

40006-5

~~No. 40005-6-II~~

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

STATE OF WASHINGTON,

Respondent,

v.

DAMIEN D. HARRIS
Appellant.

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SUPERIOR COURT
THURSTON COUNTY
WASHINGTON

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

The Honorable, Judge Christine A. Pomeroy
Cause No. 09-1-00301-1

BRIEF OF RESPONDENT

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A. STATEMENT OF THE CASE.

The statement of the case provided by Appellant's brief is a satisfactory summary of the facts and proceedings. It does bear mentioning that the trial court made specific findings underscoring the defendant's convictions for Leading Organized Crime, Solicitation to Commit Murder, Delivery of Controlled Substances, and Money Laundering:

"... the evidence showed that Mr. Harris was intentionally organizing, managing, directing, and supervising three or more people with intent to engage in a pattern of criminal profiteering activity ... these individuals were all connected to Mr. Harris for the purpose of furthering his drug distribution enterprise. The criminal profiteering acts involved in this leading organized crime case committed for financial gain ... were to continue and further the drug distribution enterprise ... The evidence has established that Mr. Harris was a prolific drug dealer who could make substantial profits by selling drugs.
CP 144

B. RESPONSE TO ASSIGNMENTS OF ERROR.

1. Double Jeopardy protections were not offended by the defendant's conviction for Leading Organized Crime, Solicitation to Commit Murder, Delivery of a Controlled Substance, and Money Laundering.

The double jeopardy clauses of the Fifth Amendment and Washington Constitution Article 1 § 9 offer three separate constitutional protections. At issue here is whether double jeopardy

precepts “protect” this defendant from his multiple convictions for Leading Organized Crime, Solicitation to Commit Murder, Money Laundering, and Delivery of a Controlled Substance. Or, whether double jeopardy proscriptions apply to this case, preventing punishment of the defendant “multiple times for the same offense.” State v. Gocken, 127 Wn.2d 95, 100, 896 P.2d 1267 (1995).

The constitutional guarantee against double jeopardy protects individuals against multiple punishments for the same offense. However, the double jeopardy clause is not violated if the Legislature specifically authorized multiple punishments. Garrett v. United States, 471 U.S. 773, 778, 105 S. Ct 2407, 85 L. Ed. 2d 764 (1985). Appellate courts use a three step process to determine whether the Legislature authorized multiple punishments. Personal Restraint Petition of Burchfield, 111 Wn. App. 892, 895, 46 P.3d 840 (2002).

First, the reviewing court looks at the statutory language to determine whether separate punishments are specifically authorized. If the language is silent, the “same evidence” test is applied to determine whether each offense has an element not contained in the other. Personal Restraint Petition of Burchfield, supra, at 896, State v. Calle, 125 Wn.2d 769, 777, 888 P.2d 155

(1995). If each offense contains a separate element, courts then determine whether there is evidence of a legislative intent to treat the crimes as one offense for double jeopardy purposes. State v. Calle, supra, at 779.

The criminal statutes in question: Leading Organized Crime, RCW 9A.82.060; Solicitation to Commit Murder, RCW 9A.28.030 and 9A.32.030; Delivery of a Controlled Substance, RCW 69.50.401; and Money Laundering, RCW 9A.83.020, do not contain specific language authorizing separate punishments for the same conduct. Thus, resort must be had to the “same evidence” test, which was distilled in Personal Restraint Petition of Burchfield, supra, at 896:

If each offense, as charged, includes an element not included in the other, and proof of one offense would not be necessarily also prove the other, the offenses are not constitutionally the same and double jeopardy clause does not prevent convictions for both offenses.

The elements of Leading Organized Crime are set forth in RCW 9A.82.060:

- 1) A person commits the offense of leading organized crime by:
 - (a) Intentionally organizing, managing, directing, supervising, or financing any three or more persons with the intent to engage in a pattern of criminal profiteering activity;...

The elements of Leading Organized Crime are clearly distinguishable from the elements of Solicitation to Commit Murder, Money Laundering, and Delivery of a Controlled Substance, RCW 9A.28.030 and 9A.32.030, RCW 9A.83.020, and RCW 69.50.401, respectively.

Leading “any three or more persons” is an element of the offense that is contained in no other and is not linked to criminal profiteering. As this court ruled in State v. Barnes, 85 Wn. App. 638, 665-666, 932 P. 2d 669 (1997):

... leading three or more persons is not linked conjunctively to the commission of the three predicate acts. In other words, the defendant must lead three persons ... And the defendant must intend to commit three acts of criminal profiteering ... But there is no requirement that any of those three people actually engage in any of the charged acts of criminal profiteering. The defendant may engage in some of the activities with others and perform others alone. (emphasis added).

The element of “pattern criminal profiteering”, RCW 9A.82.010(12) is first defined in RCW 9A.82.010(4):

(4) "Criminal profiteering" means any act, including any anticipatory or completed offense, committed for financial gain...and punishable as a felony and by imprisonment for more than one year, regardless of whether the act is charged or indicted, as any of the following:¹

¹ Murder, Money Laundering, and Delivery of a Controlled Substance are listed among dozens of other predicate offense. RCW 9A.82.010(4)(a),(q), and (t).

Thus, while Solicitation to Commit Murder can be a predicate offense for Leading Organized Crime, in the context of the statute any predicate offense has the additional element of “... committed for financial gain.”

Moreover, there must be an “intent to engage in a pattern of criminal profiteering “which is defined in RCW 9A.82.010(12):

(12) "Pattern of criminal profiteering activity" means engaging in at least three acts of criminal profiteering, one of which occurred after July 1, 1985, and the last of which occurred within five years, excluding any period of imprisonment, after the commission of the earliest act of criminal profiteering. In order to constitute a pattern, the three acts must have the same or similar intent, results, accomplices, principals, victims, or methods of commission, or be otherwise interrelated by distinguishing characteristics including a nexus to the same enterprise, and must not be isolated events.

Accordingly, applying the “same evidence test”, the offenses charged (Leading Organized Crime, Solicitation to Commit Murder, Money Laundering, and Delivery of a Controlled Substance) are not the same. The Leading Organized Crime elements are not comparable to the “predicate felonies”, and the predicate felonies required the additional elements of “committed for financial gain,” i.e., “criminal profiteering,” as well as a “pattern of criminal

profiteering.” The elements of the various offenses are not contained in the others.

Application of the “same evidence” test may not always be dispositive. Two convictions may still constitute double jeopardy even though the offenses clearly involve different legal elements, if there is clear evidence that the Legislature intended to impose only a single punishment. State v. Calle, supra, at 780; Personal Restraint Petition of Burchfield, supra, at 897.

The court in Personal Restraint Petition of Burchfield, supra, at 898-899, reviewed previous cases that ruled – in spite of different legal elements – that the legislature intended to impose only a single punishment. For example, in State v. Valentine, 108 Wn. App. 24, 27, 29 P.3d 42 (2001), the court held that while first degree assault and attempted second degree murder had different elements, it would be a violation of double jeopardy to punish a stabbing as an assault when it is also the foundation for attempted murder. Similarly, in State v. Read, 100 Wn. App. 776, 998 P. 2d 897 (2000), the court concluded that a single shot could not support convictions for both second degree murder and first degree assault. While those offenses had different elements, “the court reasoned that the assault and murder statutes are directed at the same evil –

assaultive conduct.” State v. Read, at 792, Restraint of Burchfield, at 898. The court opined that “When the harm is the same for both offenses ... it is inconceivable the Legislature intended the conduct to be a violation of both offenses.” Read, supra, at 792.

These authorities made clear that Leading Organized Crime and its predicate offenses were not designed to impose a single punishment. Rather, the Legislature intended that Leading Organized Crime and any predicate offenses would allow for multiple punishments.

In 1984, the legislature enacted chapter 9A.82 RCW as the “Washington State Racketeering Act” in order to combat organized crime. 1984 Final Legislative Report, 48th Wash. Leg., Reg. Sess. At 197. This Legislative Report, at pages 197-198 pronounced:

The federal Racketeer Influenced and Corrupt Organizations (RICO) statute is recognized as a significant tool in the Government’s efforts to combat organized crime. In particular, the unique provisions of RICO allow the government to aim specifically at organized criminal influence in legitimate business operations. Several states, recognizing the usefulness and adaptability of RICO, enacted statutes modeled on RICO’s provisions. A Washington State RICO would provide similarly effective tools for law enforcement officers in their efforts to thwart the sophisticated elements of organized crime...

New crimes aimed at conduct associated with organized crime and the use of funds gained through

illegal activities are created including extortionate extension of credit, trafficking in stolen property, and leading organized crime. The commission of these new crimes and other serious crimes already in statute is known as "racketeering."

The act was renamed the "Criminal Profiteering Act" by the time it was effective on July 1, 1985. RCW 9A.82.001. The Act was reenacted in 2001. RCW 9A.82.001.

The express desire of the Legislature to create new crimes, or "tools," to combat organized crime is evidence that the Legislature did not intend merely to impose a single punishment for Leading Organized Crime "and other serious crimes already in statute." Organized crime is viewed as a dire threat to the public and has been recognized as such by this court. In State v. Smith, 64 Wn. App. 620, 625-626, 825 P. 2d 741 (1992) the court stated:

...we observe that a community faces a greater peril from collective criminal activity than it does from criminal activity by one individual. A criminal enterprise which is composed of a number of persons, whether it is known as a gang, a mob, or a criminal syndicate, poses a great challenge to law enforcement agencies. Furthermore, the specter of such organized wrongdoing tends to make the general public feel that it is held hostage by the criminal enterprise...

Accordingly, given the "same evidence" test, as well as the demonstrable legislative intent for the creation of Leading

Organized Crime and its criminal profiteering predicates, the Legislature did not intend a single punishment in such circumstances as this case. Double jeopardy safeguards are not offended by the “multiple punishments” of the instant case.

2. The Trial Court properly denied the defense Motion to Suppress

(a) The Affidavit in Support of the Search Warrant for the deposit Box established probable cause for the search.

The issuance of a search warrant is a matter of judicial discretion and is reviewed only for an abuse of that discretion. State v. Smith, 93 Wn.2d 329, 610 P.2d 869 (1980); State v. Fergun, 131 Wn. App. 694, 704, 129 P3 1271 (2006). Furthermore, in determining whether probable cause exists, a magistrate is entitled to draw reasonable inferences from the facts and circumstances set forth in the affidavit. State v. Condon, 72 Wn. App. 638, 642, 865 P.2d 521 (1993); State v. Clark, 143 Wn.2d 731, 748, 24 P.3d 1006 (2001). Upon review, the affidavit (for search warrant) must be read in a common sense manner and doubts should be resolved in favor of the warrant. State v. O'Connor, 39 Wn. App 113, 123-124, 692 P.2d 208 (1984), State v. Clark, supra, p. 748. Finally, search warrants... “are to be tested and interpreted in a commonsense, practical manner, rather than in

a hyper-technical sense.” State v. Perrone, 119 Wn.2d 538, 549, 834 P.2d 611 (1992). The Appellant calls upon this court to review the instant search warrant affidavit in a hyper-technical manner.

Among other things, the affidavit in support of the search warrant established that the defendant was engaged in drug dealing for profit, that he maintained a room within an apartment to keep money and drugs, and that one Tamica Tamez was directed to collect money and drugs from that location by the defendant. CP 76-80. Moreover, the defendant further directed Tamez to go to “his bank” and gain access to his safe deposit box and conceal items therein before law enforcement found them. CP 79, 80. It was reasonable for the court to infer that evidence of the defendant’s criminal activity – drug dealing – would be found in the safe deposit box, as the court so found. CP 124

(b) The Affidavit in Support of the Search Warrant contained no Material Misrepresentation of fact.

In the seminal case of Franks. V. Delaware, 438 U.S. 154, 155-156, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978) as adopted by the Washington Supreme Court in State vs. Garrison, 118 Wn. 2d 870 (1992), the Court held that where

defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or

with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. Franks, at 155-56

The Franks test for material misrepresentations also applies to allegations of material *omissions*. State v. Cord, 103 Wn.2d 361, 367, 693 P. 2d 81 (1985). The *Franks* opinion is clear that there must be allegations of deliberate falsehood [or deliberate omission] or of a reckless disregard of the truth. Allegations must be accompanied by an offer of proof. Also, "[a]llegations of negligence or innocent mistake are insufficient." Franks, at 171, State v. Seagull, 95 Wn.2d 898, 908, 632 P.2d 44 (1981). (emphasis added). The two elements which are "intentionality' and 'materiality" -- are independently necessary. United States v. Colkley, 899 F. 2d 297, 201 (4th Cir. 1990). If these requirements are not met the inquiry ends. If these requirements are met, and the false representation or omitted material is relevant to establishment of probable cause, the affidavit must be examined. If relevant false representations are the basis of attack, they are set aside. If it is a matter of deliberate or reckless omission, those omitted matters are considered as part of the affidavit. If the affidavit with the matter

deleted or inserted, as appropriate, remains sufficient to support a finding of probable cause, the suppression motion fails and no hearing is required. However, if the altered content is insufficient, defendant is entitled to an evidentiary hearing. Franks, at 171-72; State v. Cord, supra.

Detective Lundquist's affidavit states: "Tamez told Harris that she had been given access to his banking accounts and safe deposit box." CP 80. The statement of Detective Lundquist is not false and is actually supported by the totality of the contacts between the defendant and Tamez regarding her getting to the bank and gaining access to the safe deposit box. CP 79-80.

Appellant argues that because Tamez did not presently have a key in her possession while at the bank, she could not have had "access."² Access is defined as "the ability or right to enter, approach, or use." Webster's Dictionary 3rd Edition (1998). The term "access" is not limit to only the word "ability". Nor does it speak to a specific moment in time. Ms. Tamez had the "right" to enter the box after her interaction at the bank on April 25, 2008. CP 80. The Detective did not and could not have know how many keys were given for the box, who else may be on the account or who

² Brief of Appellant p.22

else could be in possession of other keys. Clearly, there were no deliberate falsehoods or omission or reckless disregard for the truth by Detective Lundquist in this affidavit.

Based upon the foregoing, it was appropriate for the court to find:

(The) affidavit does not contain a misrepresentation of material fact. Detective Lundquist averred that Ms. Tamez was given "access to his banking accounts and the safe deposit box." The Court finds this was a true statement and did not misrepresent the fact known to Detective Lundquist at this time of the time of the affidavit ..." CP 126

C. CONCLUSION.

The search warrant in the instant case was constitutionally valid in all respects. Double jeopardy protections were not compromised by the multiple punishments imposed. The conviction of the defendant should be affirmed.

Respectfully submitted this 17 day of February, 2011.



David H. Bruneau, WSBA 6830
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Respondent's Brief, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 17 day of February, 2011, at Olympia, Washington.

[Signature]
Caroline Jones