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COURT OF APPEALS
DIVISION II

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NO. 37620-2-II

STATE OF WASHINGTON

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

STATE OF WASHINGTON,

Respondent,

v.

JOSEPH PATRICK DORN,

Appellant.

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

The Honorable Linda CJ Lee, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient independent evidence of intent to manufacture to permit admission of appellant's statements to police under the corpus delecti rule.
2. Appellant's conviction for possession of pseudoephedrine with intent to manufacture must be reversed because the state failed to prove intent o manufacture.
3. Appellant assigns error to the trial courts suppression conclusion of law B 6.
4. Appellant assigns error to the trial courts suppression conclusion of law B 7.
5. Appellant assigns error to the trial courts suppression conclusion of law B 8.
6. Appellant assigns error to the trial courts suppression conclusion of law B 9.
7. Appellant assigns error to the trial court's failure to enter written findings of fact and conclusions of law following the bench trial.

Issues Pertaining to Assignments of Error

1. Was there sufficient independent corroborative evidence of intent to manufacture to permit admission of appellant's statements to police under the corpus delecti rule?

2. Must appellant's conviction for possession of pseudoephedrine with intent to manufacture be reversed because the state failed to prove intent to manufacture?
3. Was appellant prejudiced by the trial court's failure to enter written findings of fact and conclusions of law following the bench trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

Joseph P. Dorn was charged with one count of manufacture of methamphetamine and one count of possession of pseudoephedrine with intent to manufacture methamphetamine. CP2-3. Following a Knapstad¹ motion, the trial court dismissed the charge of manufacture of methamphetamine. CP 32-41.

a. Knapstad Motion

On March 10, 2008, at the trial court level Judge Culpepper, not the trial judge ruled on a Knapstad motion after reviewing a stipulated record containing the police reports, that under the corpus delecti rule, Mr. Dorn's statements were admissible. CP 32-41. The following day, judge Culpepper reversed his decision with respect to the manufacturing charge and dismissed that charge against Dorn. CP 32-41.

¹ State v. Knapstad, 107 Wn.2d 346, 356, 729 P.2d 48 (1986)

After the Knapstad motion, Mr. Dorn proceeded to a bench trial on the remaining count and was found guilty as charged. CP 42, 52-65. After the state rested, the defense moved to dismiss for insufficient evidence citing the corpus delecti rule. RP 142.

b. Half Time Motion To Dismiss.

The trial court denied the motion and proceeded to read the boilerplate law on corpus delecti before actually ruling on Dorn's case. RP 152-54. In relevant part, the court's oral ruling is as follows:

First, the defendant acquired more than the legal limit of pseudoephedrine pills within a few hours from various stores at the time he was detained. Two, the defendant possessed 50 pseudoephedrine pills. There, the pseudoephedrine pills found in defendant's possession were removed from their blister packs. These pills were removed from their blister packs after the defendant purchased the pills and after he had left the stores where he had purchased them. Four, several of the State's witnesses testified that the first stage of the manufacturing process of methamphetamine is the acquisition of pseudoephedrine tablets that are then crushed and mixed with alcohol or water. Five, also a rubber tubing² was found in the truck that the defendant was driving alone. Six, the state's witnesses testified that such tubing is commonly used in the manufacture of methamphetamine.

RP 154-55.

² Following the conclusion of the bench trial the judge in her oral ruling referred to the tubing as plastic not rubber. RP 172.

There was no evidence to suggest that Mr. Dorn acquired any alcohol or water or that he intended to, or had crushed the pills, or that he was aware of the presence of a piece of plastic or rubber tubing in the back of the floor of the truck cab. The trial court did not issue findings and conclusions following the bench trial. This timely appeal follows. CP 66.

2. Substantive Facts

Mr. Dorn was in possession of 50 pseudoephedrine pills obtained from three different stores. RP 89-90. The police observed Dorn make these purchases and ultimately stopped him and found the pills in a brown bag in the ashtray of the truck he was driving. Id. The pills were not in their blister packs. RP84?? Officer Fry observed Mr. Dorn throw something a trash can near a pharmacy in Enumclaw, but he could not see the items. RP 37. Fry looked in the trash can which he stated was almost empty. The items retrieved from the trash can were not admitted at trial. RP 40.

After officer O'Brien observed Mr. Dorn purchase pseudoephedrine in Enumclaw, Fry stopped Mr. Dorn, arrested him and read him his Miranda warnings. RP 44-45. Pursuant to the search of the truck incident to the arrest, officer William Brand found the 50 pseudoephedrine pills in a brown bag in the ashtray, a cell

phone, and a length of tubing in the back of the truck's cab under the driver seat. RP 89-90. The tubing was not in plain view. RP 100.

O'Brien also searched Mr. Dorn's wallet and found several sheets of paper which read "Settle up with Ted, 1200 or oz". RP 93. Without any proof, O'Brien opined that this was a crib note that meant \$1200 is the price of an ounce of methamphetamine. RP 97. One of the other sheets of paper read, "Pat Ernie a thousand dollars" and the other "Get legal wheels". RP 97. O'Brien knows a person named Ernie Googer, but there was no evidence to connect the notes in Mr. Dorn's wallet to Ernie Googer. Mr. Dorn also had some plastic film and a few small, clean, empty baggies in his wallet. RP 98-99.

Fry testified that rubber tubing is used in the reaction phase of making methamphetamine using the ephedrine extraction method. RP 27-29. There were no tools for making methamphetamine in the truck, owned by Ernie Googer and there was no evidence that Mr. Dorn was aware of the rubber tubing behind the driver's seat. RP 57-59.

C. ARGUMENT

1. APPELLANT'S CONVICTION MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT CORROBORATIVE EVIDENCE TO PERMIT ADMISSION OF APPELLANT'S STATEMENTS UNDER THE CORPUS DELECTI RULE AND WITHOUT THE ADMISSION

INSUFFICIENT EVIDENCE OF
INTENT TO MANUFACTURE.

The trial court erred by admitting Dorn's statements where there was insufficient independent corroborative evidence of possession of pseudoephedrine with intent to manufacture. The trial court should have granted Mr. Dorn's motion to suppress his admission and dismissed the charge of possession with intent to manufacture under the corpus delicti rule.

A defendant's admissions cannot be used to prove the defendant's guilt without sufficient independent evidence corroborating that admission. State v. Aten, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996). The independent corroborative evidence may be either direct or circumstantial. State v. Aten, 130 Wn.2d at 655. The State has the burden of producing corroborative evidence sufficient to satisfy the corpus delicti rule. State v. Riley, 121 Wn.2d 22, 32, 846 P.2d 1365 (1993). In the absence of sufficient corroborative evidence, the admission of the defendant may not be considered to establish the defendant's guilt. Aten, 130 Wn.2d at 656.

To be sufficient, independent corroborative evidence need not establish the corpus delicti, or "body of the crime,"

beyond a reasonable doubt, or even by a preponderance of the evidence. *Riley*, 121 Wn.2d at 32. Rather, independent corroborative evidence is sufficient if it prima facie establishes the corpus delicti. *State v. Smith*, 115 Wn.2d 775, 781, 801 P.2d 975 (1990). Prima facie in this context means evidence of sufficient circumstances supporting a logical and reasonable inference of criminal activity. *Aten*, 130 Wn.2d at 656; *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). . . . But the independent evidence must support a logical and reasonable inference of criminal activity only. *Aten*, 130 Wn.2d at 659-60. If the independent evidence also supports logical and reasonable inferences of noncriminal activity, it is insufficient to establish the corpus delicti. *Aten*, 130 Wn.2d at 659-60. [***7]

State v. Whalen, 131 Wn. App. 58, 62-63, 126 P.3d 55 (2005).

In State v. Brockob, 159 Wn.2d 311, 331, 150 P.3d 59 (2006), the Supreme Court reiterated that “if the State’s evidence supports the reasonable inference of a criminal explanation of what caused the event and one that does not involve criminal agency, the evidence is not sufficient to corroborate the defendant’s statement”. *Id.*

In Whalen, the defendant admitted that he possessed an illegal amount of pseudoephedrine but successfully argued that that was insufficient to establish an intent to manufacture. *Id.* The

Court in Whalen reiterated that "bare possession of pseudoephedrine is not enough to prima facie establish the corpus delicti for an intent to manufacture conviction; at least one additional factor, suggestive of intent, must be present." Whalen, 131 Wn. App at 63, citing, State v. McPherson, 111 Wn. App. 747, 759, 46 P.3d 284 (2002).

In Whalen, the defendant attempted to steal 7 boxes of pills containing pseudoephedrine within a 30-60 minute time frame. Whalen, 131 Wn. App. 60. The Court of Appeals held that even after reviewing the evidence in the light most favorable to the state, without Whalen's admissions, the evidence only indicated an attempt to steal and possess an illegal amount of pseudoephedrine, rather than possession with intent to manufacture. Whalen, 131 Wn. App. at 63-65; RCW 69.43.110.

In another similar case, State v. Cobelli, 56 Wn. App. 921, 924, 788 Pd.2d 1081 (1989) police observed Cobelli have a series of brief conversations with several "clusters" of people in a parking lot near a convenience store. Cobelli, 56 Wn. App. at 922. The police did not observe any actual exchanges, but testified that, "[t]he manner in which it was happening [was] real indicative of what I've seen before in the sales and purchase of drugs."

Whalen, 131 Wn. App. at 65, quoting, Cobelli, 56 Wn. App. at 922.

The police arrested Cobelli, and discovered multiple baggies containing marijuana and money from Cobelli's pockets and Cobelli admitted selling two baggies of marijuana for \$10 each. Cobelli, 56 Wn. App. at 923. Cobelli was found guilty of possession of marijuana with intent to deliver. Cobelli, 56 Wn. App. at 922. Division One of the Court of Appeals reversed the conviction and held that the state failed to produce sufficient independent corroborative evidence of intent to deliver. Cobelli, 56 Wn. App. at 924-25. The fact that Cobelli had several separate packs of marijuana in his pockets, baggies, cash and was observed in what appeared to be drug transactions was insufficient to establish intent to deliver. *Id.*

By contrast in State v. Moles, 130 Wn. App. 461, 123 P.3d 132 (2005), the defendants stole pseudoephedrine from three different stores within a short timeframe and had over 400 loose tablets and a coffee filter containing methamphetamine residue in their stolen vehicle. This Court "held that the short timeframe involving three purchases at three separate stores, the loose pills, and evidence of the coffee filter containing methamphetamine in a defendant's pocket constituted sufficient evidence of intent to

manufacture.” Whalen, 131 Wn. App. at 66, citing, Moles, 130 Wn. App. at 466-67.

Similarly in State v. Missieur, 140 Wn. App. 181, 165 P.3d 381 (2007), the Court applied Whalen, and determined that Missieur's possession of as many as 78 stolen boxes of pseudoephedrine plus 64 lithium batteries, known as necessary ingredients in the manufacture of methamphetamine was sufficient to sustain the charge of possession with intent to manufacture. Missieur, 140 Wn. App. at 188-89.

In contrast to Missieur and Moles, in Brockob, 159 Wn.2d at 331, Brockob shoplifted a large quantity of Sudafed and left some of the packaging in the store. The State Supreme Court concluded the facts were like Whalen rather than Moles and determined the evidence was insufficient to convict. Brockob, 159 Wn.2d at 338. "He did not have any coffee filters or other equipment used in the manufacturing process. In short, nothing pointed to Brockob's intent to manufacture rather than merely possess Sudafed." Brockob, 159 Wn.2d at 338-39.

In Dorn's case as in Brockob, Whalen and Cobelli, absent Dorn's confession, there was insufficient independent evidence of intent to manufacture. Dorn as in Brockob, Whalen and Cobelli,

was observed stealing pseudoephedrine from different stores over a relatively short period of time. When he was arrested he was in possession of 50 pills containing pseudoephedrine. There was also a piece of plastic or rubber tubing in the back cab under the driver seat of a truck that Dorn did not own. RP 89-90. The tubing was not in plain view and there was no evidence that Dorn was aware of it or that he had intended to use it for illegal purposes . RP 100.

In Dorn's case, unlike in Moles, the tubing in the truck and baggies did not contain methamphetamine residue and there was no evidence to connect these items Dorn's wallet notes or to the manufacture of methamphetamine or to the pseudoephedrine pills. Also unlike in Missieur, Dorn did not possess 78 boxes of pseudoephedrine pills and 64 new unopened lithium batteries; rather he possessed 3 boxes of pills and an unspecified length of tubing was found in another person's truck. There was no evidence to suggest that the tubing was connected to Dorn or to a criminal purpose. Missieur, 140 Wn. App at 183-84.

Mr. Dorn also had several sheets of paper in his wallet which read "Settle up with Ted, 1200 or oz". RP 93. Pat Ernie a thousand dollars" and the other "Get legal wheels". RP 97. O'Brien knows a person named Ernie Googer, but there was no evidence to connect

the notes in Mr. Dorn's wallet to Ernie Googer or to a criminal purpose. Mr. Dorn also had some plastic film and a few small, clean, empty baggies in his wallet which had no methamphetamine or other related residue. Because the plastic baggies and tubing were as likely to be used for a non criminal purpose, they were not corroborative of intent to manufacture methamphetamine. Brockob, 159 Wn.2d at 331.

The independent evidence in Dorn's case supported logical and reasonable inferences of noncriminal activity, therefore as in Cobelli, Whalen, Brockob, the evidence was insufficient to permit admission of his statements under the corpus delicti rule. Brockob, 159 Wn.2d at 331; Whalen, 131 Wn. App. at 62-63, citing, Aten, 130 Wn.2d at 659-60.

In sum there was no independent evidence of criminal activity to support the charge of possession with intent to manufacture. As such it was error to admit Mr. Dorn's admissions. Whalen 131 Wn. App. at 62. Without Mr. Dorn's admissions, there was insufficient evidence of intent to manufacture. Because the state did not also charge the illegal possession of pseudoephedrine, this Court must reverse and dismiss the charge. Whalen, 131 Wn. App. at 65 fn. 5.

2. THE STATE FAILED TO PROVE APPELLANT
INTENDED TO MANUFACTURE
METHAMPHETAMINE.

The state failed to prove beyond a reasonable doubt that Dorn intended to manufacture methamphetamine. In a claim of insufficient evidence, a reviewing court examines whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," when viewing the evidence in the light most favorable to the State. State v. Hughes, 154 Wn.2d 118, 152, 110 P.3d 192 (2005) quoting, State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

RCW 69.50.440. Possession with intent to manufacture provides in relevant part as follows:

(1) It is unlawful for any person to possess ephedrine or any of its salts or isomers or salts of isomers, pseudoephedrine or any of its salts or isomers or salts of isomers, pressurized ammonia gas, or pressurized ammonia gas solution with intent to manufacture methamphetamine, including its salts, isomers, and salts of isomers.

RCW 69.50.101(p) defines "[m]anufacture" as:

"the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container."

Id.

A person acts with intent when "he acts with the objective or purpose to accomplish a result that constitutes a crime." Moles, 130 Wn. App. at 466, citing State v. Davis, 117 Wn. App. 702, 708, 72 P.3d 1134 (2003), citing RCW 9A.08.010(1)(a)). Additionally, according to the Court in Moles, "[a] person who knowingly plays a role in the manufacturing process can be guilty of manufacturing, even if someone else completes the process." Moles, 130 Wn. App. at 466, citing State v. Davis, 117 Wn. App. at 708.

"Bare possession of a controlled substance is not enough to support an intent to manufacture conviction; at least one additional factor, suggestive of intent, must be present." Moles, 130 Wn. App. at 466, citing, State v. McPherson, 111 Wn. App. 747, 759, 46 P.3d 284 (2002).

In Dorn's case, the state failed to present sufficient evidence of intent to manufacture. The only evidence of intent to manufacture consisted of Dorn's possession of 50 pills. He did not have any product with any residue of methamphetamine nor did he possess huge quantities of lithium batteries or other products used for the manufacture of methamphetamine. There was some rubber or plastic tubing in the truck that he drove, but the truck was not Dorn's and there was no evidence that Dorn possessed the tubing.

When reviewed in the light most favorable to the state, the state failed to meet its substantial burden of proof beyond a reasonable doubt. Reversal and dismissal is the remedy. Brockob, 159 Wn.2d at 339.

3. FAILURE TO FILE WRITTEN FINDINGS PREJUDICED APPELLANT.

The criminal rules for superior court judges require that, following a bench trial, the judge enter findings of fact and conclusions of law. CrR 6.1(d). Findings and conclusions comprise a record that may be reviewed on appeal. State v. Banks, 149 Wn.2d 38, 65 P.3d 1198 (2003), citing, State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998)). The trial court's failure to

enter findings and conclusions after the bench trial requires reversal when the defendant is prejudiced. Head, 136 Wn.2d at 622; State v. Byrd, 83 Wn. App. 509, 512, 922 P.2d 168 (1996), review denied, 130 Wn.2d 1027, 930 P.2d 1229 (1997)³.

A defendant is prejudiced by a failure to enter written findings when the record is insufficient to permit appellate review. State v. Cruz, 88 Wn. App. 905, 909, 946 P.2d 1229 (1997); State v. Smith, 76 Wn. App. 9, 16-17, 882 P.2d 190 (1994), review denied, 126 Wn.2d 1003 (1995); State v. Smith, 68 Wn. App. at 209-10. Prejudice is determined on a case-by-case basis. Cruz, 88 Wn. App. at 909. Prejudice can also arise from late entered filings that have been "tailored" to meet issues raised on appeal. Head, 136 Wn.2d at 625.

Failure to file written findings is only "harmless error if the court's oral opinion and the record of the hearing are 'so clear and comprehensive that written findings would be a mere formality.'"

Smith, 76 Wn. App. at 13, (citations omitted).

A trial court's oral opinion is never as clear and comprehensive as written findings; it is "no more than oral

³ Because Byrd did not appeal denial of his suppression motion, the court could not find prejudice.

expressions of the court's informal opinion at the time rendered. . . [it] . . . has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment. State v. Head, 136 Wn.2d at 622, quoting, State v. Mallory, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966) accord State v. Dailey, 93 Wn.2d 454, 458-59, 610 P.2d 357 (1980).

The Court in Head held that "[a]n appellate court should not have to comb an oral ruling to determine whether appropriate 'findings' have been made, nor should a defendant be forced to interpret an oral ruling in order to appeal his or her conviction." Head, 136 Wn.2d at 623-25. In the absence of a showing of prejudice, remand for entry of written findings and conclusions is generally the solution for failure to enter written findings. State v. Head, 136 Wn.2d at 623-25.

In Smith, 68 Wn. App. at 209-211, a juvenile case, the Appellate Court determined that Smith was prejudiced by the trial court's opinion following a bench trial because it was not clear enough to permit review. The Court in Smith, held that:

We find that the lack of formal findings and conclusions renders us unable to be sure exactly what the court's theory was or exactly what facts the court found to be established by the

testimony. The trial court's opinion is a far cry from the "comprehensive opinion" which has been fundamental to every case in which the court proceeded to address the merits of a confession or suppression issue in the absence of the findings required by CrR 3.5 or CrR 3.6.

Lack of written findings of fact on a material issue in which the State bears the burden simply cannot be harmless unless the oral opinion is so clear and comprehensive that written findings would be a mere formality. The trial court's opinion falls far short of that standard. Accordingly, the conviction cannot stand on the present record.

Smith, 68 Wn. App. at 608 (citations omitted).

In Cruz, the Appellate Court reversed after determining that the trial court's memorandum was not clear enough to permit review.

In the instant case, the trial court failed to render a comprehensive oral decision sufficient to permit appellate review of the issues raised. The record of the court's decision is vague and unclear. The trial judge discussed at length the fact that 50 loose pseudoephedrine pills were found in the truck, but only mentioned the fact of a "plastic" or rubber" tube which could have been used in the manufacture process. RP 172-73. The judge then proceeded to rely on Dorn's statements to the officer without any indication that

the evidence presented was sufficient to meet the corpus dilecti rule. RP 174-75. The judge stated in summation that

Given the totality of the evidence that was before the court, the court finds that the State has met its burden on the disputed element of intent to manufacture methamphetamine. The defendant purchased 50 pills containing pseudoephedrine from three different pharmacies over a brief period of time, the defendant immediately removed all of the 50 pills from its [sic] blister packs, which the defendant acknowledges is what he did when he made methamphetamine

RP 174. This recitation of the evidence presented to support the admission of Dorn's statements is insufficient to meet the corpus delecti rule requiring independent corroborative evidence of intent to manufacture methamphetamine. Brockob, 159 Wn.2d at 339; Whalen, 131 Wn. App. at 62-63; Moles, 130 Wn. App. at 466.

The only relevant information in these findings discusses the fact that Mr. Dorn was in possession of 50 pills. Prejudice exists in the instant case because the record is insufficient to permit meaningful appellate review.

Furthermore, the state is now in a position to "tailor" its findings to meet the issues raised in appellant's opening brief;

specifically the trial court's lack of reference in her summation to any corroborative evidence of intent to manufacture methamphetamine.

There is no excuse for the trial court's failure to enter written findings; The Supreme Court and both Divisions One and Two of the Court of Appeals have held in both adult and juvenile settings that the failure to file written findings is an unacceptable practice. Cruz, 88 Wn. App. at 211; Smith, 68 Wn. App. at 211. In accord with Head; Cruz, and Smith, 68 Wn. App. at 909, reversal is required. In the alternative and at a minimum, a remand is necessary. Head, *supra*.

D. CONCLUSION

Mr. Dorn respectfully requests this Court reverse and dismiss his conviction because the trial court impermissibly relied on Mr. Dorn's admissions without sufficient independent corroborating evidence of intent to manufacture methamphetamine. Moreover without the admission of Dorn's statements there was insufficient evidence of intent to manufacture and the failure to enter written findings following the bench trial was prejudicial error.

FILED
COURT OF APPEALS
DIVISION II

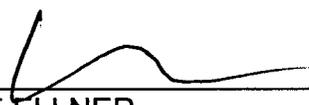
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STATE OF WASHINGTON
BY *Lise*
DEPUTY

DATED this 20th day of August 2008.

Respectfully submitted,

LAW OFFICES OF LISE ELLNER



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor 930 Tacoma Ave S. Rm. 946 Tacoma, WA 98492 and Joseph Patrick Dorn DOC# 317237 Cedar Creek_ Cedar Creek Corrections Center 12200 Bordeaux Rd Post Office Box 37 Littlerock, WA 98556-0037 a true copy of the document to which this certificate is affixed, On August 20, 2008. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

