

NO. 43907-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

PAUL A. KENT, SR.,

Appellant.

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

The Honorable Marilyn Haan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court failed to suppress the unauthorized recording of appellant's communications.

2. The trial court improperly refused to instruct the jury on the affirmative defense.

3. The judgment and sentence contains a scrivener's error.

Issues pertaining to assignments of error

1. Appellant was charged with two counts of delivery of a controlled substance resulting from controlled buys in which law enforcement used a confidential informant. During the second controlled buy, the informant wore a wire to record her conversations. Appellant was not named as a target of the investigation in the report seeking authorization to record. Moreover, he was not brought into the transaction by the target but by the informant. Where the authorization to record was not valid as to appellant, should the recording have been suppressed?

2. Where appellant presented evidence from which the jury could have found each element of the affirmative defense to the school zone enhancement, does the court's refusal to instruct the jury in that defense require reversal?

3. Where the judgment and sentence correctly indicates the total confinement imposed but misstates the sentence on each count, is remand for correction of the scrivener's error the proper remedy?

B. STATEMENT OF THE CASE

1. Procedural History

On November 11, 2011, the Cowlitz County Prosecuting Attorney charged appellant Paul Kent, Sr., with two counts of possession with intent to deliver heroin within 1000 feet of a school bus route stop and two counts of sale of heroin for profit. CP 1-3; RCW 69.50.401(1); RCW 69.50.435(1)(c); RCW 69.50.410(1). In an amended information the State dropped the two sale for profit charges and changed the controlled substance listed in count II to methamphetamine. CP 4-5.

The case proceeded to jury trial before the Honorable Marilyn Haan, and the jury returned guilty verdicts. CP 42-43. The jury also entered special verdicts finding the transactions occurred within 1000 feet of a school bus route stop. CP 41, 44. The court imposed standard range sentences with consecutive sentence enhancements, for a total confinement of 88 months. CP 51. Kent filed this timely appeal. CP 59.

2. Substantive Facts

Jeannie Cole started working as confidential informant in May 2011, completing controlled drug buys for the Longview Police

Department to work off a misdemeanor charge. 1RP¹ 40; 2RP 145-46. After fulfilling her obligation, she continued working for monetary compensation through November 2011. 1RP 41; 2RP 146. Cole completed over 90 controlled buys, receiving \$30 for each completed transaction. 1RP 41; 2RP 146.

On September 20, 2011, Cole met with her handler, Detective Brian Streissguth, and suggested she could purchase heroin from Roger Hendrickson that day. 1RP 41. A controlled buy was arranged. Cole was searched and given buy money, then she was kept under observation as she approached and left Hendrickson's home. 1RP 42, 45. Cole returned to Streissguth, handed him a bundle of heroin, and was again searched. 1RP 46.

Detective Kevin Sawyer was positioned to view Hendrickson's residence. Before Cole arrived, Sawyer saw Paul Kent, who he recognized from previous encounters, step outside and start working in front of the home. 1RP 116. Cole approached and knocked on the front door. While she was standing at the door, Kent went back inside, and Cole followed. Kent then left the residence and returned a few minutes later. A few minutes after that, Cole left the residence. 1RP 117-18.

¹ The Verbatim Report of Proceedings is contained in two volumes, designated as follows: 1RP—12/28/11, 8/2/12; 2RP—8/3/12, 8/27/12.

According to Cole, when she was inside the residence she told Hendrickson she wanted to buy heroin, she gave him the buy money, and he sent Kent to another residence to get the drugs. 2RP 155-56. Kent returned, handed Hendrickson the heroin, and Hendrickson handed it to Cole. 2RP 157.

Another controlled buy was arranged on September 30, 2011. This time Streissguth obtained authorization to electronically intercept and record Cole's conversations. 1RP 47. The information Streissguth provided to obtain authorization was that Hendrickson was the target of the arranged transaction. 1RP 70-71; CP 12. No other potential suspects were referenced in the intercept authorization. CP 12-14.

Cole wore a wire during the September 30 controlled buy. 1RP 47. Again Cole was searched, provided buy money, and observed going to and from Hendrickson's residence. She returned with methamphetamine. 1RP 48-49. Sawyer again conducted surveillance of the residence. He observed Cole approach, knock, and go inside. A short time later, Kent left the residence. When he returned he went back inside, and a few minutes later Cole came out. 1RP 119.

Cole was inside Hendrickson's home for about an hour. During that time she asked Hendrickson if he could get her some methamphetamine. 2RP 163. Hendrickson told her that Kent would know

where to get it, and Cole called Kent and asked him to get her some methamphetamine. 2RP 171-72. Kent then came to Hendrickson's home. Hendrickson added money to the money Cole gave him, and he sent Kent to get the drugs. 2RP 164, 175. Kent returned after a time and handed Hendrickson two bags of methamphetamine. Hendrickson handed one of the bags to Cole, and Cole left. 2RP 165, 182.

C. ARGUMENT

1. THE COURT SHOULD HAVE SUPPRESSED THE UNAUTHORIZED RECORDING OF KENT'S COMMUNICATIONS.

Washington's Privacy Act prohibits the interception or recording of any private conversation without the consent of all persons engaged in the conversation. RCW 9.73.030(1)(b). Under RCW 9.73.230², however,

² RCW 9.73.230 provides as follows:

(1) As part of a bona fide criminal investigation, the chief law enforcement officer of a law enforcement agency or his or her designee above the rank of first line supervisor may authorize the interception, transmission, or recording of a conversation or communication by officers under the following circumstances:

(a) At least one party to the conversation or communication has consented to the interception, transmission, or recording;

(b) Probable cause exists to believe that the conversation or communication involves:

(i) The unlawful manufacture, delivery, sale, or possession with intent to manufacture, deliver, or sell, controlled substances as defined in chapter 69.50 RCW, or legend drugs as defined in chapter 69.41 RCW, or imitation controlled substances as defined in chapter 69.52 RCW; or

(ii) A party engaging in the commercial sexual abuse of a minor under RCW 9.68A.100, or promoting commercial sexual abuse of a minor under RCW

9.68A.101, or promoting travel for commercial sexual abuse of a minor under RCW 9.68A.102; and

(c) A written report has been completed as required by subsection (2) of this section.

(2) The agency's chief officer or designee authorizing an interception, transmission, or recording under subsection (1) of this section, shall prepare and sign a written report at the time of authorization indicating:

(a) The circumstances that meet the requirements of subsection (1) of this section;

(b) The names of the authorizing and consenting parties, except that in those cases where the consenting party is a confidential informant, the name of the confidential informant need not be divulged;

(c) The names of the officers authorized to intercept, transmit, and record the conversation or communication;

(d) The identity of the particular person or persons, if known, who may have committed or may commit the offense;

(e) The details of the particular offense or offenses that may have been or may be committed and the expected date, location, and approximate time of the conversation or communication; and

(f) Whether there was an attempt to obtain authorization pursuant to RCW 9.73.090(2) and, if there was such an attempt, the outcome of the attempt.

(3) An authorization under this section is valid in all jurisdictions within Washington state and for the interception of communications from additional persons if the persons are brought into the conversation or transaction by the nonconsenting party or if the nonconsenting party or such additional persons cause or invite the consenting party to enter another jurisdiction.

(4) The recording of any conversation or communication under this section shall be done in such a manner that protects the recording from editing or other alterations.

(5) An authorization made under this section is valid for no more than twenty-four hours from the time it is signed by the authorizing officer, and each authorization shall independently meet all of the requirements of this section. The authorizing officer shall sign the written report required under subsection (2) of this section, certifying the exact date and time of his or her signature. An authorization under this section may be extended not more than twice for an additional consecutive twenty-four hour period based upon the same probable

cause regarding the same suspected transaction. Each such extension shall be signed by the authorizing officer.

(6) Within fifteen days after the signing of an authorization that results in any interception, transmission, or recording of a conversation or communication pursuant to this section, the law enforcement agency which made the interception, transmission, or recording shall submit a report including the original authorization under subsection (2) of this section to a judge of a court having jurisdiction which report shall identify (a) the persons, including the consenting party, who participated in the conversation, and (b) the date, location, and approximate time of the conversation.

In those cases where the consenting party is a confidential informant, the name of the confidential informant need not be divulged.

A monthly report shall be filed by the law enforcement agency with the administrator for the courts indicating the number of authorizations granted, the date and time of each authorization, interceptions made, arrests resulting from an interception, and subsequent invalidations.

(7)(a) Within two judicial days of receipt of a report under subsection (6) of this section, the court shall make an ex parte review of the authorization and shall make a determination whether the requirements of subsection (1) of this section were met. Evidence obtained as a result of the interception, transmission, or recording need not be submitted to the court. If the court determines that any of the requirements of subsection (1) of this section were not met, the court shall order that any recording and any copies or transcriptions of the conversation or communication be destroyed. Destruction of recordings, copies, or transcriptions shall be stayed pending any appeal of a finding that the requirements of subsection (1) of this section were not met.

(b) Absent a continuation under (c) of this subsection, six months following a determination under (a) of this subsection that probable cause did not exist, the court shall cause a notice to be mailed to the last known address of any nonconsenting party to the conversation or communication that was the subject of the authorization. The notice shall indicate the date, time, and place of any interception, transmission, or recording made pursuant to the authorization. The notice shall also identify the agency that sought the authorization and shall indicate that a review under (a) of this subsection resulted in a determination that the authorization was made in violation of this section provided that, if the confidential informant was a minor at the time of the recording or an alleged victim of commercial child sexual abuse under RCW 9.68A.100 through 9.68A.102 or 9[A].40.100, no such notice shall be given.

(c) An authorizing agency may obtain six-month extensions to the notice requirement of (b) of this subsection in cases of active, ongoing criminal investigations that might be jeopardized by sending the notice.

law enforcement agencies are permitted to authorize the interception or

(8) In any subsequent judicial proceeding, evidence obtained through the interception or recording of a conversation or communication pursuant to this section shall be admissible only if:

(a) The court finds that the requirements of subsection (1) of this section were met and the evidence is used in prosecuting an offense listed in subsection (1)(b) of this section; or

(b) The evidence is admitted with the permission of the person whose communication or conversation was intercepted, transmitted, or recorded; or

(c) The evidence is admitted in a prosecution for a "serious violent offense" as defined in RCW 9.94A.030 in which a party who consented to the interception, transmission, or recording was a victim of the offense; or

(d) The evidence is admitted in a civil suit for personal injury or wrongful death arising out of the same incident, in which a party who consented to the interception, transmission, or recording was a victim of a serious violent offense as defined in RCW 9.94A.030.

Nothing in this subsection bars the admission of testimony of a party or eyewitness to the intercepted, transmitted, or recorded conversation or communication when that testimony is unaided by information obtained solely by violation of RCW 9.73.030.

(9) Any determination of invalidity of an authorization under this section shall be reported by the court to the administrative office of the courts.

(10) Any person who intentionally intercepts, transmits, or records or who intentionally authorizes the interception, transmission, or recording of a conversation or communication in violation of this section, is guilty of a class C felony punishable according to chapter 9A.20 RCW.

(11) An authorizing agency is liable for twenty-five thousand dollars in exemplary damages, in addition to any other damages authorized by this chapter or by other law, to a person whose conversation or communication was intercepted, transmitted, or recorded pursuant to an authorization under this section if:

(a) In a review under subsection (7) of this section, or in a suppression of evidence proceeding, it has been determined that the authorization was made without the probable cause required by subsection (1)(b) of this section; and

(b) The authorization was also made without a reasonable suspicion that the conversation or communication would involve the unlawful acts identified in subsection (1)(b) of this section.

recording of conversations as part of a criminal investigation where at least one party to the conversation has consented to the recording, there is probable cause to believe that the conversation involves a drug transaction, and a written report is prepared detailing the planned interception. RCW 9.73.230(1)-(2). Under the terms of the statute, such authorization is valid for the interception of communications from others not named in the report if those others are brought into the conversation or transaction by the nonconsenting party. RCW 9.73.230(3). If these statutory requirements are not met, however, the recorded conversation is inadmissible in a subsequent proceeding. RCW 9.73.230(8); State v. Jimenez, 128 Wn.2d 720, 726, 911 P.2d 1337 (1996) (absent compliance with statute, recorded communication inadmissible).

In this case, the defense moved in limine to suppress the recording from the September 30 controlled buy, arguing that the statutory requirements were not met. First, Kent was not named as the target of the investigation in the authorization, and second, he was brought into the conversation or transaction by Cole, who was a consenting party to the recording. CP 6-7; 1RP 9-14. The court ruled the recording admissible, finding that Hendrickson had brought Kent into the transaction when he suggested that Cole call him. 1RP 18-19.

The Washington Supreme Court has held that admissibility of any information obtained through interception of a private conversation pursuant to RCW 9.73.230 is governed by the provisions of that statute. Absent strict compliance with the statute, the intercepted or recorded communication is inadmissible. Jimenez, 128 Wn.2d at 726. Contrary to the trial court's conclusion, the statutory requirements were not met in this case, and the recording should have been suppressed.

First, the police were not specifically authorized to record Kent's communications. Despite Cole's contention that Kent participated in the previous controlled buy, Kent was not identified as a person "who may have committed or may commit the offense" in the intercept authorization. CP 12; RCW 9.73.230(2)(d) (written report in support of authorization must identify suspect if known).

Nor was the authorization valid as to Kent's communications under subsection (3) of the statute. Under that provision, a properly obtained authorization is valid as to communications from other persons not named in the authorization, if those persons are "brought into the conversation or transaction by the nonconsenting party[.]" RCW 9.73.230(3). Here, Hendrickson, as the named target of the investigation, was the nonconsenting party. Unless he brought Kent into the

conversation or transaction, the authorization was invalid as to Kent's communications, and the recording is inadmissible in these proceedings.

The evidence showed that Kent was not at Hendrickson's residence when Cole arrived to conduct the controlled buy. Hendrickson told Cole he did not have the methamphetamine she asked for, and he suggested she ask Kent where she could get some. Cole then called Kent and asked for his help obtaining the drugs. Responding to Cole's call, Kent came to Hendrickson's home, where his communications with Cole were recorded. 2RP 172-73. Thus, although Hendrickson suggested that Cole talk to Kent, there was no communication between Hendrickson and Kent which resulted in Kent's involvement in the recorded conversation. It was the phone call from Cole, the consenting party, that brought Kent into the conversation or transaction. The intercept authorization thus was not valid as to Kent's communications.

The court below noted that the statute was not clear as to how a person is "brought into the conversation or transaction." 1RP 18. It then resolved this ambiguity in the State's favor, ruling that Hendrickson brought Kent into the conversation by suggesting that Cole call him, even though there was no communication between Hendrickson and Kent. This was error. It is well settled that where a criminal statute is subject to more than one possible construction, the rule of lenity requires courts to

construe the statute strictly against the State and in favor of the accused. See e.g. State v. Hornaday, 105 Wn.2d 120, 127, 713 P.2d 71 (1986); State v. Gore, 101 Wn.2d 481, 486-86, 681 P.2d 227 (1984). Any ambiguity in the statute should have been resolved in Kent's favor, resulting in suppression of the recorded communications.

The court's improper admission of the recording prejudiced the defense. Without the recording, the jury had only Cole's testimony as to what happened inside Hendrickson's home. She was the only witness who involved Kent in the drug transaction. Her credibility was suspect, however. Cole testified that following completion of her work as an informant, she was convicted of forging a prescription for controlled substances. 2RP 208, 214. She also admitted that she had used heroin several times a day during her work as an informant, despite the contract provision prohibiting drug use. 1RP 71; 2RP 149, 195. Given the issues with Cole's credibility and the lack of other evidence, it is reasonably likely the jury would have a reasonable doubt as to Kent's participation in the delivery. Kent's conviction for the September 30 transaction must be reversed and the case remanded for a new trial without admission of the unauthorized recording.

2. THE COURT'S REFUSAL TO INSTRUCT ON THE AFFIRMATIVE DEFENSE TO THE SCHOOL ZONE ENHANCEMENT DENIED KENT A FAIR TRIAL.

Based on the evidence at trial, the defense requested jury instructions on the affirmative defense to the school zone sentence enhancement, as defined in RCW 69.50.435. 2RP 242-43; CP 17-22. As applicable here, that statute provides for enhancement of the sentence of anyone convicted of violating RCW 69.50.401 by delivering a controlled substance within one thousand feet of a school bus route stop³. RCW 69.50.435(1)(c). It also establishes an affirmative defense:

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 69.50.401 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.

RCW 69.50.435(4).

A defendant is entitled to have the jury instructed on an affirmative defense when substantial evidence in the record supports every element of the defense. State v. Bell, 60 Wn.App. 561, 566, 805 P.2d 815, review

³ The State presented evidence that Hendrickson's home was within 1000 feet of a school bus route stop as designated by the Longview school district. 1RP 86, 94.

denied, 116 Wn.2d 1030 (1991). “In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury.” State v. May, 100 Wn.App. 478, 482, 997 P.2d 956, review denied, 142 Wn.2d 1004 (2000). A valid instruction, improperly denied, constitutes reversible error. State v. Harvill, 169 Wn.2d 254, 259, 234 P.3d 1166 (2010).

A court's refusal to instruct the jury on an affirmative defense is reviewed for abuse of discretion. Harvill, 169 Wn.2d at 259. The court below refused to give the proposed instructions on the affirmative defense, reasoning that the evidence would not support a finding that the prohibited conduct occurred entirely within a private residence. 2RP 247. Because there was evidence from which the jury could find this element of the defense, the court abused its discretion in denying the defense instructions.

The prohibited conduct in this case was the delivery of a controlled substance. “Delivery” means “the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship.” RCW 69.50.101(f). According to Cole, Kent transferred controlled substances, by handing them to Hendrickson, inside Hendrickson's residence. 2RP 157, 165. Although there was evidence

that Kent left the residence and returned with controlled substances, the State presented no evidence as to what Kent did while he was gone or whether any of his actions involved a transfer of controlled substances. This evidence, interpreted in favor of the defense, supports a finding that the delivery itself occurred entirely inside Hendrickson's residence.

There is substantial evidence to support the other elements of the affirmative defense as well. Cole testified that there were no minors present during either transaction, and she would not have gone through with the buys if children were present. 2RP 202-03. Cole also testified that she did not give Kent any money and she was not aware of any personal benefit Kent received from Hendrickson for his role in the transactions. 2RP 212.

Because Kent was prevented from presenting his defense on the sentence enhancement to the jury, the court's improper refusal to instruct the jury on the affirmative defense cannot be considered harmless. This court must reverse Kent's convictions and remand for a new trial.

3. A SCRIVENER'S ERROR IN THE JUDGMENT AND SENTENCE MUST BE CORRECTED

The standard range sentence for each of Kent's convictions is 20 to 60 months. In addition, he faces 24 month school zone enhancements on each offense, which must be served consecutively to each other and to the

underlying sentence. Thus the maximum standard range sentence the court could impose on each conviction is 84 months. CP 48.

At sentencing, the court indicated it was imposing mid-standard range sentences, for a total confinement of 88 months, which included the combined 48 months for the two sentence enhancements. 2RP 311-12. The sentence of 88 months confinement is reached by imposing concurrent 40-month sentences on each count, with consecutive 24-month enhancements. Thus the total sentence for each count is 64 months. The judgment and sentence incorrectly indicates a sentence of 88 months on each count, however. CP 51.

This error in the judgment and sentence must be corrected. The proper remedy is remand to the trial court for correction of the scrivener's error. In re the Personal Restraint of Mayer, 128 Wn. App. 694, 701, 117 P.3d 353 (2005).

D. CONCLUSION

The recording from the second controlled buy should have been suppressed, and the court should have instructed the jury on the affirmative defense. For these reasons Kent's convictions must be reversed and the case remanded for a new trial. In addition, remand is necessary to correct a scrivener's error in the judgment and sentence.

DATED this 8th day of February, 2013.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Catherine E. Glinski".

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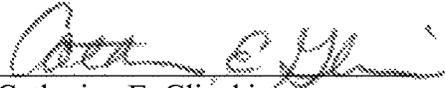
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A. Kent, Sr., Cause No. 43907-7-II to:

Paul A. Kent, Sr., DOC# 351776
Stafford Creek Corrections Center
191 Constantine Way
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I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
February 8, 2013

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