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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

NO. 36308-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

JAMIE LEE WALTARI,

Appellant

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# REPLY BRIEF OF APPELLANT JAMIE LEE WALTARI AND ACCOMPANYING RESPONSE TO STATE'S CROSS-APPEAL

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## A. ARGUMENT IN REPLY

1. Contrary to the assertions of the respondent, STATE OF WASHINGTON, the superior court of Asotin County, State of Washington, in criminal cause no. 17-1-00017-2, should not have allowed the prosecution on October 6, 2017, and again March 5 and May 15, 2018, to amend its initial January 26, 2017 information against the appellant, JAMIE L. WALTARI, so as to include a different crime, as well as a school bus stop enhancement, being added to the existing Counts 1 through 3 of the original charges [RCW 69.50.435(a)(3) and RCW 9.94A.533(6)] against him, which is in direct violation of Rule of 2.1(d) of the Superior Court Criminal Rules [CrR] which bars and such amendment if the substantial rights of the accused are prejudiced thereby. [Issue No. 1].

On pages 13 through 18 of the "Brief of Respondent," the STATE OF WASHINGTON claims, without legal substance, that no error committed in the course of the prosecutor's multitude of amendments to its criminal information against the defendant, JAMIE L. WALTARI. By way of permitting the same to transpire over the course of several months, the superior court allowed the STATE OF WASHINGTON to enhance and elevate the charges associated with counts 1 through 3 against the defendant resulting in substantial and undue prejudice to the due process rights of Mr. WALTARI in terms of his then being faced with a mandatory twenty-four [24] month sentence under the provisions of RCW 69.50.435(1)(c) and RCW 9.94A.533(6).

Even though Mr. WALTARI did not specifically raise this issue

and challenged at the trial, it is clear that a significant error of constitutional magnitude, such as the unlawful amendment of charges by the prosecutor, may be raised for the first time on appeal as contemplated under RAP 2.5(a)(3). Furthermore, it is clear that such error will be presumed prejudicial, and subject to reversal on appeal, unless the government establishes that such constitutional error was harmless beyond a reasonable doubt. State v. Spotted Elk, 109 Wn.App.253, 261, 34 P.3d 906 (2001).

As to the error itself, the court in State v. Martinez, 76 Wn.App.1, 884 P.2d 3 (1994) aptly observed that CrR 2.1(d), which governs an amendment to a criminal information, must be read in light of Article I, section 22, of the Washington State Constitution which mandates that "in criminal prosecutions, the accused shall have the right . . . to demand the nature and cause of action of the accusation against him." In other words, the limitations on the prosecution's ability to amend a criminal information under CrR 2.1(d) directly implicates our state constitution and, thus, an issue associated thereto is one which may readily be raised for the first time on appeal under RAP 2.5(a)(3). Id.

Here, it is axiomatic to an accused's right to immediately know the charges against him that the various amendments to the initial information

neither encompassed, nor relate to, any newly discovered facts. Rather, all the operative circumstances in this case were known or could have been easily discernible by the prosecution on January 26, 2017 [CP 13-15], when the original information was filed. [CP 124-28].

Likewise, the October 6 amendment was not a mere typographical change having no significant consequence or impact on the inviolate rights of the accused, Mr. WALTARI. Rather, the amendment to counts nos. 1 through 3 essentially involved more serious charges being alleged, along with an increase or enhancement of the penalties associated therewith. Suffice it to say, the "indecisiveness" on the part of the STATE to file and make the ultimate charges known to the defendant was entirely at odds with his freedoms and safeguards envisioned under Article I, section 22. In this vein, and consistent with the tenor of CrR 2.1(d), the Washington supreme court held in State v. Olds, 39 Wn.2d 258, 235 P.2d 165 (1951), that the government's ability to amend a criminal information does not encompass the changing of an existing charge, in the absence of a substantial change in the facts which were non-existent at the time of the original filing of charges. Thus, contrary to the respondent's view on pages 13 through 18 of its responsive brief, any interpretation of CrR 2.1(d) otherwise would run afoul of the guarantees of due process

established under the state and federal constitutions. Id.; see also, State v. Schaffer, 120 Wn.2d 616, 845 P.2d 281 (1993). The rules of criminal procedure cannot be arbitrarily and capriciously construed, so as deny the defendant his fundamental, constitutional rights including the right to know the precise charges against him. Id; see also, State v. Berry, 31 Wn.App.408, 641 P.2d 1213 (1982). Any notion offered otherwise constitutes a glaring denial of due process to the accused. Id.

2. Contrary to the claim of the STATE OF WASHINGTON, the superior court of Asotin County, State of Washington, in criminal cause no. 17-1-00017-2, misapplied the law when holding the appellant, JAMIE L. WALTARI, guilty of count 4 [CP 83-85] as set forth in the second and third amended informations [CP 65-69, 76, 107] with respect his having been in "possession with intent to deliver" while similarly finding and imposing an school bus zone enhancement therewith under RCW 69.50.435(a)(3) and RCW 9.94A.533(6). [Issue no. 2].

On pages 18 through 24 of its "responsive brief," the STATE OF WASHINGTON then goes on to incorrectly suggests that the evidence it offered at trial was sufficient to support the superior court's finding of guilty on count 4 in this matter. However, the prosecution's claim in this regard is devoid of any proof or evidence beyond a reasonable doubt.

Following trial, the superior court determined that, with respect to the methamphetamine found in the defendant's truck on January 25, 2017,

that JAMIE L. WALTARI was guilty of count 4 in terms of his having been "in possession with intent to deliver" [RCW 69.50.401(2)(b)]. [CP 83-84]. The superior court then went on and imposed an enhancement as contemplated under RCW 69.50.435(a)(3) and RCW 9.94A.533(6) in connection with Mr. WALTARI having been stopped by law enforcement "within 1,000 feet of a school us zone." [CP 84].

Once again, questions of statutory interpretation are reviewed de novo. State v. Wadsworth, 139 Wn.2d 724, 734, 991 P.2d 80 (2000). In this vein, the courts are to determine and carry out the underlying intent and purpose of the legislature, while avoiding any arguable constitutional deficiencies. State v. Cromwell, 157 Wn.2d 529, 539, 140 P.3d 593 (2006); State v. Crediford, 130 Wn.2d 747, 755, 927 P.2d 1129 (1996). By the same measure, the courts are required to presume that the legislature did not intend any "absurd results." State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

In determining whether the amount of drugs found, and any other surrounding circumstances, support a finding of intent to deliver beyond a reasonable doubt under RCW 69.50.401(2)(b), the court must be mindful of the clear distinction between the mere possession of the controlled substance of the defendant and the situation where such possession

necessary demonstrates an intent to deliver the same to another person. State v. Brown, 68 Wn.App.480, 843 P.2d 1098 (1993). In this regard, the mere possession of drugs, without more, raises no interference whatsoever of an intent to deliver. State v. Cobelli, 56 Wn.App. 921, 925, 788 P.2d 1081 (1989).

In this instance, the STATE OF WASHINGTON as well as the court relied upon the fact Mr. WALTARI was found with 5.4 grams of methamphetamine after his vehicle was stopped on January 25 2017, along with the circumstance that he had $240.00 on his person along with two [2] cell phones and a charger. It is a longstanding legal premise that an officer's opinion, without more, that the quantity of a controlled substance seized is not associated with mere personal use, is insufficient in itself to prove, beyond a reasonable doubt, that said contraband was in fact possessed with an intent to deliver. State v. Hutchins, 73 Wn.App. 211, 217, 868 P.2d 196 (1994); see also, State v. O'Connor, 155 Wn.App. 282, 290, 229 P.3d 880 (2010); Brown, at 482-485.

Here, the amount of methamphetamine at issue [5.4 grams], was clearly not indicative of any intent on the part of the defendant to deliver. Rather, the quantity of methamphetamine obtained from his vehicle on January 25, 2018, was entirely consistence with said drugs being kept by

Mr. WALTARI for his own personal use over a period of time.

Suffice it to say, the record is replete with Mr. WALTARI being an addict himself when he was stopped by police on that date. Likewise, the additional factor that he had $240.00 in cash on his person is not evidence beyond a reasonable doubt, of any intent to deliver. This small sum of cash is an innocuous at best and does not represent a sum normally associated with drug trafficking. Cf., State v. Hotchkiss II, 1 Wn.App.2d 275, 404 P.3d 629 (2017), involving $2,150.00 in cash; see also, State v. Campos, 100 Wn.App. 218, 223-24, 988 P.2d 893 (2000), involving $1,750.00 in cash; see also, Brown, at 484.

By the same measure, the alleged fact Mr. WALTARI was in possession of two [2] cell phones, and a charger, is equally innocuous in nature. There was no testimony offered by the prosecution suggesting that the mere possession of these items was in any sense indicative of intent to deliver on the part of the defendant. Likewise, there was no evidence showing that either of these phones was in fact used in any drug transaction. Similarly, the mere fact Mr. WALTARI had previously sold drugs some months or years earlier adds nothing to the mix in terms of proof beyond a reasonable doubt of any intent to deliver in this instance with respect to his detention on January 25, 2017. Id.; see also, State v.

Thomas, 68 Wn.App. 268, 273, 843 P.2d 540 (1992).

Again, contrary to the view of the STATE, Mr. WALTARI's conviction for possession with intent to deliver, in terms of count 4, is clearly subject to reversal for lack of proof beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); see also, Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979). Since there is no underlying crime to which an enhancement under the provisions of RCW 69.50.435(a)(3) and RCW 9.94A.533(6) can attach, such enhancement also fails and is in turn subject to reversal on this appeal. RAP 12.2.

Even assuming, arguendo, that count 4 itself could somehow be allowed to stand, the school bus zone enhancement associated therewith nonetheless fails on its own. In this vein, there was "no act of volition" placing Mr. WALTARI at the location where he was followed, surveiled several blocks, and eventually stopped by law enforcement on January 25, 2017. This process or chain of events leading to the traffic stop was strictly the decision of police to place Mr. WALTARI at this particular geographical location. Thus, there was no actus reus on the defendant's part so as to warrant any enhancement under RCW 69.50.435. See, State v. Eaton, 143 Wn.App. 155, 157, 164-65, 177 P.3d 157 (2008), aff'd, 168

Wn.2d 476 (2010).

In terms substantive due process, said enhancement statute was clearly not intended by the Washington legislature to convict or punish a defendant for his involuntary acts or the acts of another. Id. Instead, such heightened penalty can only lawfully be imposed when the accused was entirely free from any police restraint, and where he was acting strictly on his own volition rather than being placed or detained by the government at a particular location. Id.

3. Finally, and once again, defendant, Jamie L. WALTARI, was wrongfully convicted of counts 1 through 3 by superior court of Asotin County, State of Washington, in criminal cause no. 17-1-00017-2, following the subject bench trial, insofar as the prosecution's evidence and testimony of the confidential informant, Lydia Ensley, was lacking in terms of credibility and trustworthiness so as to fall short of constituting proof beyond a reasonable doubt as required under State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); see also, Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979? [Issue no. 3].

On pages 24 through 29 of its "responsive brief," the STATE OF WASHINGTON then goes on to argue, without merit, that the evidence presented at trial was sufficient beyond a reasonable doubt to support the superior court's determination of guilty on counts 1, 2 and 3. This is not the case.

Once again, it is axiomatic to this court's review herein that the heart and soul of the prosecutor's case against the defendant, JAMIE L. WALTARI, rested entirely upon the integrity and reliability of its principle witness, and confidential informant [CI], Lydia Ensley, concerning her alleged "controlled buy" of methamphetamine associated with counts 1 through 3 against the accused. A simple review of Ms. Ensley's testimony at trial [RP 261-71], coupled with that of other defense witnesses, including Eric Lee Hagen [now Gireth] [RP 272-82] and Detective Bryson Aase [RP 283-91], leaves no doubt Ms. Ensley was neither a credible nor truthful witness, in terms of the superior court having wrongfully convicted Mr. WALTARI on counts 1, 2 and 3 beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); see also, Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979).

By way of her own admission against interest, Ms. ENSLEY was without question lacking both in terms of honesty as well as sobriety, while doing the biding of the Quad-City Drug Task Force [QCDTF]. [RP 270-71, 273, 278-79]. Stated differently, she readily admitted she did not feel bound in the least to act in a forthright manner when serving as a so-called confidential informant [CI]. [Id.]. Rather, Ms. Ensley

acknowledged she was playing both sides of the fence in order to reduce the pending charges against her for delivery of a controlled substance, while continuing to be a part of local drug culture in Asotin County. [RP 82, 189-90, 268, 296-97].

In July 2018, she contacted Mr. WALTARI's then-attorney, Monica Brennan, and informed the latter that she would be willing to recant and back away from her claims against Mr. WALTARI regarding the alleged "controlled buys" from him so as undo this transgression which had been visited him. [RP 263-64, 265, 269-71]. Adding to this incriminating evidence going directly to the heart of her credibility, Ms. ENSLEY further admitted at trial that she had failed to abide by the QCDTF's strict guidelines against drug use and other criminal activities while acting as a CI. In this regard, she continued to use drugs and was "high" throughout the time she in the employ by the QCDTF. [RP 263-64, 265, 270-71]. On at least one occasion, she admitted "smoking" meth with the defendant during the surveiled and failed attempt to purchase drugs from him on September 20, 2016. [Id.; RP 109, 113, 122, 184-85].

Also, during her trial testimony, Ms. Ensley readily admitted she had purposely misled and distorted the truth with respect to her continued drug usage, while in the employ of the QCDTF, along with other

important facts and circumstances including her living arrangements as well as identify of persons she associated with including various places she and those friends, including Ms. Gireth, had stored or hidden their personal belongings including ostensibly drugs and other contraband. [RP 174-75, 175-76, 189, 189-90, 192, 262-63, 263-64, 265, 267-68, 270-71, 275, 278-79].

Hence, it was apparent to everyone at trial that the members of the QCDTF exercised little, if any, control over Ms. Ensley when monitoring her activities so as to insure she was acting as in a reliable or trustworthy capacity rather than continuing to embark on her criminal endeavors and drug-related activity. [RP 285-90]. In fact, at trial, detective Aase acknowledged that he was unaware Ms. Ensley was continuing to use meth while directly in his employ. [RP 168-69]. Had he known this, he would not have employed her as a so-called CI. [RP 83-84].

Presumably, Detective Aase chose to keep his head in the sand in this regard, because his CI's credibility would have otherwise been drawn into "irreconcilable doubt," as it clearly was in this case. [Id.]. In sum, the QCDTF should not have been allowed to "wallow in the mud" with this drug induced informant, and then profit from the same criminal misconduct in terms of its prosecution of Mr. WALTARI. Given this

fundamental infirmity associated with Ms. Ensley's immoral character and her inherent lack of veracity [CP 82-85, 100-07, 138-47, 148], reversal of Mr. WALTARI's convictions on counts 1 through 3 of the amended informations is fully in order. Green, at 221; see also, Jackson v. Virginia, supra; RAP 12.2. Due process and fundamental fairness require nothing less. See, Wash.St.Const, Art. I, §§ 3 & 22; U.S.Const., amend. 5 & 14. An admittedly unreliable witness should not be allowed to be the sole basis for a criminal conviction brought on by the STATE. Id.

**B. ARGUMENT IN RESPONSE TO CROSS-APPEAL**

As this court is well-aware, the respondent, STATE OF WASHINGTON, has filed in a cross-appeal challenging the superior court's decision, in accordance with the provisions of RCW 9.94A.660, to grant the JAMIE L. WALTARI's request for the imposition of a Drug Offender Sentencing Alternative [DOSA] or, in the alternative, to impose a sentence of eighty-four [84] months confinement, as being an abuse of manifest abuse of discretion. This issue is now moot to the extent that this reviewing court determines that Mr. WALTARI's convictions were in error and subject to reversal for the reasons set forth in his briefing in this appeal.

However, even if said cross-appeal remains viable and is not moot, the STATE's claim of manifest abuse of discretion in this instance is not well-taken under the facts and circumstances presented herein. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997); State v. Robinson, 79 Wn.App.386, 902 P.2d 652 (1990). This is abundantly clear when the governing provisions of RCW 9.94A.660 are taken into account.

As judicial officer and trier of fact, the superior court herein found that, in the months of September and October 2016, Mr. WALTARI had engaged in the use, sale and distribution of methamphetamine and that these actions on his part were directly due to his debilitating use and addiction to controlled substances. The court further noted that the defendant had first began abusing methamphetamine, after one of brothers has suddenly passed. This loss was mentally and emotionally devastating on Mr. WALTARI daily wellbeing, sending him into a tail-spin in which he could not cope without the course of his becoming totally dependent upon the use of meth.

The requirements for a DOSA sentencing alternative are set forth in RCW 9.94A.660. First, and contrary to the misguided logic and distorted claims of the STATE OF WASHINGTON on pages 30 through 31 of its "brief." Mr. WALTARI had not committed of any crime of

violence or sexual misconduct, and the charges against him did not entail any enhancement under RCW 9.94A.553 insofar as he did not possess a firearm while engaging in any criminal activity. RCW 9.94A.660(1)(a).

Furthermore, the defendant was not convicted of a felony DUI or felony physical control in terms of RCW 9.94A.660(1)(b). In addition, and likewise contrary to the prosecution's assertions otherwise, Mr. WALTARI was not suffering under any current or prior conviction for any sexual or violence offense as contemplated under RCW 9.94A.660(1)(c). Lastly, and as the superior court found after reviewing the evidence, Mr. WALTARI met all other criteria in order to qualify for DOSA under RCW 9.94A.660.

In this vein, the court clearly determined that Mr. WALTARI was a prime candidate for this alternative sentencing insofar as his convictions all stem from a single, isolated problem, to wit: long term addiction to meth resulting directly from the tragic loss of his brother. Contrary to the opinion of the prosecution, DOSA was designed by the legislature for individuals such as Mr. WALTARI who have committed criminal offenses out of a blurred mental and emotional state coupled with a long term chemical dependency. Id.

Hence, the superior court properly recognized that DOSA offered

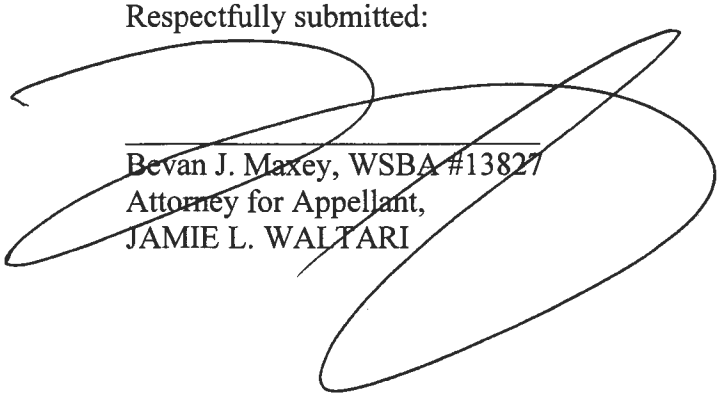
Mr. WALTARI, as well as society as a whole, the opportunity to overcome this chemical dependency and return to a productive, law-abiding life. In short, this alternative sentence was not any abuse of discretion; the superior court applied the correct legal standard to the facts and circumstances presented in this particular instance. See, Stenson, at 701; State v. Robinson, supra.

## C. CONCLUSION

Based upon the foregoing points and authorities, the appellant, JAMIE L. WALTARI, once more respectfully requests that the convictions and resulting "judgment and sentence" which was erroneously entered against him in this matter by the superior court of Asotin Spokane County, State of Washington, on August 28, 2018, in cause no, 17-1-00017-2, be reversed and the case remanded by this reviewing court with instructions that all charges including counts 1 through 5 be dismissed with prejudice. RAP 12.2. In the alternative, if the challenged convictions are upheld, the DOSA sentence should be upon upheld by this court. Id.

DATED this 19th day of April, 2019.

Respectfully submitted:



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