

NO. 35107-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY R. DE LACRUZ,

Appellant.

14-1-19
COURT OF APPEALS
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STATE OF WASHINGTON
BY *dm*

ORIGINAL

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-00794-8

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

- A. The trial court erred when it denied Mr. Delacruz's motion to suppress.
- B. The trial court erred when it denied Mr. Delacruz's motion to dismiss.
- C. The trial court erred when it failed to give Mr. Delacruz's unanimity jury instruction.
- D. The trial court erred when it failed to give Mr. Delacruz's jury instruction further defining dominion and control.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

- A. Did the trial court err when it denied Mr. Delacruz's motion to suppress evidence found as the result of an illegal warrantless search?
- B. Did the trial court err when it denied Mr. Delacruz's motion to dismiss when Mr. Delacruz was forced to choose between his right to speedy trial and effective assistance of counsel?
- C. Did the trial court err when it failed to give the proposed unanimity jury instruction when the prosecution presented multiple independent acts or pieces of evidence to support the conclusion that Mr. Delacruz possessed methamphetamine?
- D. Did the trial court err when it failed to give the proposed jury instruction limiting the definition of dominion and control, especially in light of the fact that the State claimed Mr. Delacruz admitted use was evidence of possession?

III. STATEMENT OF THE CASE

Timothy Delacruz was charged by information filed in the Superior Court for Kitsap County with one count of Possession of a Controlled Substance (methamphetamine) in violation of RCW 69.50.4013 and 69.50.206(d)(2) on May 27, 2005. CP 1. On October 17, 2005, the day of trial, Mr. Delacruz filed a Notice of Withdrawal and Substitution of Counsel. CP 20 Trial was continued until December 5, 2005 with a status hearing scheduled for November 7, 2005. CP 21 Mr. Delacruz failed to appear at the

November 7, 2005 status hearing and a bench warrant was issued and trial date of December 5, 2005 was struck. CP 23 On November 9, 2005, Mr. Delacruz appeared with counsel to quash the warrant and a new trial date of January 4, 2006 was set. A 3.6 motion to suppress hearing was heard on January 4, 2006. CP 43 Findings of Fact and Conclusions of Law were entered on January 30, 2006. The motion to suppress was partially granted and partially denied. CP 48 Trial was set for February 6, 2006, however, defendant appeared in wrong court room and trial was struck and rescheduled February 8, 2006. CP 51. On February 8, 2006, before Judge Hartman, at trial call, the State attempted to file an amended information adding a Bail Jump charge. RP 2 Counsel for Mr. Delacruz objected to joining the two charges on grounds that there was a conflict of interest. The court sustained the objection and the state was not permitted to file the amended complaint. RP 3-6 The parties appeared before Judge Laurie to begin trial, and defense counsel stated that it was not in the best interest of Mr. Delacruz to sever the counts. Defense counsel moved to continue the trial and withdraw from representation. RP 1-9; CP 57 Mr. Weaver filed a Notice of Appearance on February 15, 2006. CP 61 Mr. Weaver filed a motion to dismiss on March 2, 2006 and argument was heard on May 19, 2006. CP 69 At the hearing, testimony of former counsel Greg Memovich was presented by defense, and DPA Kevin Anderson testified on behalf of the State. The testimony concerned the events of February 8, 2006. Mr. Memovich testified that Mr. Anderson became angry after Judge Hartman denied the State's amended information adding the bail jump charge. Mr. Anderson told Memovich that it would not be in his client's best interest to have separate trials. He virtually guaranteed that the bail jump charge would not be filed in a timely manner as to

allow for concurrent sentences, and that Mr. Delacruz would serve more time if the two were not joined for trial. RP 22-24 Mr. Anderson corroborated Mr. Memovich's testimony, admitting he was angry and that the State was not compelled to file charges at the convenience of the defendant. RP 55-60 The motion to dismiss was denied. CP 73. A Second Amended Information was filed on June 12, 2006 charging Mr. Delacruz with Count One Delivery of a Controlled Substance (Methamphetamine) and Count Two Bail Jumping. CP 79 A trial by jury was held June 12 – 14, 2006. The jury found Mr. Delacruz guilty on count I and not guilty on count II. Timely notice of appeal was filed. CP 102

A. SUBSTANTIVE FACTS

On May 26, 2005 several plain clothed Bremerton Police Department detectives went to the home of Mr. Delacruz to conduct and knock and talk. The detectives had been informed by Mr. Delacruz's girlfriend that they would find drug paraphernalia in the house. When Mr. Delacruz answered the door, the officers identified themselves as police officers and stated that they had been informed that drug paraphernalia would be found in the house. Mr. Delacruz agreed that paraphernalia would be found in the house. At this time, the detective noted that Mr. Delacruz was sweaty and wide eyed and suspected he was high on meth. He then read Mr. Delacruz Ferrier and Miranda warnings, and Delacruz permitted the detectives to enter the house to search. Prior to entering the house, Delacruz told Detective Elton that there was a meth pipe and a bottle fashioned into a meth pipe in the house. Detective Endicott had noticed a female in the house who appeared to be trying to hide a bong. A bottle with a meth pipe attached to it was located where Endicott had seen the female. Another pipe was located somewhere, not specified, in the living room.

A makeup bag was also found, and it was noted that there were baggies of what appeared to be methamphetamine and pills in the bag. After finding these items, Elton asked Delacruz when he last used meth. Delacruz stated that he had started a few days ago and used about five times since and that he had used meth today and was high right now. CP 1

IV. ARGUMENT

A. THE TRIAL COURT ERRED WHEN IT DENIED MR. DELACRUZ'S MOTION TO SUPPRESS BECAUSE THE CONSENT TO SEARCH WAS NOT VOLUNTARY.

In reviewing findings of facts on a motion to suppress, the court will only review findings of facts to which error has been assigned. Unchallenged findings of fact are treated as verities on appeal. State v. Kinzy, 141 Wn.2d 373, 382, 5 P.3d 668 (2000) (quoting State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994)). The court reviews challenged findings of fact for substantial evidence. State v. Holmes, 108 Wn.App. 511, 31 P.3d 716 (2001). The court reviews conclusions of law in an order pertaining to suppression evidence de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Mr. Delacruz assigns error to Conclusion of Law, number three which states: "That while the defendant may have ingested methamphetamine recently, he understood who was speaking with him and what was being discussed, and voluntarily waived his rights under Miranda and Ferrier." The trial court permitted two pipes found in the living room to be admitted, but did not allow items known to be in the make up bag to be admitted. CP 48

The Washington State Constitution guarantees to its citizens that they will neither be disturbed in their private affairs, nor have their homes invaded, without authority of

law. Wash. CONST. art 1, § 7. Warrantless searches are per se unreasonable. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). A residence is given heightened protection under both the Fourth Amendment to the United States Constitution and Article 1, section 7 of the Washington Constitution. A search of a residence without the benefit of a search warrant is presumably invalid unless it falls within one of the carefully drawn exceptions to the search warrant requirement. While consent is a recognized exception to the warrant requirement, all such exceptions are narrowly drawn. State v. Reichenbach, 153 Wn.2d 126, 131, 101 P.3d 80 (2004). The State has the burden of proving that consent to the search was given voluntarily by someone with authority to give consent. The level of proof required is clear and convincing evidence. State v. Smith, 115 Wn.2d 775, 801 P.2d 975 (1990). The Washington Constitution grants even greater protection to a residence than does the Fourth Amendment. Before a warrantless search of a residence based on consent is deemed to be valid pursuant to a knock and talk procedure, law enforcement must advise the occupant of their right to refuse. State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998). If the police make a show of force at the time the consent is sought, or if surroundings are coercive in another respect, the consent will generally not be considered voluntary. See Ferrier. In Ferrier there were four police officers present when consent to enter the residence was sought. Similarly here, there were at least four armed and uniformed law enforcement officers present.

Moreover, at the time law enforcement sought Mr. Delacruz's consent it was apparent to them that Mr. Delacruz was impaired and admitted to being high on methamphetamine. Not only is mental impairment relevant in determining if consent was

knowingly and voluntarily given, the mere act of law enforcement seeking consent from someone they believe to be impaired might be deemed coercive. State v. Sondergaard, 86 Wn.App. 656, 664, 938 P.2d 351 (1997) *review denied*, 133 Wn.2d 1030 (1998). In Sondergaard, the State argued, that despite the fact that Sondergaard was hallucinating, she was able to respond to the officer in a way that was not incoherent. Id. The court held that the State had not met its burden of showing that Sondergaard had the mental capacity to voluntarily consent. Similarly here, although Delacruz's responses to the officers were not incoherent, it was evident to the officers that he was under the influence of methamphetamine, stating that he was sweating and wide eyed and appeared nervous. Therefore, the fact that they pursued obtaining consent, believing he was high on methamphetamine, was in itself coercive behavior which vitiates the consent. The State has not met its burden of proving that the consent to enter and search was voluntarily obtained, and the motion to suppress evidence found should be granted.

B. THE TRIAL COURT ERRED WHEN IT DENIED MR. DELACRUZ MOTION TO DISMISS BECAUSE MR. DELACRUZ WAS FORCED TO CHOOSE BETWEEN HIS RIGHT TO SPEEDY TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL.

1. The Trial Court Abused Its Discretion in Denying the Motion to Dismiss Under CrR 8.3(b).

A trial court has discretion to dismiss “any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused’s right to a fair trial.” CrR 8.3(b) Two things must be shown to support dismissal under CrR8.3(b). A defendant must show by a preponderance of the evidence arbitrary action or governmental misconduct; and (2) actual

prejudice affecting the defendant's right to a fair trial. State v. Rohrich, 149 Wn.2d 647, 654, 658, 71 P.3d 638 (2003); State v. Wilson, 149 Wn.2d 1, 9, 65 P.3d 657 (2003); State v. Cannon, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996); State v. Martinez, 121 Wn.App. 21, 86 P.3d 1210, 1214 (2004). Governmental misconduct does not require evil or dishonest action; simple mismanagement is sufficient. State v. Michielli, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). Prejudice includes the "right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense." Michielli, at 240 (quoting State v. Price, 94 Wn.2d 810, 814, 620 P.2d 994 (1980)).

Dismissal is an extraordinary remedy reserved for egregious cases. State v. Moen, 150 Wn.2d 221, 226, 76 P.3d 721 (2003). The trial court's decision on the motion to dismiss is reviewed for an abuse of discretion. Moen, 150 Wn.2d at 226. A trial court abuses its discretion when its decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons. State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). However, the Garza court held:

Because we believe that a prosecutor's intentional intrusion into the attorney-client relationship constitutes a direct interference with the Sixth Amendment rights of a defendant and because a fair adversary proceeding is a fundamental right secured by the Sixth and Fourteenth Amendments, we believe that absent a countervailing state interest, such an intrusion must constitute a per se violation of the Sixth Amendment... In adopting this rule, we conclude that no other standard can adequately deter this sort of misconduct. We also note that prejudice in these circumstances is so likely that case by case inquiry into prejudice is not worth the cost.

State v. Garza, 99 Wn.App. 291, 994 P.2d 868 (2000).

In State v. Martinez, 121 Wn.App. 21, 86 P.3d 1210 (2004) the Court of Appeals affirmed the dismissal of a case pursuant to CrR 8.3(b) because the prosecutor knowingly withheld exculpatory evidence until the middle of trial, forcing defense counsel to request a mistrial. The Court of Appeals found compelling the trial court's findings that the State's misconduct resulted "in the deprivation of Mr. Martinez's right to counsel (because the late discovery compromised defense counsel's ability to adequately prepare for trial), and to effective assistance of counsel (because suppression of critical evidence hindered Mr. Moore's ability to defend)."

In State v. Burri, 87 Wn.2d 175, 550 P.2d 507 (1976) the defendant notified the State at a pretrial hearing that he intended to rely on an alibi defense and gave notice of six alibi witnesses. The State summoned the six witnesses for a special inquiry hearing under RCW 10.27 and questioned them outside the presence of the defendant or his counsel. The Court began by noting that RCW 10.27 "does not authorize use of special inquiry proceeding to discover or gather evidence against an already charged defendant, as to crimes already charged." Burri at 177 citing State v. Manning, 86 Wn.2d 272, 543 P.2d 632 (1975). The Court of Appeals affirmed the dismissal of the case saying, "A defendant is denied his right to counsel if the actions of the prosecution deny the defendant's attorney the opportunity to prepare for trial. Such preparation includes the right to make a full investigation of facts and law applicable to the case." Burri at 180.

Applying these principles to the facts of Mr. Delacruz's case, the State engaged in arbitrary action and governmental misconduct. Mr. Anderson apparently had the time and energy in the hours leading up to Mr. Delacruz's February 8th hearing to prepare an

amended information adding the charge of bail jumping. His thinly veiled threat of consecutive time should the charges not be joined came after Judge Hartman refused the filing of the amended information. He then made the clearly disingenuous remark that he was so busy with his other work that he could virtually guarantee that the second information would not be filed in time for a joined sentencing hearing. Mr. Anderson, knowing that Mr. Memovich had a conflict of interest and could not proceed that day with a joined trial, was engaged in misconduct designed to force Mr. Delacruz to continue his case beyond speedy trial and have his attorney of choice disqualified as to all charges. Had Mr. Memovich proceeded with trial, he would not have been able to provide effective assistance of counsel to Mr. Delacruz on the bail jumping charge, which is a class C felony. Therefore, the State engaged in arbitrary governmental action which affected Mr. Delacruz's Sixth Amendment right to effective assistance of counsel.

The appropriate remedy for arbitrary governmental action is dismissal of the charges. Therefore, the trial court abused its discretion when it denied the motion to dismiss.

C. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY FAILING TO PROVIDE A UNANIMITY INSTRUCTION.

1. The Jury was not required to be unanimous as to the several distinct acts presented in support of the single crime charged.

Jury unanimity is required when the state charges a single crime that may have been committed by several distinct acts. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984); State v. Hanson, 59 Wn. App. 651, 656, 800 P.2d 1124 (1990). Jury unanimity is assured when the trial court instructs that the "jurors must agree that the same underlying

criminal act has been proved beyond a reasonable doubt.” State v. Petrich, 101 Wn.2d at 572. The Supreme Court explained:

When the evidence indicates that several distinct criminal acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected. We therefore adhere to the [*State v.*] *Workman* [66 Wash. 292, 119 P.751 (1911)] rule, with the following modification. The State may, in its discretion, elect the act upon which it will rely for conviction. Alternatively, if the jury is [*656] instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, a unanimous verdict on one criminal act will be assured. When the State chooses not to elect, this jury instruction must be given to ensure the jury’s understanding of the unanimity requirement.

In Hanson, the Court reversed the conviction for failing to provide a unanimity instruction where the evidence suggested a “multitude of events sufficient to support conviction.” State v. Hanson, 59 Wn. App. At 659-60.

In the instant case defense proposed the following jury instruction:

There are allegations that the defendant was in possession of multiple controlled substances. To convict the defendant, one or more particular controlled substances must be proved beyond a reasonable doubt and you must unanimously agree as to which controlled substance has been proven beyond a reasonable doubt. You need not unanimously agree that possession of all the controlled substances has been proved beyond a reasonable doubt. CP 87

The State presented evidence of two pipes found in two different locations in the residence, each containing a residue which contained methamphetamine. The defense presented a different defense for each pipe. In addition, the State presented evidence that Mr. Delacruz had used methamphetamine and was currently under the influence of methamphetamine at the time of the search. The State claimed that the fact that Delacruz

had admitted using that day was evidence that he had possessed methamphetamine.

Because there were three different possible means of possession, and a different defense to each of the three, Mr. Delacruz was entitled to a unanimity instruction.

2. Lack of Unanimity Instruction not Harmless Error.

Failure to provide a Petrich instruction “affects the defendant’s constitutional right to a jury trial, State v. Camarillo, 115 Wn.2d 60, 64, 794 P.2d 850 (1990); State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988), and thus may be raised for the first time on appeal.” State v. Hanson, 59 Wn. App. At 659. “Constitutional error requires reversal unless it is harmless beyond a reasonable doubt.” Id. Error can only be deemed harmless if no rational trier of fact could have a reasonable doubt. Id. In the instant case because one pipe was apparently seen in the possession of Ms. Jones and there was no evidence as to where the other pipe was located, the jury may not have found that Delacruz possessed either of the pipes, and only found that Mr. Delacruz had used methamphetamine that day in order to determine that he possessed methamphetamine. This exception will be discussed below. However, because there is a reasonable doubt as to both of the pipes, the failure to include the unanimity instruction was not harmless error, and the conviction should be reversed and remanded for further proceedings.

D. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FAILED TO PROVIDE THE LIMITING DEFINITION OF DOMINION AND CONTROL IN ITS JURY INSTRUCTIONS.

1. Actual or Constructive Possession is an element of the crime of possession of a controlled substance.

“Jury instructions satisfy the fair trial requirement when, taken as a whole, they properly inform the jury of the law, are not misleading, and permit the parties to argue their theories of the case.” State v. Morgan, 123 Wn.App. 810, 814-15, 99 P.3d 411 (2004) (citing State v. Kennard, 101 Wn.App. 533, 536-37, 6 P.3d 38 (quoting State v. Tili, 139 Wn.2d 107, 126, 985 P.2d 365 (1999), rev. denied, 142 Wn.2d 1011, 16 P.3d 1267 (2000)). “When read as a whole, jury instructions must make the legal standard ‘manifestly apparent to the average juror.’” State v. Bland, 128 Wn.App. 511, 514, 116 P.2d 369 (1996)). Here, possession is an element of the crime charged and “therefore the burden is on the State to establish a possession that is more than a “passing control.”” State v. Staley, 123 Wn.2d 794, 802, 872 P.2d 502 (1994).

In order to hold the State to this burden, Delacruz proposed the following instruction:

Once a controlled substance is within a person’s system, the power of the person to control, possess, use, dispose of, or cause harm is at an end. The drug is assimilated by the body. The ability to control the drug is beyond human capabilities. The essential element of control is absent. Evidence of a controlled substance after it is assimilated in a person’s blood does not establish possession or control of that substance. CP 87

The above instruction was taken from dicta in State v. Hornaday, 105 Wn.2d 120, 713 P.2d 71 (1986). While the Hornaday case addressed a misdemeanor crime which required possession in the presence of the police officer, the description concerning possession is still instructional. In fact, in hearing on the jury instruction, the court specifically addressed the fact that if there were no pipes in the room, and the only evidence of possession was Mr. Delacruz’s

statement, and appearance that he was under the influence of methamphetamine, the evidence would not have survived a half-time motion. RPIII 232-34 Therefore, the fact that Delacruz may have used methamphetamine earlier in the day is evidence of no more than passing control, which does not constitute dominion and control. Because the jury could have found that Delacruz did not have dominion and control over either of the pipes, and because the State surmised that his statement that he had used earlier in the day was evidence that he possessed, the jury was not properly instructed concerning an important element of the crime.

2. Instructional error was not harmless and requires reversal.

“[A] conviction cannot stand if the jury was instructed in a manner that would relieve the State” of the burden of proving each essential element of the crime charged. State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). The Washington Supreme Court held that instructional error of this type is subject to the harmless error analysis employed by the United States Supreme Court in Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999), querying “whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.” State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting Neder, at 15). Under this analysis, “the error is harmless if the [omitted or misstated] element is supported by uncontroverted evidence.” Brown, at 341 (quoting Neder, at 18). Therefore the Brown Court continued, “[i]n order to hold the error harmless, we must ‘conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error.’” Brown, at 341 (quoting Neder, at 19).

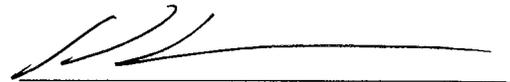
In a recent post-Brown case, a defendant was convicted of bomb threats where a jury instruction erroneously omitted the element of intent. State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006). The Court found that the trial was “tainted” because the jury was influenced by the erroneous jury instructions which governed the trial.” Id. at 712. Applying the Neder analysis, the Court concluded that the instructions were “insufficient to ensure a constitutional verdict, and the instructional error cannot be deemed to be harmless beyond a reasonable doubt.” Id. The conviction was reversed and remanded for a new trial.

Here, by omitting the proposed instruction, the jury may have been influenced to find possession from passing and momentary control alone, Mr. Delacruz statement that he had used methamphetamine. The error is evident in the jury’s question back to the court for further definition of dominion and control. Defense counsel reiterated at that point the need to give this further instruction, however, the court denied the request. The failure to give the limiting definition of dominion and control, as requested by defense counsel, in this case, relieved the State of its burden to prove each and every element of the crime. Because neither the unanimity instruction or this instruction were given, the instructions were insufficient to ensure a constitutional verdict. The error cannot be deemed harmless beyond a reasonable doubt and the conviction should be reversed and remanded for a new trial.

V. CONCLUSION

Because the motion to suppress and the motion to dismiss were erroneously denied, the conviction should be reversed and the charges dismissed. If the court does not agree, because jury instructions were impermissibly denied the defendant, relieving the State of its burden, the conviction should be reversed and the case should be remanded for a new trial.

Respectfully Submitted this 7 day of March, 2007.



Roger A. Hunko, WSBA# 9295
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 7th day of March, 2007, I sent via U.S. Mail the Original and one copy of the Brief of Appellant to be filed with The Clerk of the Court for the Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402, and that I caused a true and correct copy of this Brief of Appellant to be served on the following in the manner indicated: Kitsap County Prosecutor's Office, 614 Division Street, MS-35, Port Orchard, WA 98366, via hand-delivery; Appellant Timothy De LaCruz, 203 Naval Avenue, Bremerton, WA 98312, via U.S. Mail.

By: 

Bronyn Heubach, Legal Assistant

COURT OF APPEALS
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07 MAR -8 PM 1:18
STATE OF WASHINGTON
BY  IDENTITY