73191-2

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Court of Appeals
Division I
State of Washington

NO. 73191-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JAMES OCAIN,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN LUM

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

IAN ITH
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

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A. ISSUES PRESENTED

1. The State's privilege to protect the identity of an informant may give way to disclosure, at the trial court's discretion, if a defendant presents non-speculative information that casts a reasonable doubt on the veracity of material representations attributed to the informant in a search warrant affidavit, and the challenged statements were the sole basis for probable cause to issue the warrant. In Ocain's trial for possession with intent to deliver controlled substances — based upon evidence obtained from a search warrant supported by drug purchases by a confidential informant — Ocain sought to question the confidential informant to explore a speculation that the search-warrant affidavit might have been incorrect about the type of car Ocain drove to the drug deals, which detectives personally observed. Did the trial court exercise proper discretion in denying examination of the confidential informant?

2. Multiple convictions for possession with intent to deliver the same type of controlled substances do not violate double jeopardy if the evidence supports separate units of prosecution, meaning separate and distinct intents to deliver the type of drug. Multiple convictions for possession with intent to deliver different

types of controlled substances do not violate double jeopardy because each conviction implicates different statutory provisions and requires different evidence — the different types of drugs. A jury convicted Ocain of six counts of possession with intent to deliver controlled substances based on street-sale-sized packages of crack cocaine, methamphetamine and heroin found in his pocket, and supply-sized stashes of powdered cocaine, methamphetamine and heroin found in his bedroom safe along with unused packaging and scales. Did the evidence support separate and distinct intents for the separate situations of the same types of drugs? Were his convictions for different types of drugs based on different statutory provisions and different evidence?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

James Master Ocain[1] was charged by amended information with six counts of possession with intent to deliver controlled substances, all alleged to have occurred on or about October 14, 2015, in King County, Washington. CP 9. Count 1 alleged possession with intent to deliver cocaine, in violation of

[1] In Appellant's Opening Brief, the appellant's surname is spelled "O'Cain," with an apostrophe. However, the court documents throughout this case, and the title of the case here, do not use apostrophes. The State is matching the spelling in the court documents for consistency, but means no disrespect.

RCW 69.50.401(1), (2)(a). Id. Count 2 alleged possession with intent to deliver methamphetamine, in violation of RCW 69.50.401(1), (2)(b). Id. Count 3 alleged possession with intent to deliver heroin, in violation of RCW 69.50.401(1), (2)(a). Id. Count 4 alleged possession with intent to deliver cocaine, in violation of RCW 69.50.401(1), (2)(a). Id. Count 5 alleged possession with intent to deliver methamphetamine, in violation of RCW 69.50.401(1), (2)(b). Id. Count 6 alleged possession with intent to deliver heroin, in violation of RCW 69.50.401(1), (2)(a). Id.

A jury convicted Ocain as charged. CP 163-68. The court imposed a low-end standard-range sentence of 60 months in prison, based on an offender score of 8. CP 295, 297. The six convictions were deemed to be the same criminal conduct for sentencing purposes, and thus did not affect the offender score. CP 176, 294-301. Ocain timely appealed. CP 304.

2. SUBSTANTIVE FACTS

On October 7, 2013, after a confidential informant made a series of controlled drug purchases from Ocain, King County Sheriff's detectives obtained a search warrant for Ocain's person, his home at 10858 1st Avenue Southwest, apartment 2, in the Top Hat neighborhood of unincorporated King County, and his two cars,

a Cadillac and a Chevrolet. CP 106-07; 3RP 246.[2] On the evening of October 14, 2013, the team of six detectives and a supervising sergeant staked out the residence and observed Ocain and his wife arrive in a car. 3RP 250. Ocain's wife went inside, but Ocain lingered outside. 3RP 289. Another man approached, and he and Ocain went inside together. Id. A SWAT team immediately converged on the apartment and secured it and Ocain. 3RP 250, 289. Ocain was handcuffed and escorted outside. 3RP 290.

Two detectives searched Ocain pursuant to the search warrant. 3RP 252, 290; CP 106. Detective Thomas Calabrese reached into Ocain's jacket pocket and found:

- A wad of $337 in cash. 4RP 253.
- A plastic sandwich bag with a large number of small rocks of crack cocaine, weighing 13 grams in total. 3RP 255-58; 4RP 426.
- Three small "dime" bags imprinted with golden skulls on a black background, each containing about 0.3 grams of methamphetamine. 3RP 262-64; 4RP 430.
- A baggie containing 16 small portions of black-tar heroin, each weighing about 0.14 grams and individually wrapped in torn plastic. 3RP 262; 4RP 428.

[2] The verbatim report of proceedings is divided into five sequentially numbered volumes, which are referred to here as 1RP (January 8, 2015); 2RP (January 12, 2015); 3RP (January 13, 2015); 4RP (January 14, 2015); and 5RP (January 16, 2015; February 10 and 27, 2015).

Detective Keith Martin discovered a keychain lanyard, holding several keys, around Ocain's neck. 3RP 290-92; Ex. 28, 34.

Meanwhile, inside the apartment, other detectives found a locked file cabinet in a closet in the master bedroom. 3RP 365; Ex. 27, 35. A key to the file cabinet was on Ocain's lanyard, and the detectives opened the drawers. Id. Inside was a fireproof document safe, a plastic plate likely used as a cutting board for taking small pieces off larger portions of drugs, a box of sandwich bags, digital scales for weighing amounts less than a gram, receipts from wiring money, and a package of multiple unused "dime" bags with the same golden-skull imprints as the dime bags in Ocain's pocket. 3RP 373, 397-405.

The document safe was locked, but the key was on Ocain's lanyard. 3RP 373. Inside the safe, detectives found:

- An envelope with $3,470 in cash.[3] 3RP 378; 4RP 460.
- A single plastic bag holding 66.3 grams of powdered cocaine, compressed into a brick shape. 3RP 382; 4RP 432. The compressed brick allows small amounts to be carved off without losing its shape. 3RP 382.
- A pill container holding a single baggie of 28 grams of methamphetamine. 3RP 386-88; 4RP 435.

[3] Detective Sergeant Raphael Crenshaw testified that the total amount of cash from the safe and Ocain's jacket pocket was $3,807, and Detective Calabrese testified that he took $337 from Ocain's pocket, so the cash in the safe totaled $3,470. 3RP 253; 4RP 460.

- A single baggie containing a 27-gram lump of black-tar heroin. 3RP 385; 4RP 432-33.
- Assorted pills, some of which looked like methadone. 3RP 389.
- More unused golden-skull dime bags. 3RP 390-91.
- A bag of marijuana and a marijuana pipe that would not be used to smoke heroin, methamphetamine or cocaine. 3RP 393-95.
- Two more digital scales, one with drug residue on it. 3RP 377, 379-81.

No other controlled substances or evidence of drug use were located in the apartment or in Ocain's vehicles, except for a half-smoked marijuana cigarette in a smaller bedroom. 3RP 268, 297, 352, 353. Numerous documents bearing Ocain's name and the apartment address were seized from the master bedroom where the filing cabinet was. 3RP 335-40.

Detective Sgt. Raphael Crenshaw testified from his training and experience that heroin, cocaine and methamphetamine are typically sold in fractions of a gram, consistent with the packaged drugs in Ocain's pocket. 4RP 455-56, 462-67. Crenshaw testified about the street-level value of the three types of drugs. 4RP 462-67. For example, just one of the many pebbles of crack

cocaine in Ocain's pocket would be worth about $20.[4] Each of the 16 small pieces of heroin in Ocain's pocket would fetch about $10 or $15. 4RP 464. Each 0.3-gram golden-skull baggie of methamphetamine would sell for $20 to $25. 4RP 455.

Additional relevant facts are provided as applicable to the arguments to follow.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY DENIED EXAMINATION OF THE CONFIDENTIAL INFORMANT.

Ocain complains that his ability to challenge the search warrant in his case was improperly frustrated when the court denied an *in camera* examination of the confidential informant. Ocain speculates that because one of his cars was in and out of a repair shop during the general period of time of the drug sales, quizzing the informant about the drug deals might have revealed falsity in the detective's search-warrant affidavit.

The trial court properly exercised its discretion in denying Ocain what would have been nothing more than a fishing expedition. An *in camera* examination of a confidential informant

[4] Crenshaw said that crack cocaine sells in pieces weighing from 0.1 to 0.2 grams. 4RP 463. The crack cocaine in Ocain's pocket weighed 13 grams. So that was approximately 65 to 130 portions, or $1,300 to $2,600.

was inappropriate to Ocain's allegations, because the type of car that he drove to the drug deals was provided by the detective himself from personal observation, not the informant. In fact, Ocain's auto-repair invoices do not establish any inconsistency in the search warrant affidavit at all. And overarching Ocain's untenable argument is the simple fact that the type of car he used in the drug deals was entirely immaterial to the finding of probable cause for the warrant to search his person and home, where the drugs were found. His argument fails.

a. Additional Relevant Facts.

i. The search-warrant affidavit.

The search warrant in this case was signed October 7, 2013, by The Honorable Peter Nault, a King County district court judge, based on an affidavit of probable cause by Detective Keith Martin. CP 106-17. The affidavit recounted that the investigation of Ocain began "in the middle of September 2013," when a confidential informant (CI) told Martin that a man called "Master J" — quickly identified as Ocain — was dealing drugs in the Burien and White Center areas. CP 109.

During the "later weeks of September 2013," Detective Martin enlisted the CI to buy crack cocaine from Ocain. CP 110. At

the agreed location, Martin and his partners watched as Ocain walked up to the CI's vehicle, got in and sold crack to the CI. Id. After the drug deal, Ocain walked to a vehicle about 12 feet from Martin and got in the driver's seat. Id. From Martin's remarkably close vantage point, he watched another man approach Ocain and openly purchase several rocks of crack cocaine from Ocain. CP 110-11. The detectives then followed Ocain as he drove to another location and made an exchange with two other men. CP 111. The affidavit does not say what kind of vehicle Ocain was driving on this occasion. CP 110-11.

On a second occasion also "in the later weeks of September," the CI arranged another crack-cocaine purchase with Ocain. CP 111. The meeting location was omitted from the affidavit to protect the CI. Id. At this location, the CI's vehicle was observed by Martin and Detective Watkins. Id. A short time later, another detective saw Ocain leave his apartment, and followed him to the meeting location. Id. The "exact means of transportation" was omitted from the affidavit "to better insulate the CI." Id. Ocain soon arrived at the meeting location and sold crack to the CI "in full

view of Watkins." CP 113.[5] Detectives then followed Ocain back to his apartment. Id.

Then, in the "the last week" before the writing of the search-warrant affidavit on October 7, 2013,[6] Martin and other detectives watched as the CI met with Ocain again. CP 113-14. This time, the affidavit specified that Ocain arrived in his Cadillac, and Martin observed Ocain in the driver's seat as he sold crack to the CI. CP 114. Also during this "last week" before the affidavit, Martin drove past Ocain's apartment and saw Ocain's Cadillac in back and Ocain's Chevrolet Cavalier parked in front. CP 114.

Finally, in the "last 72 hours" before the search warrant affidavit was written,[7] the CI again arranged to buy crack from Ocain. CP 115. A detective followed Ocain as he drove the Chevrolet Cavalier from his apartment to the meeting location, where detectives Martin and Watkins watched Ocain sell crack to the CI. Id.

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[5] The search warrant affidavit that was attached to the State's Response To Defense Motion Challenging Search Warrant Probable Cause has a photocopying error, with an extra page 6 of the affidavit appearing between pages 4 and 5. CP 111-14. This makes the affidavit somewhat difficult to follow unless CP 112 (the extra page 6) is skipped.

[6] The "last week" before October 7, 2013, was September 29 through October 6.

[7] October 4-6, 2013.

ii. Ocain's motion to examine the informant.

Pretrial, Ocain moved for *in camera* questioning of the confidential informant to "resolve concerns about Detective Martin's veracity." CP 16. Ocain complained that Martin had refused to discuss the informant with the defense, and refused to "disclose the exact dates" of the drug transactions. CP 12. Ocain alleged to have invoices showing that "at least one of Mr. Ocain's cars was in a repair shop for most of the time when Detective Martin claims to have seen it used in drug transactions." Id.

But Ocain initially refused to present the invoices, alleging in court that if Detective Martin were to see the invoices, he would commit perjury to square the timing of the drug deals with the invoices. 1RP 8-9. Still, Ocain alleged that the invoices would prove that "one of the cars that Detective Martin claims was used in these transactions could not possibly have been used in these transactions." 1RP 20-21.

Additionally, Ocain called Martin a "known liar and a known racist," based on disciplinary history from about 15 years prior. CP 15-93. Ocain contended that the search warrant was improperly issued because Martin did not disclose these disciplinary incidents

to the issuing judge. CP 15. Ocain averred that he had made the "minimal showing of inconsistency" to entitle him to question the informant. CP16.

The trial court denied Ocain's motion because Ocain's request for disclosure was made "basically on a speculative basis." 1RP 29. The trial court summarized Ocain's contentions as "speculating that perhaps, if the confidential informant were interviewed about the circumstances surrounding the controlled buys, that perhaps ... there might be an inconsistency regarding which of the cars were used." Id.

The court also noted that because the affidavit was unspecific about the dates of the drug sales, "it's hard to see any kind of inconsistency," especially with Ocain unwilling to present the invoices. 1RP 30. Moreover, the court said, even if there were an inconsistency about the vehicles, it would not be material to determining probable cause. Id. The trial court offered Ocain an opportunity to challenge probable cause based on the "four corners" of the affidavit, but Ocain declined. 1RP 31.

Ocain's motion to file the invoices under seal was denied, so Ocain then submitted them in a motion to reconsider. CP 94-95, 119-24. The invoices show that Ocain's Cadillac was checked into

a dealership from the afternoon of September 21 to the afternoon of September 26; then again from about 9 a.m. to about 1 p.m. on October 1; and lastly from the morning of October 4 to the afternoon of October 11. CP 122-24. The invoices do not address Ocain's Chevrolet. Id.

The court denied Ocain's motion to reconsider. 1RP 86. The court concluded that even with the invoices, there was "no showing of materiality," and "no showing of falsity," and "for us to get to the minimal showing of inconsistency" as required to examine the informant, "there has to be an inconsistency, and there's none here." 1RP 85.

b. The Trial Court Exercised Sound Discretion In Denying Ocain's Motion To Examine The Informant.

To establish probable cause, a search-warrant affidavit must set forth "sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched." State v. Lyons, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). A search warrant enjoys a presumption of validity, and courts give great deference to the magistrate's determination of probable cause. State v. Chenoweth, 160 Wn.2d 454, 477, 158

P.3d 595 (2007). Review is usually limited to the four corners of the affidavit supporting probable cause. State v. Neth, 165 Wn.2d 177, 182, 196 P.3d 658 (2008).

In limited circumstances, a defendant may be entitled to a so-called Franks hearing to challenge the truthfulness of factual statements made in an affidavit supporting a search warrant. Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). As "a threshold matter, the defendant must first make a 'substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is *necessary to the finding of probable cause*.'" State v. Atchley, 142 Wn. App. 147, 157, 173 P.3d 323 (2007) (emphasis added) (quoting Franks, 438 U.S. at 155-56).

"Only *material* falsehoods or omissions made recklessly or intentionally will invalidate a search warrant." Chenoweth, 160 Wn.2d at 479 (emphasis added). Negligent omissions or misstatements will not invalidate a warrant. Id. at 477. Materiality means that "the challenged information must be *necessary* to the finding of probable cause." State v. Garrison, 118 Wn.2d 870, 874-75, 827 P.2d 1388 (1992) (emphasis in original) (citing Franks,

438 U.S. at 156). Our Supreme Court has emphasized that a fact is not material simply because it "tends to negate probable cause." Garrison, 118 Wn.2d 870, 874, 827 P.2d 1388 (1992). That "confuses materiality or relevance as it relates to establishment of bad motive with the separate inquiry whether the information is *necessary* to the probable cause determination." Id. (emphasis in original).

The government may refuse to disclose the identity of informants who provide information concerning criminal violations. Roviaro v. United States, 353 U.S. 53, 59, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957); State v. Harris, 91 Wn.2d 145, 148, 588 P.2d 720 (1978). This "informer's privilege" is intended to further effective law enforcement and to encourage citizens to report their knowledge of criminal activities. Roviaro, 353 U.S. at 59; Harris, 91 Wn.2d at 148. This privilege is codified at CrR 4.7(f)(2) and RCW 5.60.060(5).

When disclosure of an informer's identity is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. Roviaro, 353 U.S. at 60-61; Harris, 91 Wn.2d at 148. But when the defendant seeks the informant's identity solely for purposes of

challenging a probable cause determination rather than during the guilt phase of the trial, disclosure of the informant's identity is not required. Atchley, 142 Wn. App. at 156 (citing State v. Casal, 103 Wn.2d 812, 816, 699 P.2d 1234 (1985)). A hearing may be denied "if the defendant's reasons for seeking the informant's testimony are only speculative." State v. Fredrick, 45 Wn. App. 916, 920, 729 P.2d 56 (1986). "Something more than uncorroborated, self-serving, or conclusory allegations is necessary to produce a substantial showing." State v. Moore, 54 Wn. App. 211, 219, 773 P.2d 96 (1989).

Recognizing that the privilege can sometimes make it difficult for a defendant to make the necessary preliminary showing for a Franks hearing, our Supreme Court has held:

> [W]here a defendant presents information which casts a reasonable doubt on the veracity of *material* representations made by a search warrant affidavit, *and* the challenged statements are the *sole basis for probable cause* to issue the search warrant, the trial court should exercise its discretion to conduct an in camera examination of the affiant and/or secret informant on the veracity issue.

Casal, 103 Wn.2d at 813 (emphasis added). A trial court's decision to refuse to order disclosure of an informant's identity is reviewed for abuse of discretion. State v. Petrina, 73 Wn. App. 779, 782, 871 P.2d 637 (1994). "A trial court abuses its discretion when it acts on

untenable grounds or for untenable reasons or when its decision is manifestly unreasonable." Id. at 783.

i. A Casal hearing is inapplicable to the type of allegation Ocain is making.

The first dispositive flaw in Ocain's argument is that a Casal hearing is inappropriate for the type of allegation Ocain is making. In Casal, the police affiant claimed in the search-warrant affidavit that a confidential informant had told police that he had been inside Casal's home and had seen a marijuana operation. Casal, 103 Wn.2d at 814. But Casal alleged that a man named Batham later claimed to be the informant and admitted that he had never been in Casal's home, had never seen any marijuana, and had reported a rumor to police. Id.

Because the informant's privilege prevented Casal from confirming that Batham was the informant and questioning him in court to establish material falsity in the affidavit — the informant's supposed statement to police was the *only* basis for the warrant — an *in camera* examination of the informant was the only way to resolve the issue. Id. at 820. But our Supreme Court also cautioned that "in any case where probable cause is established *independently* of the affiant's challenged statements, the rule in

today's case will not be applicable." Id. at 820-21 (emphasis in original).

Here, Ocain speculates that Detective Martin might have misidentified the automobile that he personally observed during one of the drug deals recounted in his affidavit. The confidential informant in Ocain's case did not provide that information to the police, and was not the source of Ocain's allegation of possible falsity, so the informant had nothing to do with the allegation of inconsistency. Several other detectives also personally observed the vehicles. The type of car Ocain drove did not establish probable cause to search his home and person. The informant and the drug deals that led to the search warrant were not introduced at trial and were not needed to prove the charged crimes. The Catch-22 that a Casal hearing is meant to remedy does not exist here. Instead, Ocain was seeking a porthole through which to cast for flaws in the affidavit. This is not what Casal prescribed.

ii. Ocain's assertion is speculative and does not show inconsistency.

Even if Ocain were right that all he needed was any inconsistency, regardless of materiality, to examine the informant, he cannot meet his own threshold.

As the trial court pointed out, the invoices that Ocain presented do not contradict anything in Detective Martin's affidavit. The only mention of a Cadillac in the affidavit came in recounting the controlled purchase "within the last week" before submitting the affidavit on October 7, 2013. CP 114. That corresponds to about September 29 to October 6. Ocain's invoices show the Cadillac was in the shop during this time for four hours on October 1, and from October 4 through 7. That leaves four and a half days (Sept. 29 and 30; the rest of October 1; and October 2 and 3) when it could have been used in Ocain's drug dealing.

The invoices actually support the accuracy of the affidavit: In the final drug deal, in the 72 hours before the affidavit — or October 4, 5 and 6 — the affidavit said Ocain was driving his Chevy Cavalier. CP 115. That fits with a period when the Cadillac was apparently in the shop, from October 4 to 11. CP 124. This does not impugn the veracity of the affidavit — it bolsters it.

Ocain, as he did at trial, further alleges that Detective Martin committed some kind of legal error by failing to tell the issuing judge that Martin had been disciplined by the Sheriff's Office more than a decade in the past. Ocain suggests that this contributed to his threshold showing of a material inconsistency in the search-

warrant affidavit. But Ocain cites no authority for what he is proffering as a rule of law. This argument should be discounted entirely.

As the trial court found, there was no inconsistency. Ocain's hopeful speculations did not entitle him to quiz the informant in search of ammunition to challenge the warrant. The trial court did not abuse its discretion.

iii. Ocain's alleged inconsistency, even if it existed, was immaterial to the finding of probable cause.

The fatal flaw in Ocain's argument is the fundamental fact that the type of car he drove to sell drugs in full view of a team of detectives was wholly immaterial to the finding of probable cause to search his person and apartment. Ocain ignores the most important part of the rule in Casal: that the inconsistency must cast "reasonable doubt on the veracity of *material* representations made by a search warrant affidavit, *and* the challenged statements are the *sole basis* for probable cause to issue the search warrant." Casal, 103 Wn.2d at 813.

Ocain actually agrees that even if he were allowed a Casal hearing, "*[a]t best*, Mr. Ocain 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." Appellant's Opening Brief at 9 (emphasis added). If this were true — and the error were deliberate or reckless — the remedy would be to strike the reference to the type of car from the affidavit and assess probable cause without it. See State v. Ollivier, 178 Wn.2d 813, 846-47, 312 P.3d 1 (2013), cert. denied, 135 S. Ct. 72 (2014) (if defendant establishes deliberate or reckless misrepresentation, then misrepresentation stricken and sufficiency of affidavit assessed as modified).

The affidavit would still show that, on multiple occasions, detectives personally observed Ocain leave his apartment, drive to prearranged drug deals, and sell crack cocaine to the informant — and even to other people who happened along — while the detectives watched. The type of car Ocain drove to the deals was in no way necessary to finding probable cause to search his person or his home, so it was immaterial.[8] It certainly was not the sole basis for probable cause, as Casal requires. Ocain's argument is meritless.

[8] Certainly, noting the specific vehicles Ocain drove was necessary to finding probable cause to search those specific vehicles, but those searches yielded no drugs so they did not affect the charged crimes.

2. OCAIN'S CONVICTIONS DO NOT VIOLATE DOUBLE JEOPARDY.

Ocain next argues that his six convictions violated double jeopardy because his conduct on October 14, 2013, constituted only one crime, or three at most. His argument fails because his analysis is wrong.

The jury was thoroughly instructed that it was required to find separate and distinct conduct for each count, and the prosecutor in closing argument painstakingly elected to apply distinct conduct to each count, matching the amended information. So where Ocain was convicted of multiple counts of possession with intent to deliver the same type of drug, double jeopardy was not violated because the evidence supported separate units of prosecution, meaning separate and distinct intents to sell the packaged drugs in his pocket in the present and the supply-sized inventory in his safe in the future. And where Ocain was convicted of possession with intent to deliver different types of drugs, double jeopardy was not violated because the convictions were different in law and fact, implicating separate statutory provisions and requiring different evidence.

a. Additional Relevant Facts.

The jury was instructed that to convict on each count, it was required to find that Ocain "possessed a controlled substance separate and distinct from conduct in" the other counts, with the intent to deliver each substance. 4RP 481-84; CP 148-53. In closing argument, the prosecutor immediately specified which conduct was alleged for each count:

> Count 1, possession with intent to deliver, refers to the crack cocaine that was found in his jacket pocket. Count 2 refers to the methamphetamine that was found in his jacket pocket, the three little baggies. Count 3 refers to the 16 little individually wrapped items of heroin. Count 4 refers to the 60 some grams of, 66 grams of powdered cocaine in a brick. Count 5 refers to the 28 grams of methamphetamine found in the safe. Count 6 is this little block, not so little block, of black tar heroin that was found in the safe. These instructions tell you that these are separate and distinct instances. And that is because there's three different drugs in his pocket and three different drugs in his supply safe. Three different drugs in two separate locations. That's six distinct instances of possession of drugs with the intent to deliver them.

4RP 500.

The prosecutor then discussed the separate elements of possession and intent to deliver, and emphasized that intent to deliver had to be found for each count: "Each of these, you have to find beyond a reasonable doubt that each of these, the intent was for him to deliver it to other people." 4RP 505. The prosecutor then again went through each count one at a time, and explained why

intent to deliver was proven. 4RP 506-07. For example, the prosecutor noted that the drugs in Ocain's pocket were found "all packaged up," along with a "wad of cash," and the reasonable inference was that "this was his store." 4RP 506. On the other hand, the large quantities in the safe, totaling nearly $12,000 in value, and the scales and packaging material showed that it was his "supply" for him to package up and "go on to his day at work." 4RP 507-08.

The prosecutor concluded his argument by yet again electing conduct for each count, matching the amended information:

> Six counts of possession with intent to deliver to others. Again, Count 1 is the cocaine on his person; Count 2, the methamphetamine on his person; Count 3, the heroin on his person; Count 4 is the cocaine in the box; Count 5 is the methamphetamine in the box; Count 6 is heroin in the box.

4RP 510; CP 9-10.

When the jury returned with its verdicts, the foreperson had inadvertently written "heroin" instead of "guilty" or "not guilty" on the line of Verdict Form F, which corresponded to Count 6. CP 168; 4RP 533-35. The judge sent the jury back to the jury room to review the verdict forms, and a few minutes later the jury returned with "heroin" crossed out and "guilty" written next to it. Id.

b. Ocain's Convictions For The Same Types Of Drug Do Not Violate Double Jeopardy Because The Evidence Supported Separate Units Of Prosecution.

The constitutions of the United States and Washington protect defendants from being "twice put in jeopardy" for the "same offense." U.S. Const. amend. V; Const. art. I, § 9. The federal and state provisions afford the same protections and are "identical in thought, substance, and purpose." In re Pers. Rest. of Davis, 142 Wn.2d 165, 171-72, 12 P.3d 603 (2000). Double jeopardy claims are questions of law that are reviewed de novo. State v. Womac, 160 Wn.2d 643, 649, 160 P.3d 40 (2007).

To determine whether a defendant has been punished multiple times for the same offense, our courts traditionally apply the "same evidence" test. In re Davis, 142 Wn.2d at 171-72. This test mirrors the federal "same elements," or "Blockburger" standard. Id. (citing Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 76 L. Ed. 306 (1932)). But that test applies only when a defendant is convicted of violating "several statutory provisions." State v. Adel, 136 Wn.2d 629, 633, 965 P.2d 1072 (1998). If a defendant is convicted of violating a single statute multiple times, the proper inquiry is what "unit of prosecution" the Legislature

intended as the punishable act under the specific criminal statute. In re Davis, 142 Wn.2d at 172.

The unit of prosecution for possession with intent to manufacture or deliver turns on the "nature of the defendant's intent." State v. Gaworski, 138 Wn. App. 141, 149, 156 P.3d 288 (2007). Evidence supporting "separate and distinct intent" to manufacture or deliver different sets of drugs supports separate units of prosecution. In re Davis, 142 Wn.2d at 175. The unit of prosecution is necessarily a case-by-case determination. Gaworski, 138 Wn. App. at 150. Evidence is sufficient if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Id.

In Adel, our Supreme Court compared two possession-with-intent cases, State v. Lopez and State v. McFadden, under the "unit of prosecution" standard to conclude that separate and distinct temporal intents — i.e. present and future intents — form two units of prosecution and do not violate double jeopardy. Adel, 136

Wn.2d at 633 (citing Lopez, 79 Wn. App. 755, 904 P.2d 1179 (1995); McFadden, 63 Wn. App. 441, 820 P.2d 53 (1991)).

In Lopez, the defendant was arrested in a car after buying cocaine from an informant. 79 Wn. App. at 759; see also Adel, 136 Wn.2d at 638-39 (summarizing Lopez's relevant parts). Officers recovered the purchased cocaine on the car's floorboard, and they also found 14 bindles of cocaine in Lopez's pocket that he had not bought from the informant. Lopez, 79 Wn. App. at 759. Lopez was charged with two counts of possession with intent to deliver. Id. at 760. But the Adel Court found that under the unit of prosecution analysis, the evidence was insufficient in Lopez to support different temporal intents for the drugs.[9] Adel, 136 Wn.2d at 639.

But McFadden stood in clear contrast to Lopez. See Adel, 136 Wn.2d at 638-39. In McFadden, the defendant was arrested in an apartment with 5.5 grams of cocaine intended for that day's sale. 63 Wn. App. at 443; see also Adel, 136 Wn.2d at 637-38 (summarizing McFadden's relevant parts). The police then went to McFadden's van and found another 83.9 grams of cocaine. McFadden, 63 Wn. App. at 638. The Supreme Court in Adel

[9] Adel found that the Court of Appeals had incorrectly used the "same evidence" test in deciding both Lopez and McFadden, so the lower court's analyses in those cases is not useful here. See Adel, 136 Wn.2d at 640.

concluded that the evidence in McFadden was sufficient for two units of prosecution because the smaller amount of cocaine in McFadden's pocket was intended for *present* sale, while the larger supply stashed in the van was intended for *future* sale. 136 Wn.2d at 638. See also Gaworski, 138 Wn. App. at 150 (summarizing McFadden and Lopez to establish units of prosecution based on present and future intent).

So Ocain's double jeopardy claim, as it relates to convictions for the same types of drugs, turns on whether the evidence in his case is more like McFadden or Lopez. It is quite similar to McFadden and quite unlike Lopez. In this case, the evidence was sufficient, when viewed in the proper light, for the jury to conclude that Ocain had separate and distinct temporal intents — present and future — for the drugs in his pocket versus the drug supply in his safe:

As to Counts 1 and 4, the prosecutor elected in closing, and the amended information alleged, separate and distinct possession of cocaine with intent to deliver. CP 9-10; 4RP 500, 506-07, 510. When a prosecutor clearly identifies which acts correspond with which charge, concerns about the jury applying the same act to multiple charges are allayed. See McFadden, 63 Wn. App. at 451.

The crack cocaine in Ocain's pocket was divided into many pieces, and was found along with a wad of cash and the other individually packaged drugs. On the other hand, the large amount of powdered cocaine in the safe was still in a compressed brick, kept with empty packaging. Any jury could easily infer that the crack cocaine in Ocain's pocket was intended for present sale, while the powdered cocaine was meant for future sale. Additionally, because the cocaine in Ocain's pocket was crack cocaine while the cocaine in the safe was powdered, a jury could also infer that Ocain intended different deliveries for those two forms of the same drug.

As to Counts 2 and 5, the prosecutor elected, and the amended information alleged, separate and distinct possession of methamphetamine with intent to deliver. Again, the evidence was sufficient for a rational jury to conclude that the three small "dime bags" of methamphetamine in Ocain's pocket were intended for present sale while the large crystals in his safe were intended to be broken up and packaged for future sale.

As to Counts 3 and 6, the prosecutor elected, and the amended information alleged, separate and distinct possession of heroin with intent to deliver. As with the other drugs, a rational jury could easily infer that the 16 individual bindles of heroin in Ocain's

pocket were intended for present sale, while the large lump of heroin in the safe was meant to be divided up for future sale. It is not insignificant that the jury in Count 6 inadvertently wrote "heroin" instead of "guilty" on the verdict form. It shows that the panel considered each type and situation of drugs individually and followed the prosecutor's elections.

Thus, the evidence against Ocain is quite comparable to McFadden because both cases squarely confront a packaged, street-sale inventory on the defendant's person for present sale versus a larger supply stashed away for future dealings. Ocain's case is substantially dissimilar to Lopez, where there was no evidence to separate Lopez's two sets of drugs (especially because he was the *buyer* in the drug bust) into distinct intents. Ocain's jury, in contrast to Lopez, had ample evidence to find separate temporal intents for Ocain's different collections of drugs.

Ocain's analysis is wrong because he offers possession-only cases to suggest that multiple units of prosecution are impossible where the same type of drug is involved. Those cases are irrelevant because they address different units of prosecution for different crimes.

For example, Ocain cites Adel in arguing that it is irrelevant that Ocain's drugs were in two different distinct places and situations. While Adel analyzed possession-with-intent cases, Adel itself was a simple possession of marijuana case, and held that the unit of prosecution for possession of marijuana is possession itself, "regardless of where or in how many locations the drug is kept." 136 Wn.2d at 637. That is inapposite to possession-with-intent cases where the unit of prosecution focuses on intent for the drugs, as in McFadden where the drugs were in separate locations and situations.

Similarly, Ocain offers State v. Chenoweth to contend that double jeopardy is always violated where multiple convictions are based on the same type of drug found on the defendant's person and in his house on the same day. 127 Wn. App. 444, 463, 111 P.3d 1217 (2005), aff'd, 160 Wn.2d 454, 158 P.3d 595 (2007). Again, Ocain is attempting to apply a simple possession case, with a different unit of prosecution, to a possession-with-intent case. Chenoweth is of no use here.

Thus, as to the counts where Ocain was convicted of possession with intent to deliver the same type of drug, double

jeopardy was not violated because the evidence was sufficient to support separate units of prosecution.

c. Ocain's Convictions For Different Types Of Drugs Do Not Violate Double Jeopardy Under The "Same Evidence" Test.

As stated previously, when a defendant is convicted under several statutory provisions, double jeopardy is determined using the "same evidence" test. Adel, 136 Wn.2d at 633; Blockburger, 284 U.S. at 304. Under that test, double jeopardy is violated if a defendant is convicted of offenses that are the same in law and in fact. State v. Calle, 125 Wn.2d 769, 777-78, 888 P.2d 155 (1995) (citing Blockburger, 284 U.S. at 304). If each offense, as charged, includes elements not included in the other, or requires proof of a fact that the other does not, the offenses are different and multiple convictions can stand. Adel, 136 Wn.2d at 633.

This test applies where different drugs are involved in the same occurrence. For example, in State v. O'Neal, the defendant was convicted of manufacturing methamphetamine and manufacturing marijuana for having both operations in a mobile home. 126 Wn. App. 395, 405, 417, 109 P.3d 429 (2005). This Court rejected the argument that a single general intent to manufacture drugs meant the convictions violated double jeopardy

under the "unit of prosecution" test. Id. at 416. This Court held that because manufacturing marijuana and manufacturing methamphetamine were prohibited under different parts of the applicable statute, and required different evidence — marijuana versus methamphetamine — they were "two distinct crimes" properly analyzed under the "same evidence" test, and the double jeopardy argument failed. Id. at 417. Ocain's case is no different.

Possession with intent to deliver cocaine, as charged in Counts 1 and 4, is prohibited under RCW 69.50.401(1), (2)(a) because cocaine is a Schedule II controlled substance, a derivative or preparation of coca leaves, under RCW 69.50.206(b)(4). Possession with intent to deliver methamphetamine as charged in Counts 2 and 5 is prohibited under RCW 69.50.401(1), (2)(b). Possession with intent to deliver heroin is prohibited under RCW 69.50.401(1), (2)(a) because heroin is a Schedule I controlled substance, an opium derivative, under RCW 69.50.204(b)(11).

Thus, Ocain, as in O'Neal, was convicted under separate statutory provisions, so the convictions are different in law. And each conviction required different evidence — cocaine versus methamphetamine versus heroin — so they are different in fact. As

in O'Neal, the jury properly convicted Ocain of distinct crimes and his double jeopardy argument fails.

Still, Ocain argues that his six convictions violated double jeopardy because they were considered the "same criminal conduct" for sentencing and did not add to his offender score. This is a nonstarter. "A double jeopardy violation claim is distinct from a 'same criminal conduct' claim and requires a separate analysis." State v. French, 157 Wn.2d 593, 611-12, 141 P.3d 54 (2006). "The double jeopardy violation focuses on the allowable unit of prosecution and involves the charging and trial stages," whereas a "same criminal conduct claim involves the sentencing phase." Id.

So Ocain's extensive quotation of State v. Rodriguez is irrelevant to his double-jeopardy claim because in that case the only issue was whether Rodriguez's two convictions for possession with intent to deliver different drugs constituted the same criminal conduct for offender-score calculation. 61 Wn. App. 812, 817-18, 812 P.2d 868 (1991) (defendant caught with cocaine and heroin in his sock at the same time). Ocain also cites State v. Vike, which is identically inapposite. 125 Wn.2d 407, 412-13, 885 P.2d 824 (1994) ("we hold concurrent counts involving simultaneous simple

possession of more than one controlled substance encompass the same criminal conduct for sentencing purposes").

Ocain's six convictions for possession with intent to deliver cocaine, methamphetamine and heroin do not violate double jeopardy because the jury had sufficient evidence to support six separate and distinct crimes. For the crimes based on the same type of drug, the evidence supported separate and distinct units of prosecution. For the crimes based on different drugs, the convictions were different in law and fact. Ocain's argument fails.

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Ocain's judgment and sentence.

DATED this 25TH day of November, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
IAN ITH, WSBA #45250
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Nancy Collins, the attorney for the appellant, at Nancy@washapp.org, containing a copy of the BRIEF OF RESPONDENT in State v. James Master Ocain, Cause No. 73191-2, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 25 day of November, 2015.

Name:
Done in Seattle, Washington