

62839-9

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NO. 62839-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM FIFE,

Appellant.

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COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHATCOM COUNTY

The Honorable Ira J. Uhrig, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The warrantless search of Appellant's car violated the Fourth Amendment and Wash. Const. art 1, § 7 (Counts I – VII).

2. The "to-convict" instructions for unlawful possession of prescription drugs omitted an essential element. (Counts I – V).

3. The evidence was insufficient to prove unlawful possession of prescription drugs. (Counts I – V).

4. The evidence was insufficient to prove possession of heroin. (Count VII).

5. The trial court failed to ensure a unanimous verdict for the charge of possession of heroin. (Count VII).

6. The sentencing court miscalculated Appellant's offender score.

7. Appellant's sentence violated his Sixth Amendment right to have sentencing facts decided by jury.

Issues Pertaining to Assignments of Error

1. Did the warrantless search of Fife's car by police violate his rights under the Fourth Amendment and Wash. Const. art 1, § 7, when there was no applicable exception to the warrant requirement?

2. Were the jury instructions fatally defective in failing to include the essential element that the offense of unlawful possession of

pharmaceuticals requires proof the drugs were obtained without a prescription?

3. Was the evidence insufficient to support a conviction for unlawful possession of pharmaceuticals where the State neglected to prove the pills were obtained without a prescription?

4. Was the evidence insufficient to prove any of three alleged instances of possession of heroin?

5. To support the charge of possession of heroin (County VII), the State offered evidence of three potential acts of possession. Where the State failed to elect which act it was relying on to support the charge, and where the trial court failed to instruct the jury that to convict it must be unanimous as to which act constituted the crime, was Appellant denied his right to a unanimous jury verdict?

6. Did the court erroneously include an unproven 1976 burglary conviction in Appellant's offender score?

7. Did the sentencing court violate Appellant's Sixth Amendment right to a jury by running his sentences for the current convictions consecutively with an earlier sentence, where no jury findings supported departing from presumptively concurrent sentences?

B. STATEMENT OF THE CASE

Just before midnight on August 2, 2008, the Whatcom County Sheriff's 911 operator received an anonymous tip that Appellant William Lauren Fife was wanted on an outstanding warrant and that he was driving a turquoise Ford Probe with a suspended license. RP 19-20, 37, 110.¹ Fife was not the owner of the car. RP 55. The dispatcher issued a "watch for" alert for the car traveling south on the major arterial between Bellingham, Washington and the neighboring community of Lynden. RP 109-10, 117. Deputy Brent Wagenaar spotted Fife and stopped him to investigate the warrant and suspended license. RP 25, 113-14. Wagenaar recognized Fife from previous contacts. RP 29.

Deputy Courtney Polinder immediately joined Wagenaar, and they arrested Fife for the warrant and for driving with a suspended license. RP 33, 116-17. Polinder read Fife his rights, handcuffed him and secured him in his patrol car. RP 49-50, 161, 165. It was standard procedure to search every arrestee's vehicle after securing the scene. RP 32, 120.

Polinder told Fife he was going to search the car incident to Fife's arrest and asked Fife if there was anything illegal in the car. RP 52. Fife said there may be needles and some pills. RP 122, 163. Fife said he had

¹ RP refers to the consecutively paginated volumes designated Vol. I, 11/3/2008; Vol. II, 11/4/2008; and Vol. III, 11/5/2008, 12/16/2008, and 1/6/2009. A brief procedural hearing on December 9, 2008 is referred to as 12/9/2008 RP.

injected himself with heroin earlier that day. RP 165. Polinder searched the car and found assorted pills, a yellow box containing drug paraphernalia, and a set of scales. RP 165, 168-69, 176. Fife's wallet was also in the car. It contained \$1,250 in cash. RP 196. Wagenaar and Polinder testified that Fife appeared depressed and lethargic. RP 124, 199. Over a defense objection, both officers expressed the opinion, based on police training and experience, that Fife's demeanor was consistent with having consumed "a central nervous system depressant or a narcotic," "like heroin or something like that." RP 125, 164-65.

Fife was charged with unlawful possession of seven different controlled substances in violation of RCW 69.50.4013(1). CP 90-93. The substances were alleged to include: Dihydrocodeinone, an opiate (Count I); Diazepam, common name Valium, a "downer" (Count II); Alprazolam or Xanax, also a downer (Count III); Clonazepam, an anti-seizure drug (Count IV); Buprenorphine, common name Suboxone, a synthetic opiate prescribed for treatment of opiate addiction (Count V); Cocaine, (Count VI); and Heroin, (Count VII). CP 91-92; RP 214-15, 219, 222, 231.

At his jury trial, the State alleged Fife was in constructive possession of all seven substances by virtue of his dominion and control of the car in which they were found. RP 325. The State alleged the pharmaceuticals were in the form of pills. RP 364-65. Cocaine and

heroin were alleged to be present in a spot of brown residue on the scales. RP 177-78, 379. The State also alleged Fife possessed heroin, now consumed, when he injected earlier in the day. RP 270, 378.

The jury found Fife guilty on all counts. CP 58-59. At sentencing, Fife disputed every aspect of the alleged criminal history. RP 410. In particular, he challenged the validity of a pre-SRA burglary conviction in 1976 for which the State produced no judgment and sentence. RP 418, 429-30. The court adopted the State's proposed offender score of 8. RP 440. Counts I – VI were sentenced as the same criminal conduct that added one point to the offender score. Count VII was deemed separate conduct that added an additional point. RP 417-18, 422. The court imposed 24 months – the high end of the standard range – on each count. CP 27; RP 412. Over Fife's objection, the court imposed the current sentences to run concurrently with each other, but consecutively to a sentence Fife received October 2008 for the previous outstanding conviction. CP 30; RP 440.

Fife timely appeals. CP 3.

C. ARGUMENT

1. SEARCHING FIFE'S CAR VIOLATED THE FOURTH AMENDMENT AND WASH CONST. ARTICLE I, SECTION 7.

This issue was not raised below, but a significant change in the law has occurred during the pendency of the appeal. Accordingly, this Court should consider the issue. RAP 2.5(c)(2); Roberson v. Perez, 156 Wn.2d 33, 42, 123 P.3d 844, 849 (2005); State v. Koslowski, ___ Wn.2d ___, ___ P.3d ___ (2009), 2009 WL 1709639 at 1, note 1.

Fife was arrested on a bench warrant for failing to appear for a previous sentencing. After he was secured in the patrol car, Deputy Polinder announced his intention to search Fife's car incident to his arrest. Since Fife's conviction, the United States Supreme Court has held that a vehicle search under these circumstances violates the Fourth Amendment. Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 1715, 173 L. Ed. 2d 485 (2009).

The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" Washington Constitution article I, section 7, provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Article I, section 7 places greater emphasis on privacy than does the Fourth

Amendment. State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994). Art. 1, § 7 protects “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.” State v. Ladson, 138 Wn.2d 343, 348-49, 979 P.2d 833 (1999), quoting State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). The search of Fife’s car violated both the state and federal constitutions.

Under both constitutions, warrantless searches and seizures are per se unreasonable, subject to a few “well-delineated” and “jealously-guarded” exceptions. Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Facts that may create an exception to the warrant requirement include consent, exigent circumstances, searches incident to arrest, inventory searches, plain view, and Terry² investigative stops. Hendrickson, 129 Wn.2d at 71. The burden is on the State to prove one of these narrow exceptions applies. Id. In light of Gant, none of these exceptions justified Polinder’s search of Fife’s car.

Polinder relied on the search incident to arrest exception. The purpose of this exception is to ensure officer safety and preserve evidence of the offense leading to the arrest. Gant, ___ U.S. at ___, 129 S. Ct. at

² Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

1716. A vehicle search incident to an arrest for an offense for which no physical evidence exists is not justified once the scene is secure. Gant, ___ U.S. at ___, 129 S. Ct. at 1715. An automobile search incident to arrest is reasonable “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” Gant, 129 S. Ct. at 1719. Although a person’s privacy interest in his automobile is less substantial than in his home, it is nevertheless constitutionally protected. Gant, 129 S. Ct. at 1720. Allowing police to search an arrestee’s car when there is no reason to believe evidence of the offense might be found there undermines the Fourth Amendment’s central concern – to deny the police “unbridled discretion to rummage at will among a person’s private effects.” Id. That is what happened here.

Fife was handcuffed and secured in Polinder’s patrol car after being arrested for offenses for which the car could contain no physical evidence. Therefore, because there were no concerns about officer safety or the destruction of evidence, the search incident to arrest was not justified.

Neither did any other warrant exception apply. Other exceptions to the warrant requirement may authorize a vehicle search that is not justified by the arrest. Gant, 129 S. Ct. at 1721. Here, the State may argue that Polinder had probable cause to suspect Fife’s car contained evidence

of criminal activity independent of the reason for his arrest. Gant, 129 S. Ct. at 1721, citing United States v. Ross, 456 U.S. 798, 820-821, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982). This argument cannot succeed, however.

Probable cause to suspect the presence of contraband in Fife's car would have been based on Fife's custodial statement there were needles and pills in the car. But Fife's statement followed a coercive demand for information by Polinder. A demand for information by a police officer constitutes an intrusion into a person's private affairs.³ State v. O'Neill, 148 Wn.2d 564, 576, 62 P.3d 489 (2003); State v. Gleason, 70 Wn. App. 13, 17, 851 P.2d 731 (1993).

Whether such an intrusion is warranted is a purely objective inquiry, based solely on the actions of the officer. O'Neill, 148 Wn.2d at 574. A show of police authority that intrudes on protected privacy rights is justified only if "specific and articulable facts," taken together with rational inferences from those facts, reasonably warrant the intrusion. O'Neill, 148 Wn.2d at 576. Probable cause to rummage through a person's effects requires more than mere suspicion or an officer's personal belief that evidence of a crime will be found. State v. Jackson, 150 Wn.2d 251, 265, 76 P.3d 217 (2003).

³ So the Fourth Amendment governs, not the Fifth.

Fife was duly advised under Miranda⁴ of his right to remain silent regarding the offenses for which he was in custody. Polinder then proceeded – in what Gant holds was a Fourth Amendment violation – to conduct a warrantless search of Fife’s car. The search was initiated by an unwarranted demand for information about the car’s contents. Polinder did not inform Fife the police could not search the car unless Fife affirmatively consented. Fife’s response was not, therefore, voluntary. It was coerced by Polinder’s announcement that a search was imminent and inevitable.

The State need not establish that the subject of a search knew of his right to refuse consent to search if the person is not in custody. O’Neill, 148 Wn.2d at 588, citing Schneckloth v. Bustamonte, 412 U.S. 218, 248-249, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). Fife, however, definitely was in custody, which is an inherently coercive situation. Heinemann v. Whitman County Dist. Court, 105 Wn.2d 796, 806, 718 P.2d 789, 794 (1986).

Under the “cat-out-of-the-bag” theory, the State cannot benefit from an incriminating statement made after unlawful police conduct renders the right to silence meaningless. State v. Lavaris, 99 Wn.2d 851,

⁴ Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 10 A.L.R.3d 974 (1966).

664 P.2d 1234 (1983). That is what happened here. Polinder should have asked Fife's permission to search his car. Had he done so, Fife likely would have declined. But, since Polinder was going to search the car anyway, there was no point in Fife's keeping silent about the contents. Therefore, Fife's admission did not constitute either voluntary consent or lawful probable cause for a search. Rather, Polinder's show of authority unlawfully communicated to Fife that withholding consent was not a meaningful option.

No specific, articulable fact gave rise to a reasonable suspicion Fife had contraband in the car. Specifically, a history of similar crimes does not create probable cause for a warrantless search. Otherwise, anyone convicted of a crime would constantly be subject to harassing and embarrassing police searches. State v. Clark, 143 Wn.2d 731, 749, 24 P.3d 1006 (2001); State v. Hobart, 94 Wn.2d 437, 446-47, 617 P.2d 429 (1980). Likewise, carrying a large amount of cash falls short of probable cause that a crime is being committed. State v. Neth, 165 Wn.2d 177, 185, 196 P.3d 658, 663 (2008).

Our State Constitution's privacy clause recognizes no "good faith" exception to the exclusionary rule. State v. White, 97 Wn.2d 92, 107, 640 P.2d 1061 (1982). "Article I, section 7 is unconcerned with the reasonable belief of the police officers." State v. Eisfeldt, 163 Wn.2d 628, 636, 185

P.3d 580 (2008). Accordingly, this search is not saved by Polinder's reasonable reliance on the search incident to arrest exception.

The remedy for an illegal search is to exclude all evidence that was unlawfully obtained. White, 97 Wn.2d at 110. That means all the controlled substances found during the search of Fife's car were inadmissible at his trial. This Court should reverse Fife's convictions and dismiss the prosecution on all seven counts with prejudice.

2. THE "TO-CONVICT" INSTRUCTIONS OMIT AN ESSENTIAL ELEMENT OF THE CRIMES ALLEGED IN COUNTS I – V.

The "to-convict" instructions for unlawful possession of the pills alleged in Counts I – V fail to inform the jury of the essential element that the pills were not obtained by prescription. This requires reversal of these convictions.

Jury instructions are sufficient only if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law. State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002). Failure to instruct the jury on every element of a charged crime is an error of constitutional magnitude that may be raised for the first time on appeal. State v. Mills, 154 Wn.2d 1, 5, 109 P.3d 415 (2005). This Court reviews

the adequacy of “to-convict” instructions de novo. Mills, 154 Wn.2d at 7-8; State v. DeRyke, 149 Wn.2d 906, 910, 73 P.3d 1000 (2003).

“To-convict” instructions purport to be a complete statement of the charged crime and must therefore include every element of the crime. State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953). Specifically, when the absence of a prescription is an essential element of the offense, the State must prove that element beyond a reasonable doubt. Clausing, 147 Wn.2d at 626, citing In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

Fife was convicted under RCW 69.50.4013(1), which provides:

It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

The “to-convict” instructions for possession of each of the five kinds of pills state:

To convict the defendant of the crime of possession of a controlled substance, Count [I – V], each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 2nd day of August, 2008, the defendant possessed a controlled substance, to-wit [Name of Substance];

(2) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 80-84 (Instructions 12 – 16).

These instructions omit any reference to the prescription element. The error cannot be deemed harmless. Clausing, 147 Wn.2d at 628. The “to-convict” instructions relieved the State of its burden to prove the pills were obtained without a prescription. Accordingly, reversal is required. State v. Brown, 147 Wn.2d 330, 339-40, 58 P.3d 889 (2002).

3. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT FIFE’S POSSESSION OF THE PHARMECEUTICALS WAS UNLAWFUL.

As a corollary to failing to instruct the jury that the absence of a prescription was an essential element of the possession offenses in Counts I – V, the State failed to present any evidence on this element. The evidence is therefore insufficient to prove Counts I – V.

This Court reviews the sufficiency of the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found every essential element of the crime beyond a reasonable doubt. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). All reasonable inferences from the evidence are drawn in favor of the State and interpreted most strongly against the appellant. Id.

It is an essential element of unlawful possession of a controlled pharmaceutical that it was not obtained pursuant to a valid prescription or otherwise authorized by statute. RCW 69.50.4013(1). The State never so much as hinted to the jury that the pills in Fife's car were not obtained by prescription.

To prove unlawful possession of heroin and cocaine, it was sufficient for the State to show that Fife had dominion and control of the premises – the car – where they were found. Unlawful possession of prescription pills is, however, different. It is perfectly legal to possess pills, absent proof they were not obtained by prescription. To convict Fife on Counts I – V, the State had to show beyond a reasonable doubt that these pills were not obtained by prescription or other lawful means. The State failed even to mention the essential prescription element.

Retrial following reversal for insufficient evidence is prohibited. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). The Court should therefore reverse the convictions and dismiss Count's I – V with prejudice.

4. THE EVIDENCE WAS INSUFFICIENT TO PROVE POSSESSION OF HEROIN.

The State failed to establish beyond a reasonable doubt that the substance alleged in Count VII was heroin. This was an essential element

of the crime charged. CP 86 (Instruction 18); CP 92 (Fourth Amended Information, Count VII). Proof of essential facts cannot rest on “guess, speculation or conjecture.” State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972).

The heroin charge was based either on heroin possessed by Fife earlier in the day when he allegedly injected himself, or on heroin in residues on items present in the car when Fife was arrested. In either case, the State did not prove that the substance in question was heroin.

The State offered no proof the substance injected earlier in the day was heroin, other than that Fife believed it was heroin. But a person’s belief he is taking a particular substance is not evidence he ingested that substance. Hutton, 7 Wn. App. at 730. Also, Polinder thought Fife appeared to be under the influence of something like heroin. But Polinder, a layman, did not claim he could distinguish heroin symptoms from those of other opiates, including the pills alleged here. Ordinarily, prudence and necessity require expert identification of drugs. Id. That Fife possessed heroin paraphernalia is immaterial; possession of paraphernalia is not a crime. Finally, Fife appeared to undergo some sort of drug withdrawal at the jail. RP 291-92. This says nothing about what drugs were in his possession. The State offered no evidence as to what drug or drugs Fife was withdrawing from. In fact, the prosecutor argued that the withdrawals

proved Fife had ingested Buprenorphine, a synthetic opiate that is commonly prescribed to treat heroin addiction and that Fife was also charged with possessing. RP 374-75.

As to alleged residues in the car at the time of Fife's arrest, the State tested only a residue spot on a set of scales. The State's drug analyst could not positively identify heroin as a component of this residue, only that heroin possibly was present. RP 246. Evidence Fife possessed a substance that might possibly have been heroin does not constitute proof beyond a reasonable doubt of an essential element of unlawful possession. Hutton, 7 Wn. App. at 730-31. The circumstantial evidence simply does not permit the inference that any of the substances alleged to be heroin was in fact heroin as the prosecutor claimed in closing argument. RP 388. This Court should, therefore, reverse Fife's conviction for possession of heroin. The Court should also dismiss this charge with prejudice.

5. UNANIMITY OF THE VERDICT FOR POSSESSION OF HEROIN IS NOT GUARANTEED.

In closing argument, the prosecutor told the jury, "You need to find that whatever substance we are talking about meets the definition, legal definition of a controlled substance." RP 358. With regard to the alleged possession of heroin, however, the prosecutor never told the jury what substance he was talking about. The State alleged Fife possessed

residue in a vial and residue on a set of scales at the time of his arrest. The State also charged that Fife injected himself with heroin earlier in the day. Accordingly, the jurors could have convicted Fife without being unanimous as to which of the three possible substances comprised the criminal act.

Our state Constitution guarantees every person accused of crime the right to a unanimous jury verdict. Const. art. I, §§ 3, 21, 22; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). Failing to require a unanimous verdict is a manifest constitutional error that can be raised for the first time on appeal. RAP 2.5(a)(3); State v. Carothers, 84 Wn.2d 256, 262, 525 P.2d 731 (1974).

When the State alleges multiple acts, any of one which could independently prove a charged offense, either the State must elect which act it is relying on for conviction or the court must instruct the jury that all twelve must agree that one particular act was proved beyond a reasonable doubt. State v. King, 75 Wn. App. 899, 902, 878 P.2d 466 (1994), citing State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). This instruction is mandatory to ensure that the jury understands the unanimity requirement. Petrich, 101 Wn.2d at 572. Failure to ensure unanimity is presumed prejudicial unless the State proves each alleged incident beyond

a reasonable doubt. State v. Kitchen, 110 Wn.2d 403, 406, 756 P.2d 105, 106 - 107 (1988).

Here, the State did not make an election, the court did not instruct the jury it must unanimously agree, and none of the alleged instances of possession was proved beyond a reasonable doubt. The State did not make an election between alleged residue in the vial, alleged residue on the scales and alleged heroin in an earlier injection. Instead, the prosecutor argued the existence of all three during the testimony and throughout closing argument.

The prosecutor told the jury Polinder identified heroin residue in a vial found in Fife's car. RP 359. When defense counsel objected that this was not supported by the evidence, the prosecutor insisted Polinder observed residue in a vial that was consistent with heroin. RP 359. The court permitted the prosecutor to say that Polinder saw residue that was the same color as heroin. The prosecutor then repeated that Polinder identified heroin residue in the vial. RP 359. This misrepresented the evidence. Polinder merely said he found a vial in the car that was of a type commonly associated with controlled substances. RP 138. Thus, a verdict based on the vial would not be supported by the evidence. Later in his argument, the prosecutor again alleged that Fife was in possession of heroin residue in the vial. RP 369-70.

The State also argued that the jury could base its verdict on alleged heroin residue on the scales, even though the WSP expert was not willing or able to identify heroin in that residue. RP 379. Thus, a reasonable juror could have found that the presence of heroin residue on the scales was not supported by the evidence.

The prosecutor also urged the jury to convict based on Fife's alleged use of heroin earlier that day. The prosecutor argued, "Did Mr. Fife possess the heroin when he injected it into his backside earlier that day? Of course he did." RP 380.

The court told the jurors they had a duty to "deliberate to reach a unanimous verdict." CP 70 (Instruction 2). But the court did not explain that this required all twelve to agree that the same underlying criminal act was proved beyond a reasonable doubt.

This error cannot be deemed harmless. Some reasonable jurors might have recalled that Polinder never said there was residue in the vial. Others may have noted that the forensic analysis could not conclusively identify heroin on the scales. For those jurors, the "substance in question" must have been whatever Fife injected earlier, which they must have found was in fact heroin. But there is no evidence the substance he injected was heroin. Reasonable jurors might also have questioned Polinder's medical credentials to diagnose that Fife's symptoms resulted

from ingesting heroin and not some other substance – such as the synthetic opiates and other “downer” chemicals that were positively identified in the car.

The State did not prove each alleged instance of possession beyond a reasonable doubt and the jury was inadequately instructed on the requirement for unanimity. Therefore we cannot be confident the guilty verdict for Fife’s possession of heroin conviction was unanimous. Therefore, this Court should reverse the conviction.

6. THE SENTENCING COURT MISCALCULATED FIFE’S OFFENDER SCORE.

The court sentenced Fife based on an offender score of 8. This score erroneously included an alleged burglary conviction in 1976 for which the State presented insufficient evidence. RP 414.

This Court reviews a trial court’s offender score calculation de novo. State v. Ortega, 120 Wn. App. 165, 171, 84 P.3d 935 (2004). It is the obligation of the State to provide the sentencing court with a record that supports the alleged criminal history. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). The State must prove the existence of each prior conviction by a preponderance of the evidence. State v. Mendoza, 165 Wn.2d 913, 920, 205 P.3d 113, 116 (2009).

The best evidence rule applies to proof of prior convictions. State v. Lopez, 147 Wn.2d 515, 519, 55 P.3d 609, 611 (2002). The best evidence of a prior conviction is a certified judgment and sentence. Mendoza, 165 Wn.2d at 920; Lopez, 147 Wn.2d at 519. The State may introduce other comparable evidence only if it shows that the judgment and sentence is unavailable for some reason other than its own fault. Lopez, 147 Wn.2d at 519, citing State v. Fricks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979). The fact that a prior sentencing court included an offense in the score is not evidence of a certified judgment and sentence. State v. Harris, 148 Wn. App. 22, 27, 197 P.3d 1206 (2008). Each court must calculate the score on the date of sentencing for the current offense. RCW 9.94A.525(1); Harris, 148 Wn. App. at 27.

Here, the State did not produce a certified judgment and sentence for Fife's alleged 1976 burglary conviction, but instead merely an "Order of Probation." Exhibit 5. The State did not explain why a judgment and sentence was not available for this conviction. RP 418. It would appear a judgment and sentence would be available if one existed, because the State produced one for another Spokane County conviction. RP 415.

The remedy for erroneously including an unproved prior conviction in the score is to remand for resentencing at which the State

may present additional evidence. RCW 9.94A.530(2); Mendoza, 153 Wn.2d at 930. That is what this Court should do.

7. THE COURT VIOLATED FIFE'S SIXTH AMENDMENT RIGHT TO A JURY BY IMPOSING THE CURRENT SENTENCES TO RUN CONSECUTIVELY TO AN EXISTING SENTENCE.

Any fact that increases a defendant's punishment, other than the existence of a prior conviction, must be found by a jury beyond a reasonable doubt unless the defendant stipulates to the fact or waives his right to a jury. Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

Fife was sentenced in October 2008, for a prior VUCSA conviction in Cause No. 07-1-01636-1. RP 411. The current sentencing was January 6, 2009, for offenses committed August 2, 2008. RP 16. Thus, the current sentencing was subsequent to the October 2008 sentencing, and Fife was not under sentence when he committed the current offenses.

Accordingly, RCW 9.94A.589(3) provides that the current sentence ordinarily will run concurrently with the October 2008 sentence. However, the statute authorizes the judge to order the two sentences to run consecutively.

Without stating the facts it was relying on, the court granted the State's request to impose consecutive sentences on Fife. RP 440. RCW 9.94A.589(3) was enacted pre-Blakely, however,⁵ and applying it to Fife in this manner violated his Sixth Amendment right to have his sentencing facts determined by jury.

The court imposed consecutive rather than concurrent sentences with no additional findings of fact, jury-based or otherwise. The State offered no justification for imposing consecutive sentences, other than to assert that Fife caused the delay in the earlier sentencing by failing to appear. RP 425. The court gave no explanation for its decision to order consecutive sentences. RP 440.

The judge may have been persuaded by the holding of State v. Grayson, 130 Wn. App. 782, 125 P.3d 169 (2005), that a sentencing court has "unfettered discretion" to impose concurrent or consecutive sentences under RCW 9.94A.589(3). Grayson, 130 Wn. App. at 786. The decision

⁵ See, Laws 2002, Ch. 175, § 7.

relied on by the Grayson court as authority for its ‘unfettered discretion’ holding, however, is also pre-Blakely. Grayson, 130 Wn. App. at 786.⁶ Blakely requires that a jury must find any additional facts the sentencing court relies on to increase the punishment over that ordinarily imposed without additional findings. State v. Hughes, 154 Wn.2d 118, 131, 110 P.3d 192 (2005). This obliterates Grayson’s holding that RCW 9.94A.589(3) gives the sentencing court unfettered discretion to be arbitrarily lenient or harsh. Grayson, 130 Wn. App. at 786.

Fife does not contend RCW 9.94A.589(3) is unconstitutional on its face. It is possible to imagine circumstances in which it could be constitutionally applied. Hughes, 154 Wn.2d at 132-33. For example, the sentencing court might make a record of its reasons for imposing consecutive sentences, and those reasons might be based on facts found by a jury or stipulations.

Here, however, the sentencing court invoked RCW 9.94A.589(3) to increase Fife’s punishment for no apparent reason beyond the whim of the judge. The State argued for an exceptional sentence based on the existence of the prior conviction, and because the current offenses were committed between a prior conviction and a prior sentencing. RP 425.

⁶ Citing In re Long, 117 Wn.2d 292, 305, 815 P.2d 257 (1991).

But these are precisely the facts the Legislature had in mind in enacting presumptive concurrent sentences. RCW 9.94A.589(3). The court simply exercised “unfettered discretion” and increased Fife’s punishment without explanation. This violated Fife’s Sixth Amendment right to have his sentencing facts determined by a jury. In re Pers. Restraint of Hall, 163 Wn.2d 346, 351, 181 P.3d 799 (2008).

Blakely explicitly struck down a provision whereby the SRA allowed courts to increase punishment beyond the presumptive sentence based on mandatory written findings of “substantial and compelling reasons.” RCW 9.94A.535. Hughes, 154 Wn.2d at 148-49. It follows that a sentencing court cannot exceed presumptively concurrent sentences under RCW 9.94A.589(3) without any findings whatsoever. This Court should remand with instructions to run the current sentence concurrently with the sentence imposed October 2008 in Cause No. 07-1-01636-1.

D. CONCLUSION

For the reasons stated, the Court should reverse all seven of Fife’s convictions because of the warrantless search. Alternatively, the Court should reverse all but Count VI (possession of Cocaine) for lack of sufficient evidence and competent jury instructions. The Court should remand for imposition of a sentence determined by the correct offender score to run concurrently with the sentence already imposed.

Respectfully submitted this 17th day of July, 2009.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
vs.)	COA NO. 62839-9-I
)	
WILLIAM FIFE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF JULY, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] WHATCOM COUNTY PROSECUTOR'S OFFICE
WHATCOM COUNTY COURTHOUSE
311 GRAND AVENUE
BELLINGHAM, WA 98227

- [X] WILLIAM FIFE
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FORKS, WA 98331

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STATE OF WASHINGTON
2009 JUL 17 PM 4:14

SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF JULY, 2009.

x *Patrick Mayovsky*