the defendant possessed three baggies that only had a tiny amount of residue. In 2010,

Division II of the Court of Appeals distinguished its earlier holding in *Robbins. State v. Slighte,* 157 Wn. App. 618, 238 P.3d 83 (2010). In *Slighte,* the trial court noted: "(1) there were more than a dozen baggies, many of which were marked with the same logo; (2) some baggies contained amounts of a crystalline powder; (3) the State tested the contents of one baggy and determined it to be methamphetamine; and (4) the State did not need to test the contents of every baggy." The appellate court held that. [t]he officers also found and seized from Slighte's person items supporting a reasonable inference of delivery—baggies containing a crystalline substance and clean baggies for packaging for sale. In his truck, the officers found a digital scale, a straw, and more baggies, some clean and some containing marijuana or a crystalline substance in varying amounts." *Slighte, supra* at 628. Division II affirmed that Slighte was guilty of possession with intent to deliver.

In this case, the facts are somewhat different than *Slighte* but similar in nature. By either measurement of weight, the defendant possessed more than simply residue. One of the defendant's cell phones rang almost continuously, he had admitted selling methamphetamine, methamphetamine possession, and methamphetamine hidden in various places in his car.

If the defendant's admission that he sold methamphetamine is added to the items uncovered by the police, there is zero doubt that the defendant possessed methamphetamine with an intent to deliver.

V.

CONCLUSION

For the reasons stated above, the State respectfully requests that decisions of the trial court be affirmed.

Dated this 13th day of May, 2014.

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	NO. 31794-3-III
v.	)	
	)	CERTIFICATE OF MAILING
LARRY G. MARQUETTE,	)	
	)	
Appellant,	)	

I certify under penalty of perjury under the laws of the State of Washington, that on May 13, 2014, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

Marie J. Trombley
marietrombley@comcast.net

and mailed a copy to:

Larry G. Marquette
DOC #935731
1313 North 13th Ave.
Walla Walla WA 99362

5/13/2014	Spokane, WA	Kathleen R. Owens
(Date)	**(Place)**	**(Signature)**