

FILED
Mar 16, 2016
Court of Appeals
Division III
State of Washington

NO. 33944-1-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant,

v.

CLIFFORD MENARD, Respondent.

BRIEF OF APPELLANT

Tamara A. Hanlon, WSBA #28345
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH BRUSIC
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
I. ASSIGNMENTS OF ERROR	1
II. ISSUE PRESENTED BY ASSIGNMENTS OF ERROR.....	1
III. STATEMENT OF THE CASE.....	1
IV. ARGUMENT	3
A. The trial court erred in dismissing the present case as a matter of law pursuant to <u>State v. Knapstad</u> and in holding that the undisputed facts failed to establish a prima facie case against the Defendant.....	3
V. CONCLUSION.....	8

TABLE OF AUTHORITIES

WASHINGTON CASES

State v. Ceglowski, 103 Wn. App. 346, 12 P.3d 160 (2000)..... 5-6

State v. Fernandez, 89 Wn. App. 292, 948 P.2d 872 (1997)2,7

State v. Henjum, 136 Wn. App. 807, 136 Wn. App. 807 (2007).....3

State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).....1

State v. Wilhelm, 78 Wn. App. 188, 896 P.2d 105 (1995).....3

STATUTES

RCW 69.50.402(1)(f)..... 3-5

I. ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing the present case as a matter of law pursuant to State v. Knapstad and in holding that the undisputed facts failed to establish a prima facie case against the Defendant.

II. ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR

A. ISSUE PRESENTED BY THE ASSIGNMENTS OF ERROR

1. Whether the trial court erred in dismissing the present case as a matter of law pursuant to State v. Knapstad and in holding that the undisputed facts failed to establish a prima facie case against the Defendant?

B. ANSWER TO THE ISSUE PRESENTED BY THE ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing the present case as a matter of law pursuant to State v. Knapstad and in holding that the undisputed facts failed to establish a prima facie case against the Defendant.

II. STATEMENT OF THE CASE

The Respondent, Rodney Clifford Menard, was charged with maintaining a drug dwelling under RCW 69.50.402. CP 4. Prior to trial, Menard filed a Knapstad motion, arguing that any drug-related activity at Menard's house was merely incidental to the primary purpose of the residence. CP 5-11. The State filed as response, alleging more facts as contained in Detective Posada's report, which was filed with the State's

reply. CP 12-38. The detective's report, which was filed below, is attached. See Appendix A.¹ The defense did not dispute the additional facts as set forth by the State. RP 7.

A hearing was held on November 10, 2015. The defense argued that assuming all the facts from the detective's report are presented, those facts did not support the conclusion that the substantial purpose for owning or possessing the home was to maintain a drug dwelling. RP 7, 10. The State argued that Menard knew his house was a place that drug users resorted to for the purpose of using controlled substances. RP 12, 18. The defense, in rebuttal, argued that the issue is what the primary purpose of the person charged is. RP 25, 28. The State countered that the test is whether the purpose is a substantial one, not the primary purpose. RP 29.

Relying on State v. Fernandez, 89 Wn. App. 292, 948 P.2d 872 (1997), the trial court granted the defense motion to dismiss on November 13, 2015. RP 44-5, CP 39. The court held that "...clearly here we have a house that's being rented out by people who are, in fact, using drugs in the house; but...it has to be shown, again, that it was one of the *primary*

¹ In the appendix, witnesses' dates of birth were redacted.

purposes and we can't find that here." RP 44 (emphasis added). The State filed a timely appeal.

III. ARGUMENT

A. THE TRIAL COURT ERRED IN DISMISSING THE PRESENT CASE AS A MATTER OF LAW PURSUANT TO STATE V. KNAPSTAD AND IN HOLDING THAT THE UNDISPUTED FACTS FAILED TO ESTABLISH A PRIMA FACIE CASE AGAINST THE DEFENDANT.

A trial court's dismissal under State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986), will be affirmed if no rational fact finder could have found the essential elements of the crime beyond a reasonable doubt. See State v. Wilhelm, 78 Wn. App. 188, 191, 896 P.2d 105 (1995). Review is de novo. State v. Henjum, 136 Wn. App. 807, 810-11, 136 Wn. App. 807 (2007). No deference is given to the trial court's ruling. Id. The question is solely one of law – whether the State has shown facts that satisfy the elements of the crime charged when viewing those facts and reasonable inferences therefrom in a light most favorable to the State. Id. The review does not require that the court decide whose version of the events is correct. Id.

The crime at issue here is maintaining a drug dwelling. RCW 69.50.402(1)(f) states as follows:

(1) It is unlawful for any person: (f)
Knowingly to keep or maintain any store,
shop, warehouse, dwelling, building,

vehicle, boat, aircraft, or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter.

Here are some of the undisputed facts from the detective's report:

1. There were several complaints of foot traffic coming and going from Menard's residence during all times of the day and night.
2. On July 15, Detective Posada was provided a small zip-loc baggie that contained suspected methamphetamine after a controlled-buy from the residence using a confidential source (CS).
3. Detective Posada obtained a search warrant for the residence and the warrant was executed. The residence had an upstairs and a basement. There was a primary living room and 3 bedrooms upstairs and 2 bedrooms and 1 pseudo-bedroom in the basement. Menard was using the living room as his bedroom. 12 persons were located inside the house and 2 persons were located outside the house.
4. Post-Miranda, Menard stated that he lived in the house and inherited it from his parents. He rents out four bedrooms. He said he was a meth user who smokes daily. He said that he was aware of all the people coming and going from his residence. He posted a sign on his back door telling people to stop coming over after 12 am. He said that most people who come to visit are there to use drugs. Menard said that occasionally, he gets drugs in lieu of rent money.
5. Sherry Payne reported that she rents from Menard. She was arrested for possessing meth. She stated that 10 to 15 individuals come to the house per day and that they come over to use drugs.
6. Renter Edward Purdom stated that he believed that 10 to 15 different individuals come and go every day and that most of them use drugs. Purdom stated that he uses meth on a limited basis. Purdom said

that he was going to move out because he had no idea there was so much traffic coming and going from the house.

7. Elaine Bowen was charged with possession of meth. She had meth and heroin and a digital scale inside of her purse. She stated that the meth was hers and that it was for personal use.
8. There were numerous items of drug paraphernalia located throughout the entire residence. Menard admitted that the glass smoking devices found in the living room (converted to his bedroom) belonged to him and had been used to smoke meth. A baggie of suspected meth was found on the couch in the downstairs southeast bedroom. There was a glass crack pipe in an ashtray next to the couch.

CP 22-25.

In its argument, the defense relied heavily on State v. Ceglowski, 103 Wn. App. 346, 12 P.3d 160 (2000). In that case, Division Two held that “the totality of the evidence must demonstrated more than a single isolated incident of illegal drug activity in order to prove that the defendant ‘maintains’ the premises for keeping or selling a controlled substance in violation of the drug house statute.” 103 Wn. App. at 350. The Ceglowski case did not involve the first prong of RCW 69.50.402(1)(f), “resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances.” Nonetheless, the undisputed facts in this case set forth substantially more than a “single isolated incident” of one person resorting to the home on one occasion to use drugs.

The Ceglowski case also held that “to constitute the crime of maintaining a premises for the purpose of unlawfully **keeping or selling** controlled substances there must be: (1) some evidence that the drug activity is a continuing or recurring character; and (2) that a substantial purpose of maintaining the premises is for illegal drug activity.” Id. at 352-3 (emphasis added). Under this test, even a small quantity of drugs found on one occasion could be sufficient if the totality of the evidence proves that the defendant maintained the premises for selling or keeping controlled substances. Id. at 353. But, under the facts of Ceglowski, the “mere possession of .9 grams of meth” in an office desk at a bait and tackle shop was not enough to prove that Ceglowski maintained a shop that was used for keeping or selling drugs. The facts at hand are highly distinguishable from the facts in Ceglowski. Here, we are not talking about a single isolated incident of mere possession, but rather, activity that is of a continuing or recurring character – 10 to 15 persons coming over each day to use drugs. CP 22-25.

The State would again note the court’s holding in Ceglowski was limited to the case where the purpose alleged was the selling or keeping of drugs. Even assuming this test applies to the “resorting to” prong, the test set forth by the court used the phrase, a “substantial purpose,” not, a primary purpose, as the trial court did in the case at hand. Id.

Furthermore, an individual can have more than one substantial reason for maintaining a dwelling. Here, Menard argued that he lived in the house. RP 9. That could be one valid purpose of maintaining a dwelling. However, one substantial purpose does not preclude the existence of other substantial purposes.

Here, the evidence was overwhelming that at least one of Menard's purposes for maintaining his home was so people could resort to it for using drugs. Menard admitted that most people who come there use drugs. CP 22-25. Witnesses said 10-15 individuals come to the house per day and that they come to do drugs. *Id.* This was not just a recurring event. It happening daily. *Id.* On the facts presented, any rational jury could find that he maintained a drug house in violation of RCW 69.50.402(1)(f).

The trial court relied on the case of State v. Fernandez, 89 Wn. App. 292, 948 P.2d 872 (1997). In that case, three residents of a home were all charged with maintaining a drug dwelling.² 89 Wn. App. at 874. There were tried together and convicted. The Court of Appeals held that the record contained insufficient evidence that "anyone other than those

² One defendant, Fernandez, claimed he lived elsewhere but the landlord said all three defendants rented the house and that when he frequently went to the house, he saw Fernandez. Neighbors also believed Fernandez lived at the house because he was usually there. 89 Wn. App. at 874.

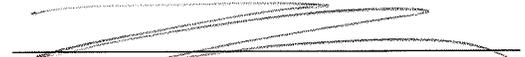
accused of maintaining the house,” ever used drugs in the house. Id. at 300. There was nothing in the record to indicate that “person other than the defendants” may have resorted to the house to use drugs. Id.

In contrast, here, there is substantial evidence that persons other than the defendant (10 to 15 individuals) were resorting to the house to use drugs on a daily basis. This was reported by at least two witnesses, Sherry Payne and Edward Purdom, and also by Menard himself. CP 22-5. It was further corroborated by the physical evidence, drugs and drug paraphernalia, found in the house. Id. As such, Fernandez is clearly distinguishable and Menard’s case should have gone to a jury. The evidence, if believed, was sufficient to show that persons other than Menard resorted to the home to use drugs.

IV. CONCLUSION

For the foregoing reasons, the State urges this Court to reverse the trial court’s decision finding that the undisputed facts failed to establish a prima facie case. Based on the undisputed facts, and reasonable inferences from those facts, a rational fact finder could have found all of the elements of maintaining a drug dealing. As such, the trial court should have denied Menard’s Knapstad motion.

Respectfully submitted this 16th day of March, 2016,



TAMARA A. HANLON WSBA 28345
Deputy Prosecuting Attorney

APPENDIX A

Narrative

Yakima Police Department - Incident Narrative Report

Incident #: 15Y-029600

Synopsis: Search warrant was served at 810 N 26th Avenue in Yakima.

Narrative:

During the month of July 2015, the DEA Drug Task Force has received several complaints from the regarding a possible drug house at 810 N 26th Avenue in Yakima. These complaints indicated there was heavy foot traffic coming and going from this residence during all times of the day and night.

I checked that address in the SPILLMAN data base and found several people associated with that residence. I printed out some of the booking photos of the people associated with 810 N 26th Ave to show informants. (It should be noted that one of the photographs was for Sherry PAYNE

On 07/15/15 at approximately 1300 hrs, Detective Horbatko and I met with a confidential and reliable informant hereinafter referred to as CS. Detective Horbatko and I asked the CS if he/she knew anyone staying at 810 N 26th Avenue. The CS was not familiar with that address. I showed the CS a picture of Sherry PAYNE. The CS stated he/she did know Ms. PAYNE. The CS stated Ms. PAYNE is a methamphetamine user.

I asked the CS if he/she was willing to go to 810 N 26th Avenue and try to purchase drugs from that location. The CS agreed.

At approximately 1345 hrs, I searched the CS for money and contraband. Nothing was located. I then issued the CS \$50.00 in DEA Drug Task Force buy funds for the anticipated purchase of 1 gram of methamphetamine.

At approximately 1357 hrs, Detective Horbatko transported the CS to the area of 25th Avenue and Willow Street where the CS was dropped off. Surveillance units watched the CS walk directly to 810 N 26th Avenue. I observed the CS enter the property and walk into the carport area out of my view.

At approximately 1402 hours the CS exited the property and walked directly to Detective Horbatko who was waiting near 25th Avenue and Willow Street. The CS provided Detective Horbatko with a small plastic zip-loc baggie that contained suspect methamphetamine.

I followed Detective Horbatko to the pre-arranged meet location. Once we were at that location, Detective Horbatko handed me the suspect methamphetamine. I asked the CS what occurred at the residence. The CS stated he/she went to the rear door which was located on the back side of the carport area. The CS stated there was a sign on the front door that directed people to go to the back of the house.

The CS knocked on the back door and it was answered by an unknown male. The CS asked for "Sherry". The unknown male let the CS inside the house and directed the CS to go downstairs to where Sherry was located. The CS stated when he/she went down the stairs there were numerous people there using drugs and just "hanging out". The CS stated he/she located Sherry and purchased the methamphetamine directly from her.

07/30/15

I conducted a presumptive field test on some of the crystalline material and received a positive reaction for the presence of methamphetamine. The gross weight of the plastic baggie and the contents was .8 grams. The evidence was tagged and placed into evidence at the Yakima Police Department.

On 7/17/15, I applied for and was granted a search warrant for 810 N 26th Ave in Yakima.

On 07/22/15, I was contacted by Yakima County Deputy Prosecutor Josh Camp regarding a resent Yakima County Superior Court Judge ruling regarding verbiage on drug search warrants. Mr. Camp asked me to change some of wording on my future search warrants to cover the concerns made by the judge.

I reviewed the signed search warrant for 810 N 26th Avenue and determined I would have to make some changes. Nothing changed on the affidavit.

I changed my search warrant to fulfill the wishes of Mr. Camp then contacted Municipal Court Judge Olwell. I explained to the magistrate judge why I had made the changes. Judge Olwell reviewed the new search warrant and old affidavit and signed both.

On 07/23/15 at approximately 0645 hrs, the Yakima DEA Drug Task Force served the search warrant at 810 N 26th Avenue in Yakima. It was determined that agents would make entry through the back door. As agents were approaching the back door we could see two individuals standing in the backyard near the shed. These two people were identified as Jake Lane and Ashley Cutler. Part of the warrant team detained Cutler and Lane while the rest of the team knocked and announced their presence and demanded someone open the door. I knocked a few times and waited for a response after each series, no one came to the door. I checked the door handle and found it was unlocked. I opened the door and agents went inside.

This residence had a primary living area upstairs as well as a basement. There were two bedrooms downstairs and a third room made into a pseudo bedroom. Edward Purdom was located in the downstairs northeast bedroom. Anthony Pleasant, Victoria Miralez and Kristina BROWN were located in the downstairs southeast bedroom. Miralez and Pleasant were sitting on the bed when DEA Agent Petty went through the bedroom door. Kristina BROWN was lying on a small couch in this same room. Ms. BROWN had her head on a small pillow. When Agent Petty detained Ms. BROWN he noticed a small baggie next to the pillow where Ms. BROWN'S head was. This baggie had suspect methamphetamine inside. Ms. Brown had a purse that was next to the couch that had her identification inside. There was also a glass crack pipe in an ashtray next to the couch where Ms. BROWN was located. This baggie of suspect methamphetamine was field tested and a positive reaction for the presence of methamphetamine was obtained. The gross weight of this baggie and respective contents was 1 gram.

Angelica Perez was found hiding in the pseudo bedroom. She had found a small area behind a refrigerator to conceal herself. It was later determined that Ms. Perez had four shoplifting warrants out of Union Gap.

There were three bedrooms upstairs and the living room was also being used as a bedroom. There were numerous people occupying the upstairs area. Agents located Sherry Payne, Shawn Jones, Timothy Reed, Elaine Bowen and Angela Eby in various locations throughout the upstairs. There was also an invalid female located in one of the upstairs bedroom that was identified as Laura Reed. She stayed in the bed the entire time we were processing the search warrant. It was determined that Ms. REED was suffering from numerous ailments and rarely got out of bed.

There were a total of 12 people located inside the house and two outside. All the occupants were brought out to the back yard area.

At approximately 0710 hrs, I read the search warrant to all of the people located inside the residence. I left a copy of the search warrant on the coffee table in the living room of the residence.

At approximately 0720 hrs, I began interviewing some of the detained people. The first person I interviewed was Kristina BROWN. I read Ms. BROWN her Miranda rights from my department issued card. Ms. BROWN stated she understood her rights and agreed to speak with me. Ms. BROWN stated she was at the casino all night and had just given Victoria Miralez a ride to this residence. I asked why Miralez wanted a ride to the house. Ms. BROWN said she didn't know. Ms. BROWN stated she was not a methamphetamine user and the methamphetamine located on the couch was not hers.

The next person I spoke with was Rodney MENARD. I read Mr. MENARD his Miranda rights from my department issued card. Mr. MENARD stated he understood his rights and agreed to speak with me. MENARD stated he has lived in this residence since he was 5 years old. The residence was in his mother and fathers names but they are no longer alive. MENARD stated he inherited the house but he has not put the property in his name.

I asked MENARD is he rents out bedrooms. MENARD said yes, he rents four bedrooms out. Menard stated he gets between \$200 and \$300 a month for each bedroom he rents. I asked him if he was a methamphetamine user. MENARD stated yes. He said he uses about \$20.00 worth of methamphetamine a day. Based on that dollar amount, Mr. MENARD smokes about 1 gram a day.

I asked MENARD if he was aware of all the people coming and going from his residence. MENARD said yes. He said he has posted a sign on his front and back door telling people to stop coming over to his house after 12 am. MENARD stated he has been unable to stop the traffic. I asked him if the people who come over to visit are there to use drugs. MENARD said most people do. I asked if people are selling drugs from inside his residence. He said he didn't think so.

MENARD stated he does not get public assistance and he uses the rent money to pay his bills. I asked MENARD if he occasionally gets drugs in lieu of rent money. He said yes.

MENARD has converted his living room into a bedroom where he sleeps. Detectives searching Mr. MENARDS bedroom located several glass smoking devices. MENARD confirmed those glass smoking devices belonged to him and had been used to smoke methamphetamine.

I then spoke with Sherry PAYNE. I read her Miranda which she stated she understood and waived. Ms. PAYNE stated she rents a room from MENARD. She said she is supposed to pay \$175.00 a month but she is behind in her payment. PAYNE was asked if she has observed a lot of people coming over to the house on a daily basis. PAYNE immediately said yes. I asked her how many different people come over on an average day. PAYNE said 10 to 15 people a day. I asked if those people came over to use drugs. She said yes.

Ms. PAYNE admitted she is a methamphetamine user but she denied ever selling it.

I then spoke with Edward PURDOM. PURDOM stated he has lived at this address for

a couple of months. PURDOM stated he was going to move out because he had no idea there was so much traffic coming and going from the house. PURDOM said he also believed at least 10 to 15 different people come and go every day and that most of them use drugs. PURDOM stated he uses methamphetamine on a limited basis.

SA Petty and Detective Pepper located a small amount of methamphetamine and heroin in a purse that contained the identification of Elaine BOWEN. There were .3 grams of heroin and 8 grams of methamphetamine. This methamphetamine was in a small tin which added to the gross weight. The methamphetamine and heroin field tested positive respectively. There was also a digital scale inside the purse.

Detective Horbatko read Ms. BOWEN her Miranda rights from his department issued card. BOWEN stated she understood and waived her rights. BOWEN admitted she is a methamphetamine user but did not know she had heroin in her purse. BOWEN admitted the methamphetamine inside her purse belonged to her for her personal use. Ms. BOWEN then decided to stop speaking with Detective Horbatko. No other questions were asked of her.

Ms. BOWEN was released pending a summons to appear in court.

There were numerous items of drug paraphernalia located throughout the entire residence. This paraphernalia was photographed and left inside the house. A copy of the receipt for property seized was left on the coffee table next to the search warrant.

All the evidence seized from this residence was tagged into property at the Yakima Police Department.

BROWN and BOWEN were arrested for possessing methamphetamine. MENARD was arrested for maintaining a drug dwelling. EBY was arrested on a felony warrant for violating her sentence conditions.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing report, written in the County of Yakima, City of Yakima is true and correct, and I am entering my authorized user ID and password to authenticate it.

Coban: Yes: No:

Date, Time: Thu Jul 23 14:57:34 PDT 2015

Reporting Officer: Phil Posada

Approving Supervisor:

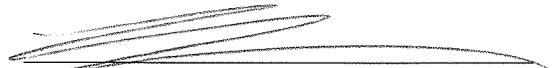
Date, Time:

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on March 16, 2016, by agreement of the parties, I emailed a copy of BRIEF OF APPELLANT to Ken Kato at hkhato@comcast.net.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 16th day of March, 2016 at Yakima, Washington.



TAMARA A. HANLON WSBA#28345
Senior Deputy Prosecuting Attorney
Yakima County, Washington
128 N. Second Street, Room 329
Yakima, WA 98901
Telephone: (509) 574-1210
Fax: (509) 574-1211
tamara.hanlon@co.yakima.wa.us