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COURT OF APPEALS
DIVISION II
07 JUL -5 PM 3:17
STATE OF WASHINGTON

81348-5

NO. 34911-6-II

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

STATE OF WASHINGTON, Respondent

v.

THOMAS HARRY EATON, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN P. WULLE
CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-02126-8

BRIEF OF RESPONDENT

Attorneys for Respondent:

ARTHUR D. CURTIS
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Clark County, Washington

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FILED 7-3-07

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Statutes

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I. STATEMENT OF THE CASE

The State accepts the statement of the case as set forth by the appellant in his brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the conviction for the statutory enhancement of committing the crime of Possession of Methamphetamine in a County Jail violated his constitutional rights and the trial court erred in denying his motion to dismiss the enhancement.

The defendant was charged with two crimes: Possession of Controlled Substance – Methamphetamine and Driving While Under the Influence (Amended Information (CP 14)). A jury convicted the defendant of both crimes. As part of count 1, the jury was asked, by special verdict, whether or not the defendant possessed the controlled substance – methamphetamine, in a county jail. The jury responded in the affirmative. (Special Verdict, Count 1 (CP 77)).

The jury instructions given to the jury (CP 56) included as Instruction No. 8 the elements of conviction of a Possession of a Controlled Substance. The instruction reads as follows:

> To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 22nd day of September, 2005, the defendant possessed a controlled substance; and
>
> (2) That the acts occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

The enhancement to this particular crime is found, as part of, RCW 9.94A.533(5)(c) and provides as follows:

> (5) the following additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility and the offender is being sentenced for one of the crimes listed in this subsection. . . .
>
> (c) twelve months for offenses committed under RCW 69.50.4013.
>
> For the purposes of this subsection, all of the real property of a state correctional facility or county jail shall be deemed to be part of that facility or county jail.
>
> RCW 9.94A.533(5)(c)(in part)

If the language of a statue is clear and unambiguous, the appellate court applies the statute as written and assumes that the legislature means exactly what it says. In Re Custody of Smith, 137 Wn.2d 1, 8-9, 969 P.2d 21 (1998); State v. McCraw, 127 Wn.2d 281, 288, 898 P.2d 838 (1995). Statutes must be read to avoid absurd and strained interpretations. State v. McDougal, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992). In interpreting a statute, the appellate court's primary objective is to ascertain and give effect to the drafters' intent. When that language is clear, the courts cannot construe a statute contrary to its plain language. Simmerly v. McKee, 120 Wn. App. 217, 221, 84 P.3d 919 (2004); City of Kirkland v. Ellis, 82 Wn. App. 819, 826, 920 P.2d 206 (1996).

In our situation, the crime is possession of the controlled substance. The active component of that crime is the possession of the illicit drugs, whether actual or constructive. There are no definitions for intent or knowledge in the particular statute. Thus, the active crime is possessing of the drugs. If those drugs are possessed in an inappropriate area, then the jury is asked whether or not the State has proven beyond a reasonable doubt, an additional penalty element of the activity. For example, if the drugs are held within a 1,000 feet of a school zone or if the drugs are within close proximity to a minor child, or if the actor is in possession of a firearm while also possessing the drugs, or if the drugs are

kept by the defendant in a jail setting, this does not require any type of strain interpretation of statutory language. It is meant to be a harsh penalty which can be imposed if the crime is committed in a specific way. The jury found that the defendant had committed this crime in a prohibited fashion and, as such, the trial court appropriately punished based on the jury's finding.

It is interesting to note that the defense spends a great deal of its argument on the statutory scheme in the State of Oregon concerning contraband being brought into a jail setting. There is a fundamental difference between the statutory scheme in Oregon and what we are faced with in the State of Washington. That fundamental difference is that the active crime in the State of Oregon is supplying contraband. That crime requires: (1) that the defendant either initiate the introduction of contraband into the jail or cause it to be introduced; and (2) that he does so consciously. ORS 161.095(1), 161.085(2). This is not a situation, as we have it, where the crime is the possession of a controlled substance and the possession of the drug in a jail is an enhancement. Rather, the possession in the jail is the actual crime itself. Thus, when we read State of Oregon v. Tippetts, 180 Ore. App. 350, 43 P.3d 455 (2002), it is obvious that the criminal intent of the crime is the voluntary act of possessing contraband

in a jail. That is the criminal act. It is not for purposes of enhancement but the actual underlying criminal activity.

To use the analysis raised by the defendant in his brief in situations of a penalty enhancement, would lead to absurd results. For example, the defendant could argue that he had no intent and did not know he was possessing the drugs within the prohibited area within a 1,000 feet of a school. Or, he could argue that the police waited to stop his vehicle until he got within a 1,000 feet of a school and thus were able to procure additional penalties. The crime remains the same (Possession of a Controlled Substance). It is unfortunate that he has chosen to voluntarily hold the controlled substance in a prohibited area or manner.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is that the trial court had signed an Ex Parte Order Amending his Judgment and Sentence and he should have been present for that.

After sentencing, the Prosecutor's Office was notified by the Department of Corrections that a portion of the Felony Judgment and Sentence had not been properly marked in that a box had not been checked off. To correct that problem, the State filed a Motion and Affidavit for Order Correcting Judgment and Sentence and a proposed Order Correcting Judgment and Sentence which was signed by the Judge on June 27, 2006.

A copy of the Motion and Affidavit for Order Correcting Judgment and Sentence with the attached Department of Corrections letter (CP 121) and a copy of the Order Correcting Judgment and Sentence (CP 124) are attached hereto and by this reference incorporated herein.

The State submits that this was just a clerical error which did not require the necessity of a re-sentencing of the defendant and did not violate any of his constitutional rights.

To determine whether a clerical error exists under CrR 7.8, the Appellate Court uses the same test used to determine clerical error under CR 60(a), the Civil Rule governing amendments or judgments. State v. Snapp, 119 Wn. App. 614, 626, 82 P.3d 252, review denied, 152 Wn.2d 1028, 101 P.3d 110 (2004). In Presidential Estates Apartment Associates v. Barrett, 129 Wn.2d 320, 326, 917 P.2d 100 (1996), the court set forth the review necessary to determine whether an error is clerical or judicial. The court looks at "whether the Judgment, as amended, embodies the trial court's intention, as expressed in the record at trial" to determine if the error is clerical. Presidential, 129 Wn.2d at 326. If it does, then the Amended Judgment merely corrects the language to reflect the court's intention or as the language the court inadvertently omitted. Presidential, 129 Wn.2d at 326. The State submits that was what was done in this

circumstance. The jury had found a special finding and the court merely clarified the Judgment to reflect the jury's finding.

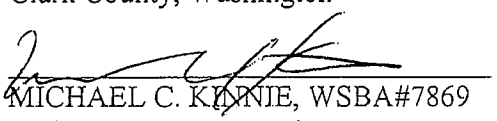
IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 2 day of July, 2007.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By: 
MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

APPENDIX "A"

MOTION AND AFFIDAVIT FOR ORDER
CORRECTING JUDGMENT AND SENTENCE

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FILED
JUN 28 2006
JoAnne McBride, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. THOMAS HARRY EATON, Defendant.	No. 05-1-02126-8 MOTION AND AFFIDAVIT FOR ORDER CORRECTING JUDGMENT AND SENTENCE

COMES NOW State of Washington by and through SCOTT S. IKATA, Deputy Prosecuting Attorney, and does move the above entitled court for an Order Correcting the Judgment and Sentence dated May 2, 2006. This motion is based upon the files and records herein, CrR 7.8(a) and the affidavit of SCOTT S. IKATA.

DATED this 26 day of June, 2006.

Philip A. Meyers 8246
SCOTT S. IKATA, WSBA #36030
Deputy Prosecuting Attorney

STATE OF WASHINGTON)
: ss
COUNTY OF CLARK)

I, ~~SCOTT S. IKATA~~ Philip A. Meyers, being sworn on oath depose and state:

That I am a Deputy Prosecuting Attorney for the Clark County Prosecuting Attorney's Office and in that capacity have reviewed Clark County Cause No. 05-1-02126-8, State of Washington v. THOMAS HARRY EATON.

KD

CLARK COUNTY PROSECUTING ATTORNEY
1013 FRANKLIN STREET • PO BOX 5000
VANCOUVER, WASHINGTON 98666-5000
(360) 397-2261 (OFFICE)
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63

That this office is in receipt of a letter dated May 19, 2006, from the Department of Corrections requesting clarification of sentence. A copy of the letter is attached hereto and incorporated herein by reference.

Your affiant respectfully requests that the court issue an Order directing the Clark County Clerk to correct the Judgment and Sentence issued on May 2, 2006, in State of Washington v. THOMAS HARRY EATON, Clark County Cause No. 05-1-02126-8 to reflect on Page 2, Section 2.1 the third box be checked reflecting that a special verdict/finding for Violation of the Uniform Controlled Susbstances Act was returned on Count 1.

Further your affiant saith not.

~~SCOTT S. IKATA~~, WSBA ~~#26080~~ 8246
Deputy Prosecuting Attorney

SUBSCRIBED AND SWORN to before me this 16 day of June, 2006.

NOTARY PUBLIC in and for the State of Washington, residing at Vancouver.
My commission expires 12/1/2009.

KD

CLARK COUNTY PROSECUTING ATTORNEY
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STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS
WASHINGTON CORRECTIONS CENTER
P.O. Box 900 • Shelton, Washington 98584

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MAY 25 2006
PROSECUTORS OFFICE

May 19, 2006

Honorable John P. Wulle
Clark County Superior Court
P.O. Box 5000
Vancouver, Washington 98666-5000

Paul R. Bruce
Attorney for Defendant
P.O. Box 956
Vancouver, Washington 98666-0956

Scott S. Ikata
Deputy Prosecuting Attorney
Clark County Prosecuting Attorney's Office
P.O. Box 5000
Vancouver, Washington 98666-5000

RE: EATON, Thomas Harry
DOC#894230
CSE#05-1-02126-8

Dear Judge Wulle and Messrs. Ikata and Bruce:

Mr. Eaton was received at the Washington Corrections Center on May 5, 2006. He was convicted of one count of Possession of a Controlled Substance-Methamphetamine with an offense date of September 22, 2005. Upon review of the Judgment and Sentence, it appears we need clarification of the sentencing.

The Sentencing Data in Section 2.3 reflects a 12-month enhancement for VUCSA in a protected zone. Section 2.1 does not reflect a special verdict/finding for Violation of the Uniform Controlled Substances Act in a protected zone.

We respectfully request the Court review the Judgment and Sentence to verify if the enhancement is valid for this sentence. If so, please amend Section 2.1 to provide a special verdict/finding to clarify the enhancement portion of the sentence for this conviction.

Thank you for your assistance in this matter.

Sincerely,

Wendy Stigall
Correctional Records Manager
(360) 427-4628
wsstigall@doc1.wa.gov

cc: Central File

"Working Together for SAFE Communities"

recycled paper

Attachments

APPENDIX "B"

ORDER CORRECTING JUDGMENT AND SENTENCE

FILED
JUN 28 2006
JoAnne McBride, Clerk, Clark Co.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff, v. THOMAS HARRY EATON, Defendant.	No. 05-1-02126-8 ORDER CORRECTING JUDGMENT AND SENTENCE

THIS MATTER having come on regularly before the undersigned Judge of the above entitled Court, upon the Motion of the plaintiff, State of Washington, for an Order Correcting the Judgment and Sentence issued on May 2, 2006, pursuant to CrR 7.8(a) and the Court now being fully advised in the premises, now, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that in the Judgment and Sentence filed on May 2, 2006, in the case of State of Washington v. THOMAS HARRY EATON, Clark County Cause No. 05-1-02126-8 shall reflect on Page 2, Section 2.1 the third box be checked reflecting that a special verdict/finding for Violation of the Uniform Controlled Susbstances Act was returned on Count 1.

DATED this 27 day of June, 2006.

THE HONORABLE JOHN P. WULLE
Judge of the Superior Court

Presented by:

SCOTT S. IKATA, WSBA #36030
Deputy Prosecuting Attorney

ORDER - 1

KD

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

STATE OF WASHINGTON, Respondent, v. THOMAS HARRY EATON, Appellant.	No. 34911-6-II Clark Co. No. 05-1-02126-8 DECLARATION OF TRANSMISSION BY MAILING

STATE OF WASHINGTON)
: ss
COUNTY OF CLARK)

On July 3, 2007, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO:		
	David Ponzoha, Clerk Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	Anne Cruser Attorney for Appellant PO Box 1670 Kalama, WA 98625
	Thomas Eaton, DOC #894230 c/o Appellate Attorney	

DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Abby Rowland
Date: July 3, 2007.
Place: Vancouver, Washington.

FILED
COURT OF APPEALS
DIVISION II
07 JUL -5 PM 3: 17
STATE OF WASHINGTON
BY
DEPUTY