

FILED
JANUARY 8, 2016
Court of Appeals
Division III
State of Washington

NO. 33278-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

DANIEL ALCARAZ-MENDOZA, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 13-1-00712-0

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

Brendan M. Siefken, Deputy
Prosecuting Attorney
BAR NO. 41219
OFFICE ID 91004

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. RESPONSE TO ASSIGNMENTS OF ERROR.....1

 A. The trial court properly restricted Officer Kuehny’s use of his report to refresh his recollection regarding the defendant’s statements and the testimony was based on his independent recollection.1

 B. The trial court properly admitted Exhibit 2 over the defense objection as the court found that the item had been properly identified by the witness who collected the item, and also by the witness who tested the item, and that any gaps in the chain of custody would go to weight to be given to the evidence.1

 C. The evidence was sufficient to prove the defendant guilty beyond a reasonable doubt, even if this Court were to disregard Officer Kuehny’s testimony regarding the defendant’s statements and the testing of Exhibit 2.1

II. STATEMENT OF FACTS1

III. ARGUMENT.....2

 A. The trial court properly restricted Officer Kuehny’s use of his report to refresh his recollection regarding the defendant’s statements and the testimony was based on his independent recollection.2

 B. The trial court properly admitted Exhibit 2 over the defense objection as the court found that the item had been properly identified by the witness who collected the item and also by the witness who tested the item, and that any gaps in the chain of

custody would go to weight to be given to the
evidence.....3

C. The evidence was sufficient to prove the defendant
guilty beyond a reasonable doubt, even if this Court
were to disregard Officer Kuehny's testimony
regarding the defendant's statements and the testing
of Exhibit 25

IV. CONCLUSION.....6

TABLE OF AUTHORITIES

WASHINGTON CASES

In re Brennan, 117 Wn. App. 797, 72 P.3d 182 (2003).....5
In re Delmarter, 124 Wn. App. 154, 101 P.3d 111 (2004).....5
State v. Campbell, 103 Wn.2d 1, 691 P.2d 929 (1984).....3, 4

UNITED STATES COURT OF APPEALS CASES

United States v. Cardenas, 864 F.2d 1528 (10th Cir. 1989).....4

OTHER AUTHORITIES

5 WASH. PRAC., EVIDENCE LAW AND PRACTICE § 402.36 (5th ed.)4

I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. **The trial court properly restricted Officer Kuehny's use of his report to refresh his recollection regarding the defendant's statements and the testimony was based on his independent recollection.**
- B. **The trial court properly admitted Exhibit 2 over the defense objection as the court found that the item had been properly identified by the witness who collected the item, and also by the witness who tested the item, and that any gaps in the chain of custody would go to weight to be given to the evidence.**
- C. **The evidence was sufficient to prove the defendant guilty beyond a reasonable doubt, even if this Court were to disregard Officer Kuehny's testimony regarding the defendant's statements and the testing of Exhibit 2.**

II. STATEMENT OF FACTS

On July 4, 2013, Kennewick Police Officers Dale Kuehny and Matt Newton arrested the defendant at a tire business on Columbia Drive in Kennewick, Washington. Report of Proceedings 02/23/2015 ("RP") at 8-9, 16-18. Officer Newton acted as a cover officer and Spanish translator for Officer Kuehny. RP at 9. During the arrest of the defendant, Officer Kuehny searched the defendant's person and located a plastic baggie that contained a white crystalline substance that field-tested positive for methamphetamine. RP at 18-19. Officer Newton asked the defendant what the substance was that Officer Kuehny pulled from his pocket and the defendant responded, "It's methamphetamine." RP at 12. Officer Kuehny

testified that he recalled that the defendant admitted it was his methamphetamine and that he stated later at the jail that he had the methamphetamine because he used it for his back pain. RP at 25. Officer Kuehny collected the substance, field-tested the substance, packaged it into an evidence bag, and placed the item into the evidence locker in the evidence room at the Kennewick Police Department. RP at 19-20. Officer Kuehny requested that it be sent off for testing at the crime lab. RP at 20. At trial, Officer Kuehny brought the white crystalline substance to court and testified that it appeared to be in the same relative condition as when he collected it and requested that it be tested by the crime lab. RP at 21. Martin McDermot, a scientist with the Washington State Crime Lab, testified that he recognized the item in court as one that he had tested and found to contain methamphetamine. RP at 30-33. At the end of a bench trial, the defendant was found guilty of Unlawful Possession of a Controlled Substance. RP at 35-36.

III. ARGUMENT

- A. The trial court properly restricted Officer Kuehny's use of his report to refresh his recollection regarding the defendant's statements and the testimony was based on his independent recollection.**

When questioned regarding the specific statements made to Officer Kuehny by the defendant, Officer Kuehny testified that he had some

recollection of the events but he did not believe he could recall word for word what was said. RP at 23. The State unsuccessfully attempted to move the court to allow Officer Kuehny to refresh his recollection as to the specific words used by the defendant. RP at 23-24. When the court denied the State's attempt to allow the witness to refresh his recollection, the State moved on and elicited testimony from the witness regarding the substance of the defendant's statements. RP at 25. There is nothing in the record that supports the defendant's position that the witness did not have an independent recollection of the events.

Even if this Court were to view Officer Kuehny's testimony regarding the defendant's statements as improper, the error would be harmless. Officer Newton also testified that the defendant identified the substance found in his pocket as methamphetamine. RP at 12.

B. The trial court properly admitted Exhibit 2 over the defense objection as the court found that the item had been properly identified by the witness who collected the item and also by the witness who tested the item, and that any gaps in the chain of custody would go to weight to be given to the evidence.

The State's Exhibit 2 was properly identified by two witnesses prior to its admission into evidence. "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 (1984). The question of whether a chain of custody must be shown is only a matter of degree, and the court has considerable discretion in administering the rule in light of the circumstances of each case. 5 WASH. PRAC., EVIDENCE LAW AND PRACTICE § 402.36 (5th ed.). The 10th Circuit discussed the chain of custody issue in relation to a drug case and held that drugs, not uniquely identifiable, require a sufficient chain of custody to support their admission. However, the chain of custody need not be perfect for the evidence to be admissible. “The well-established rule in this circuit is that deficiencies in the chain of custody go to the weight of the evidence, not its admissibility; once admitted, the jury evaluates the defects and, based on its evaluation, may accept or disregard the evidence.” *United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir. 1989).

Officer Kuehny testified that Exhibit 2 contained the baggie of methamphetamine that he collected from the defendant’s pocket. RP at 19-20. Officer Kuehny testified that he recognized the item based on the packaging, the contents, and that it contained his signature. RP at 20. Officer Kuehny testified that once he collected the item, he placed it into an evidence locker and requested that it be sent to the Washington State Crime Lab for testing. RP at 20. Mr. McDermot testified that he also

recognized Exhibit 2 as an item that he tested at the Washington State Crime Lab. RP at 30-31. The trial court correctly overruled the defense objection to the admission of Exhibit 2 and explained that any deficiencies go to weight, not admissibility. RP at 33.

C. The evidence was sufficient to prove the defendant guilty beyond a reasonable doubt, even if this Court were to disregard Officer Kuehny's testimony regarding the defendant's statements and the testing of Exhibit 2.

The unchallenged evidence supports a court finding the defendant guilty beyond a reasonable doubt. The Court of Appeals has upheld unlawful possession of controlled substance convictions based solely on independent evidence of a field test and a confession. *In re Delmarter*, 124 Wn. App. 154, 163, 101 P.3d 111 (2004); *see also In re Brennan*, 117 Wn. App. 797, 804, 72 P.3d 182 (2003). In the present case, Officer Newton testified that the defendant admitted that the substance found in his pocket was methamphetamine. RP at 12. Officer Kuehny located the white crystalline substance in the defendant's pocket and it field-tested positive for the presence of methamphetamine. RP at 18. These facts alone support the defendant's conviction for Unlawful Possession of a Controlled Substance.

IV. CONCLUSION

There were no errors by the trial court in accepting Officer Kuehny's testimony and admitting Exhibit 2 and the testimony surrounding the testing of the methamphetamine. Even if this Court were to find that both of those constituted errors by the trial court, the unchallenged and untainted evidence still supports the defendant's conviction.

RESPECTFULLY SUBMITTED this 8th day of January, 2016.

ANDY MILLER

Prosecutor



Brendan M. Siefken, Deputy

Prosecuting Attorney

Bar No. 41219

OFC ID NO. 91004

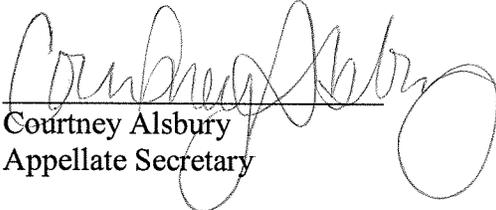
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

David Donnan
Washington Appellate Project
1511 3rd Ave., Suite 701
Seattle, WA 98101-3647

E-mail service by agreement
was made to the following parties:
wapofficemail@washapp.org

Signed at Kennewick, Washington on January 8, 2016.



Courtney Alsbury
Appellate Secretary