

FILED
Court of Appeals
Division III
State of Washington
1/11/2019 12:52 PM

NO. 36010-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

MIKHAIL BARBAROSH,

Appellant.

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

The Honorable Shea Brown, Judge

REPLY BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
THE FAILURE TO IDENTIFY IN THE TO-CONVICT INSTRUCTION THE SUBSTANCE BARBAROSH POSSESSED REQUIRES A MISDEMEANOR SENTENCE.....	1
B. <u>CONCLUSION</u>	5

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Clark-EI</u> 196 Wn. App. 614, 384 P.3d 627 (2016)	1, 2, 4, 5
<u>State v. DeRyke</u> 149 Wn.2d 906, 73 P.3d 1000 (2003)	3
<u>State v. Gonzalez</u> 2 Wn. App. 2d 96, 408 P.3d 743 <u>review denied</u> , 190 Wn.2d 1021, 418 P.3d 790 (2018)	1, 2, 4, 5
<u>State v. Head</u> 4 Wn. App. 2d 1061 (July 30, 2018)	4
<u>State v. Jackson</u> ___ Wn. App. 2d ___, 2018 WL 4860190 (October 8, 2018)	4
<u>State v. Sibert</u> 168 Wn.2d 306, 230 P.3d 142 (2010)	4, 5
<u>State v. Smith</u> 131 Wn.2d 258, 930 P.2d 917 (1997)	3
<u>State v. Williams</u> 162 Wn.2d 177, 170 P.3d 30 (2007)	4, 5
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
GR 14.1	4

A. ARGUMENT IN REPLY

THE FAILURE TO IDENTIFY IN THE TO-CONVICT INSTRUCTION THE SUBSTANCE BARBAROSH POSSESSED REQUIRES A MISDEMEANOR SENTENCE.

As argued in the opening brief, the failure to identify in the to-convict instruction the substance possessed requires vacation of Barbarosh's felony sentence and imposition of a misdemeanor sentence. See Amended Brief of Appellant, at 12-16 (relying primarily on State v. Clark-El, 196 Wn. App. 614, 624-625, 384 P.3d 627 (2016), and State v. Gonzalez, 2 Wn. App. 2d 96, 114, 408 P.3d 743, review denied, 190 Wn.2d 1021, 418 P.3d 790 (2018)).

In response, the State notes that when Judge Brown first introduced the case and the participants to potential jurors, he announced that Barbarosh was accused of possessing methamphetamine. Brief of Respondent, at 2. Specifically, Judge Brown said:

The defendant is charged by first amended information as follows:

Count I: That the said Mikhail S. Barbarosh in the County of Benton, State of Washington, on or about the 4th day of November, 2017, did unlawfully possess a controlled substance, to wit: methamphetamine, contrary to the form of the statute

in such cases made and provided, and against the peace and dignity of the State of Washington.

RP (1/8/18) 2-3.

The State argues that, because potential jurors were informed that the charge alleged possession of methamphetamine, and the verdict form indicates jurors found Barbarosh guilty “as charged in Count 1,” jurors likely understood they were required to find the substance at issue was methamphetamine. See Brief of Respondent, at 14-16. The State cites no relevant legal precedent for this argument.

That the trial judge identified the substance allegedly possessed has no impact on Barbarosh’s claim. The problem identified by Clark-EI and Gonzalez is the failure to include the identified substance in the to-convict instruction. Whether jurors otherwise knew the substance allegedly possessed is irrelevant.

Indeed, in Gonzalez, an argument stronger than that now suggested by the State in Barbarosh’s case was rejected. In that case, a majority of the Court rejected a dissenting judge’s argument that because *the to-convict instruction* referenced the charging document, and the charging document identified the substance as methamphetamine, the element was thereby incorporated into the

to-convict instruction. See Gonzalez, 2 Wn. App. 2d at 114 n.10. Not even that reference in the to-convict instruction itself (missing in Barbarosh's case; see CP 28) could save the sentence.

Announcing the charge at the beginning of trial is not the same as including all essential elements in the to-convict instruction. That announcement did not add the substance involved to the to-convict instruction any more than it added proof that Barbarosh's actions were "contrary to the form of the statute in such cases made and provided," proof that the act was "against the peace and dignity of the State of Washington," or proof that the crime occurred "in the County of Benton."

The relevant rules are worth repeating: "a 'to convict' instruction must contain all of the elements of the crime because it serves as a 'yardstick' by which the jury measures the evidence to determine guilt or innocence" and "a reviewing court may not rely on other instructions to supply the missing element from the 'to convict' instruction." State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003) (quoting State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997)). "When the identity of a controlled substance increases the statutory maximum sentence which the defendant

may face upon conviction, that identity is an essential element” and falls under this rule. Clark-EI, 196 Wn. App. at 618.

Alternatively, the State argues that Gonzalez was wrongly decided by Division Two. See Brief of Respondent, at 16-18. Notably, Division One has also adopted the reasoning and holding in Gonzalez. See State v. Head, 4 Wn. App. 2d 1061, at *3-*4 (July 30, 2018); State v. Jackson, ___ Wn. App. 2d ___, 2018 WL 4860190 (October 8, 2018).¹ Thus, the State’s argument is aimed at two divisions of this Court.

The State’s criticism of Gonzalez is merely a rehash of the position adopted by the *dissenting judge* in Gonzalez, who relied on a non-binding plurality opinion in State v. Sibert, 168 Wn.2d 306, 230 P.3d 142 (2010), and relied on State v. Williams, 162 Wn.2d 177, 170 P.3d 30 (2007), a case addressing a dissimilar statutory scheme pertaining to bail jumping. Compare Brief of Respondent, at 16-17 with Gonzalez, 2 Wn. App. 2d at 118-119 (Melnick, J., dissenting); see also Clark-EI, 196 Wn. App. at 619-620 (recognizing plurality opinion in Sibert not binding); Gonzalez, 2 Wn. App. 2d at 110-111 (same).

¹ Under GR 14.1, Barbarosh does not cite these unpublished decisions as binding authority. Rather, he cites them for whatever persuasive authority this Court deems appropriate.

The State's continued reliance on Sibert and Williams should be rejected here for the same reasons it was rejected in Clark-EI and Gonzalez. Although the State maintains that sentencing Barbarosh for a misdemeanor possession is absurd, it is the only outcome consistent with the State's proof requirements found in the to-convict instruction. No other sentence is authorized under the instructions and verdict.

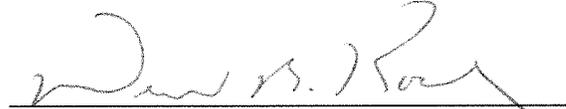
B. CONCLUSION

For the reasons discussed in the opening brief, prosecutorial misconduct and ineffective assistance of counsel warrant reversal of Barbarosh's conviction. For the reasons discussed in the opening brief and here, this Court should vacate Barbarosh's sentence and remand for a misdemeanor sentence. Finally, this Court should accept the State's concession of error and strike the filing fee and DNA fee.

DATED this 11th day of January, 2019.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



DAVID B. KOCH, WSBA No. 23789
Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

January 11, 2019 - 12:52 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36010-5
Appellate Court Case Title: State of Washington v. Mikhail S. Barbarosh
Superior Court Case Number: 17-1-01220-7

The following documents have been uploaded:

- 360105_Briefs_20190111124933D3608332_8133.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was RBOA 36010-5-III.pdf

A copy of the uploaded files will be sent to:

- andy.miller@co.benton.wa.us
- prosecuting@co.benton.wa.us
- terry.bloor@co.benton.wa.us

Comments:

Copy mailed to: Mikhail Barbarosh, 909 N Road 56 Pasco, WA 99301

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: David Bruce Koch - Email: kochd@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20190111124933D3608332