NO. 35159-5-II

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

FILED
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STATE OF WASHINGTON
BY

STATE OF WASHINGTON,

Respondent,

v.

KENNETH C. STAFFORD

Appellant.

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

The Honorable Stephen M. Warning, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court denied appellant a fair trial by refusing to prevent the jury from viewing an evidence envelope containing improper opinion evidence.

Issue pertaining to assignment of error

Appellant was charged with Violation of the Uniform Controlled Substances Act, based on an allegation that he delivered methamphetamine. The substance identified as methamphetamine was admitted into evidence. Over defense objection, the court allowed this exhibit to go to the jury in an envelope the investigating officer had marked with appellant's name and the crime he believed appellant committed. Did the court's refusal to prevent the jury from using this improper opinion evidence deny appellant a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

On November 30, 2005, the Cowlitz County Prosecuting Attorney charged appellant Kenneth Stafford with one count of Violation of the Uniform Controlled Substances Act. CP 3-4; RCW 69.50.401(1). The case proceeded to jury trial before the Honorable Stephen M. Warning, and the jury entered a guilty verdict. CP 48. The court imposed a low-end standard range sentence, and Stafford filed this timely appeal. CP 54, 62.

2. Substantive Facts

On April 15, 2005, the Cowlitz-Wahkiakum Narcotics Task Force executed a search warrant at the residence of Michael Nolte, looking for evidence of a suspected marijuana grow operation. 1RP[1] 31. The Task Force discovered and seized not only marijuana but also cocaine and other evidence of drug sales. 1RP 31, 49. Nolte was arrested. 1RP 31.

Nolte had just been released from prison six months earlier, and he did not want to go back. He worked out a deal with the Task Force whereby he would provide a list of people who would sell him drugs and would participate in a number of controlled buys in order to earn his freedom. 1RP 32. Detective Darrin Ullmann, the lead detective on the case, told Nolte that he needed to arrange a controlled buy that day, to demonstrate his reliability, so that the Task Force could determine whether it would be advantageous to work with Nolte. 1RP 132. Nolte agreed. 1RP 32-33.

After this agreement was reached, none of the officers remained with Nolte until the controlled buy, and Nolte was not kept under surveillance. Instead, he met Detectives Ullmann and Watson at a shopping plaza a few hours later. 1RP 33, 68, 114-15.

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[1] The Verbatim Report of Proceedings is contained in two consecutively-paginated volumes, designated as follows: 1RP—7/24/06; 2RP—7/25 & 26/06.

When Nolte arrived, Ullmann had him get into the back seat of Ullmann's vehicle and told him to call someone who would sell him narcotics. Nolte chose Kenneth Stafford's name from his list and made a call. 1RP 34. He arranged to purchase methamphetamine from the person who answered the phone. 1RP 35.

After the phone call, Ullmann searched Nolte, leaning over the back of the front seat to do so. 1RP 35, 57. Ullmann searched inside Nolte's shirt, pants, and socks but did not have him take off his socks or squeeze his toes. 1RP 35-36, 57. Moreover, even though he and other members of the Task Force knew from experience that the underwear area is a common hiding place for drugs, Ullmann did not thoroughly search that area on Nolte. 1RP 57, 90. Ullmann mistakenly allowed Nolte to pick up and pocket his wallet after the search, even though he meant to retain it until the buy was complete. 1RP 35-36, 58. He also forgot to give Nolte the prerecorded $100 bill to use in the buy. Nolte called after returning to his car to say he did not have the buy money. Ullmann then met him in the bathroom of the store where he did a quick pat down search, retrieved Nolte's wallet, and gave Nolte the money. 1RP 36-37.

While Ullmann searched Nolte, Watson spent one and a half to two minutes searching Nolte's car. He then returned to Ullmann's vehicle to wait and watch. 1RP 101.

Two other officers were providing surveillance in the vicinity in separate cars. 1RP 75. The officers saw a black Ford Ranger pull into the parking lot and park next to Nolte. Nolte got out of his car and into the passenger side of the pickup. After about a minute he got back out of the truck and returned to his car. 1RP 38-39. Ullmann did not see the driver of the pickup. RP 61. Of the four officers present, one identified the driver, saying in his report that he appeared to be Kenneth Stafford. 1RP 123. He also recognized the pickup as belonging to Stafford's father. 1RP 104.

One of the surveillance officers followed the pickup truck as it left the parking lot. 1RP 77. He testified that he saw a single white male in the truck, who he was not able to identify. 1RP 82, 84. The officer lost sight of the vehicle for a short time but found it again parked at a residence. He was aware that Stafford was connected with that address. 1RP 83. The officers made no attempt to arrest the driver that night, no attempt to recover the recorded buy money, and no attempt to search the pickup truck or residence for drugs. 1RP 67, 89.

Ullmann and Watson met with up Nolte at a nearby parking lot. Nolte handed Ullmann a small plastic baggie, and Ullmann and Watson again searched Nolte and his car. 1RP 39. Nolte identified Stafford to Ullmann. 1RP 41. He also testified at trial that he purchased

methamphetamine from Stafford on April 15, 2005. 1RP 138. In exchange for his cooperation, Nolte was never booked or charged with any crimes relating to the evidence seized from his residence. 1RP 50.

After meeting with Nolte, Ullmann and Watson returned to the department, where Ullmann field-tested the substance Nolte had given him, finding it consistent with methamphetamine. 1RP 41. Ullmann then weighed the material, packaged it, and placed it in evidence. 1RP 41.

The Cowlitz County evidence custodian transferred the evidence to the Crime Lab in Vancouver, where the contents were tested by a forensic chemist and found to contain methamphetamine hydrochloride. 1RP 22; 2RP 161. After examining the contents, the chemist sealed them in a wax paper packet, which he initialed and placed back in the original packaging. 1RP 23. The package was then returned to the Cowlitz County Sheriff's office. 2RP 161.

Stafford was arrested in November 2005. Ullmann was not present when Stafford was arrested and neither Ullmann nor any other officer ever interviewed Stafford about the incident. 2RP 176-77, 180.

At trial, Stafford testified that he had no specific recollection of April 15, 2005. 2RP 174. He knew Nolte, although not well, and it was possible he would agree to meet with Nolte if Nolte called, but he did not

remember doing so. 2RP 174-75. Stafford testified, however, that he never sold methamphetamine to Nolte or anyone else. 2RP 175.

The state offered into evidence Exhibit 1, an envelope containing a white crystal substance. 1RP 18-19, 42. Ullmann testified that the contents of the exhibit were consistent with what Nolte had given him. 1RP 40. On the evidence envelope in which he placed the material, however, he had written Stafford's name. 1RP 40. He also wrote VUCSA, an abbreviation of the crime with which Stafford was charged. Exhibit 1. Ullmann also marked the envelope with an evidence stamp indicating a case number, item number, a description of the item, and the date. 2RP 160, 184. Defense counsel objected to this packaging, arguing that the statements on the envelope were testimonial and asking that the contents be placed in a separate container marked only with the exhibit number. 2RP 184.

The court responded that the markings on the envelope had been testified to in terms of the chain of custody of the evidence. It ruled that if the chain of custody came up in closing argument, then the envelope would go to the jury. If it did not, the contents would be placed in a different envelope without the extra verbiage. 2RP 185. In his closing argument, the prosecutor noted that Nolte gave a packet to Ullmann, which Ullmann placed in evidence, which the evidence custodian sent to

the crime lab, which the crime lab determined to be methamphetamine. 2RP 189. Following the state's argument, the court ruled that Exhibit 1 would go to the jury in the envelope bearing Ullmann's comments. 2RP 220.

C. ARGUMENT

THE TRIAL COURT DENIED STAFFORD A FAIR TRIAL WHEN IT DENIED HIS MOTION TO EXCLUDE THE EVIDENCE ENVELOPE FROM THE JURY'S VIEW.

In order to assure a defendant a fair trial under both Washington Constitution, Article 1, § 21, and the Sixth Amendment to the United States Constitution, no witness may give an opinion as to the defendant's guilt, either directly or inferentially. "The determination of the defendant's guilt or innocence is solely a question for the trier of fact." State v. Carlin, 40 Wn. App. 698, 701, 700 P.2d 323 (1985).

Here, over defense objection, the court allowed Exhibit 1 to go to the jury in an envelope on which Ullmann had described the contents as methamphetamine, named Stafford as the source, and indicated that the crime committed was a VUCSA. These comments communicated to the jury Ullmann's opinion that Stafford was guilty of the crime with which he was charged. While Ullmann would not have been allowed to testify from the witness stand that he believed Stafford committed a specific

offense, his opinion was presented to the jury through the information he had written on the evidence envelope.

The trial court recognized that there was merit to the defense objection but nonetheless decided to send the exhibit to the jury in the marked evidence envelope because there had been testimony about the chain of evidence, and the envelope also contained evidence tape and markings showing it had been sent to and received from the crime lab. 2RP 185. There was nothing objectionable about the markings which showed the chain of custody, the bar code, the case number, or the item number. Inclusion of Stafford's name and the name of the offense Ullmann believed he committed, however, was highly improper, and at the very least, the court should have redacted those comments. The court's failure to do so denied Stafford a fair trial.

A similar issue was presented in State v. Velasquez, 67 Wn.2d 138, 406 P.2d 772 (1965), cert. denied. 384 U.S. 989 (1966). There, the defendant was charged with possessing stolen property and possessing burglary tools, based on evidence obtained during execution of a search warrant. The defendant disputed at the time of the search that the house being searched was his residence, and he objected on appeal to admission of the search warrant which stated that it was. Velasquez, 67 Wn.2d at 138-41. He also objected that exhibits had been sent to the jury with

police identification tags attached. On these tags, police had filled in such information as the defendant's name, the crime charged, the address searched, and the location where the item was found. Id. at 141-42.

As to the identification tags, the trial court cautioned the jury that "the only purpose of the tag is to identify this particular exhibit. You are not to accept anything on the tag other than the identification, as to being the one the officer says he found." Id. at 142. The court also gave a written instruction that "any writing on any exhibit and/or card marking an exhibit is not evidence of the defendant's residence and shall not be used by you as evidence to determine his residence." Id. at 142-43.

On appeal, the Supreme Court noted that "The practice of leaving anything on the exhibit except the court's identifying marker is not recommended; and the better practice in this case would have been to remove the sheriff's identification tags." Id. at 143. It held, however, that in light of the court's explicit instruction that the tags were not to be viewed as anything other than identifying marks and the abundant evidence connecting the defendant with the residence, the identifying tags were harmless in that case. Id. at 143.

Here, as in Velasquez, the court improperly allowed the jury to see Ullmann's comments on the envelope containing Exhibit 1. But unlike in Velasquez, the court gave no cautionary instruction about the purpose of

Ullmann's markings. Moreover, the record does not contain abundant evidence of Stafford's guilt.

Instead, the evidence showed sloppy police work and lack of attention to detail as the officers rushed to complete a controlled buy so that they could proceed to use Nolte as an informant. The officers did not take the time to obtain authorization to use a body wire, as they would normally do, and as a result, the transaction was not recorded. 1RP 148. Nor was the transaction photographed or videotaped. 1RP 117. Watson rushed through the search of Nolte's car in one and a half to two minutes. 1RP 119. And Ullmann did not bother to search Nolte's body thoroughly, even though he knew from experience that drugs can easily be concealed almost anywhere, even under the genitalia. 1RP 57. He also knew that Nolte had not been under surveillance prior to the buy and could have obtained drugs without the officers' knowledge. 1RP 68, 114. In the rush to proceed with the buy, Ullmann lost track of Nolte's wallet and forgot to give Nolte the buy money, necessitating a last minute change of plans. 1RP 58, 60.

The police procedures following the buy were sloppy as well. Even though recorded buy money was used, no attempt was made to locate it, and the money was never connected to Stafford. 1RP 67. No effort was made to obtain Nolte's phone records to confirm that he had

called Stafford. 1RP 116. Finally, Stafford was never found to have any drugs in his possession, and he was never interviewed about the incident. 1RP 125, 2RP 180-81.

Given this underwhelming evidence, it is likely that Ullmann's opinion that the investigation was good enough to prove Stafford guilty of a Violation of the Uniform Controlled Substances Act tipped the scales for the jury and resulted in the verdict in this case. The improper admission of this opinion evidence denied Stafford a fair trial, and his conviction should be reversed.

D. CONCLUSION

By refusing to exclude the envelope containing Ullmann's opinion as to Stafford's guilt, the court denied Stafford a fair trial. His conviction must therefore be reversed.

DATED this 11th day of January, 2007.

Respectfully submitted,

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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Designation of Exhibit and Brief of Appellant in *State v. Kenneth C. Stafford*, Cause No. 35159-5-II, directed to:

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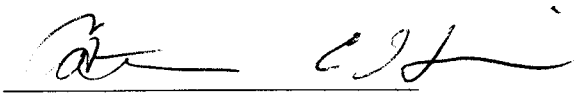
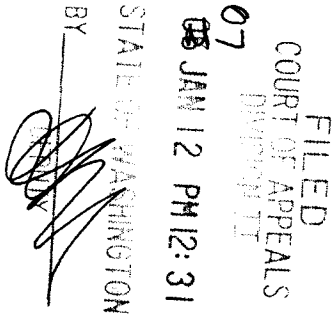
I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
January 11, 2007