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MAY 12, 2015
Court of Appeals
Division III
State of Washington

No. 32857-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,
Appellant,

v.

JEFFERY MAY,
Respondent.

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

BRIEF OF RESPONDENT

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A. INTRODUCTION

Respondent, Jeffery May, was charged with controlled substance homicide, after a longtime drug-user, Danielle Dunn, died in his trailer of a methamphetamine overdose. The trial court found insufficient evidence to establish the *corpus delicti* of a controlled substance homicide, or to corroborate Mr. May's statement about Ms. Dunn's death, and dismissed the charges.

B. COUNTER-ISSUE STATEMENT

1. Under the *corpus delicti* rule, the State must present prima facie evidence independent of a defendant's statement that supports the inference he committed the specific crime with which he was charged. State v. Brockob, 159 Wn.2d 311, 329, 150 P.3d 59 (2006). Where the State failed to sufficiently corroborate Mr. May's statement, did the State fail to satisfy the strict requirements of *corpus delicti*?

2. The appropriate standard of review by a trial court on a motion to dismiss for failure to establish the *corpus delicti* is whether the State produces prima facie evidence, independent of the defendant's statement, to support a logical and reasonable inference that the charged crime occurred. Because the trial court applied the correct legal standard and the evidence was insufficient to establish the

elements of controlled substance homicide, should the dismissal be affirmed? E.g., CP 61 (Conclusion of Law 2).

3. If the evidence presented supports both a hypothesis of guilt and a hypothesis of innocence, it is insufficient to corroborate a defendant's statement. State v. Brockob, 159 Wn.2d 311, 330, 150 P.3d 59 (2006) (citing State v. Aten, 130 Wn.2d 640, 660-61, 927 P.2d 210 (1996)). The trial court here did not apply a "multiple hypothesis test to the facts," as argued by the State; rather, the court simply found no evidence of a connection between Mr. May and the death of Ms. Dunn, independent of Mr. May's statement. To the extent the court considered a hypothesis of innocence test, since this analysis is not erroneous, and in fact, is proper under Aten and State v. Bernal, 109 Wn. App. 150, 33 P.3d 1106 (2001), should the State's appeal be denied?

C. FACTS RELEVANT TO RESPONSE

Jeffery May and Danielle Dunn met each other approximately one day before Ms. Dunn's death on September 5, 2013. CP 52. Ms. Dunn was a longtime intravenous drug user with track marks up and down her legs. CP 22-23. Ms. Dunn spent her time hanging around the Yakima trailer park where Mr. May parked his mobile home, and

during the days preceding her death, she met several people with whom she shared meals and narcotics. CP 52.

Ben Fromm, Mr. May's neighbor, stated that on the evening before her death, Ms. Dunn had been at another trailer using drugs with a friend of hers named "Nikki." CP 52.[1] She called Mr. May and said she was unhappy and needed a ride. CP 52. According to Mr. Fromm, Ms. Dunn complained that "she can't believe the place she's at … she wants to leave and she's high." CP 52. Mr. May went to pick up Ms. Dunn, and when they returned to Mr. May's trailer, she was already "pretty high." Id. Mr. Fromm specifically chided Ms. Dunn for "partying" so early. Id.

The following evening, Mr. May rushed out of his trailer, seeking help for Ms. Dunn, who was vomiting and had stopped breathing. CP 53-54. Mr. Fromm called 911, while Mr. May tried to resuscitate her. Id. Mr. May told law enforcement at the scene that Ms. Dunn had injected herself with methamphetamine. CP 27. Upon questioning, Mr. May later told officers he had given her some methamphetamine. Id. Ms. Dunn later died of a methamphetamine overdose at the Yakima Regional Medical Center. CP 32.

[1] There is no last name for "Nikki" in Mr. Fromm's statement. CP 52.

No used syringes were found in Mr. May's mobile home, on his person, or on Ms. Dunn. CP 33; 6/4/14 RP 21. No empty bags or packaging from methamphetamine were recovered – from either inside the mobile home, on Mr. May's person, or on Ms. Dunn. CP 33; 6/4/14 RP 19. Officers did find a small bag of methamphetamine in Mr. May's pocket during a search incident to arrest, as well as a box of unused syringes from his mobile home. CP 27, 33.

The results of an autopsy confirmed that Ms. Dunn died of an acute methamphetamine overdose. CP 21. The autopsy also described Ms. Dunn's long history of intravenous narcotic abuse, noting multiple lower extremity injection sites of varying ages. Id.

Mr. May was charged with controlled substance homicide. RCW 69.50.415. CP 5. Mr. May moved to dismiss pursuant to the *corpus delicti* rule, arguing there was insufficient evidence, independent of his statement, to support a reasonable and logical inference that he had delivered the methamphetamine to Ms. Dunn that resulted in her death. CP 8-36.

The Honorable Richard H. Bartheld heard argument and granted Mr. May's motion to dismiss. 6/6/14 RP 23-25; CP 44. The trial court

entered Findings of Fact and Conclusions of Law, CP 60-63, and the court denied the State's motion for reconsideration. CP 64.

The State appeals the dismissal. CP 65.

D. ARGUMENT

THE DISMISSAL SHOULD BE AFFIRMED BECAUSE THE STATE FAILED TO ADEQUATELY CORROBORATE MR. MAY'S STATEMENT OR INDEPENDENTLY ESTABLISH THE *CORPUS DELICTI* OF CONTROLLED SUBSTANCE HOMICIDE.

The trial court granted Mr. May's motion to dismiss after finding the State failed to make a prima facie showing supporting a logical and reasonable inference that there was a criminal act of methamphetamine delivery to Ms. Dunn, and that this drug led to her death. 6/4/14 RP 23-25. Because the State failed to present sufficient evidence to corroborate Mr. May's statement or independently establish the *corpus delicti*, the State's appeal should be denied.

1. The *Corpus Delicti* Rule.

Corpus delicti ("body of the crime"), in a homicide case consists of two elements: 1) the fact of death; and 2) a causal connection between the death and a criminal act. State v. Aten, 130 Wn. 2d 640, 655, 927 P.2d 210 (1996), citing 1 McCORMICK ON EVIDENCE § 145, at 227 (John W. Strong ed., 4th ed. 1992); State v. Lung, 70 Wn.2d

365, 371, 423 P.2d 72 (1967). The *corpus delicti* rule was established in order to protect against improper and unjust convictions based upon a false confession alone. City of Bremerton v. Corbett, 106 Wn.2d 569, 574-77, 723 P.2d 1135 (1986), citing Smith v. United States, 348 U.S. 147, 75 S.Ct. 194, 99 L.Ed. 192 (1954); J. Wigmore, Evidence §§ 2070-71 (rev. 1978).

The general "judicial distrust of confessions," as the Supreme Court wrote in Corbett, stems from the concern that a confession "may have been misreported or misconstrued, elicited by force or coercion, based upon mistaken perception of the facts or law, or falsely given by a mentally disturbed individual." 106 Wn.2d at 576 (citing Note, Proof of the Corpus Delicti Aliunde the Defendant's Confession, 103 U. Pa. L.Rev. 638, 642-46 (1955); Note, Confession Corroboration in New York: A Replacement for the Corpus Delicti Rule, 46 Fordham L. Rev. 1205 (1978).

In Washington, an accused person's statement is not sufficient to prove a crime occurred. The State must present evidence that the crime described in the statement actually occurred; this evidence must be independent of the statement itself. State v. Brockob, 159 Wn.2d 311, 328, 150 P.3d 59 (2006), as amended (Jan. 26, 2007). "The

independent evidence need not be of such a character as would establish the *corpus delicti* beyond a reasonable doubt, or even by a preponderance of the proof. It is sufficient if it prima facie establishes the *corpus delicti."* Aten, 130 Wn.2d at 656 (quoting State v. Meyer, 37 Wn.2d 759, 763-64, 226 P.2d 204 (1951)). Prima facie corroboration of a defendant's incriminating statement exists if the independent evidence supports a "logical and reasonable inference of the facts sought to be proved." Brockob, 159 Wn.2d at 328 (quoting State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (2000)).

2. The State failed to produce sufficient evidence, independent of Mr. May's statement, to establish the *corpus delicti*.

Here, the State did not produce prima facie evidence sufficient to support a logical and reasonable inference that there was a criminal act of methamphetamine delivery to Ms. Dunn, and that this drug led to her death. The State failed, therefore, to produce sufficient evidence independent of Mr. May's statement to meet its burden. Brockob, 159 Wn.2d at 327-30; Aten, 130 Wn.2d at 660-61.

Under RCW 69.50.415, a person is guilty of controlled substance homicide if he or she unlawfully delivers a controlled substance to a person, and that person's use of the substance results in

death. State v. Bernal, 109 Wn. App. 150, 153, 33 P.3d 1106 (2001). The two leading cases on *corpus delicti* and controlled substance homicide are Bernal and State v. Zillyette, 163 Wn. App. 124, 256 P.3d 1288, reversed on other grounds, 178 Wn.2d 153 (2013) .

In Bernal, Division Two of this Court found the *corpus delicti* rule had not been satisfied, and the Court affirmed the trial court's dismissal of the controlled substance homicide charge. 109 Wn. App. at 154. The facts in Bernal are similar to those here: the decedent in the case died of an overdose – in Bernal, the drug was heroin – and the defendant lived in the same trailer park as the decedent. 109 Wn. App. at 152. The only connection to Ms. Bernal was her statement that she provided drugs to the decedent a few days earlier. Id. The Bernal Court found that without the defendant's statement, the State had only proved one of the two elements of the *corpus delicti* – that the heroin had resulted in the decedent's death. Id. at 153. Independent of the statement, the Court held:

> Excepting Bernal's statement, the record shows absolutely nothing about how Reid acquired the heroin that caused his death. We can speculate that he acquired it by delivery, by stealing it, by finding it, or by some other means – but the record gives no rational basis for inferring one possibility over the others.

Bernal, 109 Wn. App. at 154 (emphasis in original).

The State's attempts to distinguish the circumstances surrounding Ms. Dunn's death from Bernal are unpersuasive. Brief of Appellant at 12-13. The evidence in this case is even weaker than that in Bernal, as the facts showed Ms. Dunn to have another source of narcotics just before her death. CP 52.

Here, according to Mr. May's neighbor, Mr. Fromm, Ms. Dunn was already high when she arrived at Mr. May's trailer. CP 52. In fact, when Mr. May went to pick her up, Ms. Dunn was already "pretty high" and "partying" – enough for Mr. Fromm to remark on her condition. Id. Ms. Dunn had another source – or multiple sources -- of narcotics, which is also clear from the track marks of varying ages on her legs, which pre-date her acquaintance with Mr. May. CP 21-23. Since no used syringes or empty bags were found in Mr. May's trailer, on Ms. Dunn, or on Mr. May, the reasonable and logical inference is that Ms. Dunn had consumed methamphetamine elsewhere, and/or had brought her own supply with her to the trailer. See CP 52.

Conversely, the Bernal Court found that there was "simply no evidence, independent of Bernal's statements, from which to infer how Reid, [the decedent], obtained heroin." 109 Wn. App. at 154. The Bernal Court specifically noted that the decedent in that case was a

"naïve user," which it deduced from the fact that his body lacked track marks. Id. at 157 (Bridgewater, J., dissenting). The Court, for this reason, could only speculate as to the source of the decedent's supply – i.e.: whether he stole, found, or was delivered the drugs that resulted in his death. Id. at 154.

As in Bernal, the trial court's assessment here of the insufficiency of the evidence was correct. The trial court could only speculate on the source of Ms. Dunn's narcotics – a level of proof far below the required prima facie showing required. Assuming the truth of the State's evidence, there is still insufficient proof of the *corpus delicti*, independent of Mr. May's statement. Bernal, 109 Wn. App. at 154; Aten, 130 Wn.2d at 660-61.

In Zillyette, conversely, the State was able to meet its burden by providing a great deal of independent evidence to establish the *corpus delicti* and thereby corroborate the defendant's inculpatory statement. 163 Wn. App. at 131. In Zillyette, Division Two of this Court held that a number of facts supported a reasonable inference that someone, specifically the defendant, provided the decedent with the pills that caused his death. Id. The Zillyette Court itemized the number of findings that supported the court's inference, including:

1) the defendant and decedent were friends and had used drugs together previously;

2) the day before he died, the decedent sent his friends a picture of himself holding a handful of pills and a prescription bottle cap;

3) the pills in the picture were identified as those with which he later overdosed;

4) the decedent did not have a prescription for the pills but the defendant did;

5) the defendant had filled her prescriptions that afternoon, and her prescription bottles were nearly empty the next day. Id.

Mr. May's is case very different from Zillyette, as the trial court properly found. There was no evidence of a prior relationship between Mr. May and Ms. Dunn. In fact, according to Mr. Fromm's statement, Ms. Dunn had only been introduced to Mr. May the previous evening. There was no evidence of prior drug use together. CP 52.

The trial court here also found a lack of evidence of causation, the type of which had been so persuasive to the Zillyette Court. See, e.g., 6/4/14 RP 21. During oral argument, the trial court engaged in the following exchange, regarding what the State's evidence would show:

COURT: So, there's no connection then even with the methamphetamine that was injected into the deceased and to the type of syringes that Mr. May had at his residence?

STATE: There is no evidence that it was injected. But she died of methamphetamine. And the only person with

> methamphetamine was Mr. May at Mr. May's residence.
>
> COURT: So you're not even going to intend to prove that she injected herself with methamphetamine, is that what I just heard you say?
>
> STATE: I don't know that – I – I – the only way that we get that she injected herself is through Mr. May's statement…

6/4/14 RP 21.

Unlike the facts of Zillyette, where there was clear evidence supporting the inference of delivery of narcotics – the photograph, the filled prescription, the empty pill bottle – here, there was no similar evidence supporting delivery of methamphetamine to Ms. Dunn. The Zillyette Court actually noted that its case should specifically be distinguished from Bernal, another Division Two case. 163 Wn. App. at 131-32 ("Unlike Bernal, where the State provided no independent proof of delivery, the independent evidence in this record establishes a reasonable inference that someone, specifically Zillyette, provided Burrows with the methadone and alprazolam pills that caused his death.").

Likewise, Mr. May's case is more similar to Bernal than Zillyette, due to the insufficiency of independent evidence to prove the *corpus delicti*.

3. Although this Court's de novo review is dispositive, the remaining issues presented by the State are inapt, as they are not supported by the record or by the law.

Because there was insufficient evidence in this case to establish the *corpus delicti* of the charged offense, as discussed above, this Court should affirm the trial court's decision and dismiss the State's appeal. Bernal, 109 Wn. App. at 154; Aten, 130 Wn.2d at 660-61.

The State raises two additional issues in its brief. First, the State argues: "the trial court erred by holding the State to a beyond a reasonable doubt standard rather than a reasonable and logical inference standard." Brief of Appellant at 9, 13. The trial court plainly did not apply a reasonable doubt standard, as is clear from the record. See 6/4/14 RP 17, 19, 23; CP 60-61.

Citing Supreme Court cases such as Corbett, Aten, and their progeny, the trial judge stated,

> [T]he independent evidence need not be of such character as would establish the *corpus delicti* beyond a reasonable doubt or even a preponderance of the evidence. It is sufficient if it is prima facie – if prima facie establishes the *corpus delicti*.

6/4/14 RP 17 (emphasis added).

The judge again discussed the "reasonable and logical inference standard" when asking the State for the evidence it would present,

independent of Mr. May's statement. Id. at 19. In the court's oral findings, the trial judge specified he was using the "logical and reasonable inference" standard. Id. at 23. The judge also specified that he was holding the State had failed to make a prima facie showing to support the inference of delivery. Id. The trial court's written findings of fact and conclusions of law are consistent with the correct standard applied by the court below. CP 61 (Conclusion of Law 2) ("There is no evidence that would support a logical and reasonable inference that the defendant, Jeffery Robert May, delivered methamphetamine to the deceased, Danielle Dunn, and that it was that methamphetamine delivered to her that caused her death").

Lastly, the State argues that the trial court "erred by applying a multiple hypothesis test to the facts in this case." Brief of Appellant at 16. The State concedes the court did not specifically state that it applied this test, but suggests that the court employed "a tacit application of that rule." Id.

Our Supreme Court has held, however, that if the State's evidence supports both a hypothesis of guilt and a hypothesis of innocence, the evidence is insufficient to corroborate a defendant's statement. Brockob, 159 Wn.2d at 330 (citing Aten, 130 Wn.2d at 660-

61). "In other words, if the State's evidence supports the reasonable inference of a criminal explanation of what caused the event and one that does not involve criminal agency, the evidence is not sufficient to corroborate the defendant's statement." Brockob, 159 Wn.2d at 330; Aten, 130 Wn.2d at 660-61.

Because the record shows the trial court employed the appropriate legal test, the State's appeal should be denied on this ground as well.

The trial court found the State failed to show a causal connection between the methamphetamine used by Danielle Dunn and that in Mr. May's pocket; the court also found no material facts to be in dispute. CP 61 (Court's Findings of Fact). Because the State fails to demonstrate that Washington law demands a different result, this Court should affirm the dismissal and deny the State's appeal in its entirety. Brockob, 159 Wn.2d at 330; Aten, 130 Wn.2d at 660-61; Bernal, 109 Wn. App. at 154.

E. CONCLUSION

For the foregoing reasons, Mr. May respectfully requests this Court affirm the dismissal of all charges and deny the State's appeal.

DATED this 12th day of May, 2015.

Respectfully submitted,

S/ Jan Trasen

_____

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

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	)	
Appellant,	)	
	)	NO. 32857-1-III
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	)	
JEFFERY MAY,	)	
	)	
Respondent.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF MAY, 2015, I CAUSED THE ORIGINAL **BRIEF OF RESPONDENT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] JEFFERY MAY (NO VALID ADDRESS) C/O COUNSEL FOR APPELLANT WASHINGTON APPELLATE PROJECT	( ) ( ) (X)	U.S. MAIL HAND DELIVERY RETAINED FOR MAILING ONCE ADDRESS OBTAINED

SIGNED IN SEATTLE, WASHINGTON THIS 12TH DAY OF MAY, 2015.

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