

NO. 34887-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JOHN EDWARD SMITH,

Appellant.

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
07 JUL 13 PM 1:27  
BY 

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

The Honorable Sergio Armijo

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REVERSAL AND DISMISSAL IS REQUIRED BECAUSE THE STATE'S VIOLATIONS OF DISCOVERY DENIED SMITH HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL.

The state does not dispute that it violated the rules of discovery by failing to specifically name the forensic scientists it intended to call as witnesses. Instead, the state argues that “defendant did not object to this below and it therefore has not been preserved for review,” mistakenly relying on State v. Guloy, 104 Wn.2d 412, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S. Ct. 1208, 89 L. Ed. 2d 321 (1986). BOR at 10. Guloy precludes appellate review of objections to the admissibility of evidence that were insufficiently specific or not made at trial. Id. at 422. Guloy therefore has no application to the violations of discovery in this case.

Likewise, the state does not dispute that it violated the rules of discovery by failing to provide the defense with 83 pages of notes used by its expert forensic scientist, Jane Boysen, during her testimony. The state argues instead that the issue is waived because the trial court made a tentative ruling and the defense did not move for reconsideration. BOR at 11-12. The state’s argument fails because it relies on cases involving

tentative rulings on pretrial motions or motions in limine, which has no application to the motion to dismiss made here. BOR 11-12.

In any event, the defense moved for dismissal based on the state's violations of discovery and mismanagement of the case. 17RP 983-1000. Defense counsel argued that the late discovery pertaining to Boysen's testimony was prejudicial:

The State was ordered to provide us tests results in the omnibus order of January 4, 2006, by the trial date. Normally, it's two weeks prior to the trial. But allowing them to produce them as of the trial date was fairly lenient of us. We actually got the notes 17 full days into trial, after the bulk of her testimony. And then we have an hour and a half at lunch. It was her report, the latter report just says we tested this, found no controlled substance. In her lab report she details all the tests. She did one type of color test and then another type of color test, then a infrared analysis, then a gas chromatograph analysis, then she admitted that she doesn't have the perfect tool for testing red phosphorus because they don't have that machine available to them any more. So we didn't even know what tests she did. If we had known what tests she did, then we could have asked the Court for an expert, under the court rules, or have DAC appoint one. Then as nonscientists we have an hour and a half over lunch, with other commitments, to digest 83 pages of notes and it is extreme mismanagement. It's a violation of the omnibus order. It's an egregious error that provides fundamental unfairness.

17RP 986-87.

Furthermore, the state does not dispute that it waited over five months to file an amended information, adding charges of possession with intent to manufacture and manufacturing within a school zone, but argues

that the amended information was not prejudicial. BOR at 13-14. The state asserts that defense counsel “acknowledged that the bus stop zone enhancement is ‘generally pretty clear.’ ” BOR at 14. The record reflects, however, that defense counsel actually stated, “The issue of the school zone enhancement is generally pretty clear, but I can’t say anything until I receive the documentation.” 6RP 34. Moreover, defense counsel objected to the amended information because the state failed to show probable cause. 6RP 36-37. The state admitted that it did not provide a declaration of probable cause with the amended information, claiming it is not required to do so under case law. 6RP 37-38. The court responded, “I have always seen the Affidavit on Probable Cause to support the Information” and directed the state to locate the case law but the record reflects that the state never provided such authority. 6RP 39.

Additionally, the state does not dispute that it knew where to locate Tucker since May 2005 but did not arrest him until well into the trial in March 2006. Instead, the state claims that Smith has failed to show that he was prejudiced by Tucker’s testimony. To the contrary, it is clear from the record that Tucker’s testimony was detrimental to Smith’s defense:

Q. What did you observe of Mr. Smith?

A. I observed him manufacturing methamphetamine on the evening of the third and the morning of the fourth.

Q. And on the third, what specifically did you observe?

A. He came to my room. He asked me to please cut some strips off of some matches and soak them in alcohol for him. And then I observed him at a later time that evening separating the ephedrine from the tablets. Then later on that evening, I saw him scraping the finished methamphetamine product from the fry pan, distributing it into packaging and selling the packages to people who came over to the house. When he finished with the first batch, he started the second one.

18RP 1105.

Without Tucker's testimony, the state's case was based entirely on circumstantial evidence. The late disclosure of Tucker's testimony was prejudicial to Smith's defense that the state failed to prove beyond a reasonable doubt that he possessed and manufactured methamphetamine given the fact that he shared the trailer with Tucker who owned the trailer.

Significantly, the state does not distinguish this case from State v. Sherman, 59 Wn. App. 763, 801 P.2d 274 (1990) or State v. Dailey, 93 Wn.2d 454, 610 P.2d 357 (1980), where this Court and our Supreme Court held that mismanagement by the state warranted dismissal. See Brief of Appellant (BOA) at 10-11. The state instead misplaces its reliance on State v. Baker, 78 Wn.2d 327, 474 P.2d 254 (1970), arguing that Smith has failed to meet his burden of proving prejudice. BOR at 16-17. In Baker, the state improperly obtained an ex parte order to acquire a

psychiatric report of the defendant. Id. at 329-330. Our Supreme Court concluded that dismissal was not the remedy because the report had no significant effect upon the trial since it was not introduced as evidence, the psychiatrist did not testify, and there was no information about the crime contained in the report which was not already possessed by the prosecutor. Id. at 332-33.

Unlike in Baker, where no prejudice occurred, the state's misconduct here was prejudicial to Smith's defense because counsel had insufficient notice and time to properly prepare for complex expert testimony, critical testimony provided by Tucker, and an amended information interjecting new facts. The defense was forced to change its original trial strategy and its theory of the case in the midst of trial, while the state had the unfair advantage of proceeding through trial as planned. Prejudice includes the "right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense." State v. Michielli, 137 Wn.2d 229, 240, 937 P.2d 587 (1997).

The purpose of CrR 8.3(b) "is to see that a defendant is fairly treated." State v. Whitney, 96 Wn.2d 578, 580, 637 P.2d 956 (1981). Reversal and dismissal is required because the state's gamesmanship and mismanagement of the case deprived Smith of his rights to a fair trial and

effective assistance of counsel. Sherman, 59 Wn. App. at 771-72; Dailey, 93 Wn.2d at 459.

2. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN ADMITTING SMITH'S STATEMENT OF A PRIOR BAD ACT PROHIBITED UNDER ER 404(b).

The state argues that the trial court did not abuse its discretion in admitting Smith's statement because it was materially relevant and highly probative of his knowledge, intent, and motive. BOR at 18-23. However, the state fails to distinguish this case from State v. Perrett, 86 Wn. App. 312, 320, 936 P.2d 426 (1997), review denied, 133 Wn.2d 1019, 948 P.2d 387 (1997), where this Court held that the trial court abused its discretion in admitting Perrett's statement of a prior bad act because it raised an inference of propensity. See BOA at 17-19. Consequently, the state's argument fails under our Supreme Court's holding in State v. Salterelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982), that "regardless of relevance or probative value, evidence that relies on the propensity of a person to commit a crime cannot be admitted to show action in conformity therewith."

The state additionally fails to show that the trial court engaged in the three-part analysis required by this Court in State v. Wade, 98 Wn. App. 328, 333-34, 989 P.2d 576 (1999), to determine admissibility of

evidence under ER 404(b). BOR at 20-21. The state's assertion that the prosecutor repeatedly stated the purpose of admitting Smith's statement and the court provided a limiting instruction to the jury does not excuse the court's failure to identify the purpose for admitting the evidence. Furthermore, the court failed to explain why the statement was materially relevant and why it was more probative than prejudicial. 11RP 394.

Although not raised below, the state argues that this Court should affirm the trial court's ruling based on the res gestae exception to ER 404(b). BOR 19-20, citing State v. Brockman, 37 Wn. App. 474, 682 P.2d 925 (1984). In Brockman, this Court concluded that the jury was entitled to know the whole story, "The defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary version of the transaction by arguing that evidence of other crimes is inadmissible because it only tends to show the defendant's bad character." Id. at 490-91. Relying on Brockman, the state illogically argues, "Defendant was not asked about any prior manufacturing arrest. His statement gives the jury the whole picture about defendant's involvement in the current charges." BOR at 20. Smith's statement that he did not use red phosphorous when he was arrested before does not even remotely connect that incident with

this case. Clearly, there is no evidence of “a string of connected offenses” as in Brockman. The state’s argument is wholly without merit.

Reversal is required because the court erred in admitting Smith’s highly prejudicial statement that materially affected the outcome of the trial given the cumulative errors in this case.

3. REVERSAL AND DISMISSAL IS REQUIRED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT SMITH POSSESSED PSEUDOEPHEDRINE AND/OR EPHEDRINE WITH THE INTENT TO MANUFACTURE METHAMPHETAMINE.

The state argues that there was sufficient evidence for the jury to convict Smith of possession of pseudoephedrine and/or ephedrine with intent to manufacture methamphetamine, relying on State v. Moles, 130 Wn. App. 461, 123 P.3d 132 (2005). BOR at 26-28. However, the state misapprehends this Court’s holding and overlooks facts that distinguishes Moles from this case. BOR at 27.

In Moles, an officer of the clandestine lab team found 440 loose white pseudoephedrine pills that had been removed from the blister packs in the defendants’ stolen vehicle. Officer Byerley testified that the first stage in the manufacturing process is to acquire pseudoephedrine tablets and then process them. Id. at 466. This Court concluded that “the fact that so many pills had been removed from the blister packs leads to the

only plausible inference: that the defendants were in the process of preparing the pseudoephedrine for the first stage of the manufacturing process.” Id. Although this Court held that this alone is sufficient to support the jury’s finding of intent to manufacture, this Court noted further that Byerley also found a coffee filter with methamphetamine residue in one of the defendant’s pocket and there was evidence that the defendants acted in concert to buy the maximum allowable amount of cold pills containing pseudoephedrine from various stores over a short period of time. Id.

Unlike in Moles, where the defendants were preparing to manufacture pseudoephedrine, the state’s evidence here only showed the existence of the remnants of an old methamphetamine lab and the remains of pseudoephedrine. See BOA at 21-22. The state asserts that numerous factors lead to a strong inference that defendant intended to manufacture methamphetamine but fails to cite to the record. BOR at 27-28. The state’s argument should therefore be rejected by this Court.

Even considering the factors asserted by the state, the evidence establishes possession but is insufficient to prove beyond a reasonable doubt that Smith possessed the pseudoephedrine to manufacture more methamphetamine. Reversal and dismissal is required because “bare possession of a controlled substance is not enough to support an intent to

manufacture conviction.” Moles, 130 Wn. App. at 466, citing State v. McPherson, 111 Wn. App. 747, 759, 46 P.3d 284 (2002).

4. REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT’S FAILURE TO TAKE ANY REMEDIAL ACTION TO CURE JURY MISCONDUCT VIOLATED SMITH’S CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

The state argues that the trial court properly denied defendant’s motion for dismissal or mistrial but does not dispute that the court had a duty to take remedial action and failed to do so. BOR at 28-32. Contrary to the state’s contention that there was no proof of jury misconduct, the court expressed concern over the markings on the board by the jury. 17RP 1047. Despite its concern, the court made no effort to determine whether misconduct occurred. Even the state encouraged the court to take remedial action, “If Your Honor wanted to interview the jury to address that, I’d have no problem with that. I’ll defer to Your Honor on that.” 17RP 1048. Inexplicably, the court concluded, “By addressing it, you raise the issue more.” 17RP 1048.

The trial court must objectively determine whether jury misconduct could have affected the jury’s deliberations. State v. Barnes, 85 Wn. App. 638, 669, 932 P.2d 669 (1997), review denied, 133 Wn.2d 1021, 948 P.2d 389 (1997). Here, the court failed to objectively determine

whether misconduct occurred by refusing to interview the jury. The court's failure to take any remedial action constitutes reversible error.

5. REVERSAL IS REQUIRED BECAUSE THE COURT ABUSED ITS DISCRETION IN REFUSING TO MEANINGFULLY CONSIDER A DOSA FOR SMITH.

The state's argument that the court did not categorically deny a DOSA for Smith is unsubstantiated by the record. BOR at 35-37. The court emphatically stated, "I'm not going to consider DOSA, I'm not." 21RP 1225. Defense counsel offered to provide his copy of the DOSA evaluation to the court but the court refused to consider it. 21RP 1225. After denying the DOSA, the court proceeded to impose sentence, commenting that it recalled Smith's disdain for Tucker during the trial but it would not punish Smith for "what I perceive as a certain type of character." 21RP 1225-26. Contrary to the state's argument, there is no indication in the record that the court "ultimately decided not to grant a DOSA due to defendant's exploitation of Mr. Tucker." BOR at 36.

Reversal is required because the court categorically refused to meaningfully consider whether a DOSA was appropriate for Smith. State v. Grayson, 154 Wn.2d 333, 342-43, 111 P.3d 1183 (2005).

B. CONCLUSION

For the reasons stated here, and in the opening brief, this Court should reverse Mr. Smith's convictions, particularly in light of the cumulative errors in this case.<sup>1</sup>

DATED this 12<sup>th</sup> day of July, 2007.

Respectfully submitted,

  
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<sup>1</sup> See BOA at 26-27.

**DECLARATION OF SERVICE**

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached, to Kathleen Proctor, 930 Tacoma Avenue South, Tacoma, Washington 98402.

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

DATED this 12<sup>th</sup> day of July, 2007 in Des Moines, Washington.

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