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NO. 93504-1

IN THE SUPREME COURT
OFTHE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent

v.

DENNIS W. JACKSON,

Petitioner.

ANSWER TO PETITION FOR REVIEW

MARK K. ROE
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ORIGINAL

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I. IDENTITY OF RESPONDENT AND CROSS-PETITIONER

The State of Washington, respondent and cross-petitioner, asks the court to deny the defendant's petition for review. Alternatively if the court accepts review the State asks the court to also accept review of the issue raised in the cross-petition.

II. ISSUE RAISED ON CROSS-PETITION

1. The Court of Appeals held that the trial court erred when it refused to give the defendant's proposed Petrich instruction. When the circumstantial evidence showed a continuing course of conduct is this decision in conflict with decisions of this court and other decisions of the Court of Appeals?

2. The Court of Appeals affirmed the defendant's conviction on the basis that although error occurred it was harmless. It then denied the State's cost bill without explanation. Does the question of whether costs should be awarded constitute an issue of substantial public interest that should be decided by the Supreme Court where there currently appears to be no standards in place for the court to exercise its discretion in determining an award of costs to the prevailing party?

III. STATEMENT OF THE CASE

On September 27, 2014 at about 2:00 p.m. the defendant, Dennis Jackson, was riding in a car driven by Mr. Stoutenberg. Officer Ross responded to a 911 call and stopped that vehicle. Officer Ross arrested Mr. Stoutenberg and placed him in the back of his patrol car. Before doing so Officer Ross checked and found no drugs or weapons. He later released Mr. Stoutenberg. Officer Ross checked the back of his patrol car again and found nothing had been left there. 12/15/14 RP 134-140.

Officers O'Hara and Cook responded to the scene when Officer Ross had called for back- up. While Officer Ross was dealing with Mr. Stoutenberg Officer O'Hara noticed the defendant seated in the stopped vehicle. The defendant moved as if he were trying to conceal something. Officer O'Hara removed the defendant from the vehicle. He then frisked the defendant but found no drugs on him at that time. When the defendant was out of the vehicle the officer noted a white crystalline substance on the defendant's seat and floorboard that appeared to be methamphetamine. The car was later searched pursuant to a search warrant. In the center console police located a cigarette box that contained

methamphetamine. The defendant said he had a box of that same brand of cigarettes in the car. 12/16/14 RP 200-203, 205-206, 230.

The defendant was arrested on a warrant and on probable cause for felony drug possession. Officer Ross checked the back of his patrol car again before putting the defendant there to transport him to jail. At the jail Officer Ross found a small baggie of brown substance on the floorboards near where the defendant's feet had been. The officer suspected the substance was heroin. 12/15/14 RP 144-145; 12/16/14 RP 204.

Officer Ross recommended jail staff conduct a strip search because of what he found on the floorboards of his car. The defendant was placed in a restraint chair after the strip search while jail personnel determined whether he would need medical attention. During this time the defendant became fidgety. Corrections Officer Stevie saw the defendant scratch under his leg. He told the defendant to hold up his hand. When the defendant did so he was holding a baggie of brown substance. The substance found in the patrol car and in the defendant's hand later tested positive for heroin. 12/15/14 RP 148; 12/16/14 RP 301-305, 344, 351-352.

The defendant was charged with one count of possession of a controlled substance, methamphetamine, count I, and one count

of possession of heroin, count II. 1 CP 69. The trial court denied the defendant's proposed Petrich instruction. 12/16/14 RP 360; 12/17/14 RP 362-635. The defendant was acquitted of count I and convicted of count II. 1 CP 29, 30.

IV. ARGUMENT

A. IF IT WAS ERROR TO REJECT A PETRICH INSTRUCTION THE ERROR WAS HARMLESS.

The Court of Appeals found the trial court erred when it refused the defendant's Petrich instruction, but that error was harmless. Slip Op. at 6-7. The defendant asks this Court to review that decision, arguing that it conflicts with a decision of the Court of Appeals in State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994). Since the facts here differ from those in King the Court of Appeal's decision does not conflict with that case. For that reason this court should deny review.

When the defendant has been charged with a single count of criminal conduct but the evidence indicates that several distinct criminal acts have been committed, jury unanimity is preserved in one of two ways. Either the prosecutor makes an election as to which act constitutes the charged count or the jury is instructed that all jurors must agree on the same criminal act beyond a reasonable doubt in order to convict. State v. Petrich, 101 Wn.2d 566, 572,

683 P.2d 173 (1984), overruled on other grounds, State v. Kitchen, 110 Wn.2d 403, 406, 756 P.2d 105 (1988). Where neither an election nor an instruction is given in a multiple acts case the error is harmless if a "rational trier of fact could find that each incident was proved beyond a reasonable doubt." State v. Camarillo, 115 Wn.2d 60, 65, 794 P.2d 850 (1990).

Where the kind of evidence presented as to each act is similar, the defense is general denial, and there is no evidence from which a jury could rationally discriminate between two incidents jurors are presented an either–or choice. Then if the jury reasonably believed one incident occurred it must have believed each of the other incidents occurred. State v. Bobenhouse, 166 Wn.2d 881, 894-895, 214 P.3d 907 (2009). In Bobenhouse the victim testified to multiple acts of sexual assault but no Petrich instruction was given. Id. at 893-894. The defendant offered only a general denial to the allegations, so the jury had no evidence on which it could rationally differentiate between the two incidents. If it believed one incident happened it must have believed each of the incidents happened. Id. at 895. In that case error in failing to give a requested Petrich instruction was harmless. Id.

In King the evidence showed that the defendant had been riding in a car in which police found a pill bottle containing cocaine. Both the defendant and the driver had made tossing motions toward the car just before the cocaine was located. Police also found another piece of rock cocaine in a fanny pack at the police station after the defendant had been arrested. At trial the defendant testified that police planted that piece of cocaine. King, 75 Wn. App. at 901-902. The court found that it was error to reject the defendant's proposed Petrich instruction. The error was not harmless because there was sufficient conflicting evidence regarding each possession that a rational trier of fact could have a reasonable doubt that the defendant was responsible for the drugs in either location. Id. at 903-904.

Unlike King there was no conflicting evidence presented regarding either the heroin found in the patrol car of the heroin in the defendant's hand at the jail. No evidence contradicted the officer's testimony that he checked and found no drugs in the back of the patrol car before putting the defendant there. Nor was there any evidence contradicting the corrections officer's testimony that the defendant was holding the heroin in his hand. Unlike King this case presented an "either-or" choice for the jury. Either they

believed the defendant was in possession of heroin in each location or they disbelieved it and acquitted the defendant. In that regard this case is like Bobenhouse.

B. THE COURT OF APPEALS ERRED WHEN IT CONCLUDED THE EVIDENCE SHOWED SEVERAL DISTINCT ACTS OF POSSESION OF CONTROLLED SUBSTANCE.

Since the Court of Appeals decision does not conflict with a decision from another decision of the Court of Appeals, and is consistent with a decision from this court, review should be denied. However, if this court does accept review of that issue then the State asks the court to likewise review the lower court's holding that a Petrich instruction was improperly denied. The decision conflicts with decisions from this court and from the Court of Appeals. Review is justified under RAP 13.4(b)(1) and (2).

No unanimity instruction or election are required where the evidence demonstrates a continuing course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). Whether the defendant's acts constitute a continuing course of conduct is evaluated in a commonsense manner. Id. The court considered (1) the time separating the criminal acts, and (2) whether the criminal acts involved the same parties, location, and ultimate purpose.

State v. Brown, 159 Wn. App. 1, 14, 248 P.3d 518 (2010), review denied, 171 Wn.2d 1015 (2011).

The court found a continuing course of conduct in two cases where the defendant was found to have possessed drugs in two different locations. State v. Love, 80 Wn. App. 357, 908 P.2d 395 (1996), State v. Fiallo-Lopez, 78 Wn. App. 717, 899 P.2d 1295 (1995). In each case the court found that no unanimity instruction was required where the circumstances involved the same people and the same objective intent to deliver the drugs. Love, 80 Wn. App. at 362, Fiallo-Lopez, 78 Wn. App. at 725-726.

Here the Court of Appeals held the facts of this case were unlike Love in that the State had not charged the defendant with possession with intent to deliver and there was no evidence that his possession was part of a "single objective." The court found that the case was more like King because the evidence showed the defendant possessed heroin at two different times and in two different places. Slip Op. at 6.

That reasoning is flawed for several reasons. First the nature of the charge is immaterial. A continuing course of conduct has been found in other circumstances where the defendant's activity shared a common purpose of promoting a criminal enterprise.

State v. Knutz, 161 Wn. App. 395, 408, 253 P.3d 437 (2011). Thus several acts of theft have constituted a single course of conduct where the evidence showed a single objective – to obtain money by deceit. Id. at 409. Several acts of promoting prostitution were similarly held to be a continuing course of conduct where the overarching enterprise had a single objective – to make money. State v. Barrington, 52 Wn. App. 478, 481, 761 P.2d 632 (1988), review denied, 111 Wn.2d 1033 (1989).

Second, the intent to possess drugs is a criminal objective even if possession is only for personal use. RCW 69.50.401, State v. Hystad, 36 Wn. App. 42, 48-49, 671 P.2d 793 (1983). Therefore is it unnecessary to have an objective beyond mere possession to constitute a continuing course of conduct.

Third, as demonstrated in Kuntz, Barrington, Love and Fillalo-Lopez, whether he possessed the drugs in two different places and at two different times is not dispositive. In Love and Fiallo-Lopez the possession with intent to deliver drugs occurred virtually simultaneously. The discovery of those drugs occurred sequentially, with little time separating each discovery.

The circumstantial evidence was that the defendant had two baggies of heroin on his person at the same time while riding in the

patrol car. Since the car had been checked and found not to contain any drugs before the defendant entered the car, the only place it could have come from was from somewhere on or in the defendant's person. Likewise the defendant had no opportunity to obtain heroin from the time he was removed from the patrol car to the time he was found holding the baggie while seated in the restraint chair. It must have been on or in his person while he was in the patrol car. Failure to locate either baggie during the pat down at the scene of the arrest or during the search at the jail does not undermine this conclusion. It simply means the defendant hid the drugs well.

C. REVIEW OF THE COURT OF APPEALS DEICSION DENYING COSTS TO THE STATE AS THE SUBSTANTIALLY PREVIALING PARTY IS WARRANTED WHERE THERE ARE NO APPARENT STANDARDS USED BY THE COURT OF APPEALS TO EXERCISE ITS DISCRETION WHEN RULING ON A COST BILL.

The Court of Appeals, the Supreme Court, and superior courts may require an adult defendant convicted of an offense to pay appellate costs. RCW 10.73.160(1). The commissioner or clerk of the Court of Appeals will award costs to the party that substantially prevails on appeal unless the appellate court directs otherwise in its decision terminating review. RAP 14.2. The appellate court has discretion to award costs regardless of the

merits of the appeal. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In the context of fee shifting statutes the United States Supreme Court recognized that judicial discretion is rarely without limits even where the statute at issue does not specify any limits. Flight Attendants v. Zipes, 491 U.S. 754, 758, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989). "Without governing standards or principles, such provisions threaten to condone judicial 'whim' or predilection. Kirtsaeng v. John Wiley & Sons, Inc., __ U.S. __, 136 S.Ct. 1979, 1986, 195 L.Ed.2d 368 (2016). In Kirtsaeng the court adopted a totality of the circumstances standard. That standard permitted a court to exercise its discretion in awarding attorney's fees under §505 of the copyright infringement act based on such factors as the objective reasonableness of the losing parties' position, a parties' misconduct during litigation, or by a parties abuse of the judicial system. Id. at 1988-1989.

In the past this court has similarly considered the circumstances of the litigation in determining whether an award of costs to the prevailing party was warranted. The court refused to depart from the general rule was that an award of costs would be granted to the successful party since to so would only mean a shift

of hardship from one party to another. Association Collectors, Inc. v. King County, 194 Wash 25, 44, 76 P.2d 998 (1938). However the court considered litigation misconduct a controlling factor when exercising its discretion on costs in Brown v. Brown, 192 Wash. 333, 73 P.2d 795 (1937). There the prevailing party was denied an award of costs because she had failed to timely perfect the record on appeal. Id. at 338.

Recently the Court of Appeals has revisited the issue of the court's discretion to award costs to the substantially prevailing party in State v. Sinclair, 192 Wn. App. 380, 367 P.3d 612, review denied, 185 Wn.2d 1034 (2016). The court recognized there was a difference between RCW 10.01.160 and RCW 10.73.160. Under RCW 10.01.160 the trial court was required to consider the defendant's ability to pay before imposing trial court. Under RCW 10.73.160 no such ability to pay analysis was required. Nonetheless, for the first time ever, and without citation to any authority from any jurisdiction, the Court held that ability to pay was "an important factor that may be considered under RCW 10.73.160." Id. at 389.

The Court's decision marks a departure from previous cases which have focused on the circumstances of the case, rather than

the parties' personal circumstances, as relevant to an exercise of discretion when considering an award of costs. The court did acknowledge that there were other factors that bore on that exercise of discretion, but did not articulate what those factors might be. Id. at 389. Since the parties in that case focused on ability to pay the court relied solely on that factor to deny an award of costs. Id. 393-394.

Since Sinclair was decided experience has shown that the Court of Appeals, Division I has denied costs in most cases but has granted costs in a few cases. The court has not explained the reason for denying or granting those costs. The reasons are not apparent from the arguments raised or the facts of each case. Thus there is confusion as to the standard employed for granting or denying an award of costs. This case illustrates the confusion occasioned by these decisions.

The defendant filed a motion for reconsideration including an objection to the State's cost bill citing primarily the judicial finding that he was indigent for purposes of appeal. He also compared his case to Sinclair stating that he will be in prison and his financial picture would be unlikely to improve while there. See Motion to Reconsider at 5-6. The State responded noting that as to the ability

to pay claim the record reflected reasons to believe the defendant could make some payments toward appellate costs. At sentencing the defendant admitted his problems stemmed from drug use, but that he was working on cleaning himself up. Further he had demonstrated an ability to pay something, because he had made some payments while in prison. Answer to Motion for Reconsideration at 8-9; Supp. CP. The defendant was sentenced to 13 months confinement in January 2015. He is most certainly out of custody at this time.

Although there were sound reasons to impose appellate costs the Court of Appeals nonetheless granted the defendant's motion for reconsideration to the extent that it denied appellate costs. It is not clear why the court did that. When considered in light of other decisions on appellate costs there appears a need for this court to articulate some standards for the court's exercise of discretion when considering an award of costs.

V. CONCLUSION

The Court of Appeals decision holding that error in failing to give a Petrich instruction does not conflict with a decision of the Court of Appeals, and review should be denied. However, if the Court accepts review of that decision, then the Court should

likewise review whether it was error to refuse the Petrich instruction because that decision does conflict with decisions from this court and the Court of Appeals. The Court should also accept review of the Court of Appeals decision to deny the State's cost bill and provide some guidance as to the standards that should be used when exercising the court's discretion to grant costs on appeal.

Respectfully submitted on August 29, 2016.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent, v. DENNIS W. JACKSON, Appellant.	No. 93504-1 DECLARATION OF DOCUMENT FILING AND E-SERVICE

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ANSWER TO MOTION FOR DISCRETIONARY REVIEW

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Dated this 29th day of August, 2016, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

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Please accept for filing the following attached document: State's Answer to Petition for Review

Thanks.

Diane.

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