

No. 34678-1

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

STATE OF WASHINGTON, Respondent

v.

JAMIE S. ANDREWS , Appellant

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY
THE HONORABLE JUDGE D. FEDERSPIEL

CORRECTED
BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

A. The trial court erred in entering Conclusion of Law 6: Under the circumstances, due to public safety and officer safety concerns, it was reasonable for Officer Sparks to have Mrs. Sparks retrieve the glass pipe. CP 94.

B. The trial court erred in entering Conclusion of Law 7: It was not misconduct for Mrs. Sparks to later field test the evidence in the presence of Officer Sparks and Officer Nathan Porter of the Sunnyside PD. CP 94.

C. The trial court erred in entering Conclusion of Law 8: The insertion of Mrs. Sparks into peripheral aspects of the criminal investigation had no material impact on the chain of custody, as there were no facts suggesting and no arguments made that she tainted the evidence in any fashion. CP 94.

D. The trial court erred in entering Conclusion of Law 9: The defendant's motion to dismiss and/or suppress are denied. CP 94.

E. This Court should not award appellate costs in the event Mr. Andrews does not substantially prevail on appeal and the State files a cost bill.

Issues Pertaining to Assignments of Error

1. Did the court err in finding it was reasonable conduct for a police officer to direct his off-duty ride along to participate in a criminal investigation when it was against Sunnyside police department protocol and the officer misrepresented the fact of participation in search warrant affidavits?
2. Was the officer's conduct sufficiently outrageous to warrant dismissal under CrR 8.3(b)?
3. Did the trial court err when it denied a motion to suppress, or in the alternative, a motion to dismiss ?
4. Should this Court deny imposition of appellate costs in the event Mr. Andrews does not substantially prevail on appeal and the State files a cost bill?

II. STATEMENT OF FACTS

On April 19, 2016, Officer Chris Sparks was on patrol in Sunnyside. RP¹⁶. That day his wife, Jerrika Sparks, accompanied

¹ For purposes of this brief, hearing date 8/12/16 will be referred to as RP; hearing date 8/22/16 will be referred to as 1RP; hearing date 8/23/16 will

him as a “ride-along”². She was employed by the Washington State Patrol (WSP), but was not on duty and did not wear her uniform that day. RP 14.

Officer Sparks traveled behind Jamie Andrews as he drove on North Avenue in Sunnyside. 2RP 61-62. Sparks ran the license plate number and learned the driver’s license of the registered owner was suspended in the third degree. 2RP 62. As he initiated the traffic stop, he saw a small glass object fly from the window of Andrew’s car and shatter in the road. 2RP 63;64. Sparks thought the glass pipe was the kind used for smoking methamphetamine. 2RP 63-64. Mr. Andrews pulled his car over and Sparks arrested him for driving with a suspended license. 2RP 64;82;88.

In a search incident to arrest, the officer found a small baggie containing a substance that he suspected was methamphetamine. 2RP 64.

Sparks directed his wife to collect the glass from the road. RP 18. In a pretrial hearing Sparks said he was not sure if it was against Sunnyside police department policy to allow a ride-along to

be referred to as 2RP; hearing date 8/24/16 as 3RP and hearing date 8/31/16 as 4RP.

² At trial, Officer Sparks testified he was unable to locate the form approving his wife to join him on the ride along. 8/23/16 RP 101.

actively participate in the processing of a criminal investigation. RP 14-15. He did not know the department's policy on ride-along observers because the manual was "an inch or two thick." RP 15.

He directed her to collect the glass because:

I mean, I just felt that it was the safest, 'cause there was glass on the roadway, a pipe in the middle of the road. I didn't have any backup yet. I had Mr. Andrews to deal with. I didn't want to leave it in the roadway for it to get ran over by another vehicle. I had a fully commissioned police officer with me, and I sent her to retrieve it. I felt it was the safest for the public to do so at that time.

RP 18.

At trial he testified he had since learned under Sunnyside police department policy that a ride along could participate in an investigation if there were an emergency. 2RP 82. At trial he said he directed his wife to collect the glass pipe because he regarded the situation as "emergent." 2RP 82. When asked what he would have done in the same situation without outside assistance, Sparks said:

I would basically -- I wouldn't be able to leave the suspect until I'd already searched him thoroughly to make sure he didn't have anything that was going to hurt me on him. Then I would be able to put him in my car and get the evidence. If backup happened to arrive before that point, then I could send them to get it. Either way, I would need to make sure that he's safe before I can go retrieve the evidence.

2RP 84.

Sparks put the remnants of broken glass along with the baggie into a ziplock bag and placed it in the trunk of his patrol car. 2RP 63;73.

Officer Sparks and his wife returned to the police station. RP 23. Sparks used the keypad to open the door to the secure patrol room and both he and his wife entered. RP 23;30. He said he intentionally allowed Ms. Sparks to swab the broken pipe she had retrieved from the road and to conduct a preliminary NIK test on it. She also conducted the NIK test on the substance in the baggie. RP 16;24. Although she handled and tested the evidence, she did not sign her initials on the evidence bag. 2RP 97.

At the pretrial hearing, Sparks did not provide any justification for why he directed his wife to conduct the NIK tests. At trial he stated it was more efficient to have his wife handle the evidence and conduct the NIK tests while he prepared paperwork. 2RP 84.

Sparks prepared a police report and two affidavits for search warrants. Sparks said that he was truthful in the search warrant affidavits he signed under penalty of perjury. RP 18-20. In the search warrant affidavits he represented that he had retrieved the pipe from the road and conducted the NIK tests. RP 18-19;Exh.

SI-5. He admitted that his affidavits were a misstatement of the facts.

Officer Sparks put the baggie and swab into an evidence locker. RP 21. He did not send the items to the state lab for testing because it seemed “more fiscally responsible” to wait until he had a request to send them. RP 12. He could not remember how many times the prosecutor asked him to send the items from the evidence locker to the lab, but he eventually responded to a request on July 21. RP 9-10; 2RP 124.

In a pretrial hearing, defense counsel sought suppression of the evidence and dismissal under CrR 8.3(b). RP 49-50; CP 13-29. He argued that Ms. Spark’s collection and testing of the evidence was improper. She was not employed by the city and the city did not sanction her involvement in the criminal investigation. RP 53. Counsel also contended that despite repeated requests for the results of the testing from the state lab the items were not sent for testing until late July. RP 43;CP 30-32.

In response, the State argued that Ms. Sparks was a commissioned law enforcement officer at the time and her involvement resulted in no prejudice to Mr. Andrews. RP 54-55. There had been an agreement by both parties to extend the

speedy trial date to late August, and the State contended there was no prejudice in the lab results arriving in late July. RP 55-57.

The court denied the motion for suppression or dismissal and entered written findings of fact and conclusions of law. RP 59; CP 92-95. The court found that the removal of the glass from the roadway was for public safety reasons. RP 60-61.

The court reasoned that the field-testing by Ms. Spark was not the “best protocol”, but she was trained, there were no chain of custody issues, and no indication the evidence had been planted or tainted. “It was simply, as I understand, argument that somebody who was not on duty did the- did the testing.” RP 61.

The matter proceeded to a jury trial. The state did not introduce any statements Mr. Andrews made because the officer did not give him Miranda warnings before asking incriminating questions. 1RP 3.

Ms. Sparks testified that on the day in question she was employed as a Washington State trooper. RP 25. However, on June 17th, the Washington State Patrol Office of Professional Standards sent a letter to the Washington Association of Prosecuting Attorneys about Ms. Sparks. Exh. 11. The letter informed prosecutors that it was alleged Ms. Sparks had been

untruthful in answering her supervisor's questions regarding a traffic stop. She testified she lied to her supervisor, but corrected it shortly thereafter. 2RP 166.

Before the department could initiate an administrative investigation, Ms. Sparks resigned from her employment. She later explained she resigned because she had been offered a job as a city law enforcement officer; when the city police chief became aware of the misconduct he rescinded the offer of employment. 2RP 169.

The State charged Mr. Andrews with possession of a controlled substance. 2RP 49. A forensic scientist from the state lab confirmed the substance in the baggie and residue from the pipe were methamphetamine hydrochloride. 2RP 124. Defense counsel did not request and the court did not give a jury instruction on expert testimony.

The jury found Mr. Andrews guilty. CP 96. The court found Mr. Andrews indigent for purposes of appeal. CP 105-107. Mr. Andrews makes this timely appeal. CP 104.

III. ARGUMENT

A. Participation In A Criminal Investigation By An Off-Duty Law Enforcement Officer Was Unreasonable And Constituted Misconduct Requiring Suppression and Dismissal.

On review, a trial court's conclusions of law are reviewed de novo. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

The court's conclusions of law must be supported by its findings of fact. *State v. Veltri*, 136 Wn.App. 818, 822, 150 P.3d 1178 (2007).

In this case, an off-duty law enforcement officer, participating in a ride along with her police officer husband, unreasonably and without legal authority, joined an investigation by collecting evidence and performing preliminary tests on it. The legal issue for this court to determine is whether the irregularity, shrouded by misstatements in affidavits and afterthought justifications, should have resulted in suppression of the evidence and dismissal under CrR 8.3(b).

An off-duty police officer, as a public servant, is invested with authority to respond to emergencies and to react to criminal conduct. *State v. Graham*, 130 Wn.2d 711, 719, 927 P.2d 227 (1996). Off-duty officers act in the discharge of their duties when they are in uniform, identify themselves as police officers, and when

they are acting on probable cause that a crime has been committed. *Graham*, 130 Wn.2d at 723. “Whether the officer is identified as such and is engaged in performing official duties³ at any given time is a question of fact.” *Id.* at 714.

Here, Ms. Sparks, was off-duty and not in uniform. RP 28;31. She understood her role as that of a citizen observer. Her involvement did not constitute “official duties” of a Washington State Trooper.

The trial court entered three conclusions of law relating to the collection and testing of the evidence by Mrs. Sparks:

Under the circumstances, due to public safety and officer safety concerns, it was reasonable for Officer Sparks to have Mrs. Sparks retrieve the glass pipe.

It was not misconduct for Mrs. Sparks to later field test the evidence in the presence of Officer Sparks and Officer Nathan Porter of the Sunnyside PD.

The insertion of Mrs. Sparks into peripheral aspects of the criminal investigation had no material impact on the chain of custody, as there were no facts suggesting and no arguments made that she tainted the evidence in any fashion.

CP 94.

³ “Official duties” as used in RCW 9A.36.031(1)(g) encompass all aspects of a law enforcement officer’s good faith performance of job-related duties, *excluding conduct when the officer is on a folic of his or her own*. *State v. Mierz*, 127 Wn.2d 460, 479, 901 P.2d 286 (1995)(emphasis added).

The Sunnyside police department manual prohibits officers from including ride-along participants in a criminal investigation absent an emergency⁴. 2RP 82. At the suppression hearing, Officer Sparks did not categorize the incident as an emergency because it was not an emergency. Rather, he specifically testified that had he been alone, as he usually was, he would have secured the arrestee and then retrieved the glass. The broken glass in the road never amounted to an emergency. As an off-duty officer, Mrs. Sparks was not responding to an emergency.

The court concluded Spark's direction to collect the glass was for public and officer safety. In light of department policy, Officer Sparks' usual behavior in such situations, and the complete absence of facts to suggest the situation required a response to an emergency, the court could not legally conclude it was reasonable for Mrs. Sparks to perform her husband's official duties.

Similarly, the court erred when it entered conclusion of law 7:

It was not misconduct for Mrs. Sparks to later field test the evidence in the presence of Officer Sparks and Officer Nathan Porter of the Sunnyside PD.
CP 94.

⁴ It was not until the trial, after Sparks had familiarized himself with the police department manual, that he described the incident as "emergent".

It was misconduct for the officer to direct his wife to perform the NIK tests. The Sunnyside police department manual provided no authority for Officer Sparks to assign his official duty to his wife.

Officer Sparks directed his wife to conduct a NIK test absent authority and without accountability. Ms. Sparks was not on duty and not employed by the Sunnyside police department. She never asserted or implied Officer Porter watched or supervised her, but merely that he was in the room. RP 30. She was not under direction to write a report on her results and she did not place her initials on the evidence bag. RP 23;31. Yet, the results of the test served as the basis for the initial charges of drug possession.

The charges were filed based on her word the test was positive for methamphetamine. Yet, between the time of the arrest and the pretrial hearing, the WSP issued a letter to prosecuting attorneys to notify them that Mrs. Sparks left their employ prior to WSP having made a finding or determination of an allegation she had been untruthful to her supervisor. (Def. Exh. 11). In the suppression hearing, Sparks attempted to sanitize his own conduct

by averring in the search warrant affidavits⁵ that he collected and tested the evidence.

The trial court concluded:

The insertion of Mrs. Sparks into peripheral aspects of the criminal investigation had no material impact on the chain of custody, as there were no facts suggesting and no arguments made that she tainted the evidence in any fashion. CP 94.

The narrative offered by Officer Sparks and his wife was heavily sprinkled with a lack of veracity. Sparks prepared and signed search warrant affidavits that contained blatant misstatements about who collected and tested the evidence. When asked whether he had *ever* allowed another ride-along to actively participate in his criminal investigations, Officer Sparks answered, “I don’t recall” and “I’m not sure.” RP 25.

The trial court’s conclusion that Mrs. Sparks’ involvement had no material impact on the chain of custody as there were no facts suggesting and no arguments made that she tainted the evidence in any fashion is error. First, the only potential facts were in the possession of two individuals who provided information that

⁵ The State did not present any evidence from either of the issued search warrants.

should have led the court to seriously question their veracity.

Second, Mrs. Sparks was not authorized to handle the evidence and she tested it in an unsupervised manner. To conclude there was no material impact or tainting of evidence, the court must assume the evidence was properly handled, despite the very real cloud over the credibility of the two witnesses. The facts do not support the court's assumption or conclusion.

CrR 8.3(b) provides in pertinent part:

The court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

A trial court's ruling on a CrR 8.3(b) motion is reviewed under a manifest abuse of discretion standard. *State v. Michielli*, 132 Wn.2d 229, 937 P.2d 587 (1997). Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *State v. Rohrich*, 149 Wn.2d 647, 655, 71 P.3d 638 (2003).

Due process requires that a prosecution be dismissed upon a showing of outrageous conduct by law enforcement. *State v. Lively*, 130 Wn.2d 1, 19, 921 P.2d 1035 (1996). The focus is on the conduct of the State's behavior and "is founded on the principle that

conduct of law enforcement officers ...may be so outrageous that due process principles would bar the government from invoking judicial processes to obtain a conviction.” *Id.* The conduct must be so shocking that it “violates the concept of fundamental fairness inherent in due process.” *State v. Markwart*, 182 Wn. App. 335, 349, 329 P.3d 108 (2014). “Whether the state has engaged in outrageous conduct is a matter of law, not a question for the jury.” *Lively*, 130 Wn.2d at 19.

In *Markwart*, the Court acknowledged a part of good police detection of crime required participation not only in deceitful practices but at times, a limited participation in unlawful practices. *Markwart*, 182 Wn.App. at 349. The Court stated that investigative methods considered unacceptable in the context of some crimes were acceptable when investigating other crimes such as prostitution, liquor sales, narcotics sales, and gambling. *Id.* Such conduct was not found to be outrageous.

Here, the objectionable conduct was not an attempt to ferret out crime that often takes place in secret. Rather, it is the behavior of the law enforcement officer that was directly contrary to department policy. It was outrageous for Officer Sparks to direct his wife to perform his duties. And, at the very least, it was

disingenuous for him to hide the facts from the magistrate who reviewed the search warrant affidavits⁶. Mr. Andrews remained in jail based on the results of the NIK test.

The trial court relied on the testing by the state lab to confirm the substances were contraband. Assuming the evidence was not tainted, nevertheless, the ends did not justify the means.

[d]ecency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government would be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example.

State v. Martinez, 121 Wn.App. 21, 36, 86 P.3d 1210 (2004)(quoting *Olmstead v. United States*, 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed.944 (1928)(J. Brandeis, dissenting)).

Unlike the justifiable ruses described in *Markwart*, the police behavior here was out of bounds and called into serious question the integrity of the prosecution. As the Court affirmed in *Martinez*, “[p]reservation of the integrity of conviction is at a minimum as important as securing the conviction itself.” *Martinez*, 121 Wn.App.at 36.

⁶ The State did not present any evidence that was obtained as a result of the search warrants.

The trial court erred when it did not dismiss the charge.

B. This Court Should Exercise Its Discretion In The Decision Terminating Review By Declining To Impose Appellate Costs.

RAP 15.2(f) provides the appellate court will give a party the benefits of an order of indigency throughout review unless the appellate court finds the party's financial condition has improved to the extent that the party is no longer indigent. Similarly, RAP 14.2 provides: When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, under RAP 15.2(f), unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency.

The trial court found Mr. Andrews indigent. CP 72-85. Under the Rules, this Court can presume his indigency continues throughout the appeal process. There is no evidence that his financial circumstances have significantly improved since the trial court made its determination.

Mr. Andrews respectfully asks this Court to exercise its discretion and decline to impose appellate costs if he does not

substantially prevail on appeal and the state submits a cost bill.

RCW 10.73.160(1).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Andrews respectfully asks this Court to reverse the trial court and dismiss the conviction with prejudice.

Respectfully submitted this 15th day of May 2017.

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Jamie Andrews, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Corrected Appellant's Opening Brief was sent by first class mail, postage prepaid, on May 17, 2017 to:

Jamie Andrews/DOC#794386
Washington Corrections Center
PO Box 900
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And I electronically served, by prior agreement between the parties, a true and correct copy of the Corrected Appellant's Opening Brief to the Yakima County Prosecuting Attorney (at appeals@co.yakima.wa.us and David.Trefry@co.yakima.wa.us).

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