

**FILED**

AUG 08, 2016  
Court of Appeals  
Division III  
State of Washington

**NO. 33945-9-III**

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

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STATE OF WASHINGTON,

Respondent,

v.

**JUSTIN GABRIEL GEBHARDT,**

Appellant.

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

The Honorable Richard Bartheld, Judge

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**BRIEF OF APPELLANT**

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LISA E. TABBUT  
Attorney for Appellant  
P. O. Box 1319  
Winthrop, WA 98862  
(509) 996-3959

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A. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in admitting trial Exhibit 2 where the State failed to establish a chain of custody.

2. The trial court abused its discretion in admitting trial Exhibit 4 where the State failed to establish a chain of custody.

3. The trial court erred in entering judgment against Mr. Gebhardt for delivery of methamphetamine because the methamphetamine evidence should have been suppressed for failure to establish an adequate chain of custody.

4. The trial court erred in entering judgment against Mr. Gebhardt for possession of methamphetamine because the methamphetamine evidence should have been suppressed for failure to establish an adequate chain of custody.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Because drug evidence is so unique and is easy to tamper with, it is not admissible unless the proponent establishes a chain of custody with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated. Here the State failed to establish a chain of custody for the methamphetamine received from an informant or found in Mr. Gebhardt's apartment. Did the State fail

to establish a chain of custody with sufficient completeness such that Exhibits 2 and 4 were admitted in error?

C. STATEMENT OF THE CASE

The Yakima County DEA Narcotics Trafficking Task Force identified Anita Ballesteros as a drug addict who sold methamphetamine to support her addiction. RP<sup>1</sup> 35, 100. The Task Force wanted to find out who provided Ballesteros with her drugs. RP 100.

Richard France, a homeless man with a drug arrest history, worked as a Task Force informant. RP 164-65, 192. In his time as an informant, he transitioned from working off a methamphetamine delivery charge to being paid for each step of each transaction he was involved in for the Task Force. RP 163-67.

Task Force Detective Eric Horbattco heard Ballesteros was out of drugs. RP 100. France believed he could buy methamphetamine from Ballesteros who was staying in Econo Lodge room 216. RP 102, 192-93. Detective Horbattco searched France, gave him pre-recorded buy money, and surveilled him as he walked into room 216. RP 102-03, 176. France was unaware of the Task Force's ulterior motive of finding out who was providing drugs to Ballesteros. RP 100-01. France was sent to

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<sup>1</sup> The report of proceedings is consecutively numbered and is thus not identified by specific volume.

Ballesteros's room so he would be present when Ballesteros's supplier came to upload her drug supply. RP 100.

The Econo Lodge was in an urban setting and within 1,000 feet of a Yakima County school bus stop.<sup>2</sup> RP 89-90, 250, 254.

France was in room 216 for about 30 minutes when another man, Walt<sup>3</sup>, entered the room. RP 105, 193. Walt stayed in the room for 17 minutes. RP 107. Walt left the room after receiving a text. RP 193-94. Walt walked to a yellow pickup sitting in an adjacent parking lot with its motor running. RP 177-78. Walt got into the passenger side and stayed for about 30 seconds before getting out with a ball of white substance in plastic in his hand. RP 180. Walt walked back to room 216 and went inside. RP 180. Per France, Walt had methamphetamine. RP 193. France paid Ballesteros for a cut of the methamphetamine and left the room. RP 194-95. France met with Detective Horbattco and gave him two one-inch clear plastic Ziploc baggies containing a crystal substance. RP 108, 195.

DEA Special Agent Joshua Gravell's surveillance location was within 10 feet of the yellow pickup. RP 178. He could see that the pickup was occupied only by a male driver. RP 178-79. The pickup left the parking lot within moments of Walt's departure. RP 180. Agent Gravell

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<sup>2</sup> The bus stop was current as of the charged incident date in December 2014. RP 254.

<sup>3</sup> No last name is provided for Walt.

testified based on his training and experience what he saw in the pickup appeared to be a drug deal. RP 179.

Washington State Patrol Detective Gary Wilcox followed the truck. RP 187. It stopped briefly in a McDonald's parking lot. RP 188. A woman from a nearby car got into the passenger side of the pickup. The pickup drove for a block, dropped the woman in another parking lot, and drove away leaving her there. RP 189, 232-33. Detective Wilcox testified that too looked like a drug deal. RP 233. Department of Licensing (DOL) records showed Justin Gebhardt as the pickup's registered owner. RP 111. Agent Gravell identified Gebhardt as the pickup's driver after viewing a DOL photo of him. RP 112, 181.

Detective Horbattco field tested and weighed the baggies given to him by France. RP 108-09. During trial, he identified Exhibit 2 as the two baggies. RP 108-09.

The Task Force served a search warrant on Gebhardt's garage apartment a week later. RP 123. During the warrant service, the police found two pipes used for smoking methamphetamine, a digital scale, and a small baggy of methamphetamine identified as Exhibit 4. RP 124-25, 145. Gebhardt told Detective Horbattco he used methamphetamine and he sometimes bought eight-ball quantities so he could sell some to the few customers he dealt with. RP 149-50. He also said that he and the woman

with him when the search warrant was served smoked methamphetamine the previous night after she arrived at his apartment without methamphetamine. RP 149-50. This was the evidence offered to support Count 2 of the amended information charging delivery of methamphetamine. RP 141-43; CP 5. Mid-trial, the court dismissed Count 2 for lack of sufficient admissible evidence. RP 142-43; CP 11.

Washington State patrol forensic scientist Jason Stenzel testified both baggies in Exhibit 2 and the single baggie identified as Exhibit 4 contained methamphetamine. RP 242. Stenzel explained the lab usually received evidence from police agencies via secure transport, UPS, or certified mail. RP 238. No witnesses provided an assurance that the items received from informant France or during the search of Mr. Gebhardt's apartment were in the same condition and had not been tampered between law enforcement acquisition and WSP lab testing.

While pending trial, Mr. Gebhardt missed a court date resulting in the addition of a bail jump charge to his amended information. CP 6. The State presented evidence that Mr. Gebhardt missed the court date after being released on bail and was later arrested on a warrant. RP 204-12.

The jury found Mr. Gebhardt guilty of possessing the methamphetamine found in his apartment, the delivery of methamphetamine to Walt, and bail jumping. CP 8, 9, 10. The jury also

found by special verdict that the delivery occurred within 1,000 feet of a school bus stop. CP 7.

At Mr. Gebhardt's request, the court imposed a prison-based drug offender sentencing alternative (DOSA). RP 352; CP 12-13. Mr. Gebhardt is serving 57 months in prison. CP 13.

Mr. Gebhardt appeals all portions of his judgment and sentence. CP 20.

D. ARGUMENT

THE TRIAL COURT ABUSED ITS DISCRETION IN ADMITTING EXHIBITS 2 AND 4 BECAUSE THE STATE FAILED TO ESTABLISH A SUFFICIENT CHAIN OF CUSTODY.

- a. A sufficient chain of custody must be established before a court may admit drugs into evidence.

To be admissible, physical evidence of a crime must be sufficiently identified and demonstrated 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). Factors to be considered include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it. *Id.* On appeal, a trial court's decision to admit evidence is reviewed for abuse of discretion. *Id.*

Drug evidence, which is not readily identifiable and is susceptible to alteration by tampering or contamination, should be identified by the

testimony of each custodian in the chain of custody from the time the evidence was acquired. *State v. Roche*, 114 Wn. App. 424, 436, 59 P.3d 682 (2002). The proponent of the evidence must “establish a chain of custody ‘with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with.’” *Id.* (quoting *United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir. 1989)).

- b. The State established no sufficient chain of custody for Exhibits 2 and 4.

The State failed to make a sufficient showing that Exhibits 2 or 4 were the items provided by informant France to Detective Horbattco or found in Mr. Gebhardt’s apartment. The evidence did not establish that Detective Horbattco properly tracked the baggies between the time he received them and they were sent to the Washington State Patrol (WSP) Crime Lab for testing.

Detective Horbattco never explained who handled the baggies between the time he found or received them and the time they made their way to the WSP Crime Lab. No one testified how a baggie of suspected drugs found during the service of a search warrant or baggies of drugs gathered from an informant would be handled or kept separate from each other or similar baggies being processed into evidence. Detective

Horbattco only testified the baggies from the delivery had a “skull pattern” on them.

Under existing case law mere identification of an item is insufficient without establishing an adequate chain of custody. The State failed to “establish a chain of custody with sufficient completeness to render it improbable that the original item had either been exchanged with another or been contaminated or tampered with.” *Roche*, 114 Wn. App. at 436.

- c. Without Exhibits 2 and 4, the evidence is insufficient to convict Mr. Gebhardt of delivery of methamphetamine or possession of methamphetamine and the convictions must be reversed.

The State must prove each element of the crime charged beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant’s fundamental right to due process is violated when a conviction is based upon insufficient evidence. *Id.* U.S. Const. Amend. 14; Wash. Const. Art. I, § 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence will support a conviction only if, “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.” *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

To find Mr. Gebhardt guilty as charged, the State had to prove beyond a reasonable doubt that on or about December 5, 2014, Mr. Gebhardt knowingly delivered methamphetamine. CP 5; Supp. Designation of Clerk’s Papers, Court’s Instructions to the Jury, sub. nom. 56 (Instruction 12); RCW 69.50.401(1); *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Absent Exhibit 2, there is no evidence Mr. Gebhardt delivered methamphetamine to Walt. Therefore, the State failed to meet its burden.

To find Mr. Gebhardt guilty as charged, the State had to prove beyond a reasonable doubt that on or about December 12, 2014, Mr. Gebhardt possessed methamphetamine. CP 5; Supp. DCP, Court’s Instructions to the Jury, Instruction 15. Absent Exhibit 4, there is no evidence the baggy in Mr. Gebhardt’s apartment was methamphetamine. RCW 69.50.4013(1).

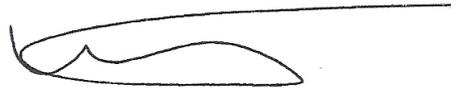
Reversal and dismissal of both convictions is required. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The prohibition against double jeopardy forbids retrial after a conviction is reversed for

insufficient evidence. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

E. CONCLUSION

Gebhardt's convictions for delivery of methamphetamine and possession of methamphetamine should be reversed and dismissed with prejudice.

Respectfully submitted August 8, 2016.

A handwritten signature in black ink, appearing to read "LISA E. TABBUT". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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LISA E. TABBUT/WSBA 21344  
Attorney for Justin Gabriel Gebhardt

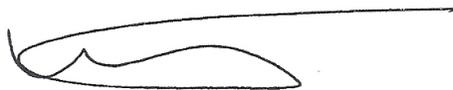
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I filed the Brief of Appellant to (1) Yakima County Prosecutor's Office, at joseph.brusic@co.yakima.wa.us and David.Trefry@co.yakima.wa.us; (2) the Court of Appeals, Division III; and (3) I mailed it to Justin Gabriel Gebhardt/DOC#882046, Coyote Ridge Corrections Center, PO Box 769 Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed August 8, 2016, in Winthrop, Washington.



Lisa E. Tabbut, WSBA No. 21344  
Attorney for Justin Gabriel Gebhardt, Appellant