Supreme Court No. 97580-9
Court of Appeals No. 77957-5-I

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

BENJAMIN ALLEN MARTIN,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Benjamin Martin, the petitioner, asks this Court to grant review of the Court of Appeals' decision terminating review.[1]

B. ISSUES PRESENTED FOR REVIEW

1. While Mr. Martin was on probation, police arrested him in a drug-sting and seized his cell phone. Nine day later, the police called in a department of corrections officer that worked regularly with them so that he could use his "authority" to conduct a warrantless search of the phone. The officer conducted a general exploratory search of the phone, not limiting himself to any particular applications or timeframe. Did the probation exception to the warrant requirement not apply when the search was part of a criminal investigation rather than as part of the supervisory process? Was the scope of any lawful search exceeded when the officer did not limit his search of the phone to areas related to the suspected probation violation? RAP 13.4(b)(3), (4).

2. Constitutional error is not harmless unless the State can prove beyond a reasonable doubt that the error did not contribute to the verdict. The evidence obtained from Mr. Martin's cell phone showed he responded

[1] A copy of the unpublished opinion, dated July 1, 2019, and order denying Mr. Martin's motion for reconsideration, dated July 30, 2019, are attached in the Appendix.

to inquiries to meet and sell drugs. The court admitted messages connected to the drug-sting, along with messages Mr. Martin had sent to others that day about selling drugs. These messages rebutted Mr. Martin's defense that he lacked intent to deliver drugs and showed he had a propensity to sell drugs. Was the error in admitting evidence from the unconstitutional search of Mr. Martin's phone prejudicial? RAP 13.4(b)(1), (3), (4).

C. STATEMENT OF THE CASE

On the evening of December 6, 2016, Everett police arrested Benjamin Martin near a Saint Vincent de Paul thrift store. CP 244-45; 3RP 235. Mr. Martin, who was on community custody, had failed to report. 1RP 32[2]; CP 170-71. According to the four police officers involved in the arrest, they used a ruse to lure Mr. Martin to the location. 3RP 174, 232-33, 265, 298.

Earlier that day, Officer Antoliy Kravchun found a Facebook profile, with the name of "Benjamin Brackett," that he believed belonged to Mr. Martin. 3RP 206; Ex. 1. He showed the profile to Officer Oleg Kravchun, his brother. 3RP 231-33. Using a "burner" cell phone he had

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[2] Citations to the transcripts are as follows:

1RP = June 1, 2017 (pretrial hearing);
2RP = June 26 & 27, 2017 (first trial);
3RP = January 8, 9, 10 & 22, 2018 (second trial).

purchased with Department funds and a phone number found on the Facebook page, Officer Antoliy[3] texted Mr. Martin. 1RP 17. Calling himself "TJ," Officer Antoliy inquired about meeting Mr. Martin to purchase a "dub" of methamphetamine. 3RP 178. The two planned to meet, but Officer Antoliy canceled the meeting, later explaining that he had to attend to other duties. 3RP 180.

Officer Antoliy texted Mr. Martin later that day, again inquiring about purchasing methamphetamine, this time asking for a "T," which is a larger amount than a "dub." 3RP 183. They agreed to meet near a Saint Vincent de Paul. 3RP 185. Officers Antoliy, Oleg, and Duane Wantland went there and waited in an unmarked surveillance van. 3RP 210-11, 299. Sergeant Jeff Hendrickson waited further away in a marked police vehicle. 3RP 265.

As recounted in the police reports and the statement of probable cause, the officers in the van immediately arrested Mr. Martin when he appeared on foot in the parking lot. Exs. 43, p. 7 (Oleg report); 44, p. 2 (Wantland report); 48, p. 2 (Antoliy report); 49 p. 2 (Wantland report); CP 245. Mr. Martin denied he was there for a drug deal. 3RP 194. Officer Antoliy searched Mr. Martin incident to arrest. 3RP 194-95. He found a

[3] For clarity, Officers Antoliy Kravchun and Oleg Kravchun are referred to by their first names.

cell phone. 3RP 195. He claimed that the screen on the phone was lit when he pulled it from Mr. Martin's pocket and that he saw the last text message he had sent Mr. Martin on the screen. 3RP 195. Mr. Martin had a little less than $700 in currency on him, mostly in large bills. 3RP 240. Officer Antoliy found a small amount of a substance, later determined to contain methamphetamine, in a plastic grocery bag in Mr. Martin's pocket. 3RP 194, 239; Exs. 4-5. On the ride to the station, Mr. Martin purportedly asked who had set him up and, in response to a statement from an officer about whether the officer needed to contact witness protection, stated he was going to put a hit on the informant. 3RP 237, 296-97.

Officer Oleg took Mr. Martin's phone and placed it in "airplane" mode sometime after about 6 p.m. 1RP 48; Pretrial Ex. 2 (showing missed call at 5:58 p.m). He later turned it off and placed it in his personal locker. 1RP 55-56. Nine days after Mr. Martin's arrest, the police searched Mr. Martin's phone without a warrant. 1RP 54-55. The search was nominally done by Louis Mahre, a Department of Corrections Officer who worked regularly with the Everett police and their Anti-Crime Team ("ACT"). 1RP 31, 36; 3RP 291. On December 23, 2016, the prosecution charged Mr. Martin with possession of a controlled substance with intent to manufacture or deliver. CP 248.

Mr. Martin moved to suppress the evidence gathered from this search of his cell phone. CP 229-32. At the combined CrR 3.5 and 3.6 hearing, Officers Antoliy, Oleg, and Wantland all testified about how they arrested Mr. Martin when he arrived in the parking lot. 1RP 12, 24, 45. The court denied Mr. Martin's motion to suppress, ruling the warrantless search was authorized by RCW 9.94A.631(1). CP 201-03.

Trial began in late June 2017. 2RP 1. In her opening statement, defense counsel argued that while the evidence would show that Mr. Martin possessed a controlled substance, the evidence would not prove beyond a reasonable doubt that he intended to deliver that substance. 2RP 67-69. Defense counsel emphasized that the officers had been looking for Mr. Martin and that they had immediately arrested Mr. Martin as he was walking through a parking lot. 2RP 67-68.

The story told by Officers Antoliy and Oleg, however, now differed. Now, they testified they did not immediately arrest Mr. Martin. 2RP 84-85, 120-21. Rather, they arrested Mr. Martin *after* he walked past their unmarked vehicle and as he was getting into the passenger side of a Toyota Corolla. 2RP 84-86, 120-21.

This Corolla had been unoccupied, but was occupied when Mr. Martin arrived on the scene. 2RP 86, 121. As Mr. Martin was getting into

the passenger side of the Corolla, the officers pulled up in their van, jumped out, and arrested Mr. Martin. 2RP 86, 144.

All of this was news to defense counsel. One of the text messages sent by "TJ" stated that he was in a "Corolla." Exs. 25, 38. But none of the four reports authored by the four officers mentioned a Corolla or that Mr. Martin had tried to get into a vehicle, let alone an occupied vehicle. Exs. 43, p. 7 (Oleg report); 44, p. 2 (Wantland report); 48, p. 2 (Antoliy report); 49 p. 2 (Wantland report); 2RP 142. This information was also not disclosed in defense interviews with the officers. 2RP 144. And despite being asked about what they observed, the officers' testimony at the pretrial hearing did not disclose this information. 2RP 145, 149.

Following Officer Oleg's testimony, Mr. Martin moved for a mistrial because of the new information. 2RP 156. Recognizing the prejudice, the court declared a mistrial. 2RP 170-71.

The second trial began in early January 2018. 3RP 1. The court adhered to its pretrial rulings. 3RP 8-18. This included a ruling that text messages indicative of illicit drug transactions, made on the same day as Mr. Martin's arrest, were admissible. 2RP 30; 3RP 13-14, 243-44.

Mr. Martin maintained his defense of simple drug possession. 3RP 166-170, 347. Defense counsel emphasized that Mr. Martin had not been found with items that were indicative of drug dealing. 3RP 355-56. Mr.

Martin was not armed with a firearm. 33RP 216. He did not have a ledger. 3RP 217. He did not have scales. 3RP 217. And he did not have small glassine baggies, commonly used to package drugs for distribution. 3RP 217.

Defense counsel also pointed out the many inconsistencies in the officers' testimony, including about how methamphetamine is sold on the streets. 3RP 348-51. In the text conversation, "TJ" first asked to purchase a "dub," but then later asked to purchase a "T." 3RP 178, 183. Exs. 31, 35. The opinions by the officers about the how much a "T" weighed or costed varied wildly. 3RP 183, 196, 203-06, 208-09, 257-59. Despite contrary statements in their reports and in previous testimony, the amount of a "T" had conveniently changed to be more consistent with what had been found on Mr. Martin. 3RP 204, 255-57, 348-51.

Defense counsel further emphasized that the officers' account had changed significantly. 3RP 348. In their reports, during interviews, and their sworn testimony at a pretrial hearing, the officers had said nothing about a Corolla and had not stated that Mr. Martin had tried to get into a car. 3RP 213-14, 218, 238, 252, 267, 348.

The explanation by the officers for their "omission" was the Corolla had originally been unoccupied when Officer Antoliy ("TJ") said he was in a Corolla. 3RP 190. But when Mr. Martin arrived, a person had

just got into the Corolla. 3RP 188-89. Because they had "safety" concerns, the officers conspired to omit this information from their reports. 3RP 190, 238, 252. Although they did not get the name of the driver or the license plate number of the Corolla, they thought putting the information about the Corolla in their reports would pose a danger to the unknown driver. 3RP 221, 226, 238, 267-68. They cited Mr. Martin's purported comment about wanting to put a hit on the informant. 3RP 219. But the officers maintained there was no informant and that "TJ" was Officer Antoliy. 3RP 192, 224. Officer Antoliy admitted another reason for the omission was that he did not want to be questioned about why he did not get the name of the driver or the license plate of the Corolla. 3RP 222.

Despite the lack of evidence showing an intent to deliver, the inconsistencies, and the significant credibility issues with the officers' testimony, the jury convicted Mr. Martin as charged. CP 148. While there was thorough briefing on the issues and oral argument, the Court of Appeals declined to address the merits of Mr. Martin's arguments, reasoning all the claimed errors were harmless beyond a reasonable doubt. Slip op. at 2.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court should grant review to decide whether the police can avoid getting a warrant to search a cell phone by abusing the probation exception to the warrant requirement. Review is also justified to decide whether the scope of a search into a probationer's cell phone is limited to areas of the phone connected to the suspected probation violation.

a. The search of Mr. Martin's cell phone was not authorized under the probation exception to the warrant requirement.

There is no categorical "probation exception" to the warrant requirement under either article I, § 7 or the Fourth Amendment. State v. Cornwell, 190 Wn.2d 296, 301-02, 412 P.3d 1265 (2018); see United States v. Lara, 815 F.3d 605, 607 (9th Cir. 2016). Although diminished, persons "on probation do not forfeit all expectations of privacy in exchange for their release into the community." Cornwell, 190 Wn.2d at 303.

The probation exception to the warrant requirement did not justify the sham procedure used to search Mr. Martin's phone. And even if the probation exception authorized an invasion into Mr. Martin's cell phone, the scope of the search was plainly exceeded by the officer's exploratory search.

Under the probation exception, "[i]ndividuals' privacy interest can be reduced only to the extent 'necessitated by the legitimate demands of the operation of the community supervision process." Cornwell, 190

Wn.2d at 303-04 (internal quotation and brackets omitted). Before a probation officer can search a probationer's property, there must be reasonable suspicion of a probation violation. Id. at 302. There must also be a nexus between the alleged probation violation and the property searched. Id. at 306.

In this case, the search of Mr. Martin's cell phone was unlawful for two reasons. First, the probation exception did not apply because it was not tied to the legitimate demands of the community supervision process. And second, even if it did apply, the scope of any legitimate search under the probation exception was exceeded.

Exceptions to the warrant requirement under article I, section 7 are "jealously guarded." State v. Valdez, 167 Wn.2d 761, 773, 224 P.3d 751 (2009). Washington courts must be wary "of the danger of wandering from the narrow principled justifications of [an] exception, even if such wandering is done an inch at a time." Id. at 774-75. Relatedly, "the police may not abuse their authority to conduct a warrantless search or seizure under a narrow exception to the warrant requirement when the reason for the search or seizure does not fall within the scope of the reason for the exception." State v. Ladson, 138 Wn.2d 343, 357, 979 P.2d 833 (1999). As with all exceptions to the warrant requirement, the probation exception must remain tethered to its rationale, particularly when new technology is

involved. See Carpenter v. United States, __ U.S. __, 138 S. Ct. 2206, 2219-20, 201 L. Ed. 2d 507 (2018) (rejecting application of third party doctrine under Fourth Amendment to cell-site location information); Riley v. California, __ U.S. __ 134 S. Ct. 2473, 2485, 189 L. Ed. 2d 430 (2014) (rejecting application of search incident to arrest exception to cell phones); State v. Samalia, 186 Wn.2d 262, 275-76, 375 P.3d 1082 (2016) (applying abandonment exception to cell phones).

Here, the police plainly abused the probation exception as a pretext to avoid getting a warrant. The search of Mr. Martin's cell phone was not "necessitated by the legitimate demands of the operation of the community supervision process." Cornwell, 190 Wn.2d at 303-04. Rather, the purpose of the search was to further a criminal investigation. The police called in a probation officer who worked with them so that this officer could use his "authority" to search Mr. Martin's phone. 1RP 62-63. While nominally a probation officer, the officer who searched the phone was not Mr. Martin's probation officer. Because the search was not tied to the probation exception, the exception did not apply.

b. Even if the probation exception applied, the scope of the authorized search was exceeded.

Additionally, the search was unlawful because the scope of any legitimate search under the probation exception was exceeded.

The problem is not a lack of a nexus connecting the alleged probation violation (possessing drugs) to Mr. Martin's cell phone. Rather, the problem is the search of the cell phone was not limited to the alleged probation violation. In looking for evidence of the suspected violation, the officer did not limit his search to specific dates or to any applications. 1RP 40. He admitted, "I was just going through it." 1RP 40. Based on this exploratory search, the prosecution sought to introduce evidence of drug transactions occurring "four days prior" and "13 days prior" to the incident at issue. 2RP 25. The actions by the (nominally) probation officer does not comport with the narrow probation exception to the warrant requirement under article I, section 7.

"[F]ishing expedition[s]" are not permitted under the probation exception to the warrant requirement under article I, § 7. Cornwell, 190 Wn.2d at 307. In construing exceptions, courts must be mindful of "the vast store of sensitive information on a cell phone." Carpenter, 138 S. Ct. at 2214. Thus, reasonable suspicion of a probation violation did not justify a fishing expedition into Mr. Martin's phone.

Like the requirement that warrants must be particular in their scope, searches under RCW 9.94A.631 must also be particular. Cf. State v. McKee, 3 Wn. App. 2d 11, 25-29, 413 P.3d 1049 (2018) (warrant authorizing search of cell phone was overbroad), reversed on other

grounds, 193 Wn.2d 271, 438 P.3d 528 (2019)). Thus, reasonable suspicion that evidence of a probation violation will be found on a probationer's cell phone provides authority to search *only* those areas of phone where the evidence is reasonably likely to be.

For this separate reason, the search of Mr. Martin's phone was unlawful.

c. Review is warranted to address the application of the probation exception to cell phones.

This Court should grant review to provide guidance on when the probation exception to the warrant requirement applies to cell phones and the scope of the exception. This Court only recently held that the probation exception requires a nexus between the suspected probation violation and the property to be searched. Cornwell, 190 Wn.2d at 306. How this applies to cell phones is a significant issue of constitutional law that this Court should review. RAP 13.4(b)(3). Review of the issue is also a matter of substantial public interest because given the prevalence of cell phones and the many people on probation, the issue will recur. RAP 13.4(b)(4).

2. The Court should grant review to provide guidance on application of the harmless beyond a reasonable doubt test.

The Court of Appeals declined to provide any guidance on the important issue of the application of the probation exception to cell

phones. Instead of addressing the issue, the Court reasoned that any error was harmless. This was a misapplication of the constitutional harmless error test that contravenes this Court's precedent, further meriting review.

The United States Supreme Court has held that constitutional error requires reversal unless the court is "able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The court "must find—beyond a reasonable doubt—that *any reasonable jury* would have reached the same result, despite the error." State v. DeLeon, 185 Wn.2d 478, 487, 374 P.3d 95 (2016) (internal quotation omitted).

Different formulations guide the appellate court in its analysis. One formulation asks whether the court can conclude "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Neder v. United States, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); see, e.g., State v. Monday, 171 Wn.2d 667, 680-81, 257 P.3d 551 (2011) (appeal to racial bias by prosecutor not harmless because court unable to "say beyond a reasonable doubt that the error did not contribute to the verdicts"). Another formulation requires the court to conclude, beyond a reasonable doubt, that overwhelming untainted evidence establishes the jury would necessarily have found guilt

notwithstanding the error. State v. Romero-Ochoa, __ Wn.2d __, 440 P.3d 994 & n.3, 997 (2019).

Courts should not myopically focus on the overwhelming evidence test. See State v. Powell, 126 Wn.2d 244, 267 n.5, 893 P.2d 615 (1995). The United States Supreme Court has warned against "'overemphasis'" on the notion that error is harmless if there is overwhelming evidence of guilt." 3B Charles Wright et al., Fed. Prac. & Proc. Crim. § 855 (4th ed) (quoting Chapman, 386 U.S. at 23)); accord Coristine, 177 Wn.2d at 392 (Gonzalez, J., dissenting). The Court has emphasized that "it is not the function of this Court to determine innocence or guilt, much less to apply our own subjective notions of justice. Our duty is to uphold the Constitution of the United States." Bumper v. North Carolina, 391 U.S. 543, 550 n. 16, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968). In analyzing whether a constitutional error is harmless, the appellate court does not "become in effect a second jury to determine whether the defendant is guilty." Neder, 527 U.S. at 19. (internal quotation omitted).

This Court's opinion in Monday is illustrative. There, video clearly showed the defendant repeatedly shooting the decedent. Monday, 171 Wn.2d at 669, 680 n.4. After being shown the video, the defendant confessed. Id. at 670. Despite this evidence, the Court reversed the conviction for first degree murder due to racial animus by the prosecutor.

Id. at 680-81. The Court reasoned that it was unable to say whether the prosecutor's appeal to racial animus contributed to the jury's verdict. Id. at 680-81. The Court emphasized its role was "not to determine whether there was sufficient evidence to sustain the jury's verdict." Id. at 680 n.4.

In this case, the Court of Appeals concluded the admission of evidence gathered from Mr. Martin's cell phone was harmless because "unchallenged evidence overwhelmingly demonstrates Martin's guilt of possession with intent to deliver." Slip op at 6-7. Because this is a misapplication of the constitutional harmless error test and conflicts with precedent, including Monday, this Court should grant review. RAP 13.4(b)(1).

An error may be harmless if the erroneously admitted evidence had "no bearing on disputed factual issues before the jury." State v. Watt, 160 Wn.2d 626, 640-41, 160 P.3d 640 (2007). Here, the central issue at trial was whether Mr. Martin had *intent* to deliver the drugs found. The erroneously admitted evidence went to the heart of the case. And Mr. Martin contested the claim that he had intent. He emphasized the evidence showing he had not been found with items indicative of drug dealing. 3RP 216-17, 355-56. But the illegally obtained evidence from his cell phone undermined the defense by corroborating the officer's testimony about setting up a deal with Mr. Martin. The evidence from the cell phone also

showed that Mr. Martin may have engaged in drug related transactions with other persons that day. Exs. 39-42. The jury even received an instruction stating that it could consider this evidence in deciding whether Mr. Martin had *intent* to deliver the drugs found on him. CP 165 (instruction no. 14).

Because the illegally obtained evidence went to the heart of the case, it cannot be proved beyond a reasonable doubt that the error did not contribute to the verdict. As Monday illustrates, that other evidence arguably showed intent does not render the error harmless. There, this Court rejected the notion that video of a shooting and a confession overwhelmingly established premeditated intent and rendered harmless the constitutional error. Monday, 171 Wn.2d at 680 n.4. Moreover, given that there was evidence to support the defense's position that Mr. Martin did not have intent to deliver, it is improper to hold the error harmless. See Neder, 527 U.S. at 19 (explaining court should not find error in omitting element of offense in jury instruction harmless if "the defendant contested the omitted element and raised evidence sufficient to support a contrary finding").

As for the untainted evidence, "[h]armless error review requires close scrutiny of all the evidence." Romero-Ochoa, 440 P.3d at 998. The Court of Appeals stated that Mr. Martin does not point to any difference

between the photos of his cell phone and the (conveniently) lost "burner" phone purportedly used by Officer Anatoliy to text Mr. Martin. Slip op. at 6. Mr. Martin's cell phone, however, shows the messages were sent and received *on December 6*. Exs. 31-42. In contrast, the photos from the lost burner phone supposedly used by the police do not show the dates of when the messages were sent or received. Exs. 11-25. Moreover, as Mr. Martin noted in his opening brief, some of the messages in the two sets of photos are curiously in a different order. Br. of App. at 28, n.11.

If the prosecution did not have photos from Mr. Martin's phone showing the messages sent and received on December 6, one or more of the jurors could have had a reasonable doubt as to whether the prosecution had met its burden. The jury was instructed that a "reasonable doubt is one for which a reason exists and may arise from the evidence *or lack of evidence*." CP 153 (instruction #2) (emphasis added). As explained, given the conspiracy by the officers to omit information from their reports and in their sworn testimony, the jury could have viewed the testimony from law enforcement with skepticism. Br. of App. at 10-11, 27-28. That skepticism may have been overcome with the illegally obtained evidence.

If the prosecution only had photos from the (inexplicably lost) burner phone, the jury could have had a reasonable doubt about the

authenticity of the messages. Instead, the jury was able to corroborate the authenticity of the messages using photos from Mr. Martin's phone.

Contrary to this Court's precedent, the Court of Appeals concluding the error was harmless beyond a reasonable doubt. Review should be granted. RAP 13.4(b)(1).

Review should also be granted to provide much needed guidance on how harmless error analysis should be performed. Until a better framework is established, review for harmless error will continue to be "an arbitrary exercise of judicial authority." Coristine, 177 Wn.2d at 387 (Gonzalez, J., dissenting) (quoting Dennis J. Sweeney, An Analysis of Harmless Error in Washington: A Principled Process, 31 Gonz. L. Rev. 277, 323 (1996)). Appellate courts frequently evaluate whether an error is prejudicial or harmless. Therefore, to provide clarity, review is warranted as the issue is one of substantial public interest. RAP 13.4(b)(4). Proper application of the harmless beyond a reasonable doubt test is also a significant constitutional issue this Court should address. RAP 13.4(b)(3).

"The problem with harmless error arises when we as appellate judges conflate the harmlessness inquiry with our own assessment of a defendant's guilt." Harry T. Edwards, To Err Is Human, but Not Always Harmless: When Should Legal Error Be Tolerated?, 70 N.Y.U.L. Rev. 1167, 1170 (1995). Respectfully, Mr. Martin submits that the Court of

Appeals conflated its own assessment of Mr. Martin's guilt with the harmless error inquiry. It did so by effectively becoming a second jury and weighing the evidence, which is improper. Neder, 527 U.S. at 19; State v. Robinson, 24 Wn.2d 909, 917, 167 P.2d 986 (1946) (legal rights "cannot be impartially preserved if the appellate courts make of themselves a second jury and then pass upon the facts"); see Rose v. Clark, 478 U.S. 570, 593, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986) (Blackmun, J., dissenting) ("The Constitution does not allow an appellate court to arrogate to itself a function that the defendant, under the Sixth Amendment, can demand be performed by a jury").

The prejudice caused by the trial court's error in denying Mr. Martin's motion to suppress was not harmless beyond a reasonable doubt. This Court should grant review.

E. CONCLUSION

For the foregoing reasons, Mr. Martin asks this Court to grant review.

DATED this 23rd day of August, 2018.

Respectfully submitted,

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Appendix

FILED
7/1/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BENJAMIN ALLEN MARTIN, Appellant.	No. 77957-5-I DIVISION ONE UNPUBLISHED OPINION FILED: July 1, 2019

CHUN, J. — After Benjamin Martin failed to report in accordance with the conditions of his community supervision, the Department of Corrections (DOC) issued a warrant for his arrest. Police set up a drug-deal sting operation, arresting Martin on the DOC warrant when he arrived at the designated meeting place. The State then charged Martin with possession of a controlled substance with intent to deliver while on community custody. A jury convicted him as charged.

Martin appeals, claiming (1) the probationer search[1] of his cell phone violated his constitutional rights because it (a) improperly bypassed the warrant requirement and (b) exceeded the permissible scope; (2) the trial court admitted

[1] "Probationer search" refers to the exception to the warrant requirement codified in RCW 9.94A.631(1), which provides:

> If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court or by the department. If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

evidence precluded by ER 404(b); and (3) the court should not have imposed legal financial obligations. Because any errors were harmless, we affirm Martin's conviction. Given Martin's indigency at the time of sentencing, we remand his Judgment and Sentence to the trial court to strike the $300 in legal financial obligations. The State concedes that we should strike these fees.

I.
BACKGROUND

A. The Arrest

In December 2016, Martin failed to report to the DOC, violating his community custody conditions. Consequently, the DOC issued a warrant for his arrest.

The DOC and Everett police encountered difficulty locating Martin. On December 6, 2016, Officer Anatoliy Kravchun[2] discovered a Facebook profile under the name "Benjamin Brackett," which he thought belonged to Martin. Due to the trouble in locating Martin, the police decided to try to arrest him on the warrant by setting up a drug deal. Officer Anatoliy texted the phone number on the Brackett profile seeking to purchase methamphetamine. Martin responded. Through text messages, the two agreed on an amount of methamphetamine and a purchase price for the sale. They decided to meet at an Everett thrift store.

Officers Anatoliy, Oleg, and Duane Wantland went to the thrift store in an unmarked surveillance van and waited for Martin to arrive. Officer Anatoliy told Martin he was in a Corolla. Martin came to the parking lot on foot and walked to

[2] Because we also mention Officer Oleg Kravchun, Officer Anatoliy Kravchun's brother, we refer to both by their first names for clarity. We intend no disrespect.

a Corolla. Martin began to open the Corolla's front passenger door when the officers pulled up and arrested him. Martin denied that he had gone to the thrift store to meet anyone. During the arrest, however, Martin asked who had "set him up."

A search incident to arrest yielded a bag of methamphetamine, $696 in cash, and a cell phone. As an officer removed the cell phone from Martin's pocket, the screen lit up and displayed Officer Anatoliy's phone number and the last text message he had sent. Officer Oleg activated the phone's "airplane" mode to preserve evidence. After taking photos of the cell phone's lock screen, Officer Oleg turned it off and placed it in his locker.

B. The Cell Phone Search

Nine days later, the police notified their DOC liaison, CCO Louis Mahre, that they had arrested Martin and seized his cell phone. The police asked CCO Mahre if he wanted to conduct a probationer search of the cell phone. CCO Mahre thought that, based on Martin's actions on the day of his arrest, he had reasonable cause to believe that Martin had violated his community custody supervision. Specifically, CCO Mahre thought Martin may have violated the conditions to obey all laws and not to possess controlled substances. Accordingly, he agreed to the search.

On December 15, 2016, CCO Mahre conducted a search of Martin's cell phone with Officer Oleg present. CCO Mahre discovered several text exchanges arranging sales of controlled substances. Officer Oleg took photos of the exchanges.

C. Trial

On December 23, 2016, the State charged Martin with one count of possession of a controlled substance with intent to deliver while on community custody.

Martin moved to suppress the evidence collected from his cell phone on the grounds that CCO Mahre conducted the search without a warrant and the search exceeded the permissible scope. The trial court held a CrR 3.6 hearing on June 1, 2017. Determining that the probationer search exception in RCW 9.94A.631(1) permitted the warrantless search of Martin's cell phone, the court denied his motion.

On June 16, 2017, during motions in limine, Martin moved to suppress (1) testimony that he had had a DOC warrant, and (2) the text exchanges showing drug dealing with individuals other than Officer Anatoliy. The court allowed testimony that the warrant existed, but precluded any statements that the DOC had issued it. As to the phone evidence, the court admitted other text exchanges from the day of Martin's arrest, but excluded exchanges from previous days.

Martin's trial[3] began in January 2018. In Martin's closing argument he admitted to possessing the methamphetamine, but argued that the State had

[3] Martin had two trials. The same trial judge presided over both trials. The second trial also maintained all rulings on motions in limine from the first trial. At Martin's first trial, the defense did not know that some of the officers were going to testify that they arrested Martin after he began to enter the Corolla. The officers had not mentioned the Corolla in their reports or their interviews with the defense. Because of the new information, the court declared a mistrial.

failed to prove intent to deliver. Accordingly, he asked the jury to convict him of the lesser included crime of possession of a controlled substance.

On January 10, 2018, the jury convicted Martin as charged. The court entered a judgment and sentence on January 22, 2018, and imposed a $200 filing fee and $100 DNA fee as legal financial obligations.

Martin appeals.

II.
ANALYSIS

A. Cell Phone Evidence

Martin contends that the probationer search of his cell phone violated the Washington and United States Constitutions because the police used it to improperly circumvent the warrant requirement. He further asserts that even if the CCO could search his phone, the search exceeded the statutory scope. As an alternative argument, the State asserts that, if erroneous, the failure to suppress the evidence collected from Martin's cell phone constituted harmless error. We agree.

When a trial court commits constitutional error, an appellate court should reverse and remand for a new trial unless the prosecution can prove that the error was harmless beyond a reasonable doubt. State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). To meet this burden, the prosecution must convince the court "beyond a reasonable doubt that the evidence not tainted by the error is, by itself, so overwhelming that it necessarily leads to a finding of guilt." State v. Trujillo, 112 Wn. App. 390, 404 n.10, 49 P.3d 935 (2002).

Here, the cell phone search led to the admission of 12 photos[4] of Martin's cell phone. The photos depicted the text exchange between Martin and Officer Anatoliy and the two other exchanges setting up drug deals. But the trial court also admitted photos of the exchange with Officer Anatoliy from the officer's phone. Thus, the photos of this exchange from Martin's cell phone, in large part, constituted cumulative evidence.

Furthermore, the unchallenged evidence admitted at trial included the following: police located a Facebook page they believed belonged to Martin and texted the number associated with the account; officers then had a text exchange setting up an illegal drug transaction for methamphetamine;[5] Martin arrived at the chosen location for the drug deal and at the designated time; after officers arrested Martin they discovered a cell phone on his person that displayed the last text message sent from Officer Anatoliy; Martin possessed methamphetamine at the time of the arrest; and, after the arrest, Martin insisted someone had "set him up." At trial, Martin admitted to possessing methamphetamine but argued that the State could not prove intent to deliver. But the unchallenged evidence

[4] The court also admitted a photo of the cell phone lock screen taken during the probationer search. The State also had a photo of the lock screen taken from the day of Martin's arrest, but it did not offer this photo into evidence. Both photos show Officer Anatoliy's phone number and the last text message he had sent. The trial court determined that "[t]he initial information on the illuminated lock screen is plain view evidence, not a search." Martin does not challenge this conclusion on appeal. Thus, we do not include the photo of the cell phone's lock screen in the list of cell phone photos that Martin challenges.

[5] Martin contends the photos of the text exchanges from Officer Anatoliy's phone are "not the equivalent" of the ones on his phone. But he does not point to any difference between the photos. He says the jury would doubt the authenticity of them due to "the officers' blatant dishonesty, as shown by their conspiring to omit material facts." Though, as the trial court noted, the officers' failure to disclose the facts about the Corolla before the first trial shows that they may "have been neglectful in their duty," the record does not demonstrate the malicious conspiracy alleged by Martin. The other physical evidence corroborates the authenticity of the photos.

overwhelmingly demonstrates Martin's guilt of possession with intent to deliver. We conclude that even if the trial court erred by admitting the challenged evidence from Martin's cell phone, that error was harmless beyond a reasonable doubt.

B. Warrant Testimony and Cell Phone Evidence Showing Prior Communications of Other Drug Dealing

Martin also contends the trial court erred by allowing testimony that he had a warrant for his arrest. Additionally, he claims the court erroneously admitted evidence showing his text exchanges from the day of his arrest regarding other drug deals. Assuming, without deciding, that the trial court erred, we again conclude the admissions were harmless.

Erroneous admissions of evidence under ER 404(b) require a harmless error analysis. State v. Gunderson, 181 Wn.2d 916, 926, 337 P.3d 1090 (2014). But because an error under 404(b) does not raise constitutional issues, the harmless error analysis is less demanding. Compare Coristine, 177 Wn.2d at 380 (noting the prosecution must prove harmlessness beyond a reasonable doubt for constitutional errors), with Gunderson, 181 Wn.2d at 926 (stating defendant must show that an error under 404(b) had a reasonable probability of affecting the outcome of their trial). For non-constitutional errors, an appellate court need determine only "whether, within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Gunderson, 181 Wn.2d at 926 (internal quotation marks omitted). As discussed above, the evidence unchallenged on appeal demonstrates Martin's guilt beyond

a reasonable doubt. Thus, the trial court admitting the testimony about Martin's warrant and the prior text exchanges at issue did not materially affect the outcome of the trial.[6] We conclude any error was harmless.[7]

C. Legal Financial Obligations

Finally, Martin seeks to have the $200 filing fee and $100 DNA fee stricken from his judgment and sentence pursuant to State v. Ramirez, 191 Wn.2d 732, 739, 426 P.3d 714 (2018). Ramirez, decided after the trial court imposed the fees in this case, held that trial courts may not impose discretionary costs on an indigent criminal defendant. 191 Wn.2d at 746. Here, the trial court recognized Martin's indigence when it allowed him to pursue his appeal at public expense. The State agrees that this court should strike the fees. Accordingly, we strike the criminal filing and DNA fees from Martin's Judgment and Sentence.

Affirmed and remanded for further proceedings consistent with this opinion.

WE CONCUR:

[6] Martin argues the admission of the warrant testimony requires reversal because the limiting instruction the court gave did not eliminate the unfair prejudice. The limiting instruction provided that the jury could only consider the warrant evidence for the purpose of lawfulness of the arrest. While we agree with Martin that this was not a proper purpose for the jury to consider, we nevertheless determine that, assuming admitting the warrant testimony constituted error, the error was harmless because of the other overwhelming, unchallenged evidence of his guilt.

[7] Martin also argues that this court should reverse his conviction under a cumulative error analysis. But because we determine that any error was harmless, we reject this argument. See State v. Stevens, 58 Wn. App. 478, 498, 794 P.2d 38 (1990) (no prejudicial error). Even excluding all the evidence challenged by Martin, overwhelming evidence of guilt remains.

FILED
7/30/2019
Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON, Respondent, v. BENJAMIN ALLEN MARTIN, Appellant.	No. 77957-5-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Benjamin Allen Martin, filed a motion for reconsideration of the opinion filed on July 1, 2019. Respondent, State of Washington, has not filed a response. A panel of the court has determined that the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Chun, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 77957-5-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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MARIA ANA ARRANZA RILEY, Legal Assistant Date: August 23, 2019
Washington Appellate Project

WASHINGTON APPELLATE PROJECT

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