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No. 71427-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS GOGEL,

Appellant.

2014 JUN 28 AM 11:28
STATE OF WASHINGTON
COURT OF APPEALS DIVISION ONE

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

APPELLANT'S REPLY BRIEF

RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. ARGUMENT

1. **Because a mandatory and controlling statute may be raised for the first time on appeal, Gogel did not forfeit his claim that he was improperly charged and convicted of violating the Legend Drugs Act.**

In general, offenses that violate the Controlled Substances Act “shall” not be charged under the Legend Drugs Act. RCW 69.41.072 (“Any offense which is a violation of chapter 69.50 RCW other than RCW 69.50.4012 shall not be charged under this chapter.”).¹ When used in a statute, “shall” is presumptively imperative and creates a mandatory duty unless there is contrary legislative intent. Goldmark v. McKenna, 172 Wn.2d 568, 575, 259 P.3d 1095 (2011). Here, the State violated this statute by charging and convicting Gogel under the Legend Drugs Act rather than the Controlled Substances Act. See State v. Rapozo, 114 Wn. App. 321, 323, 58 P.3d 290 (2002) (State conceded on appeal that defendant should have been charged under Controlled Substances Act, not the Legend Drugs Act, for possession of lorazepam, a controlled

¹ The purpose of this statute is likely to ensure uniformity and equal protection of the law. As recounted in the opening brief, the offense charged here under the Legend Drugs Act has a harsher punishment than the corresponding offense under the Controlled Substances Act. As the State agrees, oxycodone is both a “legend drug” and a “controlled substance.” Absent enforcement of this provision, violations of the Fourteenth Amendment or article 1, section 12 of the Washington constitution may result. See Olsen v. Delmore, 48 Wn.2d 545, 550, 295 P.2d 324 (1956).

substance). The State does argue otherwise. Br. of Resp't at 7-12. Still, the State maintains that it too late for Gogel to obtain relief.

Contrary to the State's argument, Gogel did not waive this error by not raising the statute below. "It is the general rule that public statutes of Washington State will be judicially noticed by all courts of this state." Gross v. City of Lynnwood, 90 Wn.2d 395, 397, 583 P.2d 1197 (1978). RCW 69.41.072 is a mandatory law which undisputedly forbade the State from prosecuting Gogel under the Legend Drugs Act for prescription forgery of oxycodone.

a. Review is proper under the "right to maintain an action" exception to the waiver rule.

The waiver rule does "not apply when the question raised affects the right to maintain the action." Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 621, 465 P.2d 657 (1970). Thus, in Maynard, the Court rejected an argument that a statute could not be applied in rendering a decision on appeal because the statute had not been raised in the trial court. Maynard, 77 Wn.2d at 621. In doing so, the Court explained that cases should be governed by the applicable law even if the representing parties ignore it or are unwilling to argue it:

Courts are created to ascertain the facts in a controversy and to determine the rights of the parties according to justice. Courts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the

mandate of a statute or an established precedent. A case brought before this court should be governed by the applicable law even though the attorneys representing the parties are unable or unwilling to argue it.

Maynard, 77 Wn.2d at 623.

In accordance with Maynard, Washington appellate courts regularly consider statutes raised for the first time on appeal. See, e.g., Bennett v. Hardy, 113 Wn.2d 912, 918, 784 P.2d 1258 (1990); Gross, 90 Wn.2d at 397; In re Dependency of A.M.M., ___ Wn. App. ___, 332 P.3d 500, 506-07 (2014). Consistent with this rule, Washington courts have also addressed arguments that a defendant was improperly charged and convicted under an inapplicable statute for the first time on appeal. See, e.g., State v. Danforth, 97 Wn.2d 255, 257, 643 P.2d 882 (1982); State v. Williams, 78 Wn.2d 459, 460, 475 P.2d 100 (1970).

b. Review is proper under RAP 2.5(a)(2).

In arguing that review is not appropriate, the State only discusses RAP 2.5(a)(3), not RAP 2.5(a)(2). Under this latter provision, a party may raise “failure to establish facts upon which relief can be granted” for the first time on appeal. RAP 2.5(a)(2); Cole v. Harveyland, LLC, 163 Wn. App. 199, 209, 258 P.3d 70 (2011). The term “failure to establish facts upon which relief can be granted” is largely interchangeable with the term

“failure to state a claim.” Roberson v. Perez, 156 Wn.2d 33, 40, 123 P.3d 844 (2005).

Applying RAP 2.5(a)(2), the Court in Gross held it was proper to consider the new argument that the plaintiff had no cause of action for age discrimination under a controlling statute. Gross, 90 Wn.2d at 397-98. There, the plaintiff was 35 years old and the statute limited the action to people between the ages of 40 and 65. Gross, 90 Wn.2d at 398-400. Thus, the dismissal of the suit was affirmed. Gross, 90 Wn.2d at 401.

Similarly, in Roberson, the defendant argued for the first time on appeal that the defendant could not maintain a cause of action for negligent investigation in light of a recent Supreme Court opinion. Roberson, 156 Wn.2d at 38-39. The Court held the argument was proper per RAP 2.5(a)(2). Roberson, 156 Wn.2d at 39-41. The Court affirmed the Court of Appeals’ decision that had reversed an award of damages. Roberson, 156 Wn.2d at 35.

Here, review is appropriate under RAP 2.5(a)(2) because the State failed to establish facts that would allow for prosecution of Gogel under the Legend Drugs Act. The State did not have the right to “maintain the action.” Maynard, 77 Wn.2d at 621.

Regardless, “application of RAP 2.5(a) is ultimately a matter of the reviewing court's discretion.” Hardy, 113 Wn.2d at 918. The language of

the rule is permissive: “The appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). Thus, even assuming RAP 2.5(a) indicated that review of the issue was not proper, this Court would still be free to consider the argument.

c. The remedy is reversal and dismissal.

Gogel was improperly prosecuted and convicted under an inapplicable statute. RCW 69.41.072. Accordingly, this Court should reverse the conviction and order the case dismissed. Williams, 78 Wn.2d at 460 (reversing and ordering action dismissed because defendant was charged under an act which did not apply); State v. Walls, 81 Wn.2d 618, 623-24, 503 P.2d 1068 (1972) (reversing and dismissing case where defendant was erroneously charged and convicted under inapplicable larceny statutes).

2. The information was deficient for failing to allege that Gogel knew the prescription was forged or altered.

a. Prescription forgery is not a strict liability crime.

The State claims that prescription forgery under RCW 69.41.020(1) is a strict liability crime. Br. of Resp’t at 14-16. Accordingly, any person who presents a prescription that has been forged is guilty even if the person lacked knowledge of the forgery. Applying

well established rules of statutory interpretation and examining the history of the statute, this Court should reject this reading.

Strict liability crimes are disfavored. State v. Anderson, 141 Wn.2d 357, 363, 5 P.3d 1247 (2000). The plain language of the offense implies a knowledge element. The language, “attempt to obtain a legend drug . . . [b]y the forgery or alteration of a prescription,” implies that the person who attempts to obtain the drug knows the prescription is forged or altered. The “by the forgery or alternation” language means that the person who tried to obtain the drugs had committed the act of “forgery or alteration” and thus must know that the prescription is forged.

The State’s counterargument is flawed. The State incorrectly contends this reading is redundant with subsection (5) of the statute which criminalizes the making or “uttering” of a forged prescription. RCW 69.41.020(5).² That section criminalizes the making of a forged prescription or circulating it. Thus, if a person forges a prescription or the forger gives it to another person (utters), the person is guilty under RCW 69.41.020(5). This is different than trying to obtain drugs through a prescription that one knows is forged.

² “‘Utter’ is generally defined as meaning ‘to put or send (a document) into circulation; esp., to circulate (a forged note) as if genuine.’” 11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 130.03 (3d Ed) (quoting Black’s Law Dictionary (8th ed. 2004)).

The history of the statute also undermines the State's contention. The State argues that the offense is a strict liability offense and analogizes it to possession of a controlled substance, RCW 69.50.4013, which is a strict liability offense. State v. Bradshaw, 152 Wn.2d 528, 539-40, 98 P.3d 1190 (2004). The Uniform Controlled Substances Act of 1970, adopted by our legislature with some changes, has mens rea elements for the offense of possession. Unif. Controlled Substances Act 1970 § 401(c) ("it is unlawful for any person knowingly or intentionally to possess a controlled substance . . ."). As our Supreme Court recounted, our act had these mental elements when introduced, but lawmakers deleted them. State v. Cleppe, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). Based largely on this history, the Court determined that possession is a strict liability offense. Cleppe, 96 Wn.2d at 380; Bradshaw, 152 Wn.2d at 537.

Unlike the history of possession of a controlled substance, the legislative history of prescription forgery in the Legend Drugs Act does not show that the legislature wanted to create a strict liability offense. The language of RCW 69.41.020 can be traced to the Uniform Narcotic Drug Act of 1932. This Act appears to be the predecessor to the Uniform Controlled Substances Act and the Legend Drugs Act. Section 17 of the Uniform Narcotic Act contains mostly identical language to RCW 69.41.020. Compare Unif. Narcotic Drug Act § 17 with RCW 69.41.020.

The State points to no legislative history showing removal of a mental element.

Further, there is an affirmative defense to the crime of possession, unwitting possession. Bradshaw, 152 Wn.2d at 538. There does not appear to be a similar affirmative defense for prescription forgery. This indicates that the legislature did not create a strict liability crime. Anderson, 141 Wn.2d at 362-63.

Reading in a knowledge element also harmonizes the statute with other offenses, including the crime of prescription forgery under the Uniform Controlled Substances Act, RCW 69.50.403(1)(c)(ii), and the crime of forgery, RCW 9A.60.020. Both these crimes require knowledge that the instrument or prescription is forged.

Accordingly, this Court should reject the State's argument and hold that knowledge of the prescription's forgery is an essential element.

b. The knowledge element cannot be fairly implied.

Under even a liberal interpretation, the information did not inform Gogel that he had to know that the prescription was forged. The information stated that Gogel "knowingly and intentionally did attempt to obtain a legend drug, to-wit: Oxycodone, a controlled substance, by means of a false and forged prescription." CP 1-2. Fairly read, this only told him that he intended to obtain oxycodone. It did not allege that Gogel knew

the prescription he used was forged. Thus, the charge should be dismissed. State v. McCarty, 140 Wn.2d 420, 428, 998 P.2d 296 (2000).

The State's analogy to State v. Nieblas-Duarte, 55 Wn. App. 376, 381, 777 P.2d 583 (1989) is unpersuasive. There, the State charged the defendant with delivery of a controlled substance using the following language:

That the defendant . . . unlawfully and feloniously did deliver to another a certain controlled substance, and a narcotic drug, to-wit: cocaine, a derivative of coca leaves.

Nieblas-Duarte, 55 Wn. App. at 377. The defendant argued the language did not include the mental element that he knew the substance was a controlled substance. The court rejected the argument in light of the language "unlawfully and feloniously" which the court equated to "knowingly." Nieblas-Duarte, 55 Wn. App. at 381.

Unlike in Nieblas-Duarte, the phrase, "knowingly and intentionally did attempt to obtain a legend drug, to-wit: Oxycodone, a controlled substance, by means of a false and forged prescription," only conveys that Gogel purposefully tried to obtain oxycodone. It does not fairly state that he knew the prescription was forged. See State v. Simon, 120 Wn.2d 196, 199, 840 P.2d 172 (1992).

Contrary to the State's argument, if the missing element cannot be fairly implied, no proof of prejudice is required. McCarty, 140 Wn.2d 425-26.

Because the missing element cannot be fairly implied, this Court should reverse.

3. Without Gogel's consent, police searched his vehicle and laptop computer.

After the filing of the opening brief, the trial court entered written findings of fact and conclusions of law. Gogel assigns error to the court's determination that Gogel consented to the search of his vehicle and the denial of his motion to suppress the evidentiary fruits from that search. Findings of Fact and Conclusions of Law at page 4.

While the court found Officer Buck's testimony credible, the court was troubled by the claim that Gogel had signed the form with his hands cuffed behind his back. Findings of Fact and Conclusions of Law at page 4. This Court should also be troubled. The point of having a written waiver is to resolve ambiguity. State v. Ferrier, 136 Wn.2d 103, 119 n.10, 960 P.2d 927 (1998). An "X" purportedly made by a defendant when his hands are cuffed behind his back is not compelling evidence of consent. Officer Buck did not testify, and the court did not find, that Gogel gave his verbal consent to search his vehicle. Instead, all the Officer procured was

an “X.” In light of these circumstances, Officer Buck’s testimony that Gogel consented by marking a form with an “X,” while his hands were cuffed behind, should be held inadequate.

Concerning the scope of the consent to search, the State misunderstands the argument. A laptop computer is neither part of a vehicle nor is it a “container.” Consent to search a “locked container” is not consent to search a laptop because a laptop is not a “container.” See Riley v. California, __ U.S. __, 134 S. Ct. 2473, 2491, 189 L. Ed. 2d 430 (2014) (rejecting argument that cell phones are “containers” that may be searched incident to arrest).

The unlawful search was prejudicial. The evidence from the laptop directly linked Gogel to the prescription presented to the pharmacist. This Court should reverse.

B. CONCLUSION

The State unlawfully charged and convicted Gogel of prescription forgery under the Legend Drugs Act. This Court should reverse the conviction. Alternatively, the conviction should be reversed due to the defective information and the unconstitutional search.

DATED this 17th day of November, 2014.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Richard W. Lechich".

Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorneys for Appellant

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DIVISION ONE**

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)	NO. 71427-9-I
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)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF NOVEMBER, 2014, 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 NOVEMBER, 2014.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710