

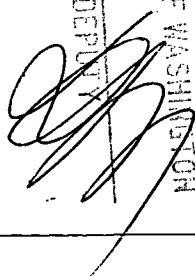
NO. 43762-7-II

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

STATE OF WASHINGTON,
Respondent,

v.

LA'JUANTA CONNER
Appellant.

FILED
COURT OF APPEALS
DIVISION II
2013 JUL 17 AM 11:37
STATE OF WASHINGTON
BY DEPUTY


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

The Honorable Jeanette Dalton, Judge

PRO SE SUPPLEMENTAL BRIEF PURSUANT TO RAP 10.10
STATEMENT OF ADDITIONAL GROUNDS

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A. ASSIGNMENTS OF ERROR

State violated appellants constitutional right to due process where it failed to prove each crime charged beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Did the State deprive the appellant of his inherent right to a fair trial where the evidence was insufficient to prove Unlawful Possession of Firearms and Possession of Stolen Firearms?

Did the State deprive the appellant of his right to a fair trial where the prosecutor 1) coerced State's witness to produce out of court statement to implicate the appellant, and where the prosecutor relied on false testimony by the same witness to gain the conviction?

C. STATEMENT OF THE CASE

For the sake of brevity the following will be in accord but not limited to the Brief Of Appellant (BOA).

On September 15, 2010 an apartment on 12th street in Bremerton, WA rented by Robert Dato, was burglarized and robbed by several males, wearing mask's and carrying guns. One of the males removed the mask or bandana off of his face but no one was identified. 20RP 1031, 20RP 1034.

Two weeks after the incident Robert Dato's home was robbed again by three males, two of the males were black and

wearing mask' and carrying guns. 20RP 1037, 20RP 1038-39. Dato did not see the third male but knew that one of them was involved in the first robbery. 20RP 1040-41, 20RP 1044-45.

On September 29, 2010, Brett Cummings, upon arriving at his apartment on Shore Drive in Bremerton, WA two men approached him at gun point and forced him into his home. Both men were wearing bandana's over their faces. 21 RP 1173-74, 21RP 1175, 21RP 1166, 21RP 1178-79, 21RP 1182, in the report to the police Cummings did not recognize any of the men. 20RP 1180.

On October 3, 2010 Kimberly Birkett returned to her home in the Weatherstone apartments in Bremerton, WA to discover her home had been burglarized. 22RP 1212, 22RP 1220. Amongst other things a sword and brass knuckles were taken. No identity of the perpetrators.

On November 3, 2010 police were called to investigate a break-in and robbery at an apartment on Wedgewood Lane in Bremerton, WA Aaron Tucheck, his wife Marie Tucheck, and their roommate Keefe Jackson stated they were robbed by three men wearing bandana's and carrying guns. 22RP 1304-05, 1308-09, 22RP 1312. None of the victims identified the robbers.

On November 17, 2010 Bremerton Police Detective Mike Davis received a call from his informant Chris Devenere, who gave him or person of interest linked to the burglaries and Robberies. 16RP 425, the name Devenere gave was Joe Perez. 16

RP 426.

Devenere had met Perez at a friends house, where Perez was bragging about some robberies he had done. 19RP 854-55. When Devenere learned that Perez was planning another robbery, he went to the police. 19RP 859,861, where he spoke to Detective Davis.

Working with the police Devenere devised a plan to set Perez up with a fake robbery, and agreed to meet at the Fred Meyer parking lot in Bremerton, WA. 16RP 434-35, 19RP 864-85. Police would conduct surveillance of the meeting, then follow Perez as he left and conduct a traffic stop. 16RP 430, 19RP 864.

Devenere told Davis that the people he was meeting would bve in a black pickup truck, and he and his friend would be in a red Chevy Tahoe. 16RP 434-35. The surveillance team observed both vehicles enter the parking lot. 16RP 436, 20RP 926. After the meeting and both vehicles exited the parking lot a patrol car pulled over the black pickup truck, where the occupants were ordered out. 19RP 872, 16RP 436, 16RP 437,440-42.

The driver of the truck was Jerrell Smith, Conner and Perez 16RP 441. While the three men were taken into custody a search of the truck was conducted. 16RP 442-43. In the bed of the truck police found paperwork, bandana's and two loaded firearms. Both guns were determined to be stolen. 16RP 448-56,

16RP 460.

Davis swabbed the guns and bandana's found inside of the bed of the truck for DNA. Mixtures of DNA was found but none linking Conner. 16RP 458,463, 17RP 502-507. Inside the glove compartment of the truck a cell phone belonging to Ann Marie Tucheck was found and a bag of marijuana was found in the back seat. 16RP 469, 18RP 694,696.

After completing the search of the truck, Davis returned to the station to conduct interviews of Smith, Conner and Perez. 16RP 470, 20RP 958. Perez declined to be interviewed. Conner told the detectives that he had no part of the crimes he is being investigated for and that he did not know what was being said between Perez and the men in the Chevy Tahoe because he was on his cell phone texting the entire time. 16RP 475-76, 478-79, 17RP 604, 32RP 2302-03.

It is to be noted that counsel for appellant incorrectly stated that Conner denied being at the Fred Meyers parking lot BOA at 13. When Conner was questioned on cross-examination, the prosecutor asked did he lie about meeting up with anyone? Conner correctly answered no because in his mind he was not meeting with anyone it was Perez' business, yet he stated that he told the police he did make a stop at Fred meyers 32RP 2138 Line 19-25, 32RP 2139 Line 1-7.

During the interview with Smith, the police did not believe Smith was being truthful about the Robberies he had

committed. 19RP 771-72. Smith asked for some type of deal for information the police was seeking. The police said they could not make deals, but they assured him that if he cooperated they would ask the prosecutor for favorable treatment for Smith, and told him not only would he reap the benefits but could be released on personal recognizance. 19RP 789, 790, 805. Clearly coercing and enticing Smith to tell the police what they wanted to hear even if that meant falsely implicating Conner where the only evidence linking Conner was Smith's false statements.

Smith spoke with law enforcement three times and his statements changed significantly from one interview to the next. 25RP 10. The police told Smith that they did not think he had orchestrated the home invasions or that he was involved in all of them. At that point Smith took a calculated guess that if the police believed he was not the ring leader, he had a better chance of getting a good deal from the prosecutor. 25RP 56-57. After the interviews, Smith agreed to ride in the patrol car and show the officers the locations of the crimes. the ride-along was recorded but 20-30 minutes into it, Smith asked the officers to stop recording. 19RP 772-773.

Although Smith testified that he was not truthful in his interviews with the police, and made up names and events. 24RP 1447, 25RP 6-7. Smith was not truthful during his trial testimony as well. Smith testified that Conner was one of the males who got out of the truck at the Fred Meyers to meet with

Devenere about the fake burglary Devenere had set up with the police and testified that it was Conner's who planned the home-invasion that night. 25RP 64. Yet trial testimony shows it was Devenere who devised a plan to convince Perez that there was a better house to rob. 19RP 863-64. Working with the police Devenere arranged to meet Perez and not Conner at the Fred Meyer parking lot. 16RP 434-35, 19RP 864-85. It was Perez who the police had targeted. 16RP 430, 19RP 864.

Devenere testified that when the black truck showed up Devenere saw two black men in the truck with Perez. Perez stepped out of the truck and the front seat passenger which was Conner opened his door but remained inside. 19RP 867-868.

Smith further testified that he was in fact involved in the Shore Drive and Weatherstone home-invasions, and was aware of other incidents. 25RP 12-13, but in the same breadth testified that it was Alexander, Conner, and Adams involved in the Shore Drive robbery and he "did not" take part in it.

To keep up with the false statements Smith pointed the finger at Conner and away from himself. 25RP 64-65. Prior to trial the State entered an agreement with Smith to not charge him with the crimes he was involved in, in exchange for his testimony. 25RP 107, 26RP 1519. Smith was allowed to plead guilty to a single count of attempted residential burglary, with no firearm allegation, where he was sentenced to 2.75 months, which he had already served. 25RP 12, 25RP 54-55.

On the other hand Conner was charged with 8 counts of First Degree Robbery, 6 counts of First Degree Burglary, 4 counts of Theft in the Second Degree, 1 count of Theft in the Third Degree, 1 count of Possession of Stolen Property, 1 count of Possession of Marijuana, 2 counts of Unlawful Possession of a Firearm in the Second Degree, and 2 counts of Possession of Stolen Firearms, which was based on Smith's false statements to the police, for probable cause to arrest Conner.

Ironically, the jury found Conner guilty of all the above charges with the exception of Possession of Marijuana, and Possession of Stolen Property, based solely on the testimony of Smith. Which was false, and went uncorrected by the State.

Conner would like to point out for this Court that he was acquitted of Possession of Stolen Property, the same property that the prosecutor alleged linked Conner to the Weather stone, and 12th street robberies.

Therefore, as Conner will show below that absent the possession of stolen property the state had insufficient evidence to prove the burglaries and robberies committed at Wedgewood, Weatherstone, and 12th Street. Furthermore, absent the possession of marijuana the state had insufficient evidence to prove unlawful possession of the firearms and possession of the stolen firearms that were inside the truck along with the marijuana.

D. RELEVANT ARGUMENT.

1. Introduction

Due Process requires the State to prove each element of the offense charged beyond a reasonable doubt.

The State bears the burden of proving each element of the crime(s) charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). A criminal defendant's fundamental right to due process is violated when a conviction is based upon insufficient evidence Id; U.S. Const. amend XIV; Const. art. 1 § 3, City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). On appellate review, evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt". Jackson v. Virginia, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Here the State failed to prove Conner was in possession of the firearms found in the back of the truck Conner was riding in. The jury correctly acquitted Conner of the possession of marijuana found inside of the truck, however the jury should have acquitted Conner of the firearms possession due to the fact that there was no evidence linking Conner to the weapons, Conner was not in possession of the weapons and had no knowledge of the weapons being in the back of the truck and that they were stolen.

The State elected to charge Conner for the guns and marijuana found in the truck. The only evidence the State had

to suggest Conner was in possession was the Statements given by Smith the owner of the truck, and Alexander where evidence show they both had lied about the facts of the case. State v. Chouinard, 169 Wn.App. 895, 282 P.3d 117 (2012); the court held that the defendant's proximity to firearm in vehicles trunk as back seat passenger in vehicle which was not owned by defendant and in which backrest on back seat had been detached to facilitate access to trunk and defendant's knowledge of firearms presence were insufficient to establish dominion and control as basis for constructive possession.

So even [i]f Conner knew about the guns the State could not claim he was in total dominion or control. Actual possession means that the person charged with possession had personal custody or actual physical possession. Id.

Here, the State presented testimony from victims Paul Woods, and Brandon Bird. First Woods testified that owned the Hi-Point .40 caliber gun that had been discovered in Smith's truck. 24RP 1388. He did not know that the gun was missing until September 2011, well after the robberies occurred, and he did not report it stolen because he thought he might have misplaced it when he moved earlier that year. 24RP 1391-92. Woods testified that Conner had been to his apartment twice but he only showed the gun to Brown as suspect involved in the robberies. 24RP 1393

Second, Bird testified that he was the victim of a

burglary on November 1, 2010, several items were stolen from his home including the .44 magnum revolver that was also found in Smith's truck during the traffic stop. 24RP 1403-05. However, Conner was not charged for the November 1, burglary nor was he implicated.

In the Scott case which is on point with this argument. Scott and his partner in crime, James-Anderson robbed Cascade Custom Jewelers in South Tacoma, WA. They brought several guns including an AR 15 semiautomatic rifle. Alerted by silent alarm, the police were waiting in the store's parking lot when Scott and James-Anderson emerged. They both ran and they both were caught [Scott. 173 Wn.2d 913] was charged with and convicted of multiple counts of first degree robbery, unlawful possession of firearms, possession of stolen property, and possession of stolen firearms. On direct review the Court of Appeals reversed the possession of stolen firearms charges finding insufficient evidence that Scott knew the guns used in the robbery had been stolen. In re Scott, 173 Wn.2d 911. Thus Scott, applies here.

Equally troubling, is Detective Davis on cross-examination admitted that he told Conner that Smith and Perez were in the other room pointing the finger at him, when that was not true. 17RP 605. He also admitted that he was lying when he told Conner that Smith and Perez said he handled the Hi-Point firearm because there was actually no information that Conner had been in possession of the guns. 17RP 607-08, 18RP 730.

The State cannot have it both ways. When the jury acquitted Conner of possession of marijuana which was found in the truck the jury should have acquitted Conner of possession of stolen firearms and unlawful possession of the firearms. Moreover, in accord to the acquittal of the marijuana charge, the jury also found Conner to be not guilty of possession of stolen property i,e the rosary which was taken from the Wedgewood robbery, that was found inside Conner's safe.

The Rosary was a key piece of evidence linking Conner to Wedgewood. Without that evidence the State cannot prove the nexus, or establish reasonable doubt that Conner committed any of the crimes charged. See State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969)(evidence held insufficient). See also State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995); State v. Willis, 153 Wn.2d 366, 373, 103 P.3d 1213 (2005)(There must be a nexus between the defendant, the crime and the weapon).

Thus the State violated Conner's Due Process rights to the Fourteenth Amendment of the United States Constitution and Washington States Constitution Article 1 § 22 (amend. 10). when it failed to prove counts 2,3,4,and 5, with respect to the Wedgewood incident.

2). It was Prosecutor Misconduct to rely on false and coerced testimony to gain the convictions.

Relying on false testimony to gain a conviction is considered to be a violation of a constitutional magnitude.

The failure of the prosecutor to correct the testimony of its chief witness Smith which the prosecutor knew to be false denied Conner due process of law, in violation of the fourteenth amendment. Napue v. Illinois, 360 U.S. 264 (1958)(the established principle that a State may not knowingly use false testimony to obtain a tainted conviction does not cease to apply merely because the false testimony goes only to the credibility of the witness. The fact that the jury was apprised of other grounds for believing that the witness may had an interest in testifying against petitioner was not sufficient to turn what was otherwise a tainted trial into a fair one).

Here, at no time did the prosecutor correct Smith on whether or not he was being truthful about the testimony he was giving. As shown above in section C. of this brief, Smith not only lied during trial but he also lied during the taking of his statements by Detective Davis, which was produced through coercion, and undue influence.

It is clear that the prosecutor would have lost the advantage by correcting Smith on the many lies he told and was telling. Although Conner's statement to the police is not at issue here, Smith's statement are at issue du to the circumstance of how it was obtained, and in the manner it was obtained.

It is without question Smith was a suspect in this

case, and the prosecutor should have determined whether his confession was free and voluntary, given the fact that the State planned to use his statements in their case-in-chief to convict Conner.

When the State seeks to admit a suspects custodial statements to police, it bears the burden of proving that the statement was made knowingly and voluntarily, by a preponderance of the evidence. State v. Braun, 82 Wn.2d 157, 509 P.2d 742 (1973). Custodial interrogation has been defined as questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his or her freedom in any specific way. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Smith testified that he made up names and events after the police promised him favorable treatment. 19RP 789, 790, 805. 24RP 1447, 25RP 6-7.

A conviction based upon unreliable information, therefore, is a violation of due process. Moreover, coercive police techniques used to extract confessions breach the concept of "fundamental fairness" [Spano v. New York, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959)] Whether a confession is free and voluntary is not determined by whether the officer's conduct is shocking or the confession is cruelly extorted, but whether it was extracted by any sort of threat, violence, direct or implied promises, or undue influence, however slight. State

v. Braun, supra; A confession which is obtained in this manner is involuntary and a violation of due process even if substantial corroborative information exists to demonstrate the reliability of the confession. Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964).

It is without a doubt had Smith been on trial for the crimes instead of in the opposite as State's witness, his statements would be at issue and objected to by counsel. It is also with question ineffective counsel deprived Conner of a fair trial where counsel failed to object to the State's use of false testimony. See Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1986). See also State v. Singh, 167 Wn.App. 971, 275 P.3d 1156 (2012)(heightened proof requirements for perjury are satisfied when the evidence of the knowingly false statement is recorded prior to the hearing at which the perjury is subsequently committed).

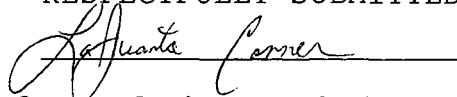
The State could contend that they also relied on their other chief witness Alexander to gain the convictions. However, Alexander was not completely honest either. In accord to the Brief Of Appellant (BOA), Alexander testified he was only involved in three or four incidents which was not true. In fact he was involved in three incidents in addition to the ones he testified about. he also claimed he did not have a gun in any of the incidents, which was another lie. 27RP 1697-98, 27RP 1702.

Further Alexander testified that he had read the police reports prior to his interview with the police and he went into the interview determined to save himself by giving the police whatever information they wanted so that he could get out of jail. 28RP 1803-04. He also testified that in his interview Detective Davis gave a long speech about what Alexander needed to do in order to get "a deal". Thus Napue v. Illinois, controls.

E. CONCLUSION.

Because the State failed to prove beyond a reasonable doubt that Conner possessed the firearms or had knowledge of the firearms being stolen, was found not guilty of the stolen property that was linked to Wedgewood crime where Conner was implicated, and the State knowingly used false testimony of its chief witness' to gain the conviction, this Court should conclude that there was insufficient evidence to prove Conner committed the crimes charged beyond a reasonable doubt in accord to State v. Green, supra; Jackson v. Virginia, supra. and reverse and remand accordingly.

RESPECTFULLY SUBMITTED,



Signed and Dated this 14th day of July, 2013

La'Juanta Conner
Pro-Se
RAP 10.10