

70305-6

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NO. 70305-6-1

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

STATE OF WASHINGTON,

Respondent,

v.

CECIL L. BURKETT,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

(1) The arresting officer frisked the defendant without having an adequate factual basis. Following the frisk, the officer requested and obtained permission to search the defendant's backpack. Should drugs in the backpack be suppressed from use in the State's case-in-chief?

(2) In an unrelated incident, police observed the defendant engaging in what appeared to be a drug sale. A search of his backpack uncovered oxycodone tablets. The backpack also held \$13,000 in cash. The defendant told police that he had just sold oxycodone (according to one version) or that he intended to do so (according to another version). Was this evidence sufficient to allow a jury to conclude that the defendant possessed a controlled substance with intent to deliver?

(3) Although the trial court did not state any intention to impose a \$100 domestic violence penalty, the judgment and sentence appears to impose such a penalty. Should this error be corrected on remand?

(4) Findings of fact and conclusions of law were not entered before the appellant's brief was filed, but they have been entered

subsequently. Is the defendant challenge to the lack of such findings moot?

II. STATEMENT OF THE CASE

The defendant was convicted in separate proceedings of three drug crimes. Count I is possession of a controlled substance with intent to deliver, committed on May 17, 2011. The defendant was convicted of this crime at a stipulated trial. CP 15-16. Count III is attempting to obtain a controlled substance by forgery. The defendant pleaded guilty to this crime. CP 45-60. (His appeal does not challenge this conviction.) Count IV is possession of a controlled substance with intent to deliver, committed on November 2, 2011. The defendant was found guilty of this crime by a jury. CP 27. (Count II was dismissed.)

A. FACTS RELEVANT TO COUNT I.

On May 17, 2011, Trooper Scott Genoway of the Washington State Patrol stopped a car on I-405 for speeding. The car was driven by Charles Drake. The defendant, Cecil Burkett, was a passenger. 3.6 hg. RP 13-14.

After questioning Mr. Drake, Trooper Genoway learned that his driver's license was suspended. He arrested Mr. Drake for driving with a suspended license. He then attempted to determine if

the defendant could drive the car. He asked the defendant if he had a valid license. The defendant said that he wasn't sure if it was valid. Trooper Genoway noticed some backpacks in the back seat. He asked the defendant whom they belonged to. The defendant said that he didn't know. 3.6 hg. RP 14-16.

Trooper Genoway then asked Mr. Drake about the backpacks. Mr. Drake said that one was his and the other was the defendant's. As Trooper Genoway was talking to Mr. Drake, he saw the defendant "kind of lunged down" towards the driver's area. Concerned for his safety, he told the defendant not to move around in the car. 3.6 hg. RP 16-17.

Trooper Genoway went back to the defendant to determine if he could validly drive. He asked for the defendant's driver's license. The defendant gave it to him. Trooper Genoway wrote down the information on the license and returned it to the defendant. He then asked the defendant to exit the vehicle. For personal safety, he patted down the defendant. He again asked about the backpack. The defendant said that he forgot that one of the backpacks was his. Trooper Genoway asked for and obtained the defendant's permission to search the backpack. 3.6 hg. RP 18-21. The search uncovered over 200 tablets of oxycodone, hydrocodone, and

methylphenidate. That evidence was the basis for the defendant's conviction on count I. CP 15-16.

B. FACTS RELEVANT TO COUNT IV.

On November 2, 2011, Dets. Jose Vargas and Charles Wilfong of the Snohomish County Sheriff's Office were carrying out drug interdiction. Both were assigned to the Snohomish County Regional Drug Task Force. They were observing the parking lot of the Everett Mall. Such parking lots are frequently used for drug sales. Trial RP 22, 26.

The detectives saw a truck that was parked by itself. A man was sitting in the driver's seat, and the engine was running. After around 10 minutes, another truck parked nearby. The driver of the second truck was later identified as the defendant. Trial RP 27-28, 75-76.

The defendant walked over to the other truck and leaned through the window. After "a second or so," he went back to his truck and drove away. Both of the detectives believed that this was a drug transaction. They followed the defendant's truck. Since they were driving an unmarked vehicle, they arranged for a patrol car to make the stop. The defendant was stopped near the Island

Crossing exit from I-5, which is close to Arlington. Trial RP 28-30, 76-78.

Det. Vargas questioned the defendant. The defendant said that he had received \$120 from Brian Lively for oxycodone that he was going to deliver the next day. He said that he was setting something up for a detective with the Task Force. Det. Vargas told him that this story didn't make any sense. The defendant then said that he had sold eight oxycodone tablets to Mr. Lively for \$160. Det. Vargas contacted the other Task Force detective, who said that she had not arranged for the defendant to carry out any drug deals. Trial RP 32-35. (At trial, she testified to the same facts. Trial RP 65-66).

Det. Vargas requested and obtained the defendant's permission to search the truck. Trial RP 36. The defendant told him that he had \$10,000 in cash. At first, he said that he had taken the money out of three different bank accounts. He said that the withdrawal slips were in the backpack. Det. Vargas said that he would look for them. The defendant then changed his story. He said that he had cashed a check from Snohomish County for \$5,000 and borrowed the other \$5,000 from a friend. Det. Vargas said that he would try to corroborate this with the friend. The defendant then

changed his story again. He said that he had cashed a check from Snohomish County and "saved a bunch of money from a job in Mukilteo." Trial RP 36-39.

Det. Vargas proceeded to search the backpack. It held \$13,000 in cash. It also held three prescription pill bottles. One was a prescription in the name of Richard Durham for methylphenidate. Despite the label, the bottle held 14 oxycodone tablets. The second bottle was a prescription in the defendant's name for oxycodone. It held 92 oxycodone tablets. The third bottle was a prescription in the name of Leon C. Burkett for methylphenidate. Trial RP 45-49, 130. Det. Vargas did not find any receipts in the backpack. After seizing the truck, the drugs, and the money, Det. Vargas returned the remaining personal property to the defendant. Trial RP 53-54.

At trial, the defendant testified that the money in the backpack came from three different sources. He had received a bail refund of \$2,540 from a district court. He had received \$5,600 for wire and \$8,500 for electrical work. He produced what purported to be receipts for these amounts.¹ He claimed that they had been in the backpack at the time of the search. Trial RP 123-26, 162-64.

¹ The prosecutor did not question the authenticity of the district court receipt. Trial RP 188.

The defendant testified that Brian Lively had owed him \$160 for electrical work. They had arranged to meet in the parking lot for Mr. Lively to pay him that amount. Trial RP 114-15. The defendant denied saying that he had delivered or intended to deliver any drugs. He claimed that the drugs in the backpack were intended for personal use. In his testimony, he admitted that he had helped another person forge prescriptions. Trial RP 101-06.

A jury found the defendant guilty of possession of a controlled substance with intent to deliver, as charged. CP 27.

III. ARGUMENT

A. WITH REGARD TO COUNT I, THE STATE CONCEDES THAT THE DEFENDANT WAS ILLEGALLY SEIZED.

The defendant's first argument relates to count I (possession with intent to deliver on 5/17/11). He contends that the contraband was illegally seized. The State is compelled to agree with this contention.

The defendant's brief argues that numerous acts by the arresting officer gave rise to a "seizure." For purposes of this brief, it is not necessary to respond to all of these arguments. The State agrees that when the officer frisked the defendant, this act constituted a "seizure." See State v. Guevara, 172 Wn. App. 184, 190-91 ¶ 14, 288 P.3d 1167 (2012). The State further agrees that

this “seizure” was not supported by sufficient facts to give rise to a reasonable suspicion of criminal activity. See State v. Armenta, 134 Wn.2d 1, 13-14, 948 P.2d 1280 (1997). Finally, the State agrees that the defendant’s consent to search was not sufficiently separated from the unjustified “seizure” to render it valid. See id. at 17-18. Consequently, the evidence resulting from this search should have been suppressed from use in the State’s case-in-chief. The conviction on count I should be reversed.

B. WITH REGARD TO COUNT IV, THE OFFICERS’ TESTIMONY SUPPORTS A REASONABLE INFERENCE THAT THE DEFENDANT POSSESSED CONTROLLED SUBSTANCES WITH INTENT TO DELIVER.

The defendant next challenges the conviction on count IV (possession with intent to deliver on 11/2/11). He claims that the evidence of this crime was insufficient. A defendant claiming insufficiency of the evidence “admits the truth of the State’s evidence.” All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “Credibility determinations are for the trier of fact and are not subject to review.” State v. Prestegard, 108 Wn. App. 14, 23, 28 P.3d 817 (2001).

At trial, the defendant admitted possessing controlled substances. Trial RP 126-27. The key issue was whether he intended to deliver them. Generally, intent to deliver cannot be inferred from the defendant's mere possession of drugs.² State v. Zunker, 112 Wn. App. 130, 136, 48 P.3d 344 (2002), review denied, 148 Wn.2d 1012 (2003). Nevertheless, "an intent to deliver might be inferred from an exchange or possession of significant amounts of drugs or money." State v. Davis, 79 Wn. App. 591, 595, 904 P.2d 306 (1995). For example, intent to deliver was inferred from the defendant's possession of 24 rocks of cocaine and \$342 in cash. State v. Hagler, 74 Wn. App. 232, 872 P.2d 85 (1994).

In the present case, there were several factors indicating intent to deliver. To begin with, the defendant admitted that intent. According to the arresting officer, the defendant said that he had received \$120 as payment for drugs that he was going to sell the following day. He then changed his story, saying that he received \$160 for drugs that he had already sold. Trial RP 34-35. The jury was entitled to believe either statement, or both. If the defendant

² Such an inference could be permissible if the quantity of drugs was large enough. State v. Wade, 98 Wn.2d 328, 340, 989 P.2d 576 (1999). The State is not contending that the quantity in the present case rose to this level.

intended to deliver drugs the next day, he was of course guilty of possession with intent to deliver. And if he had already delivered some of the drugs, that was circumstantial evidence of his intent to deliver additional drugs.

In addition to this evidence, police observed the defendant engage in what appeared to be a drug sale. Trial RP 28-29, 76. The defendant also possessed \$13,000 in cash. Trial RP 130. These facts provide further support for an inference of intent to deliver.

At trial, the defendant produced receipts that purportedly explained his possession of this money. One of these receipts was handwritten by the defendant himself. Ex. 12. Another was typed (with a supposed signature). Ex. 13. The defendant claimed that these receipts were in his backpack when he was arrested. Trial RP 162. The arresting officer testified to the contrary. Trial RP 53-54. There was ample reason for the jury to believe that these "receipts" were not authentic.

The defendant's brief relies heavily on his own testimony. This testimony is irrelevant to this court's determination of the sufficiency of the evidence. The jury was entitled to disbelieve any or all of the defendant's testimony. That credibility determination cannot be re-examined by this court. State v. Campos, 100 Wn.

App. 218, 224, 998 P.2d 893, review denied, 142 Wn.2d 1006 (2000). The evidence supports the jury's finding that the defendant possessed controlled substances with intent to deliver.

C. THE IMPOSITION OF A DOMESTIC VIOLENCE PENALTY APPEARS TO BE A SCRIVENER'S ERROR, WHICH SHOULD BE CORRECTED ON REMAND.

The defendant next challenges one aspect of the sentence. In imposing sentence, the court imposed a \$500 victim penalty assessment, a \$100 biological sample fee, and a \$1000 drug fine. Sent. RP 230. The judgment and sentence reflects these assessments. On the form, however, there is also a mark near the box for "Domestic Violence Penalty." Despite this, the total is specified as \$1600 – which reflects the three financial obligations that the court said that it intended to impose. CP 8.

It does not appear that the court intended to impose a domestic violence penalty. The mark on the form appears to be a scrivener's error. Had anyone raised a timely objection, the error would have been corrected. On re-sentencing, this error should be corrected.

D. SINCE FINDINGS AND CONCLUSIONS HAVE BEEN ENTERED, THERE IS NO NEED TO REMAND THE CASE FOR ENTRY OF THEM.

Finally, the defendant complains of the lack of findings and conclusions at the sentencing hearing. After the appellant's brief was filed, such findings were entered. CP ____ (Certificate Pursuant to CrR 3.6 of the Criminal Rules for Suppression Hearing, docket no. 98). This issue is therefore moot.

IV. CONCLUSION

The conviction on count I should be reversed. For the reasons set out above, the conviction on count IV should be affirmed. Since the conviction on count III has not been challenged, that conviction should be affirmed in any event. The case should be remanded for re-sentencing.

Respectfully submitted on April 4, 2014.

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