

64001-1

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1No. 64001-1-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

THE STATE OF WASHINGTON,
Respondent,
v.
JULIAN TELLEZ,
Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON

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

BRIEF OF APPELLANT

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A. INTRODUCTION

The jury heard testimony that after conducting what a police observer believed to be two drug transactions over the course of 10 minutes, Julian Tellez began to walk away only to be arrested about one block away. The jury also heard testimony that a nearby street corner had been designated as a school bus stop during the preceding school year. The jury heard further testimony that at the time of the mid-August drug sale in the present case, the school district was in the process of redesignating its bus stops for the approaching school year. The jury did not receive any evidence that the street corner was an “active” school bus stop at the time of the drug sale. Nonetheless, the jury concluded the State proved the nearby street corner was an “active” school bus stop.

B. ASSIGNMENT OF ERROR

The trial court deprived Mr. Tellez of Due Process by entering a conviction in the absence of proof beyond a reasonable doubt of each element.

C. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Due process requires the State prove each element of a crime beyond a reasonable doubt. In its best light, the State’s evidence established Mr. Tellez still possessed cocaine after

conducting two drug sales, but does not establish that he intended to sell the remaining cocaine. Did the State prove each element of the offense beyond a reasonable doubt?

2. Where the State does not object to the submission of additional elements to the jury, State must prove those elements beyond a reasonable doubt. Where the special verdict form required the jury to determine the crime occurred within 1000 feet of an "active" school bus stop and the State did not present any evidence that bus stop was active during August 2008, has the State offered sufficient evidence to support the conviction?

D. STATEMENT OF THE CASE

On August 18, 2008, a Seattle Police officer watched Mr. Tellez standing against a building in the 200 block of Bell Street in Seattle for about 10 minutes. 1/13/09 RP 59, 61. During that period, the officer saw Mr. Tellez engage in two transactions with unidentified people. Id. 68-71, 78. Based upon his experience and observations, the officer believed Mr. Tellez was selling cocaine. When Mr. Tellez began to walk from the area, the officer radioed to other officers to arrest Mr. Tellez. Id. 85. Mr. Tellez was arrested about one block away, and officers found .79 grams of crack cocaine in his pocket. 1/13/09 RP 127-38; 1/14/09 RP 10-14.

A jury convicted Mr. Tellez as charged of possessing cocaine with intent to deliver within 1000 feet of a school bus stop. CP 13-15.

E. ARGUMENT

THE STATE DID NOT PROVE EACH ELEMENT OF THE OFFENSE BEYOND A REASONABLE DOUBT

1. The State must prove each element of the charged offense beyond a reasonable doubt. A criminal defendant has the right to a jury trial and may only be convicted if the government proves every element of the crime beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 300-01, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); United States v. Gaudin, 515 U.S. 506, 510, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). The constitutional rights to due process and a jury trial “indisputably entitle a criminal defendant to ‘a jury determination that [she] is guilty of every element of the crime beyond a reasonable doubt.’” Apprendi, 530 U.S. at 476-77, quoting Gaudin, 515 U.S. at 510.

2. The State did not prove Mr. Tellez possessed cocaine with the intent to deliver it. Pursuant to RCW 69.50.401 it is a Class B felony to possess cocaine with the intent to deliver it. Pursuant to RCW 46.61.4103, it is merely a Class C felony to possess cocaine. Mr. Tellez does not dispute that he possessed cocaine. However, the State did not present any evidence that he intended to sell that cocaine rather than retain it for his own use.

In the light most favorable to the State, an officer observed Mr. Tellez standing against a building for a period of time. 1/13/09 RP 95. During that period of time, the officer observed what he believed to be two drug transactions. 1/13/09 RP 68-71, 78. Police did not arrest or recover the alleged drugs exchanged, 1/13/09 RP 94-5, and allowed the substance "could have been a Tic-Tac; it could have been drywall." 1/13/09 RP 86. At some point after the second transaction, Mr. Tellez began walking away, and was arrested. 1/13/09 RP 82.

Even if the two observed transactions involved a sale of drugs, there is nothing that indicates Mr. Tellez intended to sell the remaining cocaine in his possession. Indeed, the fact that he was walking away from the scene of the transaction strongly suggests

he no intention of conducting any further sales. The State did not prove Mr. Tellez possessed cocaine with the intent to deliver.

3. The State did not prove Mr. Tellez possessed cocaine with the intent to deliver within 1000 feet of an active school bus stop.

Apprendi makes clear that "[a]ny possible distinction between an 'element' of a felony offense and a 'sentencing factor' was unknown to the practice of criminal indictment, trial by jury, and judgment by court as it existed during the years surrounding our Nation's founding." 530 U.S. 466 478, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (footnote omitted).

Washington v. Recuenco, 548 U.S. 212, 220, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (Recuenco II). If a fact "increases the maximum punishment that may be imposed on a defendant, that fact – no matter how the State labels it – constitutes an element, and must be found by a jury beyond a reasonable doubt."

Sattazahn v. Pennsylvania, 537 U.S. 101, 111, 123 S.Ct. 732, 154 L.Ed.2d 588 (2003); see also Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2348, 153 L.Ed.2d 556 (2002); Harris v. United States, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002). The standard range sentence permitted by a jury's verdict alone is the "statutory maximum" for the offense. Blakely, 542 U.S. at 303-04.

Because a finding that a drug offense was committed within a drug free zone under RCW 69.50.401 increases a person's standard range sentence, that fact is an element which must be proved to the jury beyond a reasonable doubt. Blakely, 542 U.S. at 303-04; but see, State v. Silva-Blatazar, 125 Wn.2d 472, 478-79, 886 P.2d 138 (1994) (concluding legislature did not intend RCW 69.50.435 to create element of offense). Sliva-Baltazar, was decided before Apprendi and its progeny, and wrongly focused on the legislature's intent rather than upon the statute's effect. Because the "enhancement" increases the statutory maximum it must be treated as an element regardless of what the legislature intended.

Where additional elements are submitted to the jury, and the State does not object, the additional element becomes the "law of the case" and must be proved beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 99, 954 P.2d 900 (1998). If the State fails to meet this burden with respect to the added element, the conviction must be dismissed. Id. at 103

In its special verdict, the jury stated it found Mr. Tellez possessed cocaine with intent to deliver "within 1000 feet of an active school bus stop at the intersection of 3rd Avenue and Bell

Street in Seattle.” CP 14-15. RCW 69.50.435 does not require the State prove the school bus stop is active. However, by asking the jury to determine that the school bus stop was “active,” the State assumed the burden of proving that fact beyond reasonable doubt. Hickman, 135 Wn.2d at 103. The State did not carry its burden.

Thomas Bishop, transportation manager for Seattle Public Schools, testified that during the 2007-2008 school year the district had designated a school bus stop at the corner of 3rd Avenue and Bell Street. 1/13/09 RP 112. Mr. Bishop testified further that the school district begins “developing the routes or switching over, during the month of August.” Id. 113. The following exchange then took place:

Q: Okay. So from August 2007 to June of 2008 - -

A: Uh huh.

Q: - - those were stops?

A: That’s correct.

Id. At the State’s prodding, Mr. Bishop added “[b]ecause schools are extended and we’ve got summer school programs, things like that [stops] are considered active all year-round.” Id. Mr. Bishop, however, offered no additional testimony that the stop at 3rd and Bell was actually used during the Summer of 2008, or that in the

annual revision of stops that occurs in August, the stop was still active.

In its best light, the evidence established the life of a school bus stop spans from August to June of the following year, or perhaps even from August to August. The evidence established the stop at 3rd and Stewart was a school bus stop during the school year beginning August 2007, but was silent as to whether it remained a school bus stop during the school year beginning August 2008. Because the offense in this case occurred in August 2008, the State did not meet its burden of proving the bus stop was active at the time Mr. Tellez committed his offense.

4. Because the State did not prove each element of the offense, the court must reverse Mr. Tellez's conviction. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Because the State did not prove each element of the offense beyond a reasonable doubt, this Court must reverse Mr. Tellez's conviction. The Fifth Amendment's Double Jeopardy Clause bars retrial of a case, such as this, where the State fails to prove an added element. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed. 2d 656 (1969),

reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). However, because the jury was expressly instructed upon the lesser offense of possession of cocaine, CP 44-45, the court could reform the verdict to a conviction on that lesser offense. Green. 94 Wn.2d at 234-35; State v. Argueta, 107 Wn.App. 532, 539, 27 P.3d 242 (2001). Similarly and even if the court finds sufficient evidence of an intent to deliver, because the jury was expressly instructed on that offense less the ‘enhancement,’ CP 36, in light of the absence of sufficient evidence to establish the “enhancement” the Court could reform the verdict to reflect a conviction of possession with intent . Green. 94 Wn.2d at 234-35; Argueta, 107 Wn.App. at 539.

F. CONCLUSION

Because the State did not prove each element of the offense beyond a reasonable doubt, this Court must reverse Mr. Tellez’s conviction.

Respectfully submitted this 4th day of August, 2009.


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DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 64001-1-III
v.)	
)	
JULIAN TELLEZ,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, SIMON ADRIANE ELLIS, STATE THAT ON THE 4TH DAY OF AUGUST, 2009, I CAUSED THE ORIGINAL **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:

[X] KING COUNTY PROSECUTING ATTORNEY	(X)	U.S. MAIL
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SIGNED IN SEATTLE, WASHINGTON THIS 4TH DAY OF AUGUST, 2009.

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