

FILED
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
BY dn

NO. 36433-6-II
Cowlitz County Cause No. 07-1-00212-7

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Respondent,

v

VALERIE JOY JOHNSON
Appellant

APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR

Appellant assigns as error the trial court's denial of the appellant's motion for suppression of evidence and dismissal of the case, based on the illegal acquisition of the evidence by the police.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

I. With the assistance of an informant, the police made arrangements to sell some Morphine tablets to the appellant. However, the police did not have any Morphine tablets legally in their possession, so they went to a pharmacy and obtained twenty-three Morphine tablets without a prescription, or an order of the court, or by any other legal means, they accompanied the informant to a meeting place with appellant and sold her twenty of those pills. Immediately after the sale, the police arrested the appellant, and she was charged with unlawful possession of a controlled substance in violation of RCW 69.50.4013. Should not the trial court have granted the appellant's motion for suppression of evidence and dismissal of the charge on the basis that the police themselves feloniously acquired that evidence in violation of RCW

69.50.4013, in order to deliver the to appellant so she could be charged with violation of that same statute?

2. Does the above described police conduct violate concepts of fundamental fairness so as to rise to the level of a violation of due process, warranting suppression of the evidence?

STATEMENT OF THE CASE

The appellant Valerie Johnson was arrested on February 14, 2007, for unlawful possession of a controlled substance, specifically, twenty Morphine pills. The discovery provided by the state to the defense, as described in the affidavit submitted in support of Johnson's motion for exclusion of evidence and dismissal at the trial court level (CP-12), included narrative reports from the investigating officers describing what the officers called a controlled reverse buy, conducted on February 14, 2007, involving Johnson. One of the reports indicated that prior to this transaction, two detectives went to a local pharmacy in Longview, Washington, and obtained twenty-three Morphine Sulfate pills, each pill containing 30mg of Morphine Sulfate. One of the officers, accompanied by the informant in this case, then met with Johnson and sold twenty of those pills to her, whereupon she was promptly

arrested for possession of a controlled substance. When an inquiry was made of the prosecutor as to the legal authority that would justify the officers in acquiring, possessing and then conveying these pills to Johnson, such as a court order, the prosecutor responded that the twenty-three Morphine Sulfate tablets had been obtained from a local pharmacy "as part of an active drug investigation", also confirming that the pills were not obtained pursuant to any court order or other authority. At the time that the defense motion for suppression and dismissal was argued to the court, the defense contended that the evidence which the police acquired in order to implement this controlled reverse buy was actually acquired illegally, in violation of RCW 69.50.4013, which violation also happened to be a felony, also arguing on the basis of the ruling of the court in State v Bonds, 98 W2d 1, 653 P2d 1024 (1982) and authorities cited therein, that the exclusionary rule should be applied in order to deter the police from acting unlawfully and obtaining evidence, and to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means. (CP-13). In entering findings of fact and conclusions of law following the CrR 3.6 hearing (CP-29), the court found that law enforcement did not have access to Morphine Sulfate from seized or forfeited items "typically available to law enforcement"

and found that the police acquired the controlled substance from a licensed pharmacist in the State of Washington "as part of a law enforcement drug investigation". The prosecutor was able to provide to the trial court a "written receipt" on the narcotics task force letterhead confirming that the two detectives had received twenty-three 30mg Morphine Sulfate extended release tablets from Medical Arts as part of an active drug investigation. The court included this information in its findings of fact as well as the fact that the receipt was signed by one of the detectives. There was no date on this "receipt". The court also found that the pills eventually sold by the Task Force to Johnson were obtained by the police without a valid prescription for the controlled substance from a practitioner acting in the course of his or her professional capacity. In rendering its decision denying the suppression motion, the court concluded that the tablets "were probably acquired in violation of pharmaceutical rules", but the police action did not rise to the level of outrageous behavior warranting application and exercise of the exclusionary rule, the defendant's due process rights were not violated, and the police action did not amount to arbitrary action or governmental misconduct that prejudiced the rights of the defendant and did not materially affect the accused's right to a fair trial under CrR 8.3(b). it should be noted that the defense

submitted proposed findings and conclusions that would have included language addressing the principle argument that had been advanced by the defendant, concerning the effect of the police violation of RCW 69.50.4013, but the trial court refused to sign those proposed conclusions, choosing to render its decision based on other considerations, as reflected in CP-29. It should be noted that the issue of whether the police had engaged in outrageous behavior, or whether the defendant's due process rights had been violated, and whether the police had engaged in arbitrary action that required dismissal under CrR 8.3(b) were raised at the trial court level by the state (CP-16, CP-17). Defense argued in response that the police commission of a felony in the furtherance of their investigation certainly qualified as a violation of the defendant's due process rights, was outrageous behavior and did amount to arbitrary action or governmental misconduct, but continued to maintain that the principle argument advanced by the defense was that application of the exclusionary rule was required by the ruling of the court in State v Bonds, supra. The trial court chose to base its decision on consideration of the issues raised by the state, as described above. A notice of appeal was filed from the trial court's ruling denying the defense suppression motion on June 14, 2007.

ARGUMENT

I. THE CONTROLLED SUBSTANCE USED TO CONVICT THE APPELLANT WAS PROCURED FELONIOUSLY BY THE POLICE AND IS SUBJECT TO THE EXCLUSIONARY RULE.

It is the contention of the appellant Johnson that based on the record in this case, since the police did not obtain the drugs that they subsequently used to set up, arrest and prosecute her in a lawful manner, but rather procured this evidence in violation of RCW 69.50.4013, this evidence should have been suppressed by the trial court pursuant to the ruling of the court in State v. Bonds, 98 W2d 1, 653 P2d 1024 (1982), and the case dismissed.

RCW 69.50.4013, which by coincidence is also the very same statute under which Johnson was charged in this matter is stated as follows:

“(1) it is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter. (2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under Chapter 9A.20. RCW.”

Although the trial court would not hold that the police action in this case in procuring the drugs constituted a violation of the above statute, it really isn't a very complicated statute, and it is very easy to conclude that since the police officers did not have a prescription for this medication, and since they didn't bother to ask a judge to provide an order authorizing their acquisition of the drugs to use in their investigation, the only possible conclusion to be drawn is that they did acquire and thereafter possess the drugs in question in violation of the above statute; they then turned around and sold the drugs to Johnson, so that she could be charged and convicted for violating that very same statute.

In State v Bonds, *supra*, our Supreme Court held that application of the exclusionary rule is not limited to instances involving violation of the Fourth Amendment or Article One, Section Seven of the Washington State Constitution but that the exclusionary rule can also be applied when a statute is violated in the course of obtaining evidence. In that case, one of the issues was whether the defendant's confession, made after a warrantless arrest by Washington police officers in the State of Oregon, should be suppressed. The court in that case concluded that the police officers, for purposes of Oregon law were only private citizens, and could arrest only for offenses committed in their presence, and

since the arrest of the defendant by them in the State of Oregon was not for an offense committed in their presence, the arrest was in violation of Oregon statutes. The court also held that since the officers made no attempt to comply with Oregon extradition procedures, they had violated a number of Oregon statutes in that regard as well, by the manner in which they arrested the defendant and transported him from Oregon to Washington. The court considered whether the exclusionary rule should be applied where the police had violated the law of another state in apprehending the defendant, which inquiry required "an appreciation of the scope and purpose of the exclusionary rule". After a discussion of constitutional considerations involving the Fourth Amendment and the potential ramifications of violations of an accused person's constitutional guarantees against unlawful search and seizure, the court went on to state as follows: "However, we have not limited the exclusionary rule to protection of the constitutional immunity from unlawful search (or seizure). ...the exclusionary rule has also been applied when a statute is violated in the course of obtaining evidence. In some cases, the statute itself provides that evidence obtained in violation of its provisions shall be inadmissible... however, even where the statute does not specifically provide for inadmissibility, the exclusionary rule has been applied where no

other remedy is available for enforcement of the statutory requirements. State v Krieg, 7 W.App.20, 497 P2d 621 (1972). In sum, therefore, we have extended the exclusionary rule beyond the original Fourth Amendment context. 98 W2d at 9, 10.

It should be noted that in the case of State v Krieg, supra, which involved the admissibility of a breath test result, the court disagreed with the state's contention that even though there had been a violation of the statute requiring the appropriate administration of warnings regarding the test, the failure to give the warnings did not affect the admissibility of the result of the breath test, only the statutory presumptions contained in the statute, RCW 46.61.506. The court in that case rejected such an argument, and stated that the basis for its decision to suppress the evidence in that case as follows: "a policy which this state has adopted with reference to evidence obtained by unlawful means was succinctly stated in State v Miles, 29 W2d 921, 927, 190 P2d 714, 744 (1948); it is beneath the dignity of the State of Washington, and against public policy, for the state to use for its own profit any evidence that has been unlawfully obtained."

In State v Bonds, supra, the court noted the view of the United States Supreme Court at that time that the primary purpose of the exclusionary rule was deterrence of police conduct that

violates Fourth Amendment rights. The court in Bonds indicated that Article One, Section Seven of the Washington State Constitution provided more expansive protection of the individual, recognizing an individual's right of privacy with no express limitations but the emphasis of the protection provided by Article One, Section Seven was on protecting personal rights rather than curbing governmental actions. However, the court went on to note that in State v White, 97 W2d 32, 640 P2d 1061 (1982), the court had recognized two other purposes of the exclusionary rule; deterrence of police misconduct and the preservation of judicial dignity. 97 W2d at 109. The court concluded its consideration of the uses and purposes of the exclusionary rule as follows: "In sum, therefore, the exclusionary rule should be applied to achieve three objectives: first, and most important, to protect privacy interests of individuals against unreasonable governmental intrusions; second, to deter the police from acting unlawfully in obtaining evidence; and third, to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means." 98 W2d at 12.

The first objective of the rule as described above is not implicated by what occurred in this case; it cannot be contended that the felonious acquisition of the controlled substances which

were then immediately conveyed to Johnson violated her rights as guaranteed by Article One, Section Seven of our constitution. However, the second and third objectives of the rule are most certainly served by application of the rule, and unquestionably require suppression of this evidence. This is not a case where the police violated a statute of some other jurisdiction such as occurred in Bonds, supra. In that case, the court decided that since a Washington state statute or constitutional provision was not violated by the police, but merely the laws of the neighboring state of Oregon, the court deemed it appropriate to engage in a cost/benefit analysis, balancing the cost of suppression against the benefits achieved by suppression. Even in conducting this analysis, which the court indicated would not be necessary where a violation of Washington law had occurred, the court acknowledged that the second and third objectives of the rule might be served by application of the rule in that case, noting that the police officers might be exposed to civilian, criminal or civil liability for unlawful arrest under Oregon law, and that they may suffer civil liability, also making the point that if that potential liability wasn't sufficient to deter police officers from engaging in these types of unauthorized excursions, that "let it be understood that we will not hesitate in the future to use our supervisory power to exclude the

fruits of such unauthorized excursions.” 98 W2d at 13. The court also noted that the final purpose of the rule, preservation of judicial integrity would also be served by the application of the rule. However, the court in considering the costs of excluding the evidence noted that these costs would be substantial; the defendant’s confession was crucial to the state’s case against him, and it implicated him in three terrible crimes (first degree burglary, rape and murder). Nevertheless, the court concluded its determination to admit the confession by stating that “Although the blatant violation of Oregon laws did not warrant exclusion of the evidence in this case, we reiterate our determination to exercise our supervisory powers to exclude evidence for such violations in the future.” 98 W2d at 15.

It must be emphasized that the only reason the court engaged in this balancing process was that the laws that were violated by the police were the laws of another jurisdiction, and that the balancing process would not be either required or allowed where a violation of a Washington State law was involved. Nevertheless, it is interesting to note that even if that balancing process was utilized in this case, there is no doubt but that the outcome of that process would be that the evidence should be excluded. The violation of law in this case did not involve the police

failing to adequately comply with extradition statutes, or even some misdemeanor violation, in order to procure much needed evidence against a murderer. This is a case where the police actually went out and committed a felony by procuring the pills unlawfully, and then conveyed them to Johnson so that she could be charged and convicted of the very same crime which they committed in procuring the pills in the first place. Condoning this behavior by passing it off as a mere "violation of pharmaceutical rules" does not exactly serve the deterrent purpose of the exclusionary rule; to the contrary, refusal to acknowledge what actually happened in this case sends a very strong message that it is acceptable for the police to commit a felony in order to prosecute a citizen for commission of the same level of crime, indeed, the very same felony. Obviously, allowing the police to commit a felony so that they can advance their investigation and prosecution of a defendant for the very same felony simply cannot be justified by any type of cost/benefit analysis. Finally, in stating its determination to exercise supervisory powers to exclude evidence for such violations in the future; our Supreme Court was saying that the police had their one free bite, and they were not going to be allowed to benefit from any further legal transgressions of this nature in the future. It would certainly be reasonable to conclude

that the actions of the police in this case in acquiring the pills in an illegal manner would certainly fall into the category of those transgressions which the Supreme Court in Bonds indicated that it would not tolerate.

In regard to the furtherance of the third objective of the exclusionary rule, the preservation of the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means, that holding by the court in State v Bonds, supra, was also cited by Judge Rosellini in his concurring opinion in State v Myers, 102 W2d 548, 558, 689 P2d 38 (1984). In that case, Myers had argued that the officers, in filling out the unauthorized arrest warrant, committed several crimes, including forgery and criminal impersonation; they had signed a fictional judge's name to a warrant and had misrepresented themselves in the execution of the warrant. The majority indicated that they were not convinced that the officers had the intent to injure or defraud, which was a requisite for those crimes. They went on to say that "our refusal to apply the exclusionary rule in this case should in no way be read to condone the use of a bogus judicial warrant. It is disturbing that the officers in this case would pay so little heed to the neutral and detached position of the magistrate. Moreover, public policy considerations weigh heavily against the unauthorized use of a

document which has heretofore demanded unquestioning obedience. Repeated use of fictitious warrants invites disobedience and confrontation. Such a practice can only be condemned.” 10 W2d at 557. In his concurring opinion Judge Rosellini agreed that the courts cannot condone the falsification of judicial warrants on the part of law enforcement officers. After noting that in falsifying an arrest warrant, the activity of the police seemed to be prohibited by the forgery statute, RCW 9A.60.020, he also noted that when the police officer signed the name of a fictitious judge as authorization for the bogus arrest warrant, his conduct appeared to fit squarely within the terms of subsection 1 of the statute, notwithstanding the majority’s assertion that the police officers did not intend to commit a crime. He went on to state as follows: “while this may be technically true, the police activity clearly violates general notions of fair play and justice. Moreover, such actions on the part of law enforcement officers must inevitably result in an erosion of public confidence in the warrant system and the judiciary by denigrating its integrity. The importance of this integrity has been a frequent subject to the United State’s Supreme Court. For example, Justice Clark has written: there are those who say, as did Justice Cardozo, that under our constitutional exclusionary doctrine “the criminal is to go free because the

constable has blundered..." in some cases this will undoubtedly be the result. But, as was said in Elkins, there is another consideration-the imperative of judicial integrity [Elkins v United States, 364 US 206 at 222, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960)]. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in Olmstead v United States, 277 US 438, 485 [48 S.Ct. 564, 575, 72 L.Ed. 944] 1928: "our government is the potent omnipresent teacher. For good or for ill, it teaches the whole people by its example...if the government becomes a law breaker it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." Mapp v Ohio, 367 US 643, 659, 81 S.Ct. 1684, 1693, 6 L.Ed.2d 1081 (1961). Justice Rosellini then went on to conclude by noting that in State v Bonds, supra, the court had recognized the illegality of the police activity and put law enforcement officials on notice that repeated impropriety would result in exclusion "in the next case." State v Myers, 558, 559.

This is the next case, or at least one of the next cases. As noted above, the courts have on a number of occasions warned that the next time, they would not tolerate police misconduct and

that next time, results would be different; the evidence would be suppressed. Here, the police committed a felony to procure the evidence necessary to support the prosecution and conviction of the defendant. They went to the pharmacy and violated RCW 69.50.4013, so that they could get evidence necessary to secure the conviction of Johnson, not on a charge of murder, but on a charge of violation of RCW 69.50.4013. According to the above authorities, this would appear to be that case where the court was promising, repeatedly, to exercise its supervisory powers to exclude evidence for such a violation.

In the case of State v Storhoff, 84 W.App 80, 925 P2d 640 (1996), this court held that "in a Washington criminal prosecution, the state may not use evidence unlawfully obtained. At least generally, the unlawfulness may result from either a constitutional violation or a statutory one." 84 W.App. at 82, 83. The court in Storhoff also indicated that suppression of the evidence will be granted if it is "the fruit of the poisonous tree", or in plainer terms, if its acquisition is the result of unlawful activity. In that case, where the Department of Licensing had apparently provided faulty advice to various individuals regarding the time within which they could contest a suspension of their license, in violation of the applicable statute, the court held that if the defendant's failure to apply for a

hearing was due to the Department of Licensing's faulty advice, his license was never validly revoked; the order revoking the defendant's license would be subject to suppression, since it had been issued in violation of the applicable statute, and the defendant could not then be prosecuted for the offense of driving on a revoked or suspended license. In the present case, the police illegally acquired the pills for the express purpose of conveying them to the defendant, and these illegally acquired pills were immediately and directly conveyed to the defendant after they were acquired by the police, and the defendant was then immediately arrested and charged with violation of RCW 69.50.4013. There was a direct, uninterrupted casual connection between the illegal activity of the police in acquiring this evidence and the defendant's arrest and prosecution, which makes the evidence utilized in support of that prosecution subject to suppression, according to the above authorities.

II. THE EVIDENCE SHOULD BE SUPPRESSED BECAUSE IT WAS OBTAINED BY POLICE MISCONDUCT WHICH VIOLATES DUE PROCESS.

At the trial court level, the prosecutor attempted to characterize the defense argument as a motion for dismissal for

violation of due process by the police, warranting dismissal pursuant to applicable authorities, case law and also CrR 8.3(b). That was in fact not Johnson's original argument, as can readily be ascertained from a review of the above argument. But in the course of oral argument, defense counsel did make that argument for the record and would reiterate that argument once more for this court. While according to the authorities to be discussed infra, relief on that basis is rarely if ever provided, it is certainly worth while to place before this court the question as to whether the police action in this case rises to the level which would warrant dismissal.

In State v Lively, 130 W2d 1, 921 P2d 1035 (1996), the court indicated that under the subjective approach of entrapment, the focal issue is the predisposition of the defendant to commit the offense; the court indicated that conversely, outrageous conduct is founded on the principle that the conduct of law enforcement officers and informants may be "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." United States v Russell, 411 US 423, 431-32, 93 S.Ct. 1637, 1643, 36 L.Ed.2d 366 (1973). The court in Lively went on to cite various authorities for the proposition that for the police conduct to violate due process, the

conduct must shock the universal sense of fairness, and whether the state has engaged in outrageous conduct is a matter of law, not a question for the jury. The court went on to state that “in determining whether police conduct violates due process, this court has held that the conduct must be so shocking that it violates fundamental fairness. State v Myers, 102 W2d 548, 551, 689 P2d 38 (1984).” The court also cited State v Emerson, 10 W.App. 235, 242, 517 P2d 245 (1973) for the proposition that public policy allows for some deceitful conduct in violation of criminal laws by the police in order to detect and eliminate criminal activity, a concept which was recently reiterated by the court in State v Athan, 160 W2d 354, 158 P3d 27 (May 10, 2007). The court in Lively also disagreed with the proposition that a due process violation requires a showing that the state’s conduct violates a specific constitutional right of the defendant. The court continued on to state that “in evaluating whether the state’s conduct violates due process, we focus on the state’s behavior and not the defendant’s predisposition. The court noted several factors which could be considered when determining whether police conduct offends due process; one of those considerations was “whether the government conduct itself amounted to criminal activity or conduct “repugnant to a sense of justice”. Another factor which was whether the police

conduct instigated a crime or merely infiltrated ongoing criminal activity. State v Lively, 130 W2d at 22.

In State v Athan, supra, the court reiterated the rule by the court in State v Lively, supra, for the proposition that due process violation requires the additional element of showing the government misconduct is "so shocking that it violates fundamental fairness". In that case, in ruling on a defense motion for dismissal pursuant to CrR 8.3(b), the court held that police officers engaging in unauthorized practice of law by impersonating a law firm did not rise to the level of conduct justifying suppression of evidence in the context of a purported due process violation, (to be distinguished from the bases for suppression discussed by the court in State v Bonds, supra,"); it should be noted that offense of unauthorized practice of law is a gross misdemeanor, and in Athan, the police were attempting to procure evidence to support a conviction for murder. This case is different; here the police committed a felony in order to obtain the evidence which they deemed necessary to further their investigation and prosecution of the appellant. While the police commission of a gross misdemeanor may not be sufficient to make a case for a due process violation, the appellant would submit that evidence of a police commission of a felony should be sufficient to make that case, particularly when the police

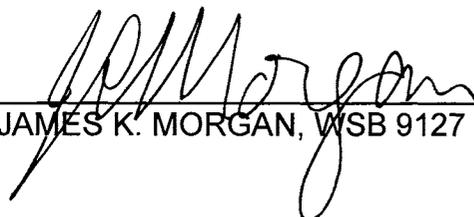
commit the felony in order to obtain the evidence necessary to secure the appellant's conviction for committing that very same felony. This must be considered conduct repugnant to a sense of justice, rising to the level of a due process violation, thus warranting suppression of the evidence and dismissal of this case.

CONCLUSION

Appellant requests that based on consideration of the above arguments and the authorities cited therein, the evidence in question should be dismissed and the charge against the appellant dismissed.

Dated this 7 day of November 2007.

Respectfully Submitted,


JAMES K. MORGAN, WSB 9127

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COURT OF APPEALS, DIVISION II, STATE OF WASHINGTON

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3			
4	STATE OF WASHINGTON,)	BY <u>DM</u>
5	Respondent,)	DEPUTY
6))	No. 36433-6-II
7))	Cowlitz County No. 07-1-00212-7
8	v)	CERTIFICATE OF
9	VALERIE J. JOHNSON,)	MAILING
	Petitioner)	

I, Jeanne Struthers, certify and declare:

That on the 7th day of November 2007, I deposited in the mails of the United States of America, next day service a properly stamped and addressed envelope, containing an original and one copy Brief of Appellant, addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

and in the mails of the United States of America, First Class a properly stamped and addressed envelope containing Petition for Review addressed to;

Prosecuting Attorney
Hall of Justice
312 SW First
Kelso, WA 98626

Valerie Johnson
601 Peardale Lane
Longview WA 98632

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

DATED this 7th day of November 2007.



Jeanne Struthers