

FILED
COURT OF APPEALS
DIVISION II

No. 38066-8-II

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STATE OF WASHINGTON
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COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

MICHAEL D. SMITH

BRIEF OF APPELLANT

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ORIGINAL

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A. Assignments of Error

Assignments of Error

1. The trial court erred by denying an affirmative defense instruction to the school enhancement.

2. The trial court erred by concluding this was a felony involving the use of a motor vehicle.

Issues Pertaining to Assignments of Error

1. Was Mr. Smith denied the opportunity to argue his theory of the case when the trial court denied his affirmative defense to the school enhancement based upon an erroneous reading of the statute?

2. Did Mr. Smith's drug transaction involve the use of a motor vehicle when it occurred entirely inside of an apartment?

B. Statement of the Case

Michael D. Smith was convicted by a jury of delivery of methamphetamine. CP, 26, 120. The jury found that the offense occurred in a school zone. CP, 121. He was tried in a joint trial with Valentino Lucero.

Detective Jonathan Meador was working as a drug detective for Bremerton's Special Operations Group in 2007. RP, 23 (May 29). He

oversaw a controlled buy, which involves a purchase of controlled substances under controlled or semi-controlled circumstances using a confidential informant. RP, 24 (May 29). In this case, the confidential informant was Chastin Hoffman. RP, 30 (May 29). Mr. Hoffman was 24 years old. RP, 99 (May 29).

On January 29, 2007, Mr. Hoffman contacted Detective Meador about the controlled buy. RP, 30 (May 29). Mr. Hoffman's person was searched by Detective Meador. RP, 31 (May 29). Detective Meador believed his vehicle was also searched, but he had no independent recollection of who did that. RP, 31 (May 29). Officer Martin Garland testified he conducted the vehicle search, but had no recollection of the details of the search. RP, 36 (May 30). Officer Garland testified over objection that he always conducts vehicle searches the same way, starting on the driver's side and moving to the passenger side. RP, 41 (May 30). Detective Meador gave Mr. Hoffman \$120 in pre-recorded money. RP, 32 (May 29). According to Detective Meador, the street value of methamphetamine is \$100 per gram. RP, 32 (May 29).

Mr. Hoffman drove his own vehicle to an apartment complex in the 4900 block of Auto Center Way in Bremerton. RP, 33 (May 29). There is a school bus stop at the corner of First and Auto Center Way. RP, 80 (May 29). The distance from the apartment to the bus stop was 307

feet. RP, 4 (May 30). Three police officers followed Mr. Hoffman. RP, 33 (May 29). Mr. Hoffman entered one of the apartments. RP, 35 (May 29). Detective Meador observed a large size vehicle (he thought it might be a Bronco) pull up and two people enter the apartment. RP, 36 (May 29). Detective Meador could not identify the people; he could not even determine their genders. RP, 36 (May 29).

According to Mr. Hoffman's testimony, he met Mr. Smith and Mr. Lucero inside the apartment. RP, 103 (May 29). The three of them were alone except for Mr. Lucero's mother, who was asleep the whole time. RP, 119-20. Mr. Hoffman gave the money to Mr. Smith. RP, 105 (May 29). Mr. Hoffman contacted the detective and told him the two individuals had the buy money and were going to get the drugs. RP, 37 (May 29).

Detective Meador observed two people (he could not say if they were the same two people or not) come out of the apartment and drive away in the Bronco. RP, 36 (May 29). After a wait, the Bronco returned. RP, 37 (May 29). Detective Meador could not recall how long the wait was. RP, 37 (May 29). Mr. Hoffman believed it was 20 to 25 minutes. RP, 104. Mr. Hoffman was waiting inside the apartment. RP, 37 (May 29). Mr. Lucero handed Mr. Hoffman the drugs. RP, 104 (May 29). Mr. Hoffman left the apartment and rejoined the police at a secure location. RP, 38 (May 29).

Mr. Hoffman turned over a baggie of methamphetamine. RP, 38-39 (May 29). The contents of the baggie later tested positive for methamphetamine. RP, 169 (May 29). Using a photo montage, Mr. Hoffman identified Mr. Smith and Mr. Lucero as the two people who gave him the methamphetamine. RP, 42, 106 (May 29).

At the conclusion of the trial, Mr. Smith and Mr. Lucero jointly requested an instruction based upon RCW 69.50.435 and WPIC 50.60.01. RP, 55 (May 30); Supplemental Clerk's Papers. The court ruled as a matter of law that the delivery was for profit and concluded that the instruction should not be given. RP, 58 (May 30).

At sentencing, the court found that Mr. Smith has an offender score of "2" and a standard range of 12+ to 20 months. CP, 124. The court also added 24 months to the sentence because of the school enhancement. CP, 124. The court ruled that the crime was one of which a motor vehicle was used. CP, 130. Mr. Smith objected to the court's finding that this is a felony involving a motor vehicle. RP, 12 (July 11). The court overruled the objection. RP, 12 (July 11). Mr. Smith appeals.

C. Argument

1. The trial court erred by denying an affirmative defense instruction to the school enhancement.

A defendant is entitled to any jury instruction that is necessary to argue his theory of the case and is a correct statement of the law. State v. Barnes, 153 Wn.2d 378, 103 P.3d 1219 (2005). The trial court erred by not instructing the jury on the affirmative defense of RCW 69.50.435 (4).

RCW 69.50.435 makes it illegal, among other things, to violate RCW 69.50.401 or 69.50.410 within 1000 feet of a school bus stop. The penalty is a 24 months enhancement added to the standard range. Subsection (4) creates an affirmative defense to this enhancement. It reads:

It is an affirmative defense to a prosecution for a violation of this section that the prohibited conduct took place entirely within a private residence, that no person under eighteen years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct did not involve delivering, manufacturing, selling, or possessing with the intent to manufacture, sell, or deliver any controlled substance in RCW 69.50.410 for profit. The affirmative defense established in this section shall be proved by the defendant by a preponderance of the evidence. This section shall not be construed to establish an affirmative defense with respect to a prosecution for an offense defined in any other section of this chapter.

Mr. Smith requested a jury instruction based upon this statute, which the trial denied.

In order to be entitled the proffered jury instruction, three things needed to be proved: (1) That the drug transaction occurred entirely within a private residence; (2) That no one under 18 years old was present; and

(3) That the transaction was not for profit. In this case, the first two elements are easily met. The transaction occurred entirely inside Mr. Lucero's apartment and the only people present were Mr. Hoffman, Mr. Smith, Mr. Lucero, and Mr. Lucero's sleeping mother. Mr. Smith and Mr. Lucero were both adults and Mr. Hoffman was 24 years old. Although Mr. Lucero's mother's age is not in the record, it can easily be concluded circumstantially that she is significantly older than 18 years old.

The disagreement in this arose whether the sale was for profit. The trial court looked at the definition of "for profit" in WPIC 50.17 and concluded that Mr. Smith obtained something of value (i.e. \$120) in exchange for the methamphetamine. Based upon this conclusion, the trial court held that Mr. Smith was not entitled to the proffered jury instruction.

The trial court was in error by relying on WPIC 50.17. The WPIC is based upon the language of RCW 69.50.410, which makes it illegal to sell controlled substances for profit. The statute defines "for profit as "the obtaining of anything of value in exchange for a controlled substance." But the statute also makes clear that this definition is "for the purposes of this section only." Because the legislature limited the definition of "for profit" to violations of RCW 69.50.410, it is error to apply the definition from this statute to the enhancement statute.

RCW 69.50.435 does not have a definition of “for profit,” although subsection (6) contains the definitions of nine other terms used in the statute. It is worth noting that RCW 69.50.435 makes it illegal to violate RCW 69.50.410 by selling for profit within a school zone, but does not incorporate the definition of “for profit” from the latter statute. Because there is not a definition of “for profit” in the statute, the usual and ordinary meaning should be used. Dominick v. Christensen, 87 Wn.2d 25, 548 P.2d 541(1976). Webster’s Dictionary defines “profit” as “realizing gain from a business venture.” The question of whether Mr. Smith realized a gain from the sale of the methamphetamine to Mr. Hoffman was a question better left to the jury than the court. The failure to give the instruction denied Mr. Smith his right to argue his theory of the case.

2. The trial court erred by concluding this was a felony involving the use of a motor vehicle.

The next issue is whether the trial court correctly concluded that Mr. Smith’s offense constituted a “felony in which a motor vehicle is used” within the meaning of RCW 46.20.285. The trial court erred in this conclusion.

The leading case interpreting RCW 46.20.285 is State v. Batten, 140 Wn.2d 362, 365, 997 P.2d 350 (2000). In Batten, the defendant was

using his vehicle to store controlled substances and firearms. The Supreme Court concurred with the Court of Appeals and said:

[T]he vehicle must contribute in some way to the accomplishment of the crime. There must be some relationship between the vehicle and the commission or accomplishment of the crime. Accordingly, where the conviction is a possessory felony, we hold that the possession must have some reasonable relation to the operation of a motor vehicle or that the use of the motor vehicle must contribute in some reasonable degree to the commission of the felony.

State v. Batten, 140 Wn.2d 362, 365, 997 P.2d 350 (2000), affirming and quoting, 95 Wn. App. 127, 131, 974 P.2d 879 (1999).

The Court noted that concealing drugs on one's person, rather than in the vehicle, might result in a different conclusion:

In reaching this decision, we note that the Court of Appeals appeared to suggest that the requisite relationship between the vehicle and the crimes would not have been present if the seized items had been on Batten's person, rather than under the driver's seat or in a console. Because that factual scenario is not present here, we view that portion of the opinion as dicta and reserve the determination of that narrower issue for a day when it is squarely presented.

Batten at 367.

The issue discussed in the Batten dicta was addressed by Division III in State v. Wayne, 134 Wn. App. 873, 142 P.3d 1125 (2006). In Wayne, the defendant was pulled over and cocaine was discovered in his pocket. The court held that there was "no reasonable relation between Mr. Wayne's possession of a controlled substance and the operation of his

car.” Wayne at 875-86. Accord State v. Hearn, 131 Wn. App. 601, 128 P.3d 139 (2006).

In State v. Griffin, 126 Wn. App. 700, 109 P.3d 870 (2005), the defendant traded drugs in exchange for a ride in his car. The Court upheld the finding that the vehicle was “used” in the commission of a felony.

In this case, the drug transaction occurred entirely inside of an apartment. According to the testimony of Mr. Hoffman, he contacted Mr. Smith and Mr. Lucero inside the apartment and gave the money to Mr. Smith. Mr. Smith and Mr. Lucero left and returned approximately twenty minutes later. According to Detective Meador, he saw two people leave the apartment, get into a Bronco, and return later, but he could not say those two people were Mr. Smith or Mr. Lucero. When Mr. Smith and Mr. Lucero returned, Mr. Lucero gave the drugs to Mr. Hoffman. The drug transaction occurred entirely inside the apartment and a motor vehicle was not used in the commission of the drug transaction.

Even if this Court were to conclude that a motor vehicle was used in this drug transaction, this court should still decline to apply RCW 46.20.285. The relevant cases make clear that the incidental use of a motor vehicle to store or transport drugs does not constitute “use.” In Wayne, when the motor vehicle was used to transport the defendant, who had drugs in his pocket, there was no “reasonable relation” between the

motor vehicle and the felony. By the same logic, when a defendant uses a motor vehicle to drive himself to a location to buy or sell drugs, but the transaction occurs outside the vehicle, there is no reasonable relation between motor vehicle and the transaction. The trial court's determination that this case involved the use of a motor vehicle should be reversed.

D. Conclusion

Mr. Smith's case should be remanded for a new trial on school enhancement. The finding that a motor vehicle was used should be stricken.

DATED this 21st day of January, 2009.



Thomas E. Weaver, WSBA #22488
Attorney for Defendant

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STATE OF WASHINGTON
BY _____
DEPUTY

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

STATE OF WASHINGTON,)	Case No.: 07-1-01605-6
)	Court of Appeals No.: 38066-8-II
Respondent,)	
)	AFFIDAVIT OF SERVICE
vs.)	
)	
MICHAEL D. SMITH,)	
)	
Defendant.)	

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action,
and competent to be a witness.

On January 21, 2009, I sent an original and a copy, postage prepaid, of the BRIEF OF
APPELLANT, to the Washington State Court of Appeals, Division Two, 950 Broadway, Suite
300, Tacoma, WA 98402.

ORIGINAL

1 On January 21, 2009, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to
2 the Kitsap County Prosecutor's Office, 614 Division St., MSC 35, Port Orchard, WA 98366-
3 4683.

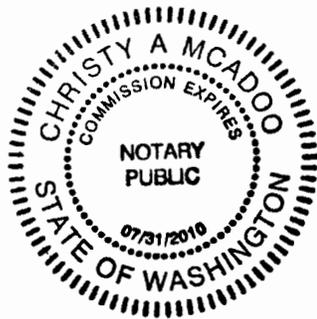
4 On January 21, 2009, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to
5 Mr. Michael D. Smith, DOC #309911, Coyote Ridge Corrections Center, P.O. Box 769, Connell,
6 WA 99326-0769.

7
8 Dated this 21st day of January, 2009.



9
10 Thomas E. Weaver
11 WSBA #22488
12 Attorney for Defendant

13
14 SUBSCRIBED AND SWORN to before me this 21st day of January, 2009.



15 Christy A. McAdoo
16 NOTARY PUBLIC in and for
17 the State of Washington.
18 My commission expires: 07/31/2010