

NO. 63098-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

DARRYL WILLIAMS,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO CONVICT MR. WILLIAMS OF DELIVERY OF COCAINE.

In his opening brief, Mr. Williams argued that his conviction for delivery of cocaine must be reversed and dismissed because the State failed to prove constructive transfer. A person is guilty of delivery of a controlled substance by constructive transfer if the State proves the transfer of a controlled substance either belonging to the defendant or under his direct or indirect control, by some other person at the instance or direction of the defendant. State v. Campbell, 59 Wn. App. 61, 64, 795 P.2d 750 (1990). But the State's evidence showed only that Mr. Williams found a dealer for undercover officers who were seeking to buy cocaine, and that Mr. Williams was never in possession of drugs or money and had no authority over the dealer. Accordingly, the conviction for constructive transfer violates due process.

The State argues that this Court should affirm because when viewed in the light most favorable to the State, Mr. Williams "solicited the officers, arranged for Watson [the dealer] to bring the crack, and repeatedly acted as a mediator between the officers and Watson to broker the deal." Br. of Resp't at 8. The State's

argument fails by its own terms because soliciting, arranging, and acting as a mediator do not satisfy the definition of “constructive transfer.” See Campbell, 59 Wn. App. at 64.

The State cites Ramirez for the contrary proposition, but that case is not on point. Br. of Resp’t at 10 (citing State v. Ramirez, 62 Wn. App. 301, 308, 814 P.2d 227 (1991), review denied sub nom. State v. Barrera, 118 Wn.2d 1010 (1992)). Most importantly, it appears that the defendant in Ramirez was convicted as an accomplice, which was not the case here. Although the State may have had sufficient evidence to prove Mr. Williams was guilty as an accomplice, it cannot now retroactively convict Mr. Williams under an accomplice liability theory where it failed to present that theory to the jury. State v. Davenport, 100 Wn.2d 757, 764-65, 675 P.2d 1213 (1984).

The issue in Ramirez was whether there was an automatic buyer-agent exemption under the Uniform Controlled Substances Act. Id. at 307. The Court nowhere discusses the definition of “constructive transfer” or whether the State presented sufficient evidence to prove constructive transfer – presumably because the State had proceeded on an accomplice liability theory. As relevant here, the Court does say, “Washington Courts should construe the

Uniform Act in conjunction with decisions from other states that have enacted it.” Id. at 307-08. As noted in Mr. Williams’s opening brief, other state courts have held – in cases with facts similar to this one – that the government failed to prove constructive transfer. Commonwealth v. Murphy, 795 A.2d 1025 (Pa. Super. Ct. 2002); Davila v. State, 664 S.W.2d 722, 724 (Tex. Crim. App. 1984). The same is true here. Accordingly, the conviction should be reversed and the charge dismissed with prejudice.

The State acknowledges Murphy and Davila, but urges this Court to disregard those cases in favor of Swinney v. State, 828 S.W.2d 254 (Tex. App. 1992). Br. of Resp’t at 12. However, Swinney is not on point because in that case the defendant controlled the drugs and the person delivering them. Unlike Mr. Williams, the defendant in Swinney was standing with the person who had the drugs when the undercover officer approached. Swinney, 828 S.W.2d at 256. When the officer asked for drugs, it was the defendant who negotiated the deal. Id. The defendant then got the other person, a juvenile, and brought him to the officer. The juvenile sat in the officer’s car with the door open, while the defendant stood in the open doorway. After the officer obtained the

drugs and started driving away, he noticed that the two went back to their original location and continued standing together. Id.

Whereas in Swinney the defendant was the dealer and the juvenile was working for him, here, Watson was the dealer, and Mr. Williams simply contacted him to introduce him to potential buyers. Unlike in Swinney, there is no evidence that Mr. Williams controlled Watson. Watson was not with Mr. Williams when the officers first arrived and did not stay with Mr. Williams after selling drugs to the officers. Nor did Mr. Williams drive away with Watson after the sale. The State's evidence showed Mr. Williams simply facilitated the meeting in hopes that the buyers would share their drugs with him. Thus, this case is like Murphy and Davila, not Swinney. This Court should reverse the conviction for failure to prove constructive transfer.

2. THE TO-CONVICT INSTRUCTION OMITTED AN ESSENTIAL ELEMENT OF THE CRIME.

a. The to-convict instruction in this case violated Mr. Williams' right to due process because it omitted the element of cocaine . In his opening brief, Mr. Williams argued in the alternative that his conviction should be reversed and his case remanded for a new trial because an essential element of the crime

– the name of the drug – was omitted from the “to convict” instruction. Cocaine is an essential element of the crime of delivery of cocaine because it increases the penalty relative to delivery of other drugs, e.g., marijuana. State v. Goodman, 150 Wn.2d 774, 778, 83 P.3d 410 (2004).

In response the State acknowledges that “a ‘to convict’ instruction must contain all elements of the crime, even if other instructions supply a missing element.” Br. of Resp’t at 17 (citing State v. Smith, 131 Wn.2d 258, 262-63, 930 P.2d 917 (1997)). It also concedes that the type of drug is an element if it affects the penalty. Br. of Resp’t at 19.

However, the State wrongly contends that the type of drug does not affect the penalty in this case. This erroneous premise leads the State to the erroneous conclusion that the type of drug is not an element. Br. of Resp’t at 20. The premise is erroneous because the penalty for delivery of marijuana (where, as here, the defendant has an offender score of six or higher) is only 12-14 months, but the penalty for delivery of cocaine is to 60-120 months. RCW 9.94A.517; RCW 9.94A.518. The type of drug strongly affects the penalty, and is therefore an element of the crime that

must be submitted to the jury in the to-convict instruction.

Goodman, 150 Wn.2d at 778.

The State essentially argues that because the charging document was constitutionally sufficient, it did not matter whether the to-convict instructions were constitutionally sufficient. Br. of Resp't at 20. As the response brief notes, the State charged Mr. Williams with violating RCW 69.50.401 (1) and (2)(a), the latter of which is limited to a "controlled substance classified in Schedule I or II." But the jury was not told that it could only convict Mr. Williams if it found he delivered a schedule I or II controlled substance; it was told to find Mr. Williams guilty if he delivered any "controlled substance". CP 22. Nor was the charging document an exhibit that the jury had during deliberations. Thus, the to-convict instructions allowed the jury to convict Mr. Williams even if it found he delivered a controlled substance whose standard and maximum penalties are much lower than the sentences imposed upon Mr. Williams for delivery of cocaine. The State's arguments therefore fail.

In sum, the to-convict instructions here were constitutionally deficient because they omitted the identity of the controlled substance.

b. Reversal is required. The State argues in the alternative that even if the trial court violated Mr. Williams's right to due process by omitting an element from the to-convict instruction, reversal is not required. Although the State would be correct under federal law, it fails to come to terms with the Washington Constitution, which requires reversal under these circumstances.

As explained in Mr. Williams's opening brief, throughout history Washington has repeatedly applied the automatic reversal rule in cases where an element was missing from the to-convict instruction. See, e.g., State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008); Smith, 131 Wn.2d at 265; State v. Emmanuel, 42 Wn.2d 799, 259 P.2d 845 (1953); McClaine v. Territory, 1 Wash. 345, 25 P. 453 (1890); State v. Pope, 100 Wash. App. 624, 630, 999 P.2d 51 (2000).

Since Mr. Williams filed his opening brief, two new cases have been decided which reinforce the rule of automatic reversal. On January 14, the Washington Supreme Court applied an automatic reversal rule in three consolidated cases where firearm enhancements were unconstitutionally imposed. State v. Williams-Walker, ___ Wn.2d ___, ___ P.3d ___, 2010 WL 118211 (Filed January 14, 2010). Firearm enhancements were imposed "where

the juries were instructed and asked to find by special verdict whether the defendants were armed with a deadly weapon,” not a firearm. Id. at ¶ 1. The supreme court stated, “We hold that this sentence is an error to which the harmless error doctrine does not apply.” Id.

Here, although the verdict form included the word “cocaine,” the to-convict instruction did not. Accordingly, if the jury followed its instructions – which we must assume it did – then it entered the word “guilty” on the verdict form after determining that Mr. Williams delivered any controlled substance, not cocaine specifically. Absent a to-convict instruction with the element of cocaine, the sentencing court lacked the authority to impose a sentence for delivery of cocaine; at most it had the authority to impose a sentence for delivery of marijuana. Under Williams-Walker, the Washington Constitution requires reversal in such circumstances.

Finally, a recent New Hampshire Supreme Court case provides persuasive authority for the automatic reversal rule in Washington. State v. Kousounadis, ___ A.2d ___, 2009 WL 4421246 (N.H., filed December 4, 2009). Like the Washington Constitution, the New Hampshire Constitution is more protective of individual rights than the parallel provisions of the United States

Constitution. Id. at *11. In Kousounadis, the Court recognized that under the federal constitution, an instruction that omits an element of the offense is subject to harmless error analysis. Id. at *10 (citing Neder, 527 U.S. at 9-15). But it noted that Neder “has been widely criticized, and we decline to follow it with regard to our interpretation of the New Hampshire Constitution.” Id. Rather, “a jury instruction that omits an element of the offense charged is an error that partially or completely denies a defendant the right to the basic trial process, and thus is not subject to harmless error analysis.” Id. at 11 (internal citations omitted).

The same is true in Washington. Accordingly, this Court should reverse Mr. Williams’s conviction for failure to include an essential element in the to-convict instruction.

B. CONCLUSION

For the reasons stated above and in his opening brief, Mr. Williams respectfully requests that this Court reverse his conviction for delivery of cocaine.

DATED this 17th day of February, 2010.

Respectfully submitted,



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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF FEBRUARY, 2010, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF FEBRUARY, 2010.

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