NO. 33981-1-II
Cowlitz Co. Cause NO. 03-1-00997-8

COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
07 JAN 19 PM 2: 12
STATE OF WASHINGTON
BY
DEPUTY

PM 1-17-07

STATE OF WASHINGTON,

Respondent,

v.

TERRY LEE WINTERSTEIN,

Appellant.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
JAMES B.SMITH/WSBA #35537
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

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I. INTRODUCTION

After a search of the property on which he resided, the Appellant was charged with manufacturing methamphetamine. The Appellant proceeded to trial on this charge, at which time the State argued he was an accomplice to another individual, Bror Soderlind. The jury returned a verdict of guilty on the sole count.

During Appellant's trial, additional information came to light regarding when the Department of Corrections had received notice of a change of address by Mr. Winterstein from 646 Englert Road to 646 ½ Englert Road. To address this issue, the parties agreed the Appellant would pursue a CrR 7.8 motion on the basis of newly discovered evidence or misrepresentation. This motion took the form a suppression hearing to determine whether or not Community Corrections Officer Kris Rongen's warrantless entry into a residence at 646 Englert Road was lawful.

Following a lengthy hearing on June 28th, 2005, the trial court denied the Appellant's CrR 7.8 motion. The lower court held that while Winterstein had properly notified DOC of his change of address, this change of address was in fact a ruse and CCO Rongen's search was conducted in good faith and was lawful. The instant appeal timely followed.

II. STATEMENT OF THE CASE

The State agrees with the factual and procedural history as set forth by the Appellant.

III. ASSIGNMENTS OF ERROR

The State assigns error to the trial court's finding of fact that the Appellant was not required to obtain CCO Rongen's approval prior to changing his address. RP (6-28-05) 181.

The State similarly assigns error to the trial court's finding of fact that the Appellant had properly effected a change of address with the Department of Corrections prior to the search on February 6, 2003. RP (6-28-05) 181-182.

These assignment of error are proper, even without the State filing notice of a cross appeal. Under State v. Kindsvogel, 149 Wn.2d 447, 69 P.3d 870 (2003), a prevailing party that does not seek affirmative relief is not required to cross appeal in order to assign error to the lower court's findings of fact.

IV. ISSUES PRESENTED

1. **UNDER THE EVIDENCE PRESENTED AT TRIAL, WAS THE APPELLANT ENTITLED TO AN INSTRUCTION MODELED ON STATE V. ROBERTS?**

2. **WAS THERE SUFFICIENT EVIDENCE TO CONVICT THE APPELLANT OF MANUFACTURING METHAMPHETAMINE AS AN ACCOMPLICE?**

3. **DID CCO RONGEN HAVE LAWFUL AUTHORITY TO ENTER APPELLANT'S RESIDENCE AT 646 ENGLERT ROAD ON FEBRUARY 6TH, 2006?**

4. **IF THE COURT FINDS THAT CCO RONGEN ERRED BY SEARCHING 646 ENGLERT ROAD RATHER THAN 646 ½ ENGLERT ROAD, WAS THE SEARCH NONETHELESS JUSTIFIED AS HE WAS ACTING IN GOOD FAITH?**

V. SHORT ANSWERS

1. No.

2. Yes.

3. Yes.

4. Yes.

VI. ARGUMENT

A. THE APPELLANT WAS NOT ENTITLED TO AN INSTRUCTION MODELED ON STATE V. ROBERTS, AS THE EVIDENCE DID NOT ESTABLISH A LANDLORD-TENANT RELATIONSHIP.

At trial, the Appellant proposed a number of instructions based upon State v. Roberts, 80 Wn.App. 342, 908 P.2d 892 (1996). The trial court refused to give these instructions, though the reasons for this decision do not appear in the record. The Appellant argues that he was entitled to this instruction, and he is therefore also entitled to a new trial. However, the facts of Appellant's case differ so substantially from those in

Roberts that the trial court was correct to refuse the Appellant's instructions.

In Roberts, the defendant was charged with manufacturing marijuana in violation of the Uniform Controlled Substances Act. This charge arose from a marijuana grow operation that was discovered in the basement of a house the defendant leased. 80 Wn.App. at 345. The defendant testified that he had subleased the basement of the house to a man named John Sylvester. The defendant further testified that he was aware of the grow operation, collected rent during the period when marijuana was being grown in the basement, and paid a portion of the utility bills. Id. at 348-349. However, the defendant denied participating in growing marijuana, stating he did not report the operation or evict Sylvester because he feared retribution. Id.

The Roberts court held that, as a matter of law, a landlord is not an accomplice to manufacturing of a controlled substance where the landlord accepts rent, pays utilities, and does not evict the tenant who is manufacturing or destroy the operation. 80 Wn.App. at 356. These actions do not amount to aiding another in criminal activity. The court noted this decision was predicated upon the legal duties and remedies provided by the Residential Landlord-Tenant Act, RCW 59.18. Id.

In the instant case, the facts are grossly dissimilar. Bror Soderlind testified that he paid the Appellant one hundred dollars a month in rent. RP 355. Mr. Soderlind lived in a bedroom in the house. RP 357, 418, 426. Mr. Soderlind testified that he cooked methamphetamine in a travel trailer behind the house. The Appellant brought this trailer onto the property and set it up. RP 356. However, the trailer evidently belonged to Mr. Soderlind, who had purchased it with illicit drugs. RP 376.

Mr. Soderlind further testified that, at his request, the Appellant ran electricity out to the trailer. RP 364. Mr. Soderlind also testified the Appellant was aware that he, Mr. Soderlind, was cooking methamphetamine in the trailer. Id. Indeed, Mr. Soderlind stated he provided methamphetamine to the Appellant. Id. at 357.

Additionally, two employees of a Walgreens store located in Vancouver, Washington testified the Appellant came to their store during the time in question and bought large quantities of pseudoephedrine. RP 332-346. This store was one of several stores listed in notebooks kept by Mr. Soderlind. RP 148, 363. Notably, the Walgreens employees stated that the Appellant would buy the maximum amount of pseudoephedrine allowed by law. RP 345.

The facts of this case do not remotely resemble those of Roberts. In Roberts, the only evidence was that the defendant rented a basement

that he knew was being used to grow marijuana. There was no evidence the defendant participated in or aided the grow operation, except for renting out the basement and paying part of the utilities. Also, the evidence in Roberts clearly indicated the defendant had a landlord-tenant relationship with the alleged grower, Mr. Sylvester.

Here, the evidence shows that the Appellant rented a *room* in the house to Mr. Soderlind. There was no testimony or suggestion that the Appellant rented the travel trailer to Mr. Soderlind. Indeed, the un-controverted evidence was that Mr. Soderlind owned the travel trailer, and that he rented only a bedroom in the house. Given this, the Appellant could not be the landlord of the travel trailer, as he was not renting it to Mr. Soderlind. The fact the Appellant apparently consented to Mr. Soderlind having the travel trailer on the property does not create any landlord-tenant relationship between them.

Indeed, there is no evidence there was any contractual agreement between the Appellant and Mr. Soderlind regarding the travel trailer. Considering the evidence, there is a strong inference that the Appellant and Mr. Soderlind agreed to use the travel trailer to cook methamphetamine, but this "contract" would be void for public policy. See Keystone Masonry, Inc. v. Garco Const., Inc., 147 P.3d 610, 613 (2006). Since the Appellant was not renting out the facilities used to

manufacture methamphetamine, he is not entitled to an instruction based on Roberts. The Appellant rented a bedroom to Mr. Soderlind, not a travel trailer. The trial court correctly declined to give the Appellant's proposed instruction.

Finally, even if this Court should find the Appellant and Mr. Soderlind were engaged in a landlord-tenant relationship regarding the travel trailer, the evidence presented at trial indicated the Appellant did much more than merely provide a location to cook methamphetamine. The testimony of the Walgreens employees indicates the Appellant was himself an integral part of the manufacturing process, in that he was supplying Mr. Soderlind with raw material to convert into methamphetamine. This distinction alone is sufficient to distinguish this case from Roberts and render any instruction based on that case improper.

i. If Failure to Give the Proposed Roberts Instruction was Error, It was Harmless.

Should this Court find the trial court erred by rejecting the Appellant's proposed instruction, this error was harmless beyond any reasonable doubt. Erroneous jury instructions may be harmless error, where the evidence shows no prejudice could have resulted. State v. Jackman, 156 Wn.2d 736, 132 P.3d 136 (2006); Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

Here, the undisputed evidence established that during the period when Mr. Soderlind was manufacturing methamphetamine in the travel trailer, the Appellant was repeatedly purchasing large quantities of pseudoephedrine from a Walgreens in Vancouver. This very same Walgreens was listed in materials Mr. Soderlind kept as part of his manufacturing operation.

This evidence is damning, particularly when coupled with Mr. Soderlind's testimony that he preferred to use pseudoephedrine when cooking methamphetamine. RP 359, 374. The testimony showed that the Appellant repeatedly bought the maximum amount of pseudoephedrine allowed by law. This evidence, when viewed in the context of the Appellant's proximity to, and relationship with, Mr. Soderlind, is compelling. A jury that believed this testimony would certainly have convicted the Appellant, even with the proposed instruction regarding accomplice liability.

B. THERE WAS SUFFICIENT EVIDENCED TO CONVICT THE DEFENDANT AS AN ACCOMPLICE.

The Appellant argues there was insufficient evidence to convict him, as an accomplice, of manufacturing methamphetamine. When the sufficiency of the evidence is challenged, the test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of

fact could have found the defendant was guilty beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-222, 616 P.2d 628 (1980).

All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-907, 567 P.2d 1136 (1977). Also, a claim of insufficiency "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Here, the evidence established that the Appellant repeatedly purchased large amounts of pseudoephedrine from a store listed in Mr. Soderlind's manufacturing notebooks. The Appellant had a clear motive to provide raw materials to Mr. Soderlind, as he was receiving methamphetamine from Mr. Soderlind. The Appellant also participated in setting up the trailer used to manufacture methamphetamine, provided a location for the manufacturing[1], and ran power to the trailer.

Furthermore, Det. Tim Watson testified that the Appellant fled the scene when confronted by his community corrections officer. RP 245-246. Det. Watson pursued the Appellant briefly, but broke off the pursuit due to the fact he was driving a minivan that was unsuited to a high-speed

[1] Though not, as the appellant contends, as a landlord. The evidence clearly indicates the appellant merely consented, without any contractual relationship, to have the trailer placed on the property.

pursuit. RP 246. When viewed in the light most favorable to the State, his flight is indicative of criminal involvement in the lab.

Contrary to Appellant's claims, the evidence in this case was more than sufficient to prove the Appellant aided Mr. Soderlind in manufacturing methamphetamine. He provided a safe location and raw materials for the manufacturing process. He fled the scene when confronted by law enforcement. The inferences that can be drawn from these facts would allow a rational jury to return a verdict of guilty, as occurred in this case.

C. PURSUANT TO CCO RONGEN'S DIRECTIVE, APPELLANT WAS REQUIRED TO PRE-APPROVE ANY CHANGE OF ADDRESS. AS APPELLANT DID NOT OBTAIN CCO RONGEN'S APPROVAL TO CHANGE HIS ADDRESS TO 646 ½ ENGLERT ROAD, HE HAD NOT PROPERLY CHANGED HIS ADDRESS PRIOR TO THE SEARCH.

During the intake process with DOC, Appellant was provided with a copy of the standard conditions of supervision. Exhibit 8. This document requires the probationer to notify his CCO prior to changing address or employment. Exhibit 8, RP (6-28-05) 21. This document also states that the probationer is to "abide by written or verbal instructions issued by a community corrections officer." Exhibit 8.

Appellant's community corrections officer was Kris Rongen. CCO Rongen testified that he informed Appellant that any change of address

would need to be pre-approved. RP (6-28-05) 21, 24. While DOC has a kiosk system that allows a probationer to electronically change his address, CCO Rongen stated this process did not comply with his own requirements, and that he had instructed the Appellant accordingly. Id. 21-24.

The State agrees with Appellant that at some point prior to the search on February 6th, 2003, he attempted to electronically change his address with DOC using the kiosk. However, the State does not agree with the Appellant or the trial court that this act constituted proper and effective change of address with the Department. Instead, at the time of the search, the only approved address registered by Appellant with CCO Rongen was 646 Englert Road.

As reflected by Exhibit 8, a probationer is required to abide by the verbal instructions of his CCO. In this case, CCO Rongen instructed Appellant that the only way he could properly change his address was to provide a proposed address for Rongen to verify and approve. Instead of doing so, Appellant engaged in a transparent ruse to evade this requirement by attempted to use the kiosk to change his address to 646 ½ Englert Road. However, as Appellant did not follow the proper procedure for changing his address, the attempted change was not effective prior to the February 6th search.

Thus, when CCO Rongen conducted the search at 646 Englert Road, he searched the last address properly listed by Appellant as his residence. The Appellant has conceded that CCO Rongen had a reasonable suspicion a probation violation had occurred, allowing for a search of Appellant's residence under RCW 9.94A.631 and State v. Simms, 10 Wn. App. 75, 85, 516 P.2d 1088 (1973). As CCO Rongen searched the last properly registered address for the Appellant, this warrantless search was proper and the trial court appropriately denied the Appellant's CrR 7.8 motion. To rule otherwise would, as the trial court noted, allow Appellant to benefit from perpetrating a fraud on DOC and CCO Rongen.

D. CCO RONGEN BELIEVED APPELLANT RESIDED AT 646 ENGLERT ROAD AT THE TIME OF THE SEARCH, AND ACTED IN GOOD FAITH BY SEARCHING THAT RESIDENCE.

Should the Court find that Appellant had properly changed his address with DOC, the State asks the Court to find that CCO Rongen's search was justified under the good faith exception to the warrant requirement. On the date of the search, CCO Rongen's actual subjective belief was that Appellant resided at 646 Englert Road. This belief was confirmed by the condition of the residence and the motor home during the search.[2] Considering this, CCO Rongen was acting in good faith when

[2] This belief was also verified by Mr. Soderlind's trial testimony that the appellant resided at 646 Englert Road. RP 357.

he conducted the search, as he actually believed the Appellant resided at that address.

The State asks this Court to adopt a good faith exception to the lawful authority requirement imposed by Article I, Section 7 of the Washington State Constitution. Under the United States Constitution, the exclusionary rule does not apply to evidence seized illegally when the state was acting in good faith. See United States v. Leon, 468 U.S. 897, 82 L. Ed. 2d 677, 104 S. Ct. 3405 (1984). Moreover, prior decisions by Washington courts have not invoked the exclusionary rule where doing so would serve no deterrent effect.

In State v. McFarland, 84 Wn.2d 391, 526 P.2d 361 (1974), the court allowed contraband seized during a jail house search to be admitted, despite the fact the defendant was being booked into jail pursuant to a void municipal court judgment. Similarly, in State v. Smith, 16 Wn.App. 425, 558 P.2d 265 (1976), the court did not exclude evidence obtained pursuant to a warrant signed by a judge who was a potential witness against the defendant. There the court noted "[p]olice deterrence is simply not involved and the underlying purposes of the Fourth Amendment would not be advanced by invoking the exclusionary rule." Smith, 16 Wn.App. at 428.

The State therefore asks this Court to find that even if CCO Rongen's search was lacking in lawful authority, it was nonetheless justified under the good faith exception to the exclusionary rule.

VII. CONCLUSION

Based on the preceding argument, the State respectfully requests the Court to deny the Appellant's appeal. The Appellant was not entitled to an instruction modeled on Roberts, as he was not renting the trailer to Mr. Soderlind. Moreover, the Appellant did not properly change his address with DOC, and cannot negate a lawful search through the use of a ruse. The State asks this Court to uphold the trial court and deny the appeal.

Respectfully submitted this 16th day of January, 2007.

Susan I. Baur
Prosecuting Attorney

By _____
James B. Smith, WSBA #35537
Deputy Prosecuting Attorney
Representing Respondent

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,	)	**NO. 33981-1-II**
	)	**Cowlitz County No.**
Appellant,	)	**03-1-00997-8**
	)	
vs.	)	**CERTIFICATE OF MAILING**
	)	
TERRY LEE WINTERSTEIN,	)	
	)	
Respondent.	)	
	)	

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BY _____
DEPUTY

I, Audrey J. Gilliam, certify and declare:

That on the 17 day of January, 2007, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

ANNE MOWRY CRUSER
Attorney at Law
P. O. Box 1670
Kalama, WA 98625

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 17 day of January, 2007.

Audrey J. Gilliam

Audrey J. Gilliam