

FILED
Court of Appeals
Division III
State of Washington
4/2/2018 1:27 PM
NO. 35384-2-III

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

STATE OF WASHINGTON,

RESPONDENT,

V.

THOMAS BARTON

APPELLANT.

RESPONDENT'S OPENING BRIEF

KATHRYN I. BURKE
Prosecuting Attorney
350 E. Delaware Ave., Stop 11
Republic, Washington
Ferry County, Washington

509-775-5225 x 2506 Phone
509-775-5212 Fax

TABLE OF CONTENTS

A. APPELLANT’S ASSIGNMENTS OF ERROR5

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR6

C. STATEMENT OF THE CASE6

 1. Facts Presented at Trial6

 2. Procedural Facts9

D. ARGUMENT10

 1. RCW 69.50.4013 Is Constitutional When Applied To Simple Possession Of Drug Residue10

 A. Standard of Review on Appeal11

 B. RCW 69.50.4013 Does Not Violate The Eighth Amendment’s Prohibition Of Cruel And Unusual Punishment When Applied To Possession Of Drug Residue In The Absence Of Any Culpable Mental State.....11

 C. RCW 69.50.4013 Does Not Violate Due Process As Applied To Possession Of Drug Residue Absent Proof Of Some Culpable Mental State..... 13

 D. The Reasonable Doubt Jury Instruction Was Lawful..... 15

 E. The Sentencing Court Did Not Err When It Included Mr. Barton’s Conviction For Eluding In His Offender Score 17

E. CONCLUSION19

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Graham v. Florida, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010) 11

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII 11-13
U.S. Const. amend. XIV 13-15

STATE CASES

State v. Schmeling, 191 Wn. App. 795, 365 P.3d 202 (2015) 11, 12, 14, 15
State v. Smith, 93 Wn. 2d 329, 610 P.2d 869 (1980)..... 12
State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004) 12, 13, 14
State v. Warfield, 119 Wn. App. 871, 80 P.3d 625 (2003)..... 13
State v. Sundberg, 185 Wn.2d 147, 370 P.3d 1 (2016)..... 14
City of Kennewick v. Day, 143 Wn.2d 1, 11 P.3d 304 (2004)..... 14
State v. Kalebaugh, 183 Wn.2d 578, 355 P.3d 253 (2015)..... 16
State v. Gore, 101 Wn.2d 481, 681 P.2d 227 (1984)..... 17
State v. Dunleavy, 2 Wn. App. 2d 420, 409 P.3d 1077 (2018) 17

WASHINGTON STATUTES

RCW 9.94A.525(2)(c).....18
RCW 69.50.401310-15, 19
RCW 9.94A.530(2) 19

COURT RULES

RAP 2.5(a)(3)16-17

OTHER AUTHORITIES

WPIC 4.0115-17

A. APPELLANT'S ASSIGNMENTS OF ERROR

1. Appellant claims RCW 69.50.4013 violates the Eighth Amendment when applied to simple possession of drug residue in the absence of any culpable mental state because it is cruel and unusual punishment.
2. Appellant claims RCW 69.50.4013 violates due process in residue cases because it authorizes a felony conviction for acts the accused person did not cause.
3. Appellant claims the Court of Appeals should exercise their authority to recognize non-statutory elements and require proof of a culpable mental state in cases involving simple possession of drug residue.
4. Appellant claims that the trial court undermined the presumption of innocence by impermissibly shifting the burden of proof by equating beyond a reasonable doubt with "belief in the truth of the charges" and violating the Appellant's constitutional right to a jury trial.
5. Appellant claims that the sentencing court erred by including the Appellant's 2000 eluding conviction because there were no criminal convictions between 2000 and 2015, and a Class C Felony washes out of the offender score after five consecutive crime-free years.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. RCW 69.50.4013 is constitutional when applied to simple possession of drug residue.
2. The “reasonable doubt” jury instruction was lawful.
3. The sentencing court did not err when it included Mr. Barton’s conviction for eluding in his offender score.

C. STATEMENT OF THE CASE

1. Facts Presented at Trial

Mr. Barton was tried by a jury on June 5-6, 2017 on one count of Possession of a Controlled Substance (Methamphetamine), one count of Resisting Arrest, one count of Use of Drug Paraphernalia, and one count of Obstructing a Law Enforcement Officer. RP 289. Witnesses who testified at the trial were Ferry County Sheriff’s Deputy Patrick Rainer (RP 71-138, RP 230-231), Washington State Patrol Crime Laboratory Forensic Scientist Jayne Wilhelm (RP 139-171), and defendant Thomas Jackson Barton (RP 181-230). The facts presented at trial are as follows.

Ferry County Sheriff’s Deputy Patrick Rainer was on duty in uniform on April 29, 2017. RP 74-5. That day, one of his duties was to serve papers, and one of the paper services was for the Defendant, Thomas Barton, in the Keller area of Ferry County. RP 78. Deputy Rainer was already familiar with Mr. Barton’s

appearance from viewing a Department of Licensing [DOL] photo, as well as viewing a previous booking photo of Mr. Barton from the jail. RP 74.

When Deputy Rainer arrived at the area in Keller where he had been told Barton would be, he observed Mr. Barton working on a vehicle. RP 84. Mr. Barton looked right at Deputy Rainer, stopped what he was doing, and ran. RP 84. Deputy Rainer chased Mr. Barton for about one hundred (100) yards or more as the deputy is yelling to Mr. Barton that he needs to stop, get on the ground, and that he was under arrest. RP 85-86, 195. As Mr. Barton was running from Deputy Rainer, he tripped and fell between two sheds. RP 87, 196. Mr. Barton then got back up and continued to run from the Deputy. RP 89, 196.

Once Mr. Barton did not stop after Deputy Rainer told him again to stop, Deputy Rainer deployed his Taser. RP 89, 197. Deputy Rainer then put Mr. Barton into a prone cuffing position in order to compel Mr. Barton to calm down and let the Deputy safely place him under arrest. RP 90, 198. While Deputy Rainer was attempting to arrest Mr. Barton, Mr. Barton continued to resist. RP 91, 199. After added force, Mr. Barton chose to cooperate and Deputy Rainer was able to handcuff him behind his back without

further incident. RP 91-92.

Once Deputy Rainer got Mr. Barton back to the patrol vehicle, the deputy searched Mr. Barton incident to arrest. RP 94-102, 199-200. During the search of Mr. Barton, Deputy Rainer found two (2) pocket knives and a metal smoking device identified by Mr. Barton as a marijuana pipe in Mr. Barton's outer garments. RP 95-96, 200-201. Deputy Rainer then searched the shorts that Mr. Barton was wearing under the overalls. RP 102, 201. In those shorts, Deputy Rainer found numerous items, including Mr. Barton's social security card, a title, cigarettes, and a glass smoking device. RP 102, 136. Mr. Barton told the deputy that he did not know that was in his pocket as he had borrowed the shorts from someone else, and that he had not used that device before. RP 202. Mr. Barton did, however, admit to using methamphetamine two days prior. TP 107. The glass smoking pipe was sent to the Washington State Patrol Crime Lab and the contents inside the device tested positive for methamphetamine. RP 112-114, 147-151.

At trial, Mr. Barton testified that prior to his arrest, he had been looking for his cousin who had jumped or fallen into the Kettle River near Keller, WA earlier that year. RP 187-188. During that

search, Mr. Barton slipped down a clay bank and nearly into the river, soaking his clothing. RP 190. Mr. Barton had to borrow clothes from his friend due to the fall. RP 191-192. The borrowed items included a pair of shorts underneath a pair of overalls, a tank top, a camouflaged long sleeve shirt, and a brown jacket, and these were the clothes that Mr. Barton was wearing when he came into contact with law enforcement. RP 191-192. Mr. Barton claimed that he ran because he didn't want the papers from his ex-wife. RP 194.

2. Procedural Facts

Based on those results, the State charged Mr. Barton with Possession of a Controlled Substance Other Than Marijuana, Resisting Arrest, Use of Drug Paraphernalia, and Obstructing a Law Enforcement Officer. CP 5-7. During the jury trial, which occurred June 5-6, 2017, Mr. Barton admitted that he ran from an officer attempting to make a lawful arrest, agreed that he obstructed the officer, and argued that he had possessed the methamphetamine pipe unwittingly. RP 1, 14, 177, 205, CP 28.

At the end of the trial, the court instructed the jury using the court's standard reasonable doubt instruction, without objection from the defense. RP 239, CP 17. The jury convicted Mr. Barton

of Possession of a Controlled Substance Methamphetamine, Resisting Arrest, and Obstructing a Law Enforcement Officer. RP 289-290. The jury found Mr. Barton not guilty on the charge of Use of Drug Paraphernalia. RP 289.

At sentencing on June 9, 2017, the parties agreed to an offender score of four (4) points for Mr. Barton. RP 299. The court sentenced Mr. Barton to eight (8) months in jail on the possession charge, to run concurrent with ninety (90) days for the obstruction and resisting arrest charges. RP 310. The Judgment and Sentence signed by the court listed Mr. Barton's prior offenses as a Theft 2, a Forgery, and a Bail Jump from 2015, as well as an Attempt to Elude from 2000, and finally a Forgery conviction from 1996. CP 50.

Mr. Barton now appeals, claiming that RCW 69.50.4013 is unconstitutional, that the reasonable doubt instruction violated Mr. Barton's Right to Due Process, and that the court erred when it signed the Judgment and Sentence because Mr. Barton's conviction for Eluding should not have been included.

D. ARGUMENT

I. RCW 69.50.4013 IS CONSTITUTIONAL WHEN APPLIED TO SIMPLE POSSESSION OF DRUG RESIDUE

A. Standard of Review on Appeal

The courts review constitutional challenges *de novo*. *State v. Schmeling*, 191 Wn. App. 795, 798, 365 P.3d 202 (2015). Statutes are presumed constitutional. *Id.* The challenger bears the heavy burden of convincing the court that that the statute is unconstitutional beyond a reasonable doubt. *Id.*

B. RCW 69.50.4013 Does Not Violate The Eighth Amendment's Prohibition Of Cruel And Unusual Punishment When Applied To Possession Of Drug Residue In The Absence Of Any Culpable Mental State

The appellant in this case argues that RCW 69.50.4013 violates the Eighth Amendment's prohibition of cruel and unusual punishment because it does not require a culpable mental state to be proven before a felony conviction. BR. Appellant at 1, 6-12.

The basic concept of the Eighth Amendment is that the punishment for a crime must be proportionate to the offense. *Graham v. Florida*, 560 U.S. 48, 59, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010). The *Graham* court used the categorical approach when it held that the Eighth Amendment prohibits the imposition of a life sentence without the possibility of parole on a juvenile who did not commit homicide. *Id.* at 61-62, 82.

The Eighth Amendment "does not require strict

proportionality between crime and sentence” and “forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” *Schmeling*, 191 Wn. App. at 798, (citing *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)). The *Schmeling* court also declined “to apply the categorical approach to punishment of adult drug offenders like Schmeling.” *Id.* at 800.

In *Schmeling*, the court discusses the analysis of a case similar to the one at hand, *State v. Smith*, 93 Wn. 2d 329, 610 P.2d 869 (1980). *Id.* at 799. Smith was convicted of possession of more than 40 grams of marijuana, a felony, and argued that the seriousness of the offense did not warrant classifying the crime as a felony. *Smith*, 93 Wn.2d at 332, 342. The *Smith* court noted that it was unaware of any authority supporting a proposition that classification alone could constitute cruel and unusual punishment. *Id.* at 342, 345. The Court in *Smith* held that Smith’s conviction and sentence for possession of marijuana was not grossly disproportionate to his offense. *Id.* at 344-45.

In *Schmeling*, the court held that classification of a crime as a felony despite the absence of a *mens rea* requirement does not result in a grossly disproportionate punishment. *Schmeling*, 191 Wn. App. at 799. In *State v. Bradshaw*, the court states that RCW

69.50.4013 has been amended seven times by the state legislature and they have not added a *mens rea* element. *State v. Bradshaw*, 152 Wn.2d 528, 533, 98 P.3d 1190 (2004). The Court in *Bradshaw* refused to imply a *mens rea* element based on the clear legislative history. *Id.* at 537.

In addition, the court in *Bradshaw* has stated the defense of unwitting possession ameliorates the harshness of a strict liability crime. *Id.* at 538.

RCW 69.50.4013 does not violate the Eighth Amendment's prohibition against cruel and unusual punishment. Mr. Barton asserted the defense of unwitting possession, which was an unsuccessful defense. Mr. Barton's felony conviction should not be vacated.

C. RCW 69.50.4013 Does Not Violate Due Process As Applied To Possession Of Drug Residue Absent Proof Of Some Culpable Mental State

The appellant also argues that RCW 69.50.4013 violates due process when applied to possession of drug residue absent proof of some culpable mental state. Br. Appellant at 12-19.

The Fourteenth Amendment of the United States Constitution provides that no state may deprive a person of liberty without due process of the law. In *State v. Warfield*, the court stated that the

legislature may create strict liability crimes, but that this prerogative is subject to the due process limitations in the United States Constitution. 119 Wn. App. 871, 876, 80 P.3d 625 (2003).

The court in *Bradshaw* held that the State has the burden of proving the elements of unlawful possession as defined in the statute – the nature of the substance and the fact of possession – but defendants can then make an affirmative defense of unwitting possession which ameliorates the harshness of a strict liability crime. *Bradshaw*, 152 Wn.2d at 538. When the defense brings an unwitting possession defense, the defendant bears the burden to present evidence in support of the defense. *State v. Sundberg*, 185 Wn.2d 147, 370 P.3d 1 (2016). This defense can be asserted in two ways, either because the defendant did not know he possessed it, or because he was unaware of the nature of the substance. *City of Kennewick v. Day*, 143 Wn.2d 1, 11, 11 P.3d 304 (2000).

The Washington Supreme Court has directly addressed whether RCW 69.50.4013 contains a *mens rea* element in *Bradshaw*, and held that the legislature deliberately omitted both knowledge and intent as elements of possession of a controlled substance, and that the court would not imply the existence of those elements. *Schmeling*, 181 Wn. App. at 801; *Bradshaw*, 152

Wn.2d at 534-38.

In fact, the Washington Supreme Court **repeatedly** has stated that the legislature has the authority to create strict liability crimes which do not include a culpable mental state and also pointed out that the legislature has deliberately omitted knowledge and intent as elements of RCW 69.50.4013 and that the court would not imply the existence of those elements. *Schmeling*, 191 Wn. App. at 801 (citing *State v. Bradshaw*, 152 Wn.2d 528, 532; *State v. Anderson*, 141 Wn.2d 357, 361 (2000); *State v. Rivas*, 126 Wn.2d 443, 452 (1995) (emphasis added).

The State respectfully asks this Court to follow Division II's decision in *Schmeling* and hold that RCW 69.50.4013 does not violate due process despite there being no requirement that the State prove knowledge or intent to convict a defendant. RCW 69.50.4013 does not violate Mr. Barton's right to due process.

D. The Reasonable Doubt Jury Instruction Was Lawful

Mr. Barton argues that WPIC 4.01, which defines "reasonable doubt" as "one for which a reason exists" and instructed the jury to consider "the truth of the charges", improperly and unconstitutionally shifted the burden of proof and undermined the presumption of innocence, as well as violated Mr. Barton's right

to a jury trial and due process rights. Br. Appellant at 1, 20-23.

The established rule on appellate review in Washington is that a party generally waives the right to appeal an error unless there is an objection at trial. RAP 2.5(a)(3); *State v. Kalebaugh*, 183 Wn.2d, 578, 583, 355 P.3d 253 (2015). However, in the case at hand, the defense did not object to WPIC 4.01 at the time of trial. RP 239. As with many general rules, however, there are exceptions to the rule. RAP 2.5.

One exception to this rule is for “manifest errors affecting a constitutional right”. *Kalebaugh*, 183 Wn.2d at 583. A manifest error “requires a showing of actual prejudice”. *Id.* at 584 (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). Actual prejudice occurs when there is a “plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case”. *Id.* (alteration in original) (quoting *Kirkman*, 159 Wn.2d at 935). In order to determine whether an error is practical and identifiable, the appellate court must put itself in the trial court’s shoes to ascertain whether the trial court could have corrected the error given what it knew at that time. *Id.* Even if a judge gave an erroneous instruction, if it did not lower the State’s burden of proof, it is a harmless error. *Id.* at 585.

The Supreme Court of Washington reaffirmed that WPIC 4.01 is the correct legal instruction for reasonable doubt. *Id.* at 584. *State v. Gore* holds that once the Supreme Court of Washington has decided an issue of state law, that interpretation is binding on all lower courts until it is overruled by that court. 101 Wn.2d 481, 487, 681 P.2d 227 (1984).

The State submits that WPIC 4.01 is the correct jury instruction for reasonable doubt based on the holding in *Gore*. *Id.* In the case at hand, the Mr. Barton shows no manifest error justifying review as the objection to WPIC 4.01 was unpreserved as required under RAP 2.5(a)(3).

E. The Sentencing Court Did Not Err When It Included Mr. Barton's Conviction For Eluding In His Offender Score

Mr. Barton claims that the sentencing court erred when it included Mr. Barton's eluding conviction in his offender score for purposes of sentencing. Br. Appellant 23-24.

Offender score calculations are reviewed *de novo*. *State v. Dunleavy*, 2 Wn. App. 2d 420, 432, 409 P.3d 1077 (2018).

Sentencing errors resulting in unlawful sentences may be raised for the first time on appeal. *Id.* The State has the burden of establishing a defendant's offender score by a preponderance of

evidence at sentencing, but is relieved of this burden if the defendant affirmatively acknowledges his or her prior criminal history, although the defendant's mere failure to object is insufficient. *Id.*

RCW 9.94A.525(2) states that a conviction may "wash out" of the offender score under certain circumstances. For example, prior class C felony convictions are not included in the offender's score if the offender spent five (5) consecutive years in the community without committing "any crime that subsequently results in a conviction." RCW 9.94A.525(2)(c).

In the case at hand, not only did the defense not object to his criminal history, but the defense agreed with the State that Mr. Barton's score was a four (4). RP 299. This is likely because Defense counsel was aware that after Mr. Barton was convicted of Attempting to Elude in 2000, he was subsequently convicted of criminal trespass in the first degree in 2003, a misdemeanor bail jump in 2005, and numerous convictions for driving while license suspended. Although the State believes that defendant has affirmatively acknowledged his criminal history by agreeing that his offender score was a four (4), the State nevertheless concedes that the intervening misdemeanor offenses were not specifically

mentioned at the time of sentencing. Therefore, if this Court deems it appropriate, the State is not opposed to a remanding the case back to the trial court for resentencing at which time the State will present evidence of the non-felony convictions which prevent the felony elude from “washing out” under RCW 9.94A.530(2).

E. CONCLUSION

Mr. Barton’s Eighth Amendment right against cruel and unusual punishment and his right to due process were not violated by RCW 69.50.4013 as the Washington State Legislature has specifically chosen not to add a *mens rea* requirement for possession of controlled substances, and Mr. Barton had the option to claim unwitting possession. Mr. Barton used the unwitting possession defense but was unsuccessful.

Next, WPIC 4.01 is a lawful jury instruction for defining reasonable doubt and is constitutional. In addition, Mr. Barton did not object at trial, therefore not preserving his right to appeal unless he showed a manifest error, which has not been shown.

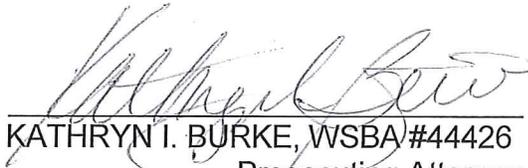
Finally, Mr. Barton’s offender score was calculated properly since Mr. Barton affirmatively acknowledged his criminal history by agreeing that his offender score was a four (4).

For the reasons stated above, the State respectfully requests

that the Court deny Mr. Barton's motion to vacate the convictions of Possession of a Controlled Substance, Resisting Arrest, and Obstruction of a Law Enforcement Officer, and to deny Mr. Barton's motion to remand for resentencing.

Dated this 2 day of April, 2018

Respectfully Submitted by:


KATHRYN I. BURKE, WSBA #44426
Prosecuting Attorney

FERRY COUNTY PROSECUTORS OFFICE

April 02, 2018 - 1:27 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35384-2
Appellate Court Case Title: State of Washington v. Thomas Barton Jackson
Superior Court Case Number: 17-1-00012-4

The following documents have been uploaded:

- 353842_Briefs_20180402132224D3765124_4571.pdf
This File Contains:
Briefs - Respondents
The Original File Name was COA Thomas Barton 353842 III Respondents Opening Brief.pdf

A copy of the uploaded files will be sent to:

- backlundmistry1@gmail.com
- backlundmistry@gmail.com

Comments:

Sender Name: Terri Bell - Email: tbell@wapa-sep.wa.gov

Filing on Behalf of: Kathryn Isabel Burke - Email: kiburke@wapa-sep.wa.gov (Alternate Email:)

Address:

350 E. Delaware Ave., #11

Republic, WA, 99166

Phone: (509) 775-5225 EXT 2506

Note: The Filing Id is 20180402132224D3765124