

**FILED**  
JUL 21, 2014  
Court of Appeals  
Division III  
State of Washington

NO. 31762-5-III & 31763-3-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

---

**STATE OF WASHINGTON,**

Plaintiff/Respondent,

V.

**RICHARD EUGENE CORNWELL, JR.,**

Defendant/Appellant.

---

**APPELLANT'S REPLY BRIEF,**

---

Dennis W. Morgan    WSBA #5286  
Attorney for Defendant/Appellant  
PO Box 1019  
Republic, Washington 99166  
(509) 775-0777

## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES

TABLE OF CASES

ii

ARGUMENT

1

## TABLE OF AUTHORITIES

### CASES

<i>State v. Jain</i> , 151 Wn. App. 117, 210 P.3d 161 (2009) .....	2
<i>State v. Mark</i> , 94 Wn. 520, 618 P.2d 73 (1980) .....	2
<i>State v. Miller</i> , 71 Wn. 2d 143, 426 P.2d 986 (1967) .....	1
<i>State v. Tvedt</i> , 153 Wn. 2d 705, 107 P.3d 728 (2005) .....	1
<i>State v. Williams</i> , 135 Wn. 2d 365, 957 P.2d 216 (1998) .....	3

## ARGUMENT

### I. Essential Element

The State misconstrues Mr. Cornwell's argument concerning the failure to include all of the language from the charging document in the jury instructions.

The State relies upon cases dealing with additional language included in the jury instructions that has not been set forth in the charging document. If the State assumes the burden of proving additional facts which are unnecessary then it is required to do so. Under those circumstances Mr. Cornwell would agree with the State's position.

*State v. Miller*, 71 Wn. 2d 143, 426 P.2d 986 (1967) involved surplusage of a fact in the Information, to wit: describing a gun as a .38 caliber revolver.

*State v. Tvedt*, 153 Wn. 2d 705, 107 P.3d 728 (2005) also involved surplus language as to facts included in an Information, to wit: the names of the individuals who were the victims of the robbery.

Mr. Cornwell's position is that the phrase "did knowingly and unlawfully possess" represents an element of the offense of possession with intent to deliver a controlled substance. The State appropriately advised

Mr. Cornwell that this was an essential element of those offenses. Nevertheless, the phrase was not included in the jury instructions.

Since the phrase was not included in the jury instructions, the jury was not properly informed of each and every element of the offense of possession with intent to deliver a controlled substance. *See: State v. Mark*, 94 Wn. 520, 526, 618 P.2d 73 (1980). *See also: State v. Jain*, 151 Wn. App. 117, 124-25, 210 P.3d 161 (2009).

The State does not address either of the foregoing cases and, therefore, it must be presumed that the State agrees with the holdings in those cases.

## **II. Double Jeopardy**

Again, the State misreads Mr. Cornwell's legal argument as to double jeopardy. Double jeopardy only comes into play if the Appellate Court determines that his argument concerning the essential elements rule requires reversal of his convictions on the four counts of possession with intent to deliver a controlled substance.

If the Court agrees with Mr. Cornwell, then he cannot be retried on those counts.

The State's argument on p.12 of its brief is an attempt at deflecting the Court from the underlying issue.

### **III. Same Criminal Conduct**

The State's argument concerning "same criminal conduct" also lacks merit. The State ignores the fact that there was only one delivery of a controlled substance under the facts and circumstances of the case. Police officers, when they executed the search warrant, located multiple controlled substances. However, no facts were introduced to indicate that any of those controlled substances had been delivered within a reasonable time of December 12, 2012.

No person, other than the confidential informant, was identified as having received a controlled substance from Mr. Cornwell. Mr. Cornwell concedes that the State did present evidence that he traded various items in exchange for providing controlled substances to others. Nevertheless, the "on or about" language contained in the Information as to the respective counts cannot be extended into infinity.

The unanswered questions are:

1. When was the delivery to occur?
2. Who was the delivery to occur to?

The uncertainty surrounding this aspect of the case squarely places the four counts within the ambit of "same criminal conduct".

Mr. Cornwell possessed the various controlled substances at the same time and place. His intent, as alleged by the State, was the same

(e.g., delivery of a controlled substance sometime in the future). Under any analysis the victim is the public. *See: State v. Williams*, 135 Wn. 2d 365, 367, 957 P.2d 216 (1998).

Mr. Cornwell otherwise relies upon the argument contained in his original brief.

DATED this 21<sup>st</sup> day of July, 2014.

Respectfully submitted,

s/Dennis W. Morgan  
DENNIS W. MORGAN WSBA #5286  
Attorney for Defendant/Appellant  
P.O. Box 1019  
Republic, Washington 99166  
Phone: (509) 775-0777/Fax: (509) 775-0776  
nodblspk@rcabletv.com

**NO. 31762-5-III & 31763-3-III**

**COURT OF APPEALS**

**DIVISION III**

**STATE OF WASHINGTON**

STATE OF WASHINGTON, )  
 ) WALLA WALLA COUNTY  
 Plaintiff, ) NO. 12 1 00430 4 & 13 1 00206 7  
 Respondent, )  
 ) **CERTIFICATE OF SERVICE**  
 v. )  
 )  
 RICHARD EUGENE CORNWELL, JR., )  
 )  
 Defendant, )  
 Appellant. )  
 )

---

I certify under penalty of perjury under the laws of the State of Washington that on this 21<sup>st</sup> day of July, 2014, I caused a true and correct copy of the *REPLY BRIEF* to be served on:

COURT OF APPEALS, DIVISION III  
Attn: Renee Townsley, Clerk  
500 N Cedar St  
Walla Walla, WA 99201

E-FILE

TERESA CHEN  
Attorney at Law  
PO Box 5889  
Pasco, WA 99302-5801  
[tchen@wapa-sep.wa.gov](mailto:tchen@wapa-sep.wa.gov)

E-FILE  
(per agreement)

CERTIFICATE OF SERVICE

RICHARD EUGENE CORNWELL, JR. #367292  
Washington State Penitentiary  
1313 N 13<sup>th</sup> Ave, Unit Victor, Cell B124  
Walla Walla, WA 99362

U.S. MAIL

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286  
Attorney for Defendant/Appellant.  
P.O. Box 1019  
Republic, WA 99169  
Phone: (509) 775-0777  
Fax: (509) 775-0776  
nodblspk@rcabletv.com

CERTIFICATE OF SERVICE