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Court of Appeals
Division III
State of Washington
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No. 36715-1-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

GREGALINE TYLER,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Gregaline Tyler was charged with possession of a small quantity of methamphetamine after being stopped by police and arrested for an outstanding warrant. Several months later, and on the eve of trial, over Mr. Tyler's vehement objection, the trial court allowed the State to amend the information to add a count of escape from community custody, which was the basis for the warrant for which Mr. Tyler was arrested. Mr. Tyler subsequently pleaded guilty to the escape count and was found guilty following a jury trial of the possession count. Because the amendment of the information was improper and Mr. Tyler suffered prejudice from the amendment, he is entitled to reversal of his convictions.

The jury returned a verdict of guilty to possession of a controlled substance. The specific type of controlled substance was not included in the verdict. Mr. Tyler submits his right to a jury trial was violated, requiring reversal of his conviction for possession of methamphetamine and remand for entry of a conviction for the lowest offense for possession of a controlled substance.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in amending the information to add the escape from community custody count.

2. The joinder of the offense of escape from community custody with the offense of unlawful possession of methamphetamine prejudiced Mr. Tyler.

3. The trial court entered a felony sentence not authorized by the jury verdict.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court may grant a State's motion to amend the information to join offenses where the offenses are the same character or based upon the same conduct or series of acts. Mr. Tyler was charged with possession of methamphetamine after being arrested on a warrant for escape from community custody. Mr. Tyler was originally charged with possession of methamphetamine but on the eve of trial and several months after the original information was filed, the trial court allowed the information to be amended to add the escape count. Was the amendment improper and Mr. Tyler entitled to reversal of his convictions where the offenses were not of the same or similar

character and they did not arise from the same conduct or series of acts?

2. As part of a defendant's right to a jury trial, he may only be convicted and sentenced on the offense found by the jury as reflected in the jury's verdict. Mr. Tyler was charged and tried for possession of methamphetamine but the jury found him guilty of possession of a controlled substance. Was Mr. Tyler denied his right to a jury trial when the trial court imposed a conviction and sentence for possession of methamphetamine, an offense which was not reflected in the jury's verdict?

D. STATEMENT OF THE CASE

In the early morning hours of September 22, 2018, Gregaline Tyler was stopped by a Spokane Police officer for riding his bicycle without a headlight. RP 160-61. Upon request, Mr. Tyler provided the officer with a Washington State ID card. RP 161. A check of Mr. Tyler's ID card showed he had an active warrant for his arrest. RP 161-62. Mr. Tyler was arrested, and during a search incident to arrest, the officer discovered a small container in Mr. Tyler's jacket pocket. RP 162-63. Inside this container was a small quantity of

methamphetamine. RP 162-63. Mr. Tyler was charged with possession of methamphetamine. CP 3.

Five months later, and prior to trial, the State moved to amend the information to add a count of escape from community custody. CP 27-30; RP 5. Over Mr. Tyler's strenuous objections, the court allowed the State to amend the information. CP 42; RP 27-28.[1]

Mr. Tyler moved *in limine* to bar the State from admitting the fact that Mr. Tyler had an active warrant for his arrest and was on community custody at the time he was stopped. CP 20-23; RP 37-40. The State argued the evidence was part of the *res gestae* of the offenses. RP 38-39. The court admitted the evidence that Mr. Tyler had an active arrest warrant, but in response, agreed to allow Mr. Tyler to plead guilty to the escape count over the State's objection. RP 44-47.

Mr. Tyler pleaded guilty to the escape count and the trial began on the possession count. CP 47-57; RP 50-53. During the trial, Jason Stenzil of the Washington State Patrol Crime Laboratory, testified the substance seized from Mr. Tyler contained methamphetamine. RP 173, 176-80. The trial court instructed the jury in the to-convict instruction

[1] Mr. Tyler also objected to the lack of discovery regarding the escape count and moved to dismiss. The trial court denied the motion to dismiss for a discovery violation but granted Mr. Tyler's motion to continue the trial.

that Mr. Tyler possessed methamphetamine and that methamphetamine was a controlled substance. CP 67-68; RP 250-51. Nevertheless, pursuant to the court's verdict form, the jury to found Mr. Tyler was guilty of "Possession of a Controlled Substance as charged in Count I." CP 73. There was nothing in the jury instructions or evidence presented at trial regarding "Count I."

E. ARGUMENT

1. The trial court erred in amending the information to join the possession count with a count of escape from community custody.

a. Offenses may be joined in an information provided the offenses meet the criteria of CrR 4.3.

"Two or more offenses may be joined in one charging document, . . . when the offenses are of the same or similar character or where the offenses. . [a]re based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan." CrR 4.3(a); *State v. Bluford*, 188 Wn.2d 298, 310, 393 P.3d 1219 (2017). The question of whether two offenses are properly joined is a question of law which is reviewed *de novo*. *State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483 (1991), *cert. denied*, 502 U.S. 1111 (1992); *State v. Bryant*, 89 Wn.App. 857, 864, 950 P.2d 1004 (1998).

b. The offenses were not the same conduct and did not arise out of a connected series of acts.

The charge of escape from community custody is of an entirely different character from the possession count. Further, as alleged in the information, the two offenses are not connected by a series of acts and are not part of the same transaction. The information alleged Mr. Tyler first committed the escape on September 5, 2018, and ended on his arrest on September 22, 2018. CP 43. The possession occurred on September 22, 2018, and was wholly unrelated to the escape.

This case differs dramatically from the cases finding the offenses of bail jump and the offense for which the defendant had posted bail were properly joined because they arose from the same series of acts or were part of the same transaction. *See Bryant*, 89 Wn.App. at 866-67 (a bail jumping charge is sufficiently connected to the underlying charge if the two offenses relate in time and the bail jumping charge stems directly from the underlying charge where bail jump arose from missed court appearance on the underlying offense). That is not the case here. The escape occurred well before the possession count occurred.

The court erred in amending the information.

c. Mr. Tyler was prejudiced by the amendment, thus reversal of his conviction is required.

Courts have recognized that joinder is inherently prejudicial. *State v. Smith,* 74 Wn.2d 744, 446 P.2d 571 (1968), *vacated in part,* 408 U.S. 934, 92 S.Ct. 2852, 33 L.Ed.2d 747 (1972). "If joinder was not proper but offenses were consolidated in one trial, the convictions must be reversed unless the error is harmless." *Bryant*, 89 Wn.App. at 864. Even if joinder was permissible, "the trial court should not join offenses if prosecution of all charges in a single trial would prejudice the defendant. *Bryant*, 89 Wn.App. at 865, *citing United States v. Peoples*, 748 F.2d 934, 936 (4th Cir.1984), *cert. denied,* 471 U.S. 1067 (1985).

"Prejudice may result from joinder . . . if use of a single trial invites the jury to cumulate evidence to find guilt or infer a criminal disposition." *State v. Russell,* 125 Wn.2d 24, 62-63, 882 P.2d 747 (1994), *cert. denied,* 514 U.S. 1129 (1995). In determining prejudice by the joinder of counts, courts consider: "(1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) the court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial." *Id.* at 63.

If this Court determines the information was properly amended, reversal is still required where Mr. Tyler suffered prejudice from the joinder. The prejudice to Mr. Tyler arises out of the fact the evidence regarding the two offenses is not cross-admissible. In order to prove escape from community custody, the State would have to prove Mr. Tyler was on community custody and that he willfully failed to contact his CCO. RCW 72. 09.310. The fact Mr. Tyler was on community custody for a prior conviction and failed to report to his Community Corrections Officer (CCO) would never be admissible in the trial for possession of a controlled substance.

Mr. Tyler suffered prejudice from the improper amendment to the information, thus he is entitled to reversal of his convictions.

2. The trial court lacked authority to enter a felony sentence for possession of methamphetamine.

Under the Sixth Amendment to the United States Constitution and article I, sections 21 and 22 of the Washington Constitution, the right to a jury trial requires that a sentence be authorized by the jury's verdict. *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010); *State v. Clark-El*, 196 Wn.App. 614, 624, 384 P.3d 627 (2016). "If a court imposes a sentence that is not authorized by the jury's

verdict, harmless error analysis does not apply." *Clark-El*, 196 Wn.App. at 624-25.

Instructive on this issue is the decision in *State* v. *Rivera-Zamora*, 7 Wn.App.2d 824, 435 P.3d 824 (2019). Mr. Zamora was charged with, among other offenses, possession with intent to deliver, methamphetamine. The to-convict instruction omitted the identity of the controlled substance. *Id.* at 829. This Court upheld Mr. Zamora's felony sentence where the verdict form stated the jury found the defendant guilty of "unlawful possession of a controlled substance with intent to deliver—methamphetamine." *Id.* at 829-30. As a consequence, the decision in *Rivera-Zamora* stands for the proposition that the express language in the verdict form controls the sentencing authority of the trial court. This is consistent with *Williams-Walker*, which held that "the jury trial right requires that a sentence be authorized by the *jury's verdict.*" 167 Wn.2d at 896 (emphasis added).

The remedy for the violation of Mr. Tyler's right to a jury trial is reversal of his sentence and remand for the court to impose a misdemeanor sentence for unlawful possession of a controlled substance for marijuana, the lowest possible sentence for unlawful possession. *See State v. Gonzalez*, 2 Wn.App.2d 96, 109, 114, 408 P.3d

743, *review denied*, 190 Wn.2d 1021 (2018), ("'[w]ithout a finding regarding the nature of the controlled substance, the jury's verdict did not provide a basis on which the trial court could impose a sentence based on possession of methamphetamine.' [citation omitted]. The remedy is to impose the lowest possible sentence for unlawful possession of a controlled substance, which is a 90-day misdemeanor sentence for possession of marijuana and remanded for resentencing").

This Court should reverse Mr. Tyler's possession of methamphetamine conviction and remand for entry of a possession of marijuana conviction and resentenced accordingly.

F. CONCLUSION

For the reasons stated, Mr. Tyler asks this Court to reverse his convictions and remand for a new trial. Alternatively, Mr. Tyler asks this Court to remand for resentencing to a misdemeanor sentence.

DATED this __ day of September 2019.

Respectfully submitted,

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	)	
GREGALINE TYLER,	)	
	)	
APPELLANT.	)	

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