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NO. 36433-6-II
Cowlitz Co. 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.

BRIEF OF RESPONDENT

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington.

II. BRIEF ANSWER

The trial court properly denied the appellant’s motion to suppress as the police officers properly acquired and delivered the pills to the appellant in a reverse sting under the statutory exemption for police officers in RCW 69.50.506(c). The appellant’s conviction should be affirmed.

III. COUNTERSTATEMENT OF THE CASE

The State rejects the appellant’s statement of the case as it contains argument in violation of RAP 10.3(a)(5).¹

¹ For example, in the appellant’s statement of the case the appellant writes “When 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.” Br. of App. at 3. The last phrase is not a “fair statement of the facts and procedure relevant to the issues presented for review, without argument. Reference to the record must be included for each factual argument.” RAP 10.3(a)(5). It is not a fair statement of the facts and procedure, nor is there any reference to the record. Later in the same paragraph the appellant notes that 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 . . .”. Br. of App. at 3. Again, this is not a fair statement of the facts and procedure of the case, and there is again no reference to the record in violation of RAP 10.3(a)(5).

Based on information developed by law enforcement, officers with the Cowlitz Wahkiakum Narcotics Task Force sought to conduct a sale of controlled substances, specifically morphine, to the appellant, Valerie Joy Johnson. CP at 43-44. The Task Force did not have access to morphine sulfate from seized or forfeited items typically available to local law enforcement. CP at 44. The Task Force acquired the morphine sulphate from a Washington State licensed pharmacist as part of the drug investigation. Officers with the Task Force provided the pharmacist with a receipt written on the Cowlitz-Wahkiakum Narcotics Task Force letterhead which stated:

“Det. Carlson & Det. Johnston received 23 30mg morphine sulfate ext. release tablets from Medical Arts as part of an active drug investigation.”

CP at 44. The receipt was signed by Detective P. Carlson and Detective J. Johnston.

On February 14, 2007, officers with the Cowlitz Wahkiakum Narcotics Task Force sold morphine sulfate tablets to the appellant, Valerie Joy Johnson. CP at 44. Officer with the Task Force did not have a valid prescription for the morphine sulfate tablets from a practioner acting in the course of his or her professional capacity. CP at 44.

On May 10 and May 17, 2007, the trial court conducted a suppression hearing. CP at 43. On May 17, 2007, the trial court denied the defendant's motion to suppress. CP at 45.

On June 14, 2007, the trial court conducted a stipulated facts trial, and convicted the defendant of possessing morphine in violation of the Uniform Controlled Substances Act. See Judgment and Sentence, CP at 31-41.

On July 12, 2007, the trial court entered Findings of Fact and Conclusions of Law. CP at 43-45.

IV. ARGUMENT

A. Appellant Has Failed to Perfect Appeal

The appellant has assigned as the sole error in this case that the trial court improperly denied the motion to suppress evidence in this case. Br. of App. at 1. The appellant has only ordered the transcription of stipulated facts trial which occurred on June 14, 2007. See Appellant's Statement of Arrangements.

As the party seeking review, the appellant must perfect the record to provide the court with all the relevant evidence pertaining to her arguments on appeal. See *State v. Vazquez*, 66 Wn.App. 573, 583, 832 P.2d 883 (1992); RAP 9.1(b), 9.2(a), (b). The appellant's failure to do so

prevents a thorough review of the suppression issue. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)(if the record is inadequate “to adjudicate the claimed error,” the error is not manifest).

While the court here does have the trial court’s Findings of Fact and Conclusions of Law, CP at 43-45, there is no transcription of the proceedings for the hearing on the motion to suppress that happened on May 10 and May 17, 2007. See CP at 43. While the findings and conclusions at CP 43-45 may be able to support appellate review of the appellant’s claim, the record is not complete and the appeal has not been perfected.

B. Source of Contraband Not Relevant

The appellant claims that the morphine pills delivered to her were “procured feloniously by the police” and thus the trial court should have suppressed the drugs. Br. of App. at 6. The appellant relies primarily on *State v. Bonds*, 98 Wn.2d 1, 653 P.2d 1024 (1982).

First, the appellant has not assigned error to any of the findings of fact or conclusions of law entered by the trial court. Br. of App. at 1. In particular, the appellant has not assigned error to the finding of the trial court that the police officers with the Task Force acquired the morphine sulphate from a Washington State licensed pharmacist as part of the drug

investigation involving the appellant. See Finding of Fact 3, CP at 44.

Therefore, the findings should be accepted as a verity on appeal.

Defendant has assigned no error to any of the entries of fact. It is well-established law that an unchallenged finding of fact will be accepted as a verity upon appeal. *In re Riley*, 76 Wn.2d 32, 33, 454 P.2d 820, *cert. denied*, 396 U.S. 972, 90 S.Ct. 461, 24 L.Ed.2d 440 (1969); *Tomlinson v. Clarke*, 118 Wn.2d 498, 501, 825 P.2d 706 (1992). We have held that this rule also applies to facts entered following a suppression motion. *State v. Christian*, 95 Wn.2d 655, 656, 628 P.2d 806 (1981). Defendant's failure to assign error to the facts entered by the trial court precludes our review of these facts and renders these facts binding on appeal. We will nevertheless take this opportunity to clarify the case law regarding the standard of review for factual findings entered pursuant to a suppression hearing.

State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994)

If the appellant does not assign error to the court's factual findings in support of an exceptional sentence, they do become verities on appeal. See, e.g., *State v. Alexander*, 125 Wn.2d 717, 723, 888 P.2d 1169 (1995); *State v. Harmon*, 50 Wn.App. 755, 750 P.2d 664 (1988).

State v. McCollum, 88 Wn.App. 977, 984, 947 P.2d 1235 (Div. 2, 1997)

A court reviews conclusions of law de novo. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006). An appellate court reviews findings of fact related to a motion to suppress for substantial evidence, but unchallenged findings are verities on appeal. *Levy*, 156 Wn.2d at 733.

The trial court's finding of fact three that the Task Force acquired the morphine sulfate from a Washington State licensed pharmacist is bolstered by the other findings of the trial court: That the police provided

the pharmacist with a written receipt on the Task Force letterhead which stated that the detectives received morphine tablets from the pharmacist “as part of an active drug investigation.” Finding of Fact 4, CP at 44. The appellant has not assigned error to that finding of fact, and that finding should also be accepted as a verity on appeal. *Hill*, 123 Wn.2d at 644.

The appellant claims that since the morphine pills in this case were ‘illegally obtained’ and since they were obtained ‘under no apparent lawful authority’ the court should suppress the pills. Br. of App. at 6 et seq.

It is not relevant whether the pills in this case were or were not lawfully acquired. The supposed taint concerning the evidence in cases cited by the defendant pertain to evidence acquired in violation of the defendant’s rights. None of the cases cited by the appellant involves the use of possibly illegally acquired drugs in a separate law enforcement action.

The appellant primarily relies upon *State v. Bonds*, 98 Wn.2d 1, 653 P.2d 1024 (1982), Br. of App. at 6 et seq. *Bond* is only tangentially related to the issue of whether the trial court here erred when it denied the motion to suppress. *Bond* does involve the issue of whether suppression is appropriate when police violate the laws of an adjacent state. *Bond*, 98 Wn.2d at 10. That fact pattern is not analogous to the situation here of

supposed improper acquisition of a controlled substance as part of a reverse sting.

The appellant also cites to *State v. Krieg*, 7 Wn.App. 20, 497 P.2d 621 (Div. 1, 1972), as well as the concurring opinion of Justice Rosellini in *State v. Myers*, 102 Wn.2d 548, 558, 689 P.2d 38 (1984). Br. of App. at 9, 14-16. But concurring appellate opinions are not precedential. *Brother Intern. Corp. v. National Vacuum & Sewing Machine Stores, Inc.*, 9 Wn.App. 154, 158, 510 P.2d 1162 (Div. 1, 1973), citing *Commonwealth v. Little*, 432 Pa. 256, 248 A.2d 32 (1968).

In *Krieg* the Court of Appeals affirmed the trial court's granting of the motion to suppress on the basis that the officer failed to inform the defendant of his statutory right to refuse the breathalyzer test, and to have additional tests performed. *Krieg*, 7 Wn.App. at 21. The appellant has not argued that the police failed to give any statutorily required warning. The language from *Krieg* cited by the appellant appears in context of the court of appeals finding that the state violated a statutory duty to warn defendants, and that therefore the evidence obtained in violation of that duty will be suppressed. *Krieg* is not relevant here since the officers did not fail to give the appellant statutorily required warnings, as was involved in *Krieg*. No such duty exists, and there was no violation of the law here

by which the state is seeking to profit. See, generally, RCW 69.50.506 and discussions which follows.

C. Pills Properly Acquired

The appellant has failed to show that the pills in this case, acquired in the due course of a law enforcement investigation, were acquired improperly. The officers were conducting a legitimate law enforcement function – investigating the improper use and/or purchase of drugs by a member of the law enforcement community, in this case a juvenile detention officer. The appellant does not show that such an investigation was improper, but only raises the issue that the drugs themselves were acquired improperly.

1. Statutory Exception for Law Enforcement

While the State concedes that there was no valid prescription for the morphine sulphate tablets used by the Task Force in this case, see Finding of Fact 6, CP at 44, the police are not required to have a prescription under state law. State law specifically provides that law enforcement officers engaged in the lawful performance of duties are not liable under Chapter 69.50 RCW. “No liability is imposed by this chapter upon any authorized state, county or municipal officer, engaged in the lawful performance of his duties.” RCW 69.50.506. In this case the appellant contends that the police improperly acquired the morphine

sulfate tablets sold to her. However, the police acquired the pills from a pharmacist as part of a “law enforcement drug investigation”. Finding of Fact 5, CP at 44.

The police have the duty to enforce the provisions of the Uniform Controlled Substances Act. RCW 69.50.500. (“It is hereby made the duty of the state board of pharmacy, the department, and their officers, agents, inspectors and representatives, and all law enforcement officers within the state, and of all prosecuting attorneys, to enforce all provisions of this chapter, . . .”).

(1) There is nothing in the record to indicate that the police officers were not duly authorized general authority peace officers. RCW 10.93.020(3).

(2) There is nothing in the record to indicate that the police officers were not engaged in an active law enforcement drug investigation when they acquired the pills from the pharmacist, and sold the pills to the appellant in the reverse sting. Indeed, the trial court’s finding of fact specifically indicated that the officers were engaged in law enforcement activities when they acquired the morphine sulfate from the pharmacist. Finding of Fact 5, CP at 44.

The officers were engaged in exercising their statutory duty to enforce the uniform controlled substances act, RCW 69.50.500, when they

acquired the morphine sulfate pills from the pharmacist and sold the pills to the appellant. State law provides that there is no liability under Chapter 69.50 RCW for law enforcement officers “engaged in the lawful performance of his duties.” RCW 69.50.506. That statutory exemption from liability allows a police officer to ‘possess’ controlled substances while “engaged in the lawful performance of his duties”, without being liable under Chapter 69.50 RCW. Even though the officer knows he or she possessed the controlled substance, and even knows the nature of the controlled substance (the two elements of possession), RCW 69.50.506(c) allows the officer to ‘possess’ or even ‘deliver’ the controlled substance for law enforcement purposes.

That is the case here with the morphine sulfate tablets acquired by the police from the pharmacist. So long as the morphine sulfate tablets were acquired by the officers in the lawful performance of duties, no liability under Chapter 69.50 RCW attaches. While the police here ‘delivered’ morphine to the appellant in apparent violation of RCW 69.50.401(2)(a), the police here are exempt from liability for that delivery under 69.50.506(c). This applies to the possession of the morphine by the police, as well as the method of acquiring the tablets from the pharmacist: RCW 69.50.506(c) exempts the police from needing a prescription for the

morphine so long as the morphine is needed by police in the lawful performance of his duties.

Division III of the Court of Appeals analyzed the Controlled Substances Act law enforcement statutory exception in *State v. McReynolds*, 80 Wn.App. 894, 899-900, 912 P.2d 514 (Div. 3, 1996). In *McReynolds* the appellant had initially agreed to work as a police informant. Police determine that *McReynolds* was still dealing drugs, and police set up a sting to catch *McReynolds*. Police set up four buys involving *McReynolds*, and a jury found *McReynolds* guilty of one count of delivering cocaine. *McReynolds*, 80 Wn.App. at 895-899. On appeal *McReynolds* claimed the trial court erred by refusing to give a jury instruction that would read:

“Delivery of a controlled substance is lawful or excused if when the delivery occurs, the Defendant believes that he is acting as an agent of any authorized state, county, or municipal officer, engaged in the lawful performance of his duties.”

McReynolds, 80 Wn.App. at 899.

The Court of Appeals noted that *McReynolds* had ignored at his own risk warnings to not sell or deliver drugs except as specifically directed by police when he agreed to be a confidential informant. The Court found that *McReynolds* could not bear the burden of showing that

he was an authorized officer engaged in the lawful performance of his duties.

RCW 69.50.401 makes delivery of a controlled substance unlawful, except as authorized by statute. RCW 69.50.506(c) is a statutory exception for authorized state, county or municipal officers engaged in the lawful performance of their duties. To invoke the statutory immunity of RCW 69.50.506(c), Mr. McReynolds had to establish (1) he was an authorized officer (2) engaged in the lawful performance of his duties. *See* *900 *Loveday v. State*, 546 S.W.2d 822, 825 (Tenn.Crim.App.1976); RCW 69.50.506(a) (the person claiming an exception bears the burden of proving it applies). He could not do that.

McReynolds, 80 Wn.App. at 899-900.

Similarly, Detectives Carlson and Johnston and the officers of the Task Force are entitled to statutory immunity upon a showing that they were ‘authorized officer(s)’ and ‘engaged in the lawful performance of his [their] duties.’ RCW 69.50.506(c). *See McReynolds*, 80 Wn.App. at 899. The officers have statutory immunity for their initial possession of the Morphine sulfate (when they acquired the pills from the pharmacist), their later delivery of the pills to the appellant, and their subsequent possession once they seized the pills from the appellant after the delivery. RCW 69.60.506(c).

2. Statutory Exception For Law Enforcement to Use Seized Drugs.

If the pills were in the custody of law enforcement having been previously seized from a purchaser or seller who did not have a

prescription for such pills, then, according to the appellant, there would be a taint of illegality associated with those pills to prevent those pills from lawfully being used by the police in any subsequent law enforcement action. State law specifically provides that the police may use seized and forfeited items to enforce drugs laws.

(7) When property is forfeited under this chapter the board or seizing law enforcement agency may:

(a) Retain it for official use or upon application by any law enforcement agency of this state release such property to such agency for the exclusive use of enforcing the provisions of this chapter;

RCW 69.50.505.

Federal regulations specifically provide that law enforcement, including state and local law enforcement, is exempt from Drug Enforcement Administration registration requirements. 21 CFR 1301.24 (a)(2).

D. Drug ‘Sting’ Operations Do Not Offend Due Process

The State contends that the statutory exemption under RCW 69.50.506(c) definitively disposes of the issues in the case. Nonetheless, the State will address whether there is any due process issue since that is raised by the appellant. Br. of App. at 18-22.

The appellant here is essentially raising a due process defense, that since the officers allegedly improperly acquired the pills, the court, in

order to ‘preserve the dignity of the judiciary’, should suppress the pills in evidence in this case.

1. Standard of Review

State v. Lively enumerates a standard of judicial review for evaluating a claim of ‘outrageous government conduct’:

We agree with those courts which hold that in reviewing a defense of outrageous government conduct, the court should evaluate the conduct based on the “totality of the circumstances.” *United States v. Tobias*, 662 F.2d 381, 387 (1981), *cert. denied*, 457 U.S. 1108, 102 S.Ct. 2908, 73 L.Ed.2d 1317 (1982); *State v. Hohensee*, 650 S.W.2d 268 (Mo.App.1982). Each case must be resolved on its own unique set of facts and each component of the conduct must be submitted to scrutiny bearing in mind “proper law enforcement objectives--the prevention of crime and the apprehension of violators, rather than the encouragement of and participation in sheer lawlessness.” *People v. Isaacson*, 44 N.Y.2d 511, 406 N.Y.S.2d 714, 378 N.E.2d 78, 83 (N.Y.1978); *Bogart*, 783 F.2d at 1438. The government conduct may be so extensive that even a predisposed defendant may not be prosecuted based on “the ground of deprivation of due process.” *Hohensee*, 650 S.W.2d at 271 (quoting *United States v. Bagnariol*, 665 F.2d 877 (9th Cir.1981)).

In evaluating whether the State’s conduct violated due process, we focus on the State’s behavior and not the Defendant’s predisposition. *United States v. Luttrell*, 889 F.2d 806, 811 (9th Cir.1989). There are several factors which courts consider when determining whether police conduct offends due process: whether the police conduct instigated a crime or merely infiltrated ongoing criminal activity, (*Harris*, 997 F.2d at 816); whether the defendant’s reluctance to commit a crime was overcome by pleas of sympathy, promises of excessive profits, or persistent solicitation, (*Isaacson*, 406 N.Y.S.2d at 719-20, 378 N.E.2d at 83; *Shannon*, 892 S.W.2d at 765); whether the government controls the criminal activity or simply allows for the criminal activity to occur, (*United States v. Corcione*, 592 F.2d 111, 115 (2d Cir.), *cert.*

denied, 440 U.S. 975, 99 S.Ct. 1545, 59 L.Ed.2d 794 and 440 U.S. 985, 99 S.Ct. 1801, 60 L.Ed.2d 248 (1979)); whether the police motive was to prevent crime or protect the public (*Isaacson*, 406 N.Y.S.2d at 719-20, 378 N.E.2d at 83; *Shannon*, 892 S.W.2d at 765); and whether the government conduct itself amounted to criminal activity or conduct “repugnant to a sense of justice.” *Isaacson*, 406 N.Y.S.2d at 719, 378 N.E.2d at 83; *United States v. Jensen*, 69 F.3d 906, 910-11 (8th Cir.1995), *cert. denied*, 517 U.S. 1169, 116 S.Ct. 1571, 134 L.Ed.2d 669 (1996).

State v. Lively, 130 Wn.2d 1, 21-22, 921 P.2d 1035 (1996).

2. Sting Operations Appropriate with Controlled Substances

Washington Courts have stated that ‘sting’ operations are appropriate when it involves the users of illegal drugs:

And certainly sting operations calculated to apprehend both distributors and users of illegal drugs by the use of confidential informants or drug enforcement officers operating undercover are appropriate. *State v. Pleasant*, 38 Wn.App. 78, 79, 82-84, 684 P.2d 761 (1984) (police set up a sting operation to catch drug dealers; court rejected defendant’s argument that sting operation violated his right to due process); *see State v. Duran-Davila*, 77 Wn.App. 701, 702, 892 P.2d 1125 (1995) (police “conducted a sting operation” at a motel); *State v. McClam*, 69 Wn.App. 885, 886, 850 P.2d 1377 (1993) (police conducted a “ ‘drug sting’ operation” on a city block in Seattle); *State v. Alonzo*, 45 Wn.App. 256, 258, 723 P.2d 1211 (1986) (police used a “special emphasis patrol” in the Pike Place Market area in response to complaints of drug dealing by area merchants and citizens).

State v. Rainey, 107 Wn.App. 129, 138, 28 P.3d 10 (Div. 3, 2001).

The court of appeals mentioned the reverse sting in *State v. Moore*, 70 Wn.App. 667, 670, 855 P.2d 306 (Div. 1, 1993), but the defendant did not raise and the court did not address an outrageous government conduct

or due process claim. See also *State v. Salinas*, 119 Wn.2d 192, 194, 829 P.2d 1068 (1992), and *State v. Wiley*, 79 Wn.App. 117, 118 (Div. 1, 1995).

The federal courts have found that “a ‘reverse sting’ operation is a constitutionally valid method for law enforcement agents to apprehend and to obtain incriminating evidence against the ‘unwary criminal.’” *Smith v. McCollough*, 97 F.Supp.2d 626, 633 (M.D.Pa., 1999), citing *Commonwealth of Pennsylvania v. Mance*, 422 Pa.Super. 584, 619 A.2d 1378 (1993).

3. The Police Did Not Engage in Outrageous Conduct

Assuming, arguendo, that the pills were acquired ‘illegally’, there is nothing here based on the ‘totality of the circumstances’ to support that the police engaged in outrageous conduct which violated the defendant’s due process rights.

First, the police did not instigate the crime. Rather, here, law enforcement received a tip about a juvenile detention officer engaging in criminal activity, that the defendant was using drugs without a prescription. The officers here became aware that the appellant was engaged in criminal activity, and merely infiltrated the ongoing criminal scheme involving the appellant.

Second, there is nothing in the reports or the record to indicate that the informant overcome the defendant's reluctance to commit a crime through pleas of sympathy, promises of excessive profits or persistent solicitation.

Third, the police did not control the criminal activity, but simply allowed the criminal activity to occur. By the time the police became involved here, the defendant had already engaged in the criminal activity, that is, purchasing drugs from the informant without a prescription. Further, the police motive here was to prevent further criminal activity, that is, to prevent the defendant from continuing to obtain drugs using sources at the juvenile detention facility.

Lastly, the government conduct here was not repugnant to a sense of justice. Unlike *Lively*, there is no showing here that the police engaged in outrageous conduct repugnant to a sense of justice. *Lively*, 130 Wn.2d at 26. Rather, it was the defendant herself who was engaging in outrageous conduct – buying drugs from a former detainee, and completing the purchase in the parking lot of a juvenile detention facility while the defendant was on duty, and in uniform.

The State does not concede that any crime was committed here by the police in the manner by which they acquired the drugs. See RCW 69.50.506(c). Even if there were, there was no outrageous conduct nor

other problems associated with those few cases where the courts have found there to be due process outrage violations involving contraband. *Lively* is not applicable here, except to the extent that the standard outlined there – that based on the ‘totality of the circumstances’ that there was no due process violation on the part of the police.

When an offense involves contraband it is unlikely that a due process violation will ever be found: “Second, the Supreme Court has stated that it is unlikely a due process violation will ever be found in the context of contraband offenses: the detection of such offenses requires law enforcement officials to resort to covert methods which would be unacceptable in other contexts.” *Pleasant*, 38 Wn.App. at 82-84, citing *Hampton* 425 U.S. at 493-495, 96 S.Ct. at 1652-53; and *State v. Emerson*, 10 Wn.App. 235, 238, 517 P.2d 235 (Div. 1, 1973).

The ‘outrageous law enforcement conduct’ defense is a ‘rarely used judicial weapon reserved only for the most unusual circumstances. *State v. Pleasant*, 38 Wn.App. 78, 82-84, 684 P.2d 761 (Div. 2, 1984), citing *Hampton v. United States*, 425 U.S. at 493, 96 S.Ct. at 1651; *United States v. Bagnariol*, 665 F.2d 877 (9th Cir.1981) *cert. denied*, 456 U.S. 962, 102 S.Ct. 2040, 72 L.Ed.2d 487 (1982); *United States v. Ryan*, 548 F.2d 782 (9th Cir.1976) *cert. denied*, 430 U.S. 965, 97 S.Ct. 1644, 52 L.Ed.2d 356 (1977); *see also United States v. Brown*, 635 F.2d 1207 (6th

Cir.1980); *United States v. Myers*, 527 F.Supp. 1206 (E.D.N.Y.1981); *United States v. Marcello*, 537 F.Supp. 1364 (E.D.La.1982), *cert. denied*, 464 U.S. 935, 104 S.Ct. 341, 78 L.Ed.2d 309 (1983).

The Supreme Court recently stated that police officers are allowed to use ruses to investigate and eliminate criminal activity. In *State v. Athan*, 160 Wn.2d 354, 158 P.3d 27 (2007), the court found the ruses there, which included the violation of a criminal statute by the police, did not amount to a violation of Athan's due process rights, and the trial court properly denied Athan's motion to suppress.

As we note in our discussion of Athan's CrR 8.3(b) motion, police officers are allowed to use some deception, including ruses, for the purpose of investigating criminal activity. Generally, ruses are upheld as long as the actions do not violate a defendant's due process rights. Because we agree with the trial court that the police ruse used here did not violate Athan's due process rights, we find this ruse permissible.

State v. Athan, 160 Wn.2d at 371

Public policy allows for a limited amount of deceitful police conduct in order to detect and eliminate criminal activity. A violation of a criminal statute is not a per se violation of CrR 8.3(b) and/or due process, and we must examine the totality of the circumstances to determine when the conduct becomes so outrageous that a reversal of a conviction is required. The police's use of a ruse to obtain evidence against a suspect is not determinative. We have upheld police ruses designed to gain warrantless entry into a suspect's house for the purpose of buying illegal drugs. *State v. Hastings*, 119 Wn.2d 229, 830 P.2d 658 (1992). In *Hastings*, we found the Fourth Amendment did not apply because the defendant had no reasonable expectation of privacy in his house when he was openly engaged in illegal

activity with the public. However, we noted that even if the Fourth Amendment had applied, the defendant had consented to the search and the police ruse used to gain entry did not vitiate that consent. *Hastings*, 119 Wn.2d at 233-36. Likewise, there is no Fourth Amendment violation here and the police ruse does not vitiate Athan's voluntary relinquishment of the envelope containing a sample of his saliva.

Although the police violated a state statute by posing as lawyers, the trial court noted the effect of the conduct on the integrity of the legal system is not as severe as where the ruse was directed at obtaining confidential information. Public policy allows for some deceitful conduct and violation of criminal laws by police officers in order to detect and eliminate criminal activity. The claimed misconduct in this case does not involve actions similar to those cases which found misconduct warranting dismissal. The police did not induce Athan to commit any crime here nor did they attempt to gain any confidential information from the ruse. The conduct here is not so outrageous as to offend a sense of justice or require dismissal of this case. We find the trial court properly denied Athan's motion to dismiss under CrR 8.3(b).

State v. Athan, 160 Wn.2d at 377-78

Similarly here with the appellant, the police conduct here is not so outrageous as to offend a sense of justice or require dismissal of the case. If the police here had access to morphine sulfate, from a recent drug case forfeiture, and then used that controlled substance to sell to the appellant in a reverse sting, then there would have been a specific statutory exception to allow the police to use the pills for law enforcement purposes under RCW 69.50.505(7)(a). The so-called outrageous conduct here arose due to the vagaries of law enforcement: there was no morphine sulfate

available to law enforcement in this case from “seized or forfeited items typically available to law enforcement”. Finding of Fact 2, CP at 44.

The courts have discussed the public policy needs for law enforcement to violate laws in order to enforce the law. For example, while a law enforcement officer will typically violate the speed limit in order to catch a vehicle that is speeding, and that ‘exoneration of the police who commits a crime in the course of crime detection would appear to be a matter of actual or presumed legislative intention’:

The commission of crimes by police officers and their agents in the course of meeting the need for crime detection has, however, created some concern. There are cases refusing to exonerate police officers of criminal responsibility for the commission of crime even though the crime was committed in the course of efforts to detect the commission of crime by others. *Reigan v. People*, 120 Colo. 472, 210 P.2d 991 (1949); *Commonwealth ex rel. Shea v. Leeds*, 9 Phila. 569 (Quarter Sess. 1872); *Rex v. Petheran*, 65 Can.Cr.Cas. 151, 2 D.L.R. 24 (AltaSup.Ct., App.Div. 1936). As stated in *Commonwealth ex rel. Shea v. Leeds*, *Supra*, ‘It was never intended that a man should violate the law in order to vindicate the law.’ 9 Phila. at 570. On the other hand, there are cases holding that police officers under such circumstances should be exempt from criminal sanctions as a matter of public policy when they violate the law in the course of their crime detection duties. *Lilly v. West Virginia*, 29 F.2d 61 (4th Cir. 1928); *State v. Gorham*, 110 Wash. 330, 188 P. 457, 9 A.L.R. 365 (1920). In the Model Penal Code s 3.02, comment at 9 (Tent. Draft No. 8, 1958), it is stated that a ‘speed limit may be violated in pursuing a suspected criminal.’ Exoneration of a police officer who commits a crime in the course of crime detection would appear in principle to be a matter of actual or presumed legislative intention. See *Sherman v. United States*, 356 U.S. 369, 78 S.Ct. 819, 2 L.Ed.2d 848 (1958); *Nardone v. United States*, 302 U.S. 379, 58 S.Ct. 275, 82 L.Ed.

314 (1937); *Sorrells v. United States*, 287 U.S. 435, 53 S.Ct. 210, 77 L.Ed. 413, 86 A.L.R. 249 (1932).

State v. Emerson, 10 Wn.App. 235, 238-239, 517 P.2d 245 (Div. 1, 1973)

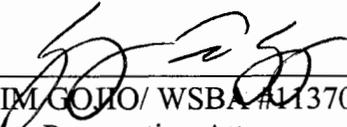
The same applies here with possession of controlled substance. Strict application of the appellant's argument would find that a court clerk, the prosecutor, and the jury may also be said to 'possess' the drugs in violation of the Uniform Controlled Substances Act when they handle the evidence in court (they know they 'possess' the drugs, and know the nature of the substance they are handling or 'possessing'). Thankfully, RCW 69.50.506 exempts law enforcement from being subject to liability for such 'possession', and it is a matter of actual or presumed legislative intent to extend that protection to the court clerk and jury.

IV. CONCLUSION

The source of the drugs in this case is not relevant to the defendant's illegal possession of morphine case. The pills were properly acquired by the police officers, and even if it were not properly acquired, there was no outrageous government conduct violative of the defendant's due process rights. The court should affirm the appellant's conviction.

Respectfully Submitted this 2 day of January, 2008.

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Representing Respondent

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

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STATE OF
BY ym

STATE OF WASHINGTON,)	NO. 36433-6-II
)	Cowlitz County No.
Appellant,)	07-1-00212-7
)	
vs.)	CERTIFICATE OF
)	MAILING
VALERIE JOY JOHNSON,)	
)	
Respondent.)	
_____)	

I, Audrey J. Gilliam, certify and declare:

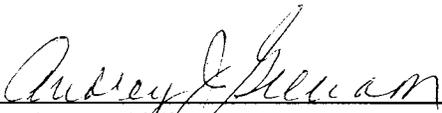
That on the 2 day of January, 2008, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

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

James K. Morgan
Attorney at Law
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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 2 day of January, 2008.



Audrey J. Gilliam