

64373-8

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No. 64373-8

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ODIS RUSSELL,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Instruction 7, the “to-convict” instruction, omitted an essential element of the offense of possession of heroin.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Due Process Clause of the Fourteenth Amendment requires the State prove each element of an offense beyond a reasonable doubt. Thus, the jury must be instructed on each fact which increases the defendant’s sentence. The type of controlled substance a person possesses is an essential element of the crime because it determines the penalty to which a person is exposed. Did the absence of “heroin” from the Instruction 7 violate Mr. Russell’s right to due process?

C. STATEMENT OF THE CASE

Odis Russell has struggled with his drug addiction for many years. RP 107. In the early morning hours of April 21, 2009, Mr. Russell along, with another man, sat on the steps of a pedestrian overpass and together loaded syringes with heroin they cooked in a portion of an aluminum can. RP 35-37, 70.

A Seattle police officer observed the two men for a few minutes and when a second officer arrived arrested them. RP 37-38. While a search of Mr. Russell’s person did not reveal any drugs

or paraphernalia, the officers recovered a full syringe from the other man's pocket and two more on the steps where the men had been sitting. RP 53, 56. 60-61.

The State charged Mr. Russell with possession of heroin.

CP 1-4.

A jury convicted Mr. Russell as charged. CP 23.

D. ARGUMENT

INSTRUCTION 7 OMITTED AN ESSENTIAL ELEMENT OF THE CRIME.

The trial court instructed the jury:

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 April 21, 2009, 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.

CP 34.

1. A to-convict instruction violates due process if it omits an element of the crime charged. The "to-convict" instruction must

contain all of the elements of the crime because it serves as the yardstick by which the jury measures the evidence to determine guilt or innocence. State v. Smith, 131 Wn.2d 258, 263, 930 P.2d 917 (1997). The failure to instruct the jury as to every element of the crime charged is constitutional error, because it relieves the State of its burden under the due process clause to prove each element beyond a reasonable doubt. State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995); see In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Jurors must not be required to supply an element omitted from the to-convict instruction by referring to other jury instructions. Smith, 131 Wn.2d at 262-63. "It cannot be said that a defendant has had a fair trial if the jury must guess at the meaning of an essential element of a crime or if the jury might assume that an essential element need not be proved." Smith, 131 Wn.2d at 263.

Because the failure to instruct the jury on every element of the crime charged is an error of constitutional magnitude, it may be raised for the first time on appeal. State v. Mills, 154 Wn.2d 1, 6, 109 P.3d 415 (2005). Omission of an element from the to-convict instruction "obviously affect[s] a defendant's constitutional rights by violating an explicit constitutional provision or denying the

defendant a fair trial through a complete verdict.” State v. O’Hara, 167 Wn.2d 91, 103, 217 P.3d 756 (2009). This Court reviews a challenged jury instruction de novo. State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

2. The to-convict instruction violated Mr. Russell’s right to due process because it omitted the element of cocaine.

Where a factor aggravates an offense and causes the defendant to be subject to a greater punishment than would otherwise be imposed, due process requires that the issue of whether that factor is present, must be presented to the jury upon proper allegations and a verdict thereon rendered before the court can impose the harsher penalty.

State v. Williams-Walker, 2010 WL 118211, 3 (quoting State v. Frazier, 81 Wn.2d 628, 633, 503 P.2d 1073 (1972)).

The court in this case concluded Mr. Russell’s sentencing range was 12 months and one day to 24 months. CP 88. The court imposed a Drug Offender Sentence Alternative imposed a 90-month sentence for delivery of cocaine. CP 36-45. But the to-convict instruction allowed the jury to find Mr. Williams guilty if it determined he delivered any controlled substance; the to-convict instruction did not mention the specific drug at all. CP 34. The to-convict instruction was constitutionally deficient, because heroin is

an element of the crime. See State v. Goodman, 150 Wn.2d 774, 778, 83 P.3d 410 (2004).

In Goodman, the Court held, “When the identity of the controlled substance increases the statutory maximum sentence ... which the defendant may face upon conviction, that identity is an essential element of the crime.” Id. This is because “any fact [other than a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.” Id. at 785 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)).

Possession of a controlled substance, marijuana, could be punished as a gross misdemeanor with up to one year of confinement, unless the jury finds the person possessed more than 40 grams in which case it is a felony. RCW 69.50.4014. Or a conviction for possession of other controlled substances could yield a sentence of up to 60 months regardless of the amount possessed. RCW 69.50.4013.

This Court has recognized that if the identity of the substance changes the standard range to which the defendant is subjected, the identity of the drug is an element that must be

submitted to the jury. State v. Evans, 129 Wn.App. 211, 229 n.15, 118 P.3d 419 (2005), reversed on other grounds, 159 Wn.2d 402, 150 P.3d 105 (2007). The judge in Evans sentenced the defendant to 60 months' confinement based on a finding that a particular drug was involved, but it was not clear that the jury premised its convictions on such a finding. Id. at 229. Accordingly, the jury verdict supported a standard range of 12 to 14 months, and the imposition of a 60-month sentence violated the defendant's Sixth Amendment right to a jury trial. Id. at 229 n.15. Similarly, the to-convict instruction here supported only a sentence of up to one year as that is the maximum penalty for possession of marijuana.<sup>1</sup> RCW 69.50.401.

In sum, the to-convict instruction here was constitutionally deficient because it omitted the identity of the controlled substance.

3. Reversal is required. The United States Supreme Court has held that under the federal constitution, harmless error analysis applies where the trial court omits an element from the to-convict instruction. Neder v. United States, 527 U.S. 1, 15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). But our state constitutional right to a jury

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<sup>1</sup> The instruction would not support a felony possession of marijuana, as it also does not require finding that more than 40 grams of the substance were possessed.

trial is stronger, requiring automatic reversal where the court omits an element from the to-convict instruction.

Article I, section 21 provides that “[t]he right of trial by jury shall remain inviolate.” Const. Art. I, § 21. There is no equivalent federal provision, and therefore our supreme court has repeatedly held that the state constitution provides a stronger right to a jury trial than the United States Constitution. E.g. State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008); Sofie v. Fibreboard, 112 Wn.2d 636, 771 P.2d 711 (1989); Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982).

Furthermore, in looking to the law regarding the specific issue raised here, our state courts have required automatic reversal for this type of error for over 100 years. In 1890, during our first year of statehood, the supreme court held in McClaine v. Territory, 1 Wash. 345, 25 P. 453 (1890), that the omission of an element from what we would now call the to-convict instruction required reversal. The court noted that a problem with a definitional instruction could possibly be considered harmless in light of other instructions, but that the omission of an element from the “to convict” instruction required reversal, without any reference to how much evidence was presented on that element or whether the

outcome would have been the same with the proper instruction. Id. at 354-55.

Many cases over the next century reaffirmed the rule that automatic reversal is required where the to-convict instruction omits an element. The supreme court so held in the 1953 case of State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953), as well as much later cases like Smith, 131 Wn.2d at 265 (“Failure to instruct on an element of an offense is automatic reversible error”). And this Court as recently as the year 2000 stated, “A harmless error analysis is never applicable to the omission of an essential element of the crime in the ‘to convict’ instruction. Reversal is required.” State v. Pope, 100 Wn.App. 624, 630, 999 P.2d 51 (2000).

Although the Washington Supreme Court has acknowledged Neder as the federal standard, its decisions in State v. Brown, , Recuenco, and most recently Williams-Walker, indicate that it will not follow that standard under the Washington Constitution. In 2002, Brown recognized Neder and purported to apply it in that case, but it did not perform an independent state constitutional analysis and it continued to cite prior Washington cases for the proposition that “[a]n instruction that relieves the State of its burden

to prove every element of a crime requires automatic reversal.”

State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002).

More recently in the Recuenco series of cases, the United States Supreme Court held that a Neder harmless-error standard must be applied to Blakely<sup>2</sup> errors because the failure to instruct on an element is indistinguishable from a failure to instruct on a sentence enhancement. Washington v. Recuenco, 548 U.S. 212, 222, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). But on remand, our supreme court held that automatic reversal was required under Washington law, because the sentence imposed was not supported by the jury’s actual verdict, notwithstanding what a jury might have found if properly instructed. State v. Recuenco, 163 Wn.2d at 441-42. The Court cited Article I, section 21, reiterated that it provides stronger protection than the federal constitution, and stated “our right to a jury trial is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.” Id. at 435. Accordingly, automatic reversal was required.

In Williams-Walker, the Court again relied upon the more-protective provisions of the Washington Constitution to conclude harmless-error analysis could not apply where the jury’s verdict did

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<sup>2</sup> Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

not reflect a fact necessary to impose a greater enhancement.

2010 WL 118211.

Similarly here, this Court should hold that automatic reversal is required because the to-convict instruction omitted an essential element of the crime.

E. CONCLUSION

For the reasons above, this Court should reverse Mr. Russell's conviction and remand his case for a new trial.

Respectfully submitted this 29<sup>th</sup> day of January, 2010.



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DIVISION ONE**

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	)	
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	)	
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STATE OF WASHINGTON  
2010 JAN 29 PM 2:05  
RUSSELL DIV #1

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29<sup>TH</sup> DAY OF JANUARY, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| <input checked="" type="checkbox"/> ODIS RUSSELL (NO VALID ADDRESS)<br>C/O COUNSEL FOR APPELLANT<br>WASHINGTON APPELLATE PROJECT                                 | ( )<br>( )<br>(X) | U.S. MAIL<br>HAND DELIVERY<br>RETAINED FOR<br>MAILING ONCE<br>ADDRESS OBTAINED |

**SIGNED** IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF JANUARY, 2010.

X \_\_\_\_\_ 

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