

FILED

NOV 14, 2016
Court of Appeals
Division III
State of Washington

COA No. 34356-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE BARBOZA CORTES,

Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

TABLE OF CONTENTS

I. ASSIGNMENTS OF ERROR.....1

 1. The court erred by denying the CrR 3.6 motion to suppress.....1

 2. The State’s evidence was insufficient to support the convictions.....1

Issues Pertaining to Assignments of Error

 A. Did the court err by denying the motion to suppress when the affidavit in support of the search warrant failed to provide a nexus between the place to be searched and the items sought? (Assignment of Error 1).....1

 B. Was the State’s evidence insufficient to prove guilt beyond a reasonable doubt? (Assignment of Error 2).....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....9

 A. The erred by denying the motion to suppress.....9

 B. The State’s evidence was insufficient to support guilt beyond a reasonable doubt.....12

IV. CONCLUSION.....14

TABLE OF AUTHORITIES

Table of Cases

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970).....13

State v. Drum, 168 Wn.2d 23, 225 P.3d 237 (2010).....13

<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	13
<i>State v. Hutton</i> , 7 Wn. App. 726, 502 P.3d 1037 (1972).....	13, 14
<i>State v. McReynolds</i> , 104 Wn. App. 560, 17 P.3d 608 (2000), <i>review denied</i> , 144 Wn.2d 1003 (2001).....	12
<i>State v. Thein</i> , 138 Wn.2d 133, 977 P.2d 582 (1999).....	11, 12
<i>State v. Thomas</i> , 91 Wn. App. 195, 955 P.2d 420, <i>review denied</i> , 136 Wn.2d 1030 (1998).....	12
<i>Wong Sun v. United States</i> , 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed.2d 441 (1963).....	12

I. ASSIGNMENTS OF ERROR

1. The court erred by denying the CrR 3.6 motion to suppress.

2. The State's evidence was insufficient to support the convictions.

Issues Pertaining to Assignments of Error

A. Did the court err by denying the motion to suppress when the affidavit in support of the search warrant failed to provide a nexus between the place to be searched and the items sought? (Assignment of Error 1).

B. Was the State's evidence insufficient to prove guilt beyond a reasonable doubt? (Assignment of Error 2).

II. STATEMENT OF THE CASE

Jose Barboza Cortes was charged by fifth amended information with count I: unlawful possession of methamphetamine with intent to deliver; count II: second degree unlawful possession of a firearm; count III: third degree possession of stolen property; count IV: forgery; count V: second degree identity theft; count VI: third degree possession of stolen property; count VII: forgery; count VIII: second degree identity theft; count IX: third degree possession

of stolen property; count X: second degree identity theft; count XI: forgery; and count XII: second degree identity theft. (CP 197).

Mr. Barboza moved to suppress evidence, but the trial court denied the motion. (CP 76, 311). He stipulated that he had two prior felony convictions for purposes of the unlawful possession of a firearm charge. (2/23/16 RP 73, 109-10; CP 130). In a CrR 3.5 hearing, the court decided statements made by Mr. Barboza in a civil forfeiture hearing were admissible. (2/23/16 RP 75-88). The statements he made were (1) an 8-ball of methamphetamine was 3.5 grams, not 4.5; and (2) the methamphetamine was his. (*Id.*). At trial, Mr. Barboza did not contest possessing methamphetamine so any error in admitting the statement was waived in any event. (2/25/16 RP 431).

The case arose from a vehicle prowler where checks were stolen and deposited into Mr. Barboza's account at Cashmere Valley Bank. (CP 3-7, 29-39). The defense did not dispute the checks were stolen by someone; they were altered; and Mr. Barboza deposited the checks. (2/23/16 RP 120-22; 2/25/16 RP 451).

Juliana Garcia was involved in a fundraiser for the medical assistants program at Wenatchee Valley College (WVC) in January

2015. (2/24/16 RP 312-13). She was the treasurer and had about \$1015 in cash and \$250 in checks from the fundraiser in her backpack. (*Id.*). After Ms. Garcia drove home, her backpack with all the money and checks in it was stolen from her car. (*Id.*). She testified she did not know Mr. Barboza; there was no reason for him to have the WVC checks; she did not give him any checks; and she did not negotiate the checks to anyone. (*Id.* at 314-15). Ms. Garcia called the police. (*Id.* at 315).

Corporal Troy Lykken took her call and responded January 16, 2015. (2/24/16 RP 326). He followed some shoe prints that started right next to her car, but lost the trail. (*Id.* at 329). Corporal Lykken saw no signs of forced entry into the vehicle. (*Id.* at 330). The evidence later showed that the shoe prints next to Ms. Garcia's car did not match Mr. Barboza's shoes. (2/25/16 RP 393-94).

Windy Cochran of Cashmere Valley Bank was contacted by police regarding Mr. Barboza. (2/24/16 RP 166-67). After collecting information on his account and creating a temporary bank statement, she testified four checks were deposited at an ATM into his account on January 27, 2015. (*Id.* at 168-72). Videos at the ATM for the time and date when the checks were deposited showed Mr. Barboza depositing the checks. (*Id.* at 175-79). They

were put into his Cashmere Valley Bank account with Mr. Barboza's address as 747 Cascade St., Wenatchee, WA. (*Id.* at 182). Ms. Cochran further testified charge-back notices were mailed to Mr. Barboza with his account closed and in charge-off status as unsatisfactory. (*Id.* at 192; 2/25/16 RP 387).

One check was from Tamara Grigg made out to WVC with a hyphen and the name Tyler Oliver following, which appeared to Ms. Cochran to be an alteration. (2/24/16 RP 189-90). There was nothing to show the check was endorsed, however, as ATM deposits did not require endorsements before accepting checks. (*Id.* at 188, 191). Another check was from Michelle Mahoney-Holland, also made out to WVC, with the name Tyler Oliver following. (*Id.* at 189). Ms. Cochran noted the handwriting did not match for WVC and Tyler Oliver. (*Id.* at 189). She did not know who altered the check. (*Id.* at 189-90). Jennifer Sanon wrote a check to WVC and no one else. (*Id.* at 190). She could not recall whether or not the check was endorsed. (*Id.*). Another check was made out to Francisco Villa by Dava Construction for \$738.37. (*Id.* at 189). This check did not appear to be altered, but the \$738.37 was charged back as not payable. (*Id.* at 189, 192).

Alta Reyna lived at 747 Cascade St. in Wenatchee. (2/24/16 RP 201-02). In January and February 2015, she rented the basement of her house to Mr. Barboza. (*Id.* at 202). No one else rented from her. (*Id.*).

Ms. Grigg testified she wrote a check to WVC for a raffle ticket and gave the check to Julie Garcia. (2/24/16 RP 203-05). She said another name was on the check next to WVC, but she did not know who wrote it in. (*Id.* at 206). Ms. Grigg did not know Mr. Barboza. (*Id.*). The check had her name and address and was the same as she had written except for the alteration. (*Id.* at 208).

Shelly Bodolla and her husband owned Dava Construction. (2/24/16 RP 209). Testifying as to the check to Francisco Villa and signed by Tom Collins, she indicated she knew neither person. (*Id.* at 210). Although reflecting the right name and address of their business, the check was not theirs. It was a U.S. Bank check and they did not bank there. (*Id.* at 210-11). Ms. Bodolla signed all checks and this one was signed by Tom Collins. (*Id.* at 211). The check was not legitimate, but she did not know who made it out. (*Id.* at 211-12).

Ms. Mahoney-Holland confirmed she wrote a check to WVC's medical assistants program in January 2015. (2/24/16 RP

212). It was a \$10 check for a fundraiser. (*Id.*). She did not write in the additional payee, Tyler Oliver, who appeared on the check next to WVC. (*Id.* at 215). Ms. Mahoney-Holland testified there was no reason for Mr. Barboza to have the check. (*Id.* at 216). She did not know who wrote Tyler Oliver on the check, which had her correct name and address on it. (*Id.* at 216-17).

Ms. Sanon also wrote a check, with her correct name and address on it, to WVC for a fundraiser. (2/24/16 RP 218-20). The check also contained a notation on the "for" line designating Tyler's breakfast. (*Id.* at 220). She did not know who wrote that on the check. (*Id.* at 220). Ms. Sanon expected the check to be deposited by WVC into its account, not by Mr. Barboza into his account. (*Id.* at 219-20).

Officer Nathan Hahn had contact with Mr. Barboza in January or February 2015. (2/24/16 RP 240). He wrote the first search warrant to Cashmere Valley Bank regarding items related to Mr. Barboza's account and the ATM where he deposited checks in that time frame. (*Id.* at 241-42). The officer identified where Mr. Barboza lived as 747 Cascade in Wenatchee and prepared the search warrant for his residence. (*Id.* at 243; 2/25/16 RP 342-43). The warrant was executed on February 5, 2015. (2/24/16 RP 288,

316). Mr. Barboza was at his residence at the time. (2/25/16 RP 343). No one else was in the basement. (*Id.*). When a shotgun was found, the search was stopped and the warrant amended to include a search for firearms and related items. (*Id.* at 394). Officer Hahn did later fire the shotgun, which was operational and fired a .410 shell. (*Id.* at 344-48). The officer also identified Mr. Barboza as the man in the ATM videos. (*Id.* at 349-50). The Dava Construction check to Francisco Villa was found in his residence. (*Id.* at 351).

Officer Hahn amended the warrant a second time when drugs, including an 8-ball of methamphetamine, were found. (2/25/16 RP 381). Each amendment was approved by a judge. (*Id.*). The officer was also at a civil forfeiture hearing concerning \$220 cash found on Mr. Barboza. (*Id.* at 350). He corrected the officer that an 8-ball was not 4.5 grams, but rather 3.5 grams. (*Id.* at 356-57). At the civil forfeiture hearing, he said the 8-ball belonged to him. (*Id.* at 357, 370). Mr. Barboza had legitimate income from unemployment of \$139/week. (*Id.* at 369, 380).

Officer Scott Reiber participated in the execution of the search warrant. (2/24/16 RP 265-66). Mr. Barboza came to the

door and was taken into custody. (*Id.* at 267). He was not armed when he came up from downstairs. (*Id.* at 272).

Sergeant Richard Johnson recovered the pump-action shotgun during the search. (2/24/16 RP 283-84). It was between two mattresses in the bedroom and was not easily accessible as the mattresses had to be pulled apart. (*Id.* at 284). The sergeant found no shotgun shells. (*Id.* at 287).

Officer Kevin Baltis helped in the execution of the search warrant on February 5, 2015. (2/24/16 RP 297). Mr. Barboza was detained and transported to the police station. (*Id.* at 300). Drug-related items were also seized. (*Id.* at 317). They were not on the warrant so the search was stopped at that point for amendment of the warrant to authorize a search for drugs and related items. (*Id.* at 318). The officer also indicated the warrant had been amended for firearms after the shotgun was found. (*Id.* at 319).

No exceptions were taken to the court's jury instructions. (2/25/16 RP 397-98). In closing argument, defense counsel acknowledged Mr. Barboza was not contesting he possessed methamphetamine; was not disputing he was to have no firearms; and was not disputing he deposited the checks in question. (*Id.* at 431, 446-47, 451).

The jury found Mr. Barboza not guilty of count I: unlawful possession of methamphetamine with intent to deliver, but guilty of the lesser included offense of possession of methamphetamine. (CP 264-67). The jury further convicted him of count II: second degree unlawful possession of a firearm; count III: third degree possession of stolen property; count V: second degree identity theft; count VI: third degree possession of stolen property; count VIII: second degree identity theft; count IX: third degree possession of stolen property; count X: second degree identity theft; and count XII: second degree identity theft. (CP 267-69, 271-72, 274-76, 278). The jury found him not guilty of count IV: forgery; count VII: forgery; and count 11: forgery. (CP 270, 273, 277).

The court sentenced Mr. Barboza to 43 months on count II and ran all other sentences on the remaining convictions concurrently for total confinement of 43 months. (4/13/16 RP 481-83; CP 283). After inquiring of his earning capacity, the court further ordered mandatory LFOs and payments of \$10/month. (*Id.* at 438-84; CP 283). This appeal follows. (CP 305).

III. ARGUMENT

A. The court erred by denying the motion to suppress.

Based on the information in the affidavit for search warrant and the warrant itself, Mr. Barboza moved to suppress all evidence obtained from the February 5, 2015 search of his residence at 747 Cascade St. in Wenatchee. (CP 77-78). The facts were undisputed and no evidentiary hearing was held on the motion to suppress. (12/10/15 RP 35-37). The court denied the motion to suppress and entered these findings:

The evidence is undisputed and consists of the Search Warrant and Search Warrant Affidavit. From the affidavit items were taken from a vehicle during a car prowling on January 16, 2015. On January 20 four of the stolen checks were deposited into the defendant's account. On January 27, 2016 [sic] four additional checks were deposited into his account. The ATM video of the deposits showed a subject who looked nearly identical to the defendant's previous booking photo which had been taken [sic] eleven days earlier in connection with a separate event. The officer sought a search warrant for the defendant's residence in hopes of obtaining evidence relating to the theft of the checks and subsequent unlawful depositing of the checks. The officer requested the search warrant on February 5, 2016 [sic]. Specifically, the officer sought the backpack, books, checks and fundraiser tickets from the car prowling, the ATM card of the defendant, Nike shoes (relating to the footprints found at the vehicle prowling), and indicia of residency. (CP 311).

The defense argued the search warrant affidavit did not provide a nexus between the place to be searched and the items

sought. (CP 79). For purposes of the motion, Mr. Barboza stipulated that the search warrant established he deposited forged and stolen checks into his bank account and he resided at 747 Cascade in Wenatchee. (*Id.*). The affidavit recited that police were notified of a vehicle prowl on January 16, 2015. (CP 87). Cash and checks were stolen from a backpack taken from the vehicle of Juliana Garcia. (*Id.*). Officer Hahn prepared the affidavit and stated there was \$250 worth of checks stolen, but he was only able to locate \$210 worth of those checks deposited into Mr. Barboza's account. (CP 89). He also believed the Nike shoes that were seen at the vehicle prowl likely belonged to Mr. Barboza. (*Id.*).

Nonetheless, the affidavit supporting the search warrant failed to state facts establishing a nexus between the place to be searched and the evidence sought to be found. *State v. Thein*, 138 Wn.2d 133, 146, 977 P.2d 582 (1999). That nexus must be established by specific facts, not a mere declaration of suspicion and belief. *Id.* at 147). Here, there are no specific facts articulated by Officer Hahn that established a nexus between (1) the stolen checks deposited into Mr. Barboza's account and his residence and (2) the Nike shoes likely belonging to Mr. Barboza and his residence. Indeed, no such uncashed checks were discovered and

the Nike shoes did not match the shoe prints from the vehicle prowl. *State v. McReynolds*, 104 Wn. App. 560, 570-71, 17 P.3d 608 (2000), *review denied*, 144 Wn.2d 1003 (2001). There may have been enough in the affidavit to support the inference Mr. Barboza was involved in criminal activity, but there was nothing in the affidavit to show that evidence of the crime could be found at the place to be searched. *Id.* at 569.

In these circumstances, the court erred by denying the motion to suppress because there was no nexus and between the place to be searched and the evidence sought. *Thein, supra*. Furthermore, the methamphetamine and shotgun found pursuant to the warrant and its subsequent amendments must be suppressed as fruit of the poisonous tree. *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 9 L. Ed.2d 441 (1963); *State v. Thomas*, 91 Wn. App. 195, 201, 955 P.2d 420, *review denied*, 136 Wn.2d 1030 (1998). All charges should accordingly be dismissed.

B. The State's evidence was insufficient to support guilt beyond a reasonable doubt.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the

crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences from it. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Although credibility issues are for the finder of fact to decide, the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

The State must prove beyond a reasonable doubt every element of a charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed.2d 368 (1970). Here, the State produced no evidence Mr. Barboza knowingly possessed a firearm, knowingly possessed stolen property, knowingly committed identity theft. The State failed to prove beyond a reasonable doubt that Mr. Barboza knowingly possessed the shotgun, which was not readily accessible and between two mattresses. (2/24/16 RP 283-84). The State failed to show the checks had not been endorsed as ATM deposits did not require endorsements before accepting them. (2/24/16 RP 191). Thus, it failed to prove Mr. Barboza knowingly possessed stolen property and knowingly committed identity

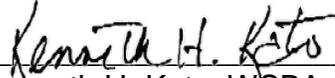
theft. The jury cannot resort to guess, speculation, or conjecture to find facts. *Hutton, supra*. But that is what it did in finding Mr. Barboza guilty. This is improper and his convictions must be reversed and the charges dismissed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Barboza respectfully urges this Court to reverse his convictions and dismiss the charges.

DATED this 12th day of November, 2016.

Respectfully submitted,



Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on November 12, 2016, I served a copy of the Brief of Appellant by USPS on Jose Barboza Cortes, # 891877, PO Box 769, Connell, WA 99326; and by email, as agreed, on Conor Johnson at prosecuting.attorney@co.chelan.wa.us.

