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STATE OF WASHINGTON

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NO. 63356-2-1

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

STATE OF WASHINGTON,

Respondent,

v.

HUMBERTO VELAZQUEZ-MEDINA,

Appellant.

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

The Honorable Michael E. Rickert, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The evidence is insufficient to support appellant's conviction for maintaining a vehicle for drug trafficking.

Issue Pertaining to Assignment of Error

The State charged appellant Humberto Velazquez-Medina with maintaining a vehicle for drug trafficking. To convict, the State had to prove that (1) the drug activity was continuing and recurring in nature and (2) that a substantial purpose in the maintenance of the vehicle was to conduct illegal drug activities. The evidence introduced at trial demonstrated that Velazquez-Medina transported one ounce of methamphetamine in his truck on one occasion. There is no evidence that a drug sale actually took place in Velazquez-Medina's truck or that the truck was used on a recurring basis for drug transactions. Did the State present sufficient evidence to convict on this charge?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Skagit County Prosecuting Attorney charged appellant Humberto Velazquez-Medina with two counts of delivery of a controlled substance (methamphetamine), maintaining a vehicle for drug trafficking purposes, conspiracy to deliver controlled

substances (methamphetamine), and intimidating a witness. CP 42-45.

A jury trial commenced in February 2009. The trial court dismissed the charge of intimidating a witness after the State rested its case.¹ 6RP 26-27. The court denied Velazquez-Medina's half-time motion to dismiss the charge of maintaining a vehicle for drug trafficking. 6RP 26-27. The jury concluded that Velazquez-Medina was guilty of all four counts. CP 77-80.

By special verdicts, the jury also found that all of the crimes were major violations of the Uniform Controlled Substances Act and that the second delivery occurred near a school bus route. CP 81-85. Based on those special verdicts, the court imposed an exceptional sentence of 90 months for the crimes. CP 88-102. Velazquez-Medina filed a timely notice of appeal. CP 87.

2. Trial Testimony

A citizen contacted a detective with the Skagit County Interlocal Drug Enforcement Unit, identified Velazquez-Medina as a drug dealer, and offered to act as a confidential informant for the police. 3RP 16. The informant arranged to buy one ounce of

¹ 1RP is October 23, 2008; 2RP is January 22, 2009; 3RP is February 9, 2009; 4RP is February 10, 2009; 5RP is February 11, 2009; 6RP is February 12, 2009; 7RP is April 8, 2009.

methamphetamine from Velazquez-Medina for \$1,200.00 on January 7, 2008. 3RP 23, 26. The two men arranged for the sale to take place at Velazquez-Medina's trailer in Mount Vernon. 3RP 24. At the last minute, Velazquez-Medina changed the meeting place to the Wal-Mart parking lot in Mount Vernon. 3RP 29.

Velazquez-Medina arrived at Wal-Mart in a white Dodge truck. 3RP 31. The State produced evidence that Velazquez-Medina regularly drove the white truck. 6RP 9. The police surveillance team observed Velazquez-Medina leave his truck and get into the informant's vehicle for approximately 45 seconds. 3RP 33-34. The confidential informant, Sergio Ortiz, confirmed that the drug sale took place in his own truck. 4RP 32-36. Velazquez-Medina returned to his truck and left the parking lot. 3RP 34.

After the buy, police recovered one ounce of pink methamphetamine from Ortiz. 3RP 36. The detective running the controlled buy contacted a Mount Vernon police officer and requested a traffic stop of Velazquez-Medina in order to confirm his identity. 3RP 44. An officer stopped Velazquez-Medina for a traffic infraction, but did not make an arrest at that time for the drug sale. 3RP 44.

Ortiz arranged to buy four ounces of methamphetamine from Velazquez-Medina on January 22, 2008. 4RP 43. The men arranged to meet at Velazquez-Medina's trailer, but once again the location for the deal changed to the Wal-Mart parking lot. 4RP 45. When Ortiz arrived at Wal-Mart, the location changed again to a store called La Mariposa. 4RP 48. Ortiz testified that Velazquez-Medina told him that another man would be waiting for him at La Mariposa with the drugs. 4RP 48-49. Ortiz drove to La Mariposa and picked up a man standing near the garage. 4RP 53. Ortiz followed the man's directions and drove behind an apartment complex to complete the drug sale. 4RP 54-59.

Ortiz attempted to arrange a third buy on February 7, 2008. 4RP 64. Ortiz arranged to meet Velazquez-Medina in the Wal-Mart parking lot. 4RP 66. Velazquez-Medina arrived in a brown Mazda truck. 4RP 66. Velazquez-Medina did not have any methamphetamine with him, and told Ortiz that he was leaving to go pick some up from his supplier. 4RP 69. After waiting for a while, the police decided to call off the buy. 4RP 70. Ortiz called Velazquez-Medina and told him to forget about the deal. 4RP 71.

After the State rested, Velazquez-Medina moved to dismiss the charge of maintaining a vehicle for drug trafficking purposes.

6RP 20. Velazquez-Medina argued that there was insufficient evidence to convict on this charge:

As far as the maintaining a vehicle for drug trafficking, your Honor, it's maintaining a vehicle for drug trafficking. In this case there was simply a transportation, at best. Even in the light most favorable to the State, at best, they have a transportation of drugs from one place to the other.

In the first incident the drug transaction did not even occur in the vehicle that they are alleging was maintained. In the second case, in the buy at La Mariposa, a vehicle wasn't even used. In the third case, there is no evidence that there was ever any drugs in the vehicle. No drugs were ever sold during that, during that transaction.

Case law is clear in terms of maintaining for a house. I did the research, and I'm not able to find much of anything, actually, that talks about maintaining a vehicle. It's the same statute. And in terms of the house, there has to be a continuing conduct. . . . It's got to be a continuing course of conduct. We just don't have that here. I just don't see that charge whatsoever.

6RP 20-21. The court denied Velazquez-Medina's motion to dismiss the charge. 6RP 27.

C. ARGUMENT

THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT ON THE CHARGE OF MAINTAINING A VEHICLE FOR DRUG TRAFFICKING.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

The State charged Velazquez-Medina with maintaining a vehicle for drug trafficking in violation of RCW 69.50.402(1)(f). This statute states that it is unlawful for any person “[k]nowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle . . . which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them” RCW

69.50.402(1)(f) (emphasis added). This statute is sometimes referred to as the “drug house statute.” See State v. Ceglowski, 103 Wn. App. 346, 349, 12 P.3d 160 (2000).

In Ceglowski, police officers executed a warrant on a bait and tackle shop. Ceglowski, 103 Wn. App. at 348. They found a tray with traces of brown powder, two small baggies with brown powder, \$600.00 in currency, a small scale, and “pay and owe” sheets consistent with the type kept to record drug transactions. Ceglowski, 103 Wn. App. at 348. Ceglowski was at the store when police executed the warrant. Ceglowski, 103 Wn. App. at 348. He had money in his pockets later identified by police as the same money used for a controlled buy that took place minutes before police executed the warrant. Ceglowski, 103 Wn. App. at 348.

The jury convicted Ceglowski of knowingly keeping or maintaining a “drug house” in violation of RCW 69.50.402. Ceglowski, 103 Wn. App. at 349-50. The Court of Appeals reversed Ceglowski’s conviction for insufficient evidence: “We hold that the totality of the evidence must demonstrate more than a single isolated incident of illegal drug activity in order to prove that the defendant ‘maintains’ the premises for keeping or selling a

controlled substance in violation of the drug house statute.”

Ceglowski, 103 Wn. App. at 350.

The court concluded that to constitute the crime of maintaining a premises for the purpose of unlawfully selling controlled substances there must be: “(1) some evidence that the drug activity is of a continuing and recurring character; and (2) that a substantial purpose of maintaining the premises is for the illegal drug activity.” Ceglowski, 103 Wn. App. at 352-53. The “keeping” and “maintaining” elements of the statute “contemplate a continuing pattern of criminal behavior beyond an isolated incident of possession or sale at the house or business.” Ceglowski, 103 Wn. App. at 348.

The holding in Ceglowski applies with equal force to cases involving maintaining a vehicle for drug trafficking purposes. State v. Marin, 150 Wn. App. 434, 438-39, 208 P.3d 1184 (2009). In Marin, the defendant challenged the sufficiency of the evidence regarding his conviction for maintaining a vehicle for drug trafficking. The Court of Appeals stated that the crime “requires some evidence that the drug activity was continuing and recurring in nature, and that a substantial purpose in the maintenance of the vehicle was to conduct illegal drug activities.” Marin, 150 Wn. App.

at 438-39 (citing Ceglowski, 103 Wn. App. at 349-50). The evidence was sufficient to affirm Marin's conviction where police found a small digital scale, numerous baggies with varying amounts of methamphetamine, and a recently added hidden compartment in the van. Marin, 150 Wn. App. at 439.

There are three alternative means of violating RCW 69.50.402(1)(f). State v. Fernandez, 89 Wn. App. 292, 301, 948 P.2d 872 (1997). The statute prohibits a person from knowingly maintaining or keeping a vehicle for the purposes of (1) illegal drug use by others, (2) storing, or (3) selling controlled substances. Fernandez, 89 Wn. App. at 301. Here, the State elected to limit its prosecution to the "selling" prong of the statute by omitting the "use" and "storing" means of violating the statute from the jury instructions. The "to convict" instruction given to the jury read:

(1) That on or about and between January 7, 2008 and February 7, 2008, the defendant did keep or maintain any vehicle, and

(2) That the defendant knew such vehicle was used for selling controlled substances in violation of the law; and

(3) That the acts occurred in the State of Washington.

CP 69 (emphasis added).

There is no evidence that Velazques-Medina ever sold drugs in the white truck. Yet, the plain language of the statute makes clear that a sale must occur at the place or in the vehicle maintained for drug trafficking: “knowing that such place is used for keeping or selling controlled substances” RCW 69.50.402(1)(f)(emphasis added); accord Fernandez, 89 Wn. App. at 301 (“Persons of common intelligence would understand the statute to prohibit a person from knowingly maintaining a house where drugs are used by others, kept, or sold.”); Ceglowski, 103 Wn. App. at 353 (“These [pay and owe] records, although consistent with the sale of drugs, do not support a reasonable inference that other sales continually took place on the premises.”)(emphasis in original). To convict under the “selling” prong, a drug sale must occur in the place or vehicle alleged to be maintained for drug trafficking. Velazquez-Medina did not sell any drugs in his white truck. At best, he transported the drugs in his truck.

Further, the State did not present any evidence indicating that a substantial purpose in maintaining the vehicle was for drug trafficking. Unlike Marin, police did not find drugs, drug paraphernalia, or any hidden compartments in the truck to support

a conclusion that the truck was maintained for drug trafficking. Following the court's holding in Ceglowski, the single isolated instance of illegal drug activity connected with the truck is insufficient to demonstrate that Velazquez-Medina maintained the truck in order to sell drugs.

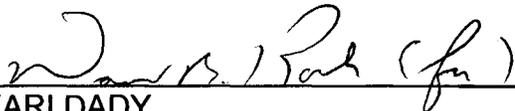
D. CONCLUSION

This court should reverse Velazquez-Medina's conviction for insufficient evidence and remand the case to the trial court with instructions to dismiss the charge with prejudice and resentence accordingly. Ceglowski, 103 Wn. App. at 354.

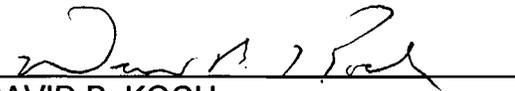
DATED this 23rd day of October 2009.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 63356-2-I
)	
HUMBERTO VELAZQUEZ-MEDINA,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 23RD DAY OF OCTOBER 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SKAGIT COUNTY PROSECUTOR'S OFFICE
COURTHOUSE ANNEX
605 S. THIRD
MOUNT VERNON, WA 98273

- [X] HUMBERTO VELAZQUEZ-MEDINA
DOC NO. 329768
AIRWAY HEIGHTS CORRECTIONS CENTER
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99007

SIGNED IN SEATTLE WASHINGTON, THIS 23RD DAY OF OCTOBER 2009.

x *Patrick Mayovsky*