FILED
September 28, 2015
Court of Appeals
Division I
State of Washington

73191-2

NO. 73191-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES M. O'CAIN,

Appellant.

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

APPELLANT'S OPENING BRIEF

NANCY P. COLLINS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Federal Court Decisions

United States Constitution

Washington Constitution

Statutes

Court Rules

A. ASSIGNMENTS OF ERROR.

1. The court denied Mr. O'Cain his right to present a defense and to the protections of the Fourth Amendment and article I, sections 7 and 22 by refusing to review the sufficiency of the search warrant or give Mr. O'Cain access to information critical to challenging the search warrant.

2. The court violated Mr. O'Cain's right not to be punished multiple times for the same offense by imposing separate convictions for the same conduct and same offense, contrary to the double jeopardy provisions of the Fifth Amendment and article I, section 9.

3. The court violated the prohibition on double jeopardy by imposing multiple convictions for possessing the same controlled substance at the same time and place and with the same intent.

4. The prosecution failed to prove six separate offenses occurred based on the essential elements as set forth in the to-convict jury instructions, in violation of the Fourteenth Amendment and articles 3, 21, and 22 of the Washington Constitution. CP 148-53 (Instructions 16-21).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. When the State uses a confidential informant's allegations to obtain a search warrant and refuses to disclose any information about the investigation, the defense may request that the court conduct a hearing, including an in camera review, if there are grounds to doubt the veracity and accuracy of claims material to the search warrant. Did the court erroneously refuse Mr. O'Cain's request for a hearing on the inconsistencies in the search warrant when the State refused to reveal any information about the investigation to the defense?

2. It violates double jeopardy to punish a person multiple times for several offenses that constitute a single unit of prosecution. The unit of prosecution is defined by the statute and the circumstances of the case. Mr. O'Cain was punished multiple times for possessing several controlled substances at the identical time and place and having the same intent to jointly distribute these substances. Do these multiple convictions violate double jeopardy?

3. The essential elements that the prosecution must prove are defined by the jury instructions and any additional elements added without objection become the law of the case. When the to-convict instruction requires the prosecution prove six instances of separate and

distinct conduct to establish each offense, but there is evidence of only a single act of joint possession of several controlled substances, has the State failed to prove the essential elements of the offense as required by the jury instructions?

4. When a person possesses a single controlled substance at the same time with the same intent, and the drug is stored in two locations within a single apartment, it constitutes a single unit of prosecution for purposes of double jeopardy. The court imposed separate convictions for Mr. O'Cain's possession of the same drugs inside his apartment at the same time because some were in his pocket and some in his closet. Did the court's imposition of separate convictions for a single unit of prosecution violate double jeopardy?

C. STATEMENT OF THE CASE.

On October 14, 2013, several police officers saw James O'Cain drive to his apartment, park his car, and walk into his home with his wife. 3RP 250-51.[1] After Mr. O'Cain and his wife entered their home, the officers stopped them because they had a warrant to search Mr. O'Cain and the apartment. 3RP 251. In his coat pocket, the police

[1] The verbatim report of proceedings consists of five volumes of consecutively paginated transcripts.

found “some narcotics and some money.” 3RP 252, 254. The narcotics in his pocket consisted of a clear plastic bag with several small rocks of crack cocaine, small yellow bindles of individually packaged heroin, and three small plastic baggies of methamphetamine. 3RP 255, 259, 262; 4RP 426, 427, 430.

A drug-sniffing trained police dog walked around Mr. O’Cain’s cars and inside his apartment. 3RP 345-46. The dog “alerted” to an odor inside a safe in cabinet in the bedroom closet. 3RP 349. The dog did not “alert” to any odors in Mr. O’Cain’s car. 3RP 354, 356-57. The only other “alert” inside the home was for a small marijuana cigarette in another bedroom. 3RP 352.

The closet cabinet held a locked safe that the police opened with a key they took from Mr. O’Cain. 3RP 365. Inside the safe, the police found “a collection of narcotics,” including larger quantities of cocaine, heroin, and methamphetamine, along with several scales and some plastic wrapping similar to that used to package the drugs in Mr. O’Cain’s pocket. 3RP 376-77, 384-86, 390-92; 4RP 431-35.

The prosecution charged Mr. O’Cain with six counts of possession of a controlled substance with the intent to deliver. CP 9-10. Mr. O’Cain attempted to investigate the allegations used to obtain the

search warrant, but the detective who prepared the warrant refused to disclose any information. CP 12; 1RP 6. The detective said a secret, paid informant had purchased drugs from Mr. O'Cain but would not disclose this paid informer's identity, the dates the unnamed informer claimed to have bought drugs from Mr. O'Cain, or give further details about the alleged drug sales that formed the basis of the warrant, claiming the need to keep the informant's identity secret. CP 12-13, 108-117; 1RP 22, 27, 31. In response, Mr. O'Cain filed a motion for the court to conduct an ex parte review of the information used to obtain the search warrant or otherwise require disclose from the State. CP 14-16. Mr. O'Cain alleged there was evidence of inconsistencies and a basis to suspect falsehoods in the search warrant application sufficient to justify further inquiry by the court into the factual basis of the warrant. CP 11-93. The court refused to conduct any ex parte review and rejected Mr. O'Cain's request for further discovery about the identity of the paid informant or the details of the police investigation. CP 94-95; 1RP 30; 2RP 83.

Mr. O'Cain was convicted after a jury trial of six counts of possession of a controlled substance with the intent to deliver. CP 163-68. The prosecution agreed that the six counts constituted the same

criminal conduct so they would not count separately in Mr. O'Cain's offender score. CP 176. The judge imposed a sentence at the low end of the standard range and scored the six separate offenses as the same criminal conduct for purposes of calculating the offender score. CP 297.

D. ARGUMENT.

1. The court's refusal to permit Mr. O'Cain to litigate the unreliability of the information used to search his body and his home denied him his rights to privacy and due process.

a. *A search warrant may not be shielded from challenge by hiding the basis of the warrant.*

The Fourth and Fourteenth Amendments of the United States Constitution and Article I, §§ 3 and 7 of the Washington Constitution protect citizens from unreasonable searches and seizures and provide that a search warrant may only be issued upon a showing of probable cause. *Kyllo v. United States*, 533 U.S. 27, 40, 121 S. Ct. 2038, 150 L. Ed. 2d 94 (2001); *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999); U.S. Const. amends. 4[2] & 14; Wash. Const. Art. I, §§ 3,[3] 7.[4]

[2] The Fourth Amendment provides:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

When a police officer uses intentional or reckless perjury to secure a warrant, "a constitutional violation obviously occurs" because "the oath requirement implicitly guarantees that probable cause rests on an affiant's good faith." *State v. Chenoweth*, 160 Wn.2d 454, 473, 158 P.3d 595 (2007), citing *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S.Ct 2674, 57 L.Ed.2d 667 (1978).

An accused person properly challenges the validity of a warrant by showing that the warrant affiant made intentional falsehoods or omitted material facts with reckless disregard for the truth. *Franks*, 438 U.S. at 155-56. The defendant's showing must be based on specific facts and offers of proof. *State v. Garrison*, 118 Wn.2d 870, 827 P.2d 1388 (1992).

An accused person lacks the ability to challenge the accuracy, truthfulness, and reliability of a search warrant if the State refuses to give him access to the information the State used to secure the warrant. *State v. Casal*, 103 Wn.2d 812, 818, 699 P.2d 1234 (1985). The accused is unable to investigate and interview the accuser if that

---

[3] The Fourteenth Amendment and Article 1, § 3 guarantee due process of law.

person's identity is kept secret and he therefore "lacks access to the information necessary" to challenge a search warrant. *Id.* The State's authority to maintain the secrecy of an informant's identity must yield to the defendant's right to investigate the allegations against him in certain circumstances. *Id*. at 816. The trial judge has discretion to decide whether the defendant's interest in disclosure outweighs the State's interest in not disclosing information to the defense. *Id*.

In *Casal*, the court endorsed "a simple solution" for a defendant faced with a secret informer. *Id*. at 818. The court may hold an in camera, ex parte hearing. *Id*. If the defendant makes "some minimal showing of inconsistency" in the government's material that supports their assertion of deliberate falsehood or reckless disregard for the truth, the court should conduct further review of the information relied upon in the search warrant. *Id*. at 819, citing *United States v. Brian*, 507 F.Supp. 761, 766 (D.R.I.1981).

[4] Article 1, § 7 of the Washington Constitution states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

b. Mr. O'Cain made the threshold showing that there is reason to doubt the veracity of the allegations used to obtain a search warrant.

Mr. O'Cain was unable to investigate the allegations used to obtain the search warrant because the State refused to disclose any underlying information. 1RP 22. The detective whose observations and investigation form the sole basis for the search warrant application would not answer Mr. O'Cain's questions or provide any information about the background of the investigation. CP 12; 1RP 22, 27, 31. The detective claimed Mr. O'Cain sold drugs to a paid informant but would not even reveal the dates of the alleged conduct or describe the car Mr. O'Cain allegedly drove to the drug sale. CP 12; 1RP 31-33; 2RP 83. This lack of information left O'Cain unable to investigate the veracity of the informant or show inaccuracies in the search warrant affidavit that undercut the allegations. 1RP 22, 31.

At best, Mr. O'Cain could show that the car the detective alleged he drove during some of the conduct at issue was in the repair shop at the time and could not have been used as the detective claimed. 1RP 31; 2RP 83; CP 119-24. In addition, although the detective's search warrant application set forth his experience to bolster the reliability of his investigation, the detective did not tell the issuing

magistrate that he had been disciplined by the police department for lying in the past and for making racist comments when arresting an African-American person. CP 12-13, 108-09. Mr. O'Cain is African-American. CP 13.

Mr. O'Cain argued that he had reason to doubt the veracity of the allegations and could show some material inconsistencies or inaccuracies in the search warrant. He explained that he was being prevented from preparing a defense and gathering any further information necessary to challenge the search warrant. CP 14-16; 1RP 6-11, 22, 31-33. Citing *Casal*, he asked the court to hold a hearing, review the evidence ex parte, or require disclosure of the details of the investigation, including the informant's identity. CP 14-16, 1RP 7-11, 27, 30; 2RP 85. The court refused, ruling that Mr. O'Cain had not met his burden of showing there were material inconsistencies in the search warrant application. 1RP 30; 2RP 85.

The State must justify preventing the defendant from challenging the criminal charges by independently verifying the officer's observations. *State v. Darden*, 145 Wn.2d 612, 625-26, 41 P.3d 1189 (2002). For this reason, the State cannot build a case based on an officer's observations yet refuse to reveal the location of the

officer who made the observations. *Id*. If the State wants to maintain confidentiality of an investigation, it can choose not to rely on this confidential information in its case. *Id*.

Likewise, an accused person has a constitutional right to cross-examine witnesses and receives extra latitude when testing the credibility of essential state's witnesses. *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970); *State v Jones*, 168 Wn.2d 713, 721, 230 P.3d 576 (2010). Even if a rule of evidence limits an avenue of questioning, that rule must be construed in light of the overarching right to present a defense and "it cannot be used to bar evidence of extremely high probative value per the Sixth Amendment." *Jones*, 168 Wn.2d at 723. Discovery rules permit wide latitude to be apprised of matters reasonably calculated to lead to admissible evidence. CrR 4.7(a)(3).

These fundamental rules and principles demonstrate the court's error in refusing to review, even ex parte, the underlying the allegations used to obtain a search warrant. CP 94-95; 1/12/15RP 85. Mr. O'Cain cast doubt on the claim that each drug sale could have occurred as the search warrant alleged and that also showed the detective failed to disclose information affecting his credibility. CP 12-13, 119-24.

Mr. O'Cain was entitled to at least an in camera hearing. *Casal*, 103 Wn.2d at 822-23. On remand, Mr. O'Cain should be given the opportunity to have the court review the necessary information and disclose the secret discovery so that he may contest the legality of the search. *Id*.

2. The six convictions for possession of a controlled substance with the intent to deliver constitute a single unit of prosecution and establish a single offense based on the jury's instructions and the law of the case.

a. The prosecution may not divide a single unit of prosecution into multiple charges.

The double jeopardy clauses of the state and federal constitutions protect against multiple punishments for the same offense. *Blockberger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932); *In re Personal Restraint of Orange*, 152 Wn.2d 795, 816, 100 P.3d 291 (2004); U.S. Const. amend. 5; Const. art. I, § 9.[5] "Double jeopardy concerns arise in the presence of multiple convictions, regardless of whether resulting sentences are imposed consecutively or

[5] The double jeopardy clause of the federal constitution provides that no individual shall "be twice put in jeopardy of life or limb" for the same offense, and the Washington Constitution provides that no individual shall "be twice put in jeopardy for the same offense." U.S. Const. amend. 5; Const. art. I, § 9.

concurrently." *State v. Womac*, 160 Wn.2d 643, 657, 160 P.3d 40 (2007).

When a person is charged with violating the same statutory provision a number of times, multiple convictions violate double jeopardy unless each conviction is predicated on a separate "unit of prosecution." *State v. Adel*, 136 Wn.2d 629, 634-35, 965 P.3d 1072 (2002). The prosecution may not divide conduct that constitutes a single unit of prosecution into multiple charges for which it seeks separate punishment. *Id.*

Determining the unit of prosecution rests on how the statute defines the punishable act and is decided on a case by case basis. *See Adel*, 136 Wn.2d at 640 (Talmadge, J., concurring); *State v. Gaworski*, 138 Wn.App. 141, 150, 156 P.3d 288 (2007). "If a statute does not clearly and unambiguously identify the unit of prosecution, then we resolve any ambiguity under the rule of lenity to avoid turning a single transaction into multiple offenses." *State v. Sutherby*, 165 Wn.2d 870, 878-79, 204 P.3d 916 (2009) (internal citations omitted). "Appellate review of the unit of prosecution is de novo" and a "double jeopardy challenge may be raised for the first time on appeal." *State v. Durrett*, 150 Wn.App. 402, 406, 208 P.3d 1174 (2009).

When assessing what offense the jury considered, the reviewing court must also review the jury instructions. The to-convict instruction "serves as a yardstick" defining the essential elements that the jury must find in order to convict the accused person. *State v. France*, 180 Wn.2d 809, 815, 329 P.3d 864 (2014). If the jury is instructed that to convict the defendant, it must be persuaded of some element that is not part of the definition of the crime, the law of the case doctrine requires the State prove this element even if it would not otherwise be an essential element. *Id*.

Underlying the deference given to the to-convict instruction is the strong protections accorded the right to a trial by jury and unanimous verdict under article I, sections 21 and 22. *State v. Williams-Walker*, 167 Wn.2d 889, 896, 225 P.3d 913 (2010). A sentencing judge must take the jury's finding at face value based on the facts the jury was asked to find. *Id*. at 897-99.

b. The simultaneous conduct of possessing several controlled substances constitutes a single unit of prosecution under the law of the case.

Mr. O'Cain was charged with six counts of possession with intent to deliver a controlled substance. CP 9-10. The jury received nearly identical to-convict instructions for each count. CP 148-53. For

example, for count 1, the jury was asked to decide, in pertinent part, whether the prosecution proved beyond a reasonable doubt:

> (1) That on or about October 14, 2013, the defendant possessed a controlled substance, separate and distinct from *conduct* in Counts 2, 3, 4, 5, and 6;
> (2) That the defendant possessed the substance with the intent to deliver a controlled substance.

CP 148 (Instruction 16) (emphasis added). The prosecution drafted and proposed these instructions. Supp. CP _, sub. no. 66.

None of the to-convict instructions named the controlled substance at issue. CP 148-53. None of the court's instructions informed the jury that the difference between the six counts was the identity of the substance allegedly possessed. Instead, the instructions asked the jury to find that Mr. O'Cain engaged in "separate and distinct" "conduct" for each count. *Id.*

The intent to deliver is the focus of the crime charged; mere possession is insufficient. *State v. Goodman*, 150 Wn.2d 774, 783, 83 P.3d 410 (2004). Additional punishment attaches to the unlawful possession of a controlled substance if the State proves the accused person intends to deliver it. RCW 69.50.401(2). "Under this statute, it is unlawful to possess with intent to deliver *any* controlled substance, and for liability purposes, it does not matter what the specific controlled

substance is." *State v. Rodriguez*, 61 Wn.App. 812, 817, 812 P.2d 868 (1991) (emphasis in original).

In *Rodriguez*, when deciding whether two convictions for possession with intent to deliver constitute the same criminal conduct, the court explained:

> if two counts are different only because different drugs were possessed, they involve the same intent - the intent to deliver a controlled substance. On the other hand, if two counts are different because the defendant intended to deliver illegal drugs in two different transactions, they involve different intents—an intent to deliver at the time and place of one transaction, and an intent to deliver at the time and place of the other transaction.

Id. at 817; *see also State v. Vike*, 125 Wn.2d 407, 411-12, 885 P.2d 824 (1994) ("when a person possesses two drugs with the intent to deliver, the defendant still has a single mental state").

There was no evidence that Mr. O'Cain had distinct plans to use or dispose of the substances he simultaneously possessed. He was inside his apartment when the police stopped him and had some narcotics in his pocket and more of the same in his closet, along with materials used to package the drugs into smaller portions. 3RP 252, 349, 361-63, 374-86. The State conceded that all six counts constituted the same criminal conduct, demonstrating that Mr. O'Cain had the same

intent to deliver the substances. CP 176. He possessed the substances together, at the same time and place

The jury instructions did not ask the jurors to find that Mr. O'Cain possessed separate substances, only that he possessed a substance with the intent to deliver and "the conduct" was separate and distinct from the other counts. CP 148-53. The jury's verdict does not reflect unanimous findings of separate controlled substances because it was not asked to determine that the prosecution proved different types of substances were the basis of each count. *Id*.

In his closing argument, the prosecutor told the jurors that this case was about Mr. O'Cain's "workaday world," and he was planning on selling the drugs in his pocket and his home. 4RP 498-99. The prosecutor further explained that the jury did not need to specify which drugs they based their verdicts on under the court's instructions. 4RP 500. He explained that each count was for "separate and distinct instances" of possession. *Id*. He also offered to "lay things out" by telling the jury that the various counts aligned with various types of controlled substances in the jacket pocket and in the closet safe. *Id*. Although the prosecutor described these allegations as "distinct instances," he did not describe any different conduct for the various

offenses. *Id*. He agreed that all drugs were possessed only in two locations, the coat pocket and the safe, at the same time and place. *Id*. The prosecutor's closing argument does not alter the essential elements as set forth in the to-convict instructions or change the State's burden of proving each element in the to-convict instructions. *See Williams-Walker*, 167 Wn.2d at 897-98. The jury instructions asked the jury to determine whether Mr. O'Cain engaged in the conduct of possessing a controlled substance, which constitutes a single unit of prosecution.

c. There is insufficient evidence to support six separate convictions based on the jury instructions and verdicts.

Based on the instructions setting forth the essential elements to convict Mr. O'Cain, the State was required to prove that Mr. O'Cain engaged in separate and distinct "conduct" for each of the six counts of possession of a controlled substance with the intent to deliver. CP 148-53. To-convict instruction is the yardstick setting forth the essential elements the State must prove and any additional elements contained in the to-convict instruction must be proved beyond a reasonable doubt. *France*, 180 Wn.2d 815; *State v. Hickman*, 135 Wn.2d 97, 102-03, 954 P.2d 900 (1998).

The burden of proving the essential elements of a crime unequivocally rests upon the prosecution. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. 14; Const. art. I, §§ 3., 22 Proof beyond a reasonable doubt of all essential elements is an "indispensable" threshold of evidence the State must establish to garner a conviction. *Winship*, 397 U.S. at 364. The jury's verdict may not rest on speculation. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Vasquez*, 178 Wn.2d 1, 7, 309 P.3d 318 (2013).

The evidence presented to the jury only addressed Mr. O'Cain's conduct at a single time and place, October 14, 2013, at his home, as he entered the apartment and was immediately arrested.. 3RP 252, 255, 259, 262, 363. The police found the drugs in his pocket and his closet during essentially contemporaneous searches. 3RP 252, 363. The State conceded that he had the same intent to deliver these various substances. CP 176.

No rational juror could have concluded from this evidence that Mr. O'Cain engaged in different conduct for each substance. *See Vasquez*, 178 Wn.2d at 14. The drugs were held and packaged together, in one coat pocket and a safe. There was no evidence Mr. O'Cain did

anything with them or said anything about them. The jury did not hear evidence that Mr. O'Cain solicited sales, sought customers at different times or places, or used different manners to sell these items.

The prosecution proposed these to-convict instructions and thereby assumed the burden of proving separate and distinct conduct underlied each charge of possession with intent to deliver. Supp. CP _, sub. no. 66; *Hickman*, 135 Wn.2d at 102. Because there was insufficient evidence Mr. O'Cain engaged in separate and distinct "conduct" and this evidence was an essential element that the State was required to prove, five of the convictions are not supported by legally sufficient evidence. *Hickman*, 135 Wn.2d at 105-06; CP 148-53.

d. Reversal and dismissal is required.

The remedy for a double jeopardy violation as well as for the failure to prove the essential elements of the offense as charged and instructed is vacation and dismissal of the convictions. *Vasquez*, 178 Wn.2d at 18; *Womac*, 160 Wn.2d at 658, 660. A single conviction may stand, but the remaining counts were not sufficiently proven separate offenses.

3. Alternatively, multiple convictions for possessing the same controlled substance at the same time and place violates double jeopardy.

Mr. O'Cain was convicted of six counts of possession with the intent to deliver a controlled substance. CP 163-68. Three of the counts involved cocaine base, heroin, and methamphetamine in his pocket and the other three involved cocaine base, heroin, and methamphetamine inside his closet. *See* 4RP 426-35. Because three counts rest on the same controlled substances found during the same search of Mr. O'Cain and his property, it violates double jeopardy to treat the offenses as six separate convictions.

In *Adel*, the Supreme Court held that double jeopardy barred multiple convictions for simple possession of marijuana based on the same substance stashed in multiple places. 136 Wn.2d at 636. The unit of prosecution for the crime was possession 40 grams of marijuana or less, regardless of where or in how many locations the drugs were kept. *Id*.

Similarly, double jeopardy barred multiple convictions for possession of methamphetamine where some drugs were found on the defendant's person and more were found at his house. *State v. Chenoweth*, 127 Wn.App. 444, 463, 111 P.3d 1217 (2005), *aff'd*, 160

Wn.2d 454, 158 P.3d 595 (2007). The court explained that the unit of prosecution test and rule of lenity require conclusion that convictions of possessing the same controlled substance in his home and his pockets violate double jeopardy. *Id*. This analysis dictates the result here.

Mr. O'Cain was charged with six counts of possessing three different controlled substances with the intent to deliver, cocaine, heroin, and methamphetamine, in violation of RCW 69.50.401. Three counts were based on small amounts of individually packaged cocaine, heroin, and methamphetamine found in Mr. O'Cain's pocket when arrested at the door of his apartment. 3RP 252, 255-62. At the same time he was being searched, other officers searched his apartment and found larger quantities of cocaine base, heroin, and methamphetamine. 3RP 348-49, 361-65; 4RP 426-35. The prosecution alleged that the drugs inside the apartment were the supply that Mr. O'Cain repackaged and intended to sell. 4RP 507, 525.

RCW 69.50.401(1) provides, "Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance."

Adel and *Chenoweth* involved identical circumstances. The separate stashes of the same drugs, possessed at the same time and in

the same general location constitute a single unit of prosecution. The two groups of smaller packaged drugs and larger, unpackaged drugs, each helped prove the intent to distribute the drugs.

Mr. O'Cain's six convictions for possessing cocaine, heroin, and methamphetamine arise out of the same incident and cannot be separately punished without violating double jeopardy. When a conviction violates double jeopardy principles, it must be vacated. *In re Pers. Restraint of Strandy*, 171 Wn.2d 814, 820, 256 P.3d 1159 (2011) (citing *State v. Turner*, 169 Wn.2d 448, 466, 238 P.3d 461 (2010); *Womac*, 160 Wn.2d at 658-60). If this Court does not find that the State proved only a single offense based on the elements contained in the jury instructions, double jeopardy precludes entering all six convictions. This Court should reverse and remand with directions to vacate three of the offending convictions based on the overlap in the identity of the controlled substances. *Womac*, 160 Wn.2d at 658-60.

E. CONCLUSION.

James O'Cain's convictions should be reversed and a new trial ordered. In addition, any convictions premised on the same unit of prosecution should be treated as a single offense.

DATED this __ day of September 2015.

Respectfully submitted,

s/ Nancy P. Collins
NANCY P. COLLINS (28806)
Washington Appellate Project (91052)
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 73191-2-I
v.	)	
	)	
JAMES O'CAIN,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF SEPTEMBER, 2015, 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:

[X] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] JAMES O'CAIN 764239 CEDAR CREEK CORRECTIONS CENTER PO BOX 37 LITTLEROCK, WA 99556	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 28TH DAY OF SEPTEMBER, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710