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DATE:

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

NO. 36194-9-II

STATE OF WASHINGTON

Appellant,

vs.

THOMAS CHAD O'MEARA

Respondent.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 07-8-00016-1

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in granting defendant's *Knapstad* motion and dismissing count 2, the charge of wrongful use of drug paraphernalia, a violation of RCW 69.50.412(1).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Does not the combined presence on one's person of (1) an elephant shaped glass smoking pipe containing burnt residue in the bowl which residue also smelled of burnt marijuana, (2) a clear plastic sandwich bag containing green vegetative matter which looked like and also smelled like marijuana, and (3) a playing card tin container which, when opened, smelled like marijuana and contained marijuana residue inside provide sufficient evidence to establish a prima facie case that the defendant had committed the offense of wrongful use of drug paraphernalia?

II. STATEMENT OF THE CASE

On March 1, 2007, based on two outstanding warrants, Jefferson County Sheriff's Deputies arrested the juvenile defendant at his home. At the time of his arrest the defendant had a nylon type bag on his person. A search of that bag revealed a glass smoking pipe in the shape of an elephant. This pipe had burned residue in the bowl. This burned residue smelled like burned marijuana. Also in the nylon bag was a clear plastic sandwich bag containing a green vegetative matter. This vegetative matter looked like and smelled like marijuana. Also in the bag was a metal tin container which, when opened, smelled of marijuana. Residue from the marijuana once placed in the tin remained. CP 4.

On March 2, 2007, the defendant was charged by Information with one count of Possession of 40 Grams or Less of Marijuana and one count of Wrongful Use of Drug Paraphernalia in violation of RCW 69.50.4014 and RCW 69.50.412, respectively. (due to scrivener's error the information listed RCW 69.50.4121 instead of RCW 69.50.412(1) but all parties proceeded on the basis that the charge was, in fact, wrongful use of drug paraphernalia) CP 1-2.

On March 15, 2007, the defendant pled guilty to count 1, Possession of 40 Grams or Less of Marijuana. On March 22, 2007, defendant made a

Knapstad motion for dismissal of count 2. CP 5-6 . On April 4, 2007, the state filed a response. CP 7-10.

On April 12, 2007, the trial judge granted the motion and dismissed count 2. RP 6. On that same date the trial court sentenced defendant to a disposition within the standard range for count 1. CP 11-16. The state now appeals the granting of the *Knapstad* motion.

III. ARGUMENT

The standard of review for a *Knapstad* (*State v. Knapstad*, 107 Wn. 2d 346 (1986)) motion and a challenge to the sufficiency of the evidence are similar. This appellate court should only uphold a trial court's dismissal of a charge pursuant to a *Knapstad* motion if no rational trier of fact could have found beyond a reasonable doubt the essential elements of the charge. *State v. Snedden*, 112 Wn. App. 122, 127, (2002), *aff'd*, 149 Wn. 2d 914 (2003).

The essential elements of wrongful use of drug paraphernalia are clearly stated in RCW 69.50.412(1). "It is unlawful for any person to **use drug paraphernalia** to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, **pack, repack, store, contain, conceal**, inject, ingest, **inhale**, or otherwise introduce into the human body a controlled substance." (emphasis added) RCW 69.50.102 further states that "drug paraphernalia" means all equipment, products, and materials of any kind which are **used, intended for use, or designed for use** in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, **packaging**, repackaging, **storing, containing, concealing**, injecting, ingesting, **inhaling**, or

otherwise introducing into the human body a controlled substance.

(emphasis added) A detailed definition of the various types of drug paraphernalia is contained in RCW 69.50.102(a). The defendant's plastic baggie containing marijuana, his metal tin containing marijuana residue, and his glass smoking pipe containing residue and the smell of burnt marijuana easily fit the definitions found in RCW 69.50.102(a)(9), (10), and (11), respectively. RCW 69.50.102(b) sets out factors helpful to consider whether or not a particular object is drug paraphernalia. Two of these factors are the proximity of the object to controlled substances and the existence of any residue of controlled substances on the object. RCW 69.50.102(b)(4) and (5).

The state first argues that there can be no doubt that the plastic baggie, the metal tin, and the glass smoking pipe were drug paraphernalia. Although the defendant submitted no affidavit with his motion the trial court allowed him to substitute the Sheriff's narrative attached to the declaration in support of a finding of probable cause. RP 6. This narrative (CP 4) details the seizure of the three items from defendant's person and the specifics concerning the smell of burnt marijuana from the pipe, the burnt residue in the pipe bowl, the marijuana residue in the tin, the smell of marijuana from the tin, and the marijuana appearing and marijuana

smelling vegetative matter in the plastic baggie.

The state next argues that the defendant possessed these items in circumstances allowing any rational trier of fact to find that he was at that particular time (in the case of the plastic baggie) and had in the recent past (in the case of the glass pipe and the metal tin) unlawfully used them as charged.

In the case of the baggie the presence of the marijuana inside is direct evidence of the purpose for which it was being used. It wasn't an empty, used "baggie" whose mere possession would not have been criminal. The defendant was using it to store his marijuana. No circumstantial evidence is required to make that determination. Although rarely charged, such use of a sandwich baggie to package or store marijuana, under the clear language of the statute, comprises a wrongful use of drug paraphernalia.

As far as the pipe and tin the state acknowledges that absent any evidence of their prohibited use by this defendant no violation of the statute has occurred. Case law has made it clear that mere possession of drug paraphernalia is not a crime. *State v. McKenna*, 91 Wn. App. 554, 563 (1998). In defendant's case, though, there was much more than mere possession of a glass smoking pipe and a metal tin. Both were being

carried on his person along with his supply of marijuana. There was burnt residue in the pipe as well as the smell of burnt marijuana. There was marijuana residue in the metal tin. Do not these facts, taken together, provide sufficient circumstantial evidence that the defendant had himself wrongfully used both the pipe and the metal tin? Indeed, our courts have recognized that residue alone may support a charge of wrongful use of paraphernalia even in the absence of a controlled substance. *State v. Williams*, 62 Wn. App. 748, 752-53 (1991) (metal pipe containing residue), review denied, 118 Wn. 2d 1019 (1992). These undisputed facts in defendant's case were enough for the trial court to opine that he, personally, had no doubt that the defendant had used the pipe. RP 8. However, the trial judge cited several cases for the proposition that some "behavioral" evidence was necessary before he could find that the defendant had used the pipe. RP 8. The state believes the trial court failed to closely analyze the facts in the cases he cited and failed to distinguish the exact context in which some type of directly observed behavioral evidence such as "bizarre behavior" or of "being under the influence" became vital. As a result, the trial court applied a strict, direct evidence, "behavioral" evidence requirement unsupported by the criminal statute or case law.

The court first referred to *State v. Lowrimore*, 67 Wn. App. 949 (1992) as authority for requiring something more than mere possession of a marijuana pipe to establish wrongful use of paraphernalia. RP 4. The state certainly agrees that something more than mere possession is required. In *Lowrimore*, however, the issue was whether bare possession of marijuana pipes and scales in one's purse was sufficient probable cause to arrest for wrongful use of paraphernalia. There was no residue in the pipes nor was there a smell of burnt marijuana. There was no supply of marijuana in the purse. The court held that without more this was just mere possession. It then found that additional evidence to exist in the fact that Ms. Lowrimore had exhibited "bizarre and emotionally unstable behavior." *Lowrimore* at 956. The difference between this case and *Lowrimore* is that here we are beginning with a marijuana pipe containing burnt residue and a smell of burnt marijuana, a supply of marijuana carried with the pipe, and a metal tin containing marijuana residue. No additional circumstantial evidence of unusual behavior is necessary to establish a prima facie case of wrongful use.

The trial court then went on to *State v. McKenna*, 91 Wn. App. 554 (1998) for the proposition that mere possession of a pipe (along with cigarette wrapping papers and a small set of scales) is insufficient to show

use. RP 5. But, again, like *Lowrimore* we have a pipe and other objects without residue, smell, or any proximity to a controlled substance. Additionally, the pipe was in a duffle bag not carried on one's person. The state agrees with this ruling. But, again, our defendant's facts are different. We have the additional evidence to show or infer use.

The trial court, obviously in confusion from his notes, also referred to *State v. Williams, Id.*, for the proposition that evidence of being under the influence of a controlled substance provides sufficient additional evidence to infer use of drug paraphernalia. RP 5. *Williams* is obviously cited in error. But, it doesn't matter because the proposition is clearly correct and, at the same time, immaterial to this defendant's situation. For the reasons already stated the state did not need any more additional evidence than it already had to establish a prima facie case of wrongful use.

Finally, the trial court referred to *State v. Neely*, 113 Wn. App. 100 (2002). In *Neely* the defendant was approached at night by officers in a high crime area. As they approached her car they noticed her leaning over the passenger seat, bobbing her head up and down in a strange way as if she was ingesting or concealing something. As they got closer they noticed items of paraphernalia (a small brillo pad, a small pair of scissors,

and a lighter) on the passenger seat. The *Neely* court found probable cause to arrest for wrongful use based on the combined facts of the timing and location of her car, her physical behavior, and the paraphernalia lying on the seat. *Neely* at 107. Again, unlike defendant O’Meara’s case, the paraphernalia was devoid of residue, had no smell of recent use, and was not in any proximity to a controlled substance. Thus the fact that evidence of her behavior (her head bobbing up and down) became vital to finding use rather than mere possession is immaterial to defendant’s case. Behavioral evidence was also especially vital in *Neely*’s case because of the additional issue of whether or not the misdemeanor crime of wrongful use of drug paraphernalia was being committed in the presence of the arresting officers. That issue was not present in defendant’s case but it could have created some confusion when analyzing these wrongful use cases and it could have contributed to the court’s perception that behavioral evidence was absolutely necessary to find a prima facie case of wrongful use.

The trial judge also acknowledged that the language of the statute would appear to make use of the metal tin to store marijuana a violation of the wrongful use of drug paraphernalia statute. RP 3. However, he further opined that (1) “nobody” charges wrongful use of drug paraphernalia to

store controlled substances, and, (2) he wasn't sure that it could be done because of the lack of a comma behind "the human body" in the statute. RP 4. Referring to an "antecedent comma rule" he suggested that perhaps the statute precludes charging any wrongful use other than that relating to ingesting, inhaling, or otherwise introducing controlled substances into the body. RP 4-7. The state can only surmise from his brief and somewhat unclear remarks that he felt there was sufficient ambiguity in the statute to call for application of the "last antecedent" rule of statutory construction and that this application would require all of the proscribed uses of paraphernalia in RCW 69.50.412(1) to be qualified by the phrase "or otherwise introduce into the human body". *In re Sehome Park Ctr., Inc.*, 127 Wn. 2d 774, 781-2 (1995) contains a discussion of this rule and its "last comma" corollary. But such an application would produce an almost unintelligible syntax. For example, how could one interpret "store or otherwise introduce into the human body" a controlled substance, or "plant or otherwise introduce into the human body" a controlled substance? Clearly, the phrase "or otherwise introduce into the human body" found in RCW 69.50.412(1) only relates back to and only qualifies the words "inject, ingest, and inhale." The state contends that defendant's use of the metal tin to store marijuana does constitute a wrongful use of drug paraphernalia. The fact that it may be uncommon to

find wrongful use of drug paraphernalia charges based on containers or baggies is immaterial to a *Knapstad* motion.

IV. CONCLUSION

For the reasons stated this court should find that the trial court erred in granting the *Knapstad* motion and should reverse and remand for trial on count 2, wrongful use of drug paraphernalia.

Respectfully submitted this 20th day of June, 2007.



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DECLARATION OF MAILING

Janice N. Chadbourne declares:

That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 20th day of June, 2007, I mailed a copy of the State's Brief of Appellant, to the following:

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

Dated this 20th day of June, 2007 at Port Townsend, Washington.


Janice N. Chadbourne
Legal Assistant

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STATE OF WASHINGTON
BY  DEPUTY