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COURT OF APPEALS
DIVISION II

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NO. 33782-1-11
STATE OF WASHINGTON

BY _____

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL W. WHEELER,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
CAUSE NO. 04-1-02249-9

HONORABLE WM. THOMAS MCPHEE, Judge

RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUE

1. Whether there was sufficient evidence for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of the crime of unlawful possession of a controlled substance with intent to deliver.

2. While the defendant was erroneously sentenced under RCW 69.50.402(2)(b), applying the appellate court's analysis in State v. Morris, whether this court should re-think that analysis in the light of State v. Cromwell.

B. STATEMENT OF THE CASE

Shortly after 4 a.m. on December 8, 2004, Thurston County Sheriff's Deputy David Odegaard responded to a report of a triggered alarm, a broken window, and smoke coming from the Scott Lake Grocery Store. Trial RP 49-50. Upon arrival, Odegaard heard the alarm and observed the broken window. Trial RP 53-54. He also observed the defendant crouching by a vehicle in the store parking lot. Trial RP 56, 85. The defendant was wearing a jacket and had a backpack with him. Trial RP 57.

Odegarrrd yelled for the defendant to stop, but the defendant instead took off running.

Odegaard chased him over a fence and onto the property of the defendant's brother, Randy. Trial RP 57-58, 85, 159. The defendant then crawled under a trailer. He still had the jacket on and still had the backpack. Trial RP 69-72.

Odegaard repeatedly demanded that the defendant come out from under the trailer. However, the defendant refused, responding to Odegaard's demands with profanity. Trial RP 73-74. In the meantime, other officers arrived to assist Odegaard. Eventually, pepper spray was used to try and drive the defendant out from under the trailer, but this effort was not successful. Trial RP 76.

Deputy Snaza then crawled under the trailer with a tazer. He warned the defendant he would use the weapon if the defendant did not come out, but the defendant still did not emerge. Snaza ultimately used the tazer on the defendant four times because it did not seem to incapacitate the defendant to the extent it should have. Trial RP 187-197, 236. He then grabbed the defendant's

legs while other officers grabbed his legs, and in this way the defendant was dragged out. Trial RP 83, 199-202. The defendant continued to physically resist efforts to place him in custody after he was pulled from beneath the trailer. Trial RP 84.

The deputies then searched the defendant's backpack. Inside was a powder weighing 4.4 grams, which was later determined by testing at the Washington State Patrol Crime Laboratory to be methamphetamine. Trial RP 92, 106-107. Inside the backpack were also a digital scale and 510 dollars, 6 to 8 syringes, a small empty baggie, and a spoon with residue on it. Trial RP 91-101. The money was mostly in \$20 bills. Trial RP 255.

The 4.4 grams of methamphetamine was an unusual amount for a user to have in his possession, but it would not have been unusual for a dealer to have that amount. Trial RP 169, 229, 252, 254. It would also be unusual to come across a user who had both methamphetamine and over \$500 in his possession. Trial RP 253.

Most often, methamphetamine is sold as a "quarter sack", which is a quarter of a gram, usually costing twenty dollars. Trial RP 226, 255. The amount of methamphetamine in the defendant's possession could have resulted in 18 "quarter sack" sales, which at the rate of twenty dollars per "quarter sack" would have provided the defendant with over 350 dollars. Trial RP 209.

The location where the defendant was found to be in possession of the methamphetamine was within one thousand feet of a school bus route stop. Trial RP 247, 259.

On March 2, 2005, the defendant proceeded to a jury trial on a Second Amended Information filed February 7, 2005, charging him with one count of unlawful possession of a controlled substance with intent to deliver, to wit: methamphetamine, committed within 1,000 feet of a school bus route stop, and one count of resisting arrest. CP 20. The defendant was found guilty on both counts and the sentence enhancement was also found to have been proved. The defendant was sentenced to a

standard range sentence of 120 months in prison on the felony charge, with an additional 24 months for the sentence enhancement. CP 84-94.

C. ARGUMENT

1. Considering the evidence in the light most favorable to the prosecution, there was sufficient evidence for a rational trier of fact to find the defendant guilty beyond a reasonable doubt of unlawful possession of a controlled substance with the intent to deliver.

The defendant contends that there was insufficient evidence to support the defendant's conviction for unlawful possession of a controlled substance with intent to deliver. He argues that the State failed to prove beyond a reasonable doubt that he had the intent to deliver as opposed to having the methamphetamine for personal use.

The evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it is enough to permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency requires that

all reasonable inferences from the evidence 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. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). It is also the function of the fact finder, and not the appellate court, to discount theories which are determined to be unreasonable in the light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). Circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The amount of methamphetamine found in Wheeler's possession was unusually large for someone intending only personal use. Trial RP 123, 229, 252. However, that alone would be insufficient to prove an intent to deliver. Some additional factor indicative of distribution must be present. State v. Zunker, 112 Wn. App. 130,

135-136, 48 P.3d 344 (2002). A large amount of cash and the presence of drug paraphernalia, such as scales, are two such factors. Zunker, 112 Wn. App. at 136. Both those additional factors were present here.

Furthermore, the evidence was that methamphetamine is most often sold in the amount of a quarter of a gram, and the price is typically twenty dollars. Trial RP 209, 255. Thus, the large number of twenty-dollar bills in the defendant's possession, specifically 17, was consistent with his having completed multiple sales of methamphetamine in that typical manner.

Considering this evidence in the light most favorable to the State, there was sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that this defendant had the intent to deliver the methamphetamine he was found to have in his possession.

2. While the defendant was erroneously sentenced under RCW 69.50.401(2)(b), applying the court's analysis in State v. Morris, the court is urged to re-think this analysis in the light of State v. Cromwell, and find that the present defendant was properly sentenced under that

statutory provision.

The defendant was convicted of unlawful possession of methamphetamine with intent to deliver, in violation of RCW 69.50.401(2)(b). At the time of the offense, that statutory provision read as follows:

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(2) Any person who violates this section with respect to:

... (b) Amphetamine or methamphetamine, is guilty of a class B felony, and upon conviction may be imprisoned for not more than ten years or (i) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (ii) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine. Three thousand dollars of the fine may not be suspended. As collected, the first three thousand dollars of the fine must be deposited with the law enforcement agency having responsibility for cleanup of laboratories, sites, or substances used in the manufacture of the methamphetamine. The fine moneys deposited with that law enforcement agency must be used for such clean-up cost;

(c) Any other controlled substance classified in Schedule I, II, or III is

guilty of a class C felony punishable according to chapter 9A.20 RCW;. . .

In State v. Morris, 123 Wn. App. 467, 98 P.3d 513 (2004), Division Two of the Court of Appeals considered the convictions of three defendants who had been convicted for delivery of methamphetamine or possession of methamphetamine with intent to deliver. Two of the defendants had been sentenced under RCW 69.50.401(a)(1)(iii), which at the time of this case was codified as RCW 69.50.401(2)(c), and the State appealed, arguing that they should have been sentenced under RCW 69.50.401(a)(1)(ii), which at the time of this case was codified as RCW 69.50.401(2)(b). In the third instance, the defendant had been sentenced under RCW 69.50.401(a)(1)(ii) [RCW 69.50.401(2)(b)], and the defendant appealed, arguing he should have been sentenced under RCW 69.50.401(a)(1)(iii) [RCW 69.50.401(2)(c)]. Morris, 123 Wn. App. at 469-470.

At the root of the dispute for all three defendants in Morris, supra, was the question of whether the term "methamphetamine" as used in RCW

69.50.401(a)(1)(ii) [RCW 69.50.401(2)(b)] included only methamphetamine in its original, base form, or whether the term also included methamphetamine's salts, isomers, and the salts of methamphetamine's isomers. Most importantly, the issue was whether methamphetamine hydrochloride, a salt of methamphetamine, was included in RCW 69.50.401(a)(1)(ii) [RCW 69.50.401(2)(b)]. Morris, 123 Wn. App. at 472-473.

Methamphetamine base is an oily liquid, a highly volatile substance that evaporates when exposed to air. Methamphetamine hydrochloride is almost always the form of the drug that is actually injected because it is more usable and far less volatile than methamphetamine base. State v. Cromwell, 127 Wn. App. 746, 751-752, 112 P.3d 1273 (2005).

Under RCW 69.50.206, Schedule II controlled substances include methamphetamine, its salts, isomers, and salt of its isomers. Therefore delivery or possession with intent to deliver any of those forms of methamphetamine would be a

violation of RCW 69.50.401. However, the defendants in Morris contended that there was only proof of their delivery of methamphetamine hydrochloride or possession of that form of methamphetamine with intent to deliver, that the term "methamphetamine" in RCW 69.50.401(a)(1)(ii) [RCW 69.50.401(2)(b)] referred only to methamphetamine base, and therefore they could only be subject to the lesser penalties resulting from a conviction for violating RCW 69.50.401(a)(1)(iii) [RCW 69.50.401(2)(c)]. Morris, 123 Wn. App. at 472-473.

The Court of Appeals in Morris agreed with the defense argument. For the defendants in that case to have been sentenced under RCW 69.50.401(a)(1)(ii) [RCW 69.50.401(2)(b)], it would have been necessary to have proved beyond a reasonable doubt that the form of methamphetamine delivered or possessed was the drug in its base form, and since that was not the case, all of those defendants had to be sentenced under RCW 69.50.401(a)(1)(iii) [RCW 69.50.401(2)(c)].

Morris, 123 Wn. App. at 474-475.

In State v. Cromwell, 127 Wn.2d 746, 112 P.3d 1273 (2005), Division One of the Court of Appeals came to a different conclusion on this issue. In Cromwell, the defendants had been convicted for delivery of methamphetamine and possession of methamphetamine with intent to deliver pursuant to RCW 69.50.401(a)(i)(ii) [RCW 69.50.401(2)(b)]. The methamphetamine involved in those crimes was in the form of a salt of methamphetamine, most likely methamphetamine hydrochloride. The defendants appealed their convictions, arguing that they could only have been convicted under RCW 69.50.401(a)(1)(ii) [RCW 69.50.401(2)(b)] if they had delivered or possessed methamphetamine in its base form. Cromwell, 127 Wn. App. at 748-749.

In that case, the Court of Appeals held that it was a violation of RCW 69.50.401(a)(1)(ii) [RCW 69.50.401(2)(b)] if there was delivery of methamphetamine or possession of methamphetamine with intent to deliver, regardless of what form the drug was in. Cromwell, 127 Wn. App. at 752. A

significant factor in the consideration of Division One in this case was that RCW 69.50.401(a)(1)(ii) [RCW 69.50.401(2)(b)] varies the applicable maximum penalty based on the amount of methamphetamine involved by weight in terms of grams and kilograms. Since such a form of measurement would not be used for the oily liquid which constitutes methamphetamine base, it was contradictory to conclude that methamphetamine base was the only form of the drug covered by RCW 69.50.401(a)(1)(ii) [RCW 69.50.401(2)(b)]. The other consideration was that methamphetamine base is a volatile substance which evaporates into the air, and so is a form of the drug only rarely delivered or possessed with intent to deliver. Cromwell, 127 Wn. App. at 751-752.

In the present case, there was no distinction made in the testimony between methamphetamine base and one of the drug's compounds. The form of methamphetamine found in the defendant's possession was a powder weighing 4.4 grams. Trial RP 92, 107. Thus, it clearly was not

methamphetamine base.

Applying the ruling in Morris, supra, the State concurs that the defendants were erroneously sentenced under RCW 69.50.401(2)(b), and instead must be re-sentenced under RCW 69.50.401(2)(c). However, the State respectfully asks that the court re-examine that ruling in the light of the analysis of Division One in Cromwell, supra, and find that RCW 69.50.401(2)(b) was intended to apply to possession of methamphetamine in any of its forms with intent to deliver, and therefore the defendant in this case properly sentenced under that statute.

D. CONCLUSION

Based on the above, the State respectfully requests that the defendant's conviction and sentence for unlawful possession of a controlled substance with intent to deliver be affirmed.

DATED this 4th day of August, 2006

Respectfully submitted,



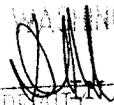
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DEPUTY PROSECUTING ATTORNEY

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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
Respondent)	DECLARATION OF
)	MAILING
v.)	
)	
DANIEL W. WHEELER,)	
Appellant)	

STATE OF WASHINGTON)	
)	ss.
COUNTY OF THURSTON)	

James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 16th day of February, 2006, I caused to be mailed to appellant's attorney, THOMAS E. DOYLE, a copy of the Respondent's Brief, addressing said envelope as follows:

Thomas E. Doyle,
Attorney at Law
P.O. Box 510
Hansville, WA 98340

I certify (or declare) under penalty of perjury
under the laws of the State of Washington that the
foregoing is true and correct to the best of my
knowledge.

DATED this 4th day of August, 2006 at Olympia, WA.



James C. Powers/WSBA #12791
Senior Deputy Prosecuting Attorney