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NO. 35468-3-II
COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

JAMES McINTYRE,

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR MASON COUNTY
The Honorable James B. Sawyer II, Judge
Cause No. 06-1-00233-4

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in refusing to instruct the jury on the affirmative defense of unwitting possession.
02. The trial court erred in permitting McIntyre to be represented by counsel who provided ineffective assistance by failing to tender to the court the unwitting possession instruction he requested.
03. The trial court erred in ordering that McIntyre participate in the MRT +/-or victim awareness education program and successfully complete a certified domestic violence counseling program and not go into bars, taverns, lounges, or other places whose primary business is the sale of liquor.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in refusing to instruct the jury on the affirmative defense of unwitting possession? [Assignment of Error No. 1].
02. Whether the trial court erred in permitting McIntyre to be represented by counsel who provided ineffective assistance by failing to tender to the court the unwitting possession instruction he requested? [Assignment of Error No. 2].
03. Whether the trial court erred in imposing conditions of community custody unrelated to the circumstances of the offense for which McIntyre was convicted? [Assignment of Error No. 3].

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C. STATEMENT OF THE CASE

01. Procedural Facts

James H. McIntyre (McIntyre) was charged by information filed in Mason County Superior Court on June 20, 2006, with unlawful possession of methamphetamine with intent to deliver, contrary to RCW 69.50.401(1). [CP 73-74].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [RP 9-10]. Trial to a jury commenced on September 5, the Honorable James B. Sawyer II presiding. The jury returned a verdict of guilty of the lesser-included offense of unlawful possession of a controlled substance. [CP 45].

McIntyre was sentenced within his standard sentence range and timely notice of this appeal followed. [CP 13-14, 25-26, 29-38].

02. Substantive Facts

On June 16, 2006, at 11:10 p.m., Deputy Kelly LaFrance was dispatched to a reported disturbance at a local residence. [RP 31-32]. In route, she was informed that a white Jeep was leaving the residence, and upon her arrival observed it pulling into the driveway across the street. [RP 33, 36]. She “recognized Tonya Glen, the driver of the vehicle ... and I knew her to be suspended and to have a warrant.” [RP 35]. LaFrance saw the passenger of the vehicle, later identified as

McIntyre, get out of the car, go to the hood, do something underneath the hood and then get back into the vehicle, all of which took less than a minute. [RP 35].

LaFrance confirmed the warrant on Glen and then arrested her. [RP 38]. Glen told LaFrance there were some syringes in the center console. [RP 84]. McIntyre was also arrested on an outstanding felony warrant and was searched incident thereto. [RP 39-40]. From McIntyre's pants pocket, La France seized \$408. [RP 41].

A search of the Jeep uncovered a syringe containing a yellowish substance in the center console and a bag directly behind the passenger's seat, which also contained a syringe containing a yellowish substance, an inmate card with McIntyre's picture, men's clothing and a "bunch of Ziploc baggies containing a white crystal-like substance(,)" samples of which subsequently tested positive for methamphetamine. [RP 43-44, 163-65]. Underneath the bag, which LaFrance stated was within McIntyre's reach, was a locked metal container(,) which was subsequently opened following issuance of a search warrant with a key previously taken from McIntyre. [RP 44, 51, 93]. Inside the metal container was drug paraphernalia, including scales and a glass pipe used to smoke methamphetamine. [RP 47]. McIntyre denied ownership of any of the items seized within the Jeep. [RP 77, 80].

Regarding the bag seized from behind the passenger's seat, Glen testified that McIntyre "had it" on the morning of the incident. [RP 181]. She did not testify that she saw McIntyre put the bag into her Jeep that evening before the two were arrested, a point conceded by the State during closing argument. [RP 181-82, 213]. Glen, who was testifying in exchange for the State reducing her charges from possession with intent to merely possession, further admitted that the syringe containing methamphetamine found in the console belonged to her and that at the time of her arrest she was carrying methamphetamine and money in her bra. [RP 183-86].

D. ARGUMENT

01. THE TRIAL COURT ERRED IN REFUSING TO GIVE AN UNWITTING POSSESSION JURY INSTRUCTION.

Unwitting possession is an affirmative defense to the crime of possession of a controlled substance. State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004).

Jury instructions must permit a party to argue his or her theory of the case, must not mislead the jury and must properly inform the jury of the applicable law. State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005). A party is entitled to an instruction that is supported by the evidence. State v. Hoffman, 116 Wn.2d 51, 111, 804 P.2d 577 (1991). To

establish the defense of unwitting possession, “the defendant must prove, by a preponderance of the evidence, that his or her possession of the unlawful substance was unwitting.” State v. Riker, 123 Wn.2d 351, 368, 869 P.2d 43 (1994); See State v. Buford, 93 Wn. App. 93 Wn. App. 149, 153, 967 P.2d 548 (1998). A trial court’s decision whether the evidence supports a proposed jury instruction is reviewed for abuse of discretion. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

McIntyre took exception to the court’s failure to give “WPIC 52.01, the unwitting possession instruction [RP 210, 216](,)” which reads:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 52.01 at 679.

Here, evidence was presented during the State’s case-in-chief that McIntyre denied possession, that the Jeep belonged to Glen and not to McIntyre, that there were other belongings of Glen’s in her car that were

not connected to McIntyre and that Glen, in light of her plea agreement to a lesser charge, had a reason to disclaim knowledge or ownership of the bag in which the methamphetamine was found. There was no evidence as to how the methamphetamine got into the bag, how long it had been in the bag and who had placed it in the bag. And there was no direct testimony that McIntyre put the methamphetamine in the bag or that he knew it was in the bag or that he placed the bag in the vehicle that night before he and Glen were arrested.

This evidence was sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that McIntyre unwittingly possessed the controlled substances. The trial court improperly refused to give an unwitting possession instruction requested by McIntyre, with the result that his conviction must be reversed.

02. McINTYRE WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO TENDER TO THE COURT THE UNWITTING POSSESSION INSTRUCTION HE REQUESTED.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a

reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this court find that counsel for McIntyre waived the unwitting possession instruction issue by failing to tender to the court the instruction he requested, then both elements of ineffective assistance of counsel have been established. Counsel's failure to exercise due diligence in tendering this instruction falls below an objective standard of reasonableness and was prejudicial in that it denied McIntyre an instruction on the defense of unwitting possession, thus preventing the jury from basing its decision on an accurate statement of the law applied to the specific facts of the case.

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03. THE TRIAL COURT ERRED IN ORDERING THAT McINTYRE PARTICIPATE IN THE MRT +/-OR VICTIM AWARENESS EDUCATION PROGRAM AND SUCCESSFULLY COMPLETE A CERTIFIED DOMESTIC VIOLENCE COUNSELING PROGRAM AND NOT GO INTO BARS, TAVERNS, LOUNGES, OR OTHER PLACES WHOSE PRIMARY BUSINESS IS THE SALE OF LIQUOR.

At sentencing, as a condition of community custody, the court ordered that McIntyre:

[x] shall not go into bars, taverns, lounges, or other places whose primary business is the sales of liquor(.)

[x] shall participate in the MRT +/-or Victim Awareness Education Program at the direction of his Community Corrections Officer.

[x] shall participate in and successfully complete a certified Domestic Violence counseling program.

[CP 33].

Here, since there was no individual victim and not even a whisper of domestic violence, the imposed conditions are not related to the circumstances of the offense and should be stricken because they were beyond the trial court's authority to impose. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). A defendant may raise claims relating to sentencing conditions for the first time on appeal. State v. Jones, 118 Wn.

App. 199, 204 n.9, 76 P.3d 258 (2003). When conditions imposed at sentencing do not relate to the circumstances of the crime, such conditions are unlawful. State v. Jones, 118 Wn. App. at 207-08. Additionally, although RCW 9.94A.700(5) allows a court to preclude a defendant from consuming alcoholic beverages whether or not alcohol related to the crime, the court lacks authority to order a defendant to not be in any place where alcoholic beverages are sold by the drink for consumption or are the primary sale item. See State v. Jones, 118 Wn. App. at 207.

E. CONCLUSION

Based on the above, McIntyre respectfully requests this court to reverse and dismiss his conviction and/or to remand for resentencing consistent with the arguments presented herein.

DATED this 26th day of April 2007.

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CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 26th day of April 2007.

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