

No. 44083-1-II

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

FILED
COURT OF APPEALS
DIVISION II
2013 JUL 31 PM 1:01
STATE OF WASHINGTON
BY  DEPUTY

STATE OF WASHINGTON,
Respondent,

v.

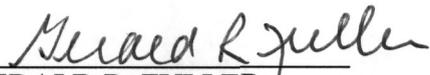
ROBERT BONNELL,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON GODFREY, JUDGE
THE HONORABLE MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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Prosecuting Attorney
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BY: 
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RESPONDENT'S COUNTER STATEMENT OF THE CASE

Procedural History

The defendant was charged by Information on February 3, 2012, with Unlawful Possession of a Firearm in the First Degree, RCW 9.41.040(1)(a), and Violation of the Uniform Controlled Substances Act - Possession of Methamphetamine, RCW 69.50.4013(1). (CP 1-3). The State alleged the predicate offense for the charge of Unlawful Possession of a Firearm to be the defendant's prior conviction for Assault in the Second Degree in Grays Harbor County cause number 94-1-33-3. On August 24, 2013, the State amended count 1, Unlawful Possession of a Firearm. (CP 49-50). The State alleged the original predicate offense of Assault in the Second Degree and a second predicate offense of Violation of the Uniform Controlled Substances Act - Possession of Methamphetamine based on the defendant's conviction of that offense in Grays Harbor Superior Court cause number 11-1-1-2.

In a pretrial hearing held on August 24, 2012, the defendant challenged the Constitutional validity of the prior conviction for Assault in the Second Degree. That motion was denied. (8/24/12 RP 71-73). Following that ruling, the State was granted leave to file the Amended Information. The defendant did not object to the amendment, acknowledging that he was aware of both convictions. The defendant entered into a Stipulation, agreeing that he had been convicted of both Assault in the Second Degree and Violation of the Uniform Controlled

Substances Act - Possession of Methamphetamine. (8/24/12 RP 74-76).

The stipulation also set forth the language to be read by the court to the jury. (CP 63).

A Motion to Suppress and CrR 3.5 hearing was held prior to trial. The court denied the Motion to Suppress and entered Findings of Fact and Conclusions of Law and an Order on both the Motion to Suppress and CrR3.5 issues. The court specifically found that the statements made by the defendant to his community corrections officer were voluntary. (CP 38, Conclusion of Law 4).

The matter was tried to a jury commencing on August 27, 2012. Community Corrections Officer Mark Shaffer and Community Corrections Officer Curtis Perry each testified at trial. In the State's case in chief. Shaffer testified that he had arrested the defendant on February 2, 2012, for violation of his Judgment and Sentence and that he informed Mr. Bonnell that he and Corrections Officer Perry were going to search his residence. (RP 89).

Neither Shaffer nor Perry testified in the State's case in chief concerning the statements of the defendant or the facts leading up to the arrest of the defendant. Shaffer testified that during his search of the residence, he located a locked box. Shaffer used a key from the defendant's key ring to open the box. The box contained a firearm, a large butane canister, a pair of tweezers and ammunition. (RP 91-92).

Community Corrections Officer Perry later removed the false bottom from the butane canister and recovered a quantity of Methamphetamine. (RP 105).

The defendant was questioned by Detective Peterson at the Hoquiam Police Department following advisement of Miranda. (RP 116-117). The defendant acknowledged that he lived alone at the residence. (RP 118). When asked about the firearm, the defendant stated, "I am so screwed, it doesn't matter." (RP 118-119). The defendant also admitted to Detective Peterson that the drugs belonged to him and that they were for his personal use. (RP 120).

The defendant testified at trial. During cross-examination he was asked about statements alleged to have been made to Community Corrections Officer Shaffer and to Officer Peterson at the time of his arrest. (RP 157-159). The defendant claimed that the box had been left at the residence by a family member, Roger Hall, and that he had no idea what was inside of it.

Community Corrections Officer Shaffer testified in rebuttal concerning the circumstances of the defendant's arrest and the discovery of the artificial bladder. (RP 163). Shaffer testified that he asked the defendant whether he had been using drugs. The defendant told Shaffer that he had been using for about a week. (RP 164). Shaffer explained that the defendant admitted trying to use the artificial bladder at the office the

day before his arrest and also admitted that he had a "Meth pipe" behind the chair in the front room of his residence. (RP 164-165).

The matter went to the jury on August 28, 2012. The jury returned a verdict of guilty on both counts.

Factual Background

The facts pertinent to this appeal are set forth in the uncontested Findings of Fact entered by the trial court on the Motion to Suppress. There were no disputed facts. No Assignments of Error have been alleged concerning the Findings of Fact entered by the trial court.

In February of 2012, the defendant was on community custody to the Department of Corrections following his conviction for Violation of the Uniform Controlled Substances Act - Possession of Methamphetamine in Grays Harbor County cause number 11-1-1-2. Among the conditions of sentence were that the defendant not possess or consume any controlled substance nor possess drug paraphernalia without a valid prescription. He was to be subject to random urinalysis. (CP 35, Undisputed Fact 1).

On February 1, 2012, the defendant reported to his community corrections officer and was directed to provide a urinalysis. The defendant told his community corrections officer that he was unable to provide a urinalysis. He claimed to have wet his pants. The defendant was instructed to return the following morning. (CP 36, Undisputed Fact 2).

The defendant did not return to the Department of Corrections office until shortly before 5:00 p.m. on February 2, 2012. When directed

to provide a urinalysis sample, the defendant was found to be wearing an artificial bladder. The defendant then told his community corrections officer that he had been "using." (RP 10-13). The defendant also acknowledged that he had tried to use the device the previous day.

Following these admissions, the defendant was handcuffed and taken into custody for refusing to give a urinalysis. (CP 36, Undisputed Fact 3, RP 13). The defendant then told his community correction officer that he had been using drugs for about a week. When asked what they might find at the defendant's residence, the defendant told his community corrections officer that, among other things, they would find a meth pipe on a chair in the front room. (CP 36, Undisputed Fact 4).

Based upon this information, the defendant's community corrections officer determined that he was going to search the defendant's residence. Arrangements were made for the Hoquiam police to meet the defendant and his community corrections officer at the residence. The defendant provided his community corrections officer with the key to the residence. The Hoquiam officers did a quick check of the residence to insure that no other individuals were inside.

Corrections officers Mark Shaffer and Curtis Perry then conducted a search of the premises. They located a firearm and a butane canister in a locked box in the living room. (CP 36-37, Undisputed Facts 5-6). The weapon was turned over to the Hoquiam police. One of the community correction officers retained the butane canister. He found that it had a

false bottom containing baggies of methamphetamine. (CP 37, Undisputed Fact 7).

The defendant was taken to the Hoquiam Police Department where he was advised of his Miranda warnings by Officer Peterson. When asked about the firearm the defendant remarked "I am so screwed, it doesn't matter." (CP 37, Undisputed Fact 8). The community correction officers later arrived at the Hoquiam Police Department with the butane canister and the methamphetamine. The defendant, upon questioning by Peterson, admitted to possession of the controlled substances. (CP 37, Undisputed Fact 9). When asked again by Peterson about the pistol the defendant stated "I am 55 years old and my life is over."

RESPONSE TO ASSIGNMENTS OF ERROR

The defendant's conviction for Assault in the Second Degree is supported by a constitutionally valid plea of guilty. (Response to Assignment of Error 1)

The defendant pled guilty to the crime of Assault in the Second Degree in Grays Harbor County cause 94-1-33-3. The record in this matter contains only a certified copy of the Statement of Defendant on Plea of Guilty (CP 44-47). Because of the age of the conviction, there is no report of proceedings available. The statement lists the elements of the crime as an "assault a person with a weapon." The defendant, in his statement to the court admits to assaulting an Aberdeen Police Officer with a shotgun. His statement reads, in part, as follows:

On January 27, 1994, in Aberdeen, I was in an aggitated [sic] suicidal state. I was pursued by an Aberdeen police officer for speeding. He pulled me over. I pulled out my shotgun and pointed it at the officer and then pointed it at my own head. (CP 113).

A defendant charged with Unlawful Possession of a Firearm is entitled to challenge the constitutional validity of a guilty plea which serves as the predicate offense for the current prosecution. State v. Swindell, 93 Wn.2d 192, 607 P.2d 852 (1980). The defendant claims that the description of the elements as “assault with a weapon,” standing alone, is proof that the defendant did not understand that the assault had to be with a deadly weapon.

All that is required is that the defendant possess an understanding of the law in relation to the facts, ie: that the assault had to be with a deadly weapon. McCarthy v. U.S., 394 U.S. 459, 466, 22 L.Ed.2d 418, 89 Sup. Ct., 1166 (1969). A defendant need only be aware of the acts and the state of mind in which they must be performed to constitute the crime. State v. Holsworth, 93 Wn.2d 148, 153, n.3, 607 P.2d 45 (1980).

These principles have been explained by the Supreme Court. In Re Keene, 95 Wn.2d 203, 207, 622 P.2d 360 (1980). In Keene the court cited specifically to comments from the Criminal Rules Task Force. Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure (1971), Comment at 60.

Apprising the defendant of the nature of the offense need not “always require a description of every element of the offense... Henderson v. Morgan, 426 U.S. 637, 647 n.18, 49 L. Ed. 2d 108, 96 S. Ct. 2253 (1976). At a minimum, however, it would appear that the defendant would need to be aware of the acts and the requisite state of mind in which they must be performed to constitute a crime.

The defendant was given “notice of what he is being asked to admit.” He acknowledged as much in the statement of defendant on plea of guilty both by the listing of the elements of the offense and by his explanation to the court concerning what he had done. Holsworth, 93 Wn.2d at p. 153. Such an acknowledgment is sufficient to demonstrate that the defendant is aware of the elements of the offense. See Henderson v. Morgan, 426 U.S. 637, 646, 96 Sup Ct. 2253 49 L.Ed.2d 108 (1976).

This record demonstrates that the defendant understood the nature of the charge and the full consequences of his guilty plea. Wood v. Morris, 87 Wn.2d 501, 554 P.2d 1032 (1976). The fact that the state cannot demonstrate on this record that the defendant was specifically advised by the court of a particular element of the crime is not dispositive. This court may look to the contents of the Guilty Plea Statement to establish that the defendant was aware of the elements of the crime and the acts he was alleged to have committed which constituted the crime. See State v. Osborne, 102 Wn.2d 87, 93-94, 684 P.2d 683 (1984).

State v. Chervenell, 99 Wn.2d 309, 662 P.2d 836 (1983), cited by the defendant is not on point. In Chervenell, the Statement of Defendant

on Plea of Guilty form drafted by the Supreme Court as set forth in CrR 4.2 adopted at that time did not contain the admonition that the defendant had the right to remain silent. The court in Chervenell found that the defendant's prior conviction could not serve as a predicate offense in an habitual criminal proceeding because the record did not reflect that the defendant was informed, in the prior proceeding, of his right to remain silent. This holding was made even though the court and the parties used the guilty plea form expressly adopted and approved by the Supreme Court. This is not the case at hand. The Statement of Defendant on Plea of Guilty signed by the defendant in 1994 contains the clear admonition that the defendant has the right to remain silent and not testify.

Additional cases cited by the defendant likewise fail to address the issue at hand. There is no issue concerning whether the conduct of the defendant failed to satisfy an element of the offense. Bousley v. U.S., 523, 614, 118 Sup. Ct., 1604, 140 L.Ed.2d 828 (1998). This defendant pointed a shotgun at a law enforcement officer. Similarly, there is no claim that the crime of Second Degree Assault was enacted after he committed his criminal acts. In Re Personal Restrain of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000). There is no question in this case concerning whether the defendant understood that his conduct constituted an offense. This is quite unlike the facts in the case of In Re Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

This assignment of error must be denied.

This court may remand the matter to Superior Court and direct that the court enter a finding of guilty as to the crime of Unlawful Possession of a Firearm in the Second Degree.

As indicated previously, the parties entered into a stipulation regarding the defendant's prior convictions. That stipulation specifically stated that the defendant agreed that he had two prior convictions, the 1994 conviction for Assault in the Second Degree and a 2011 conviction for Violation of the Uniform Controlled Substance Act - Possession of Methamphetamine. The information was amended to allege both offenses as predicate offenses for the current charge. No challenge of any kind was made to the 2011 conviction.

The defendant stipulated to the existence of both convictions. The jury was read a stipulation in which they were told that the defendant so stipulated. Even if this court were to find that the predicate offense for Assault in the Second Degree was constitutionally invalid, the conviction for Unlawful Possession of a Firearm stands because the Information alleged both offenses. The defendant was given notice of both offenses. The jury, by its verdict, accepted the stipulation of the parties that the defendant had a previous conviction for both offenses.

In short, if this court does find that the Second Degree Assault conviction is constitutionally invalid, this court should remand the matter to the Superior Court for entry of Judgment and Sentence on the crime of Unlawful Possession of a Firearm in the Second Degree.

Miranda requirements do not apply to statements made to a community corrections officer. (Response to Assignments of Error 2, 3 and 4)

A community corrections officer is entitled to require an offender to submit to a search of his person and his residence upon reasonable cause to believe that the offender has violated a condition of sentence. RCW 9.94A.631. In this particular case, that reasonable cause arose when the defendant appeared at the community correction office wearing an artificial bladder, told his community corrections officer that he had been using drugs, and admitted that there was a meth pipe at his residence. The refusal to give a urine sample on two occasions, the use of the artificial bladder, and the defendant's statements formed the reasonable basis for the search of the defendant's residence by the community corrections officer. The defendant's statements to his community corrections officer were offered at the pre-trial hearing to support reasonable cause for the search and were not offered by the state as substantive evidence in the trial of this matter.

Washington courts have long acknowledged that Miranda warnings are inapplicable to proceedings regarding violation of a Judgment and Sentence by an offender. State v. Johnson, 9 Wn.App. 766, 772-73, 514 P.2d 1073 (1973):

In the instant case, the defendant confessed acts which violated the terms of his probation. The defendant has the right to deny or explain away the probation officer's testimony. More is not needed for

compliance with due process protection in a probation revocation proceeding. To hold otherwise (that warnings would have to be given), the purpose of probation would be materially affected and the probationer-probation officer relationship would be strained if a carte blanche exclusionary rule were applied to every office visit and on custodial or non-custodial contact.

Other jurisdictions have so held. Miranda requirements do not apply to probation and parole proceedings. U.S. v. Johnson, 455 F.2d 932 (5th Circuit 1972).

The state acknowledges that the statements following the defendant's arrest and handcuffing were custodial. These statements as well as those made prior to his arrest established the reasonable basis for the search that the community corrections officer was entitled to conduct in connection with his supervision of the defendant. In this context, Miranda warnings are not required. Miranda warnings may be required if custodial statements made to the community corrections officer are going to be used by the State in its case in chief in a criminal prosecution. State v. Lozano, 76 Wn.App. 116, 882 P.2d 1191 (1994). Such is not the case herein.

No one is suggesting that the search conducted by the community corrections officer was done at the direction of the police or done with the original intent to use any seized evidence in a criminal prosecution. The community corrections officer was acting according to his statutory authority. Evidence seized pursuant to a lawful search conducted pursuant

to RCW 9.94A.631(1) may be used by the State of Washington in a separate criminal prosecution so long as there are “reasonable grounds” to support the search. State v. Parris, 163 Wn.App. 110, 121-22, 259 P.3d 331 (2011); U.S. v. Conway, 122 F.3d 841 (1997).

A search conducted by a community corrections officer is reasonable if the officer has a well-founded suspicion that a violation has occurred. State v. Massey, 81 Wn.App. 198, 200, 913 P.2d 424 (1996). A community corrections officer is entitled to rely on the specific and articulable facts before him and rational inferences therefrom. State v. Sims, 10 Wn.App. 75, 87, 516 P.2d 1088 (1973). All that is needed to establish reasonable cause is a substantial possibility that criminal conduct has occurred. State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

Even without the defendant’s custodial statements, the community corrections officer had reasonable grounds to support the search. The defendant showed up on February 1, 2012, and claimed not to be able to give a urine sample. (RP 10-11). The following day when the defendant appeared, the defendant became upset when the officers told him that they were going to check him and make sure that he didn’t have an artificial bladder. (RP 12). It was at this point that the officers discovered the artificial bladder that the defendant was wearing. (RP 12). The defendant then acknowledged, prior to his arrest by his community corrections officer, that he had been “using” for a little while. (RP 13). Following

this statement, the defendant was placed in handcuffs and escorted back to the office.

The fact of the defendant's refusal to give a urinalysis and the presence of the artificial bladder made it immediately apparent to the community corrections officers the defendant had been using controlled substances in violation of the Judgment and Sentence. At this point, even without his statements, the community corrections officer had reasonable grounds to search the likely places where the defendant might consume his controlled substances and store them. This surely would include the defendant's residence.

The defendant's citation to State v. Sergeant, 111 Wn.2d 641, 762 P.2d 1127 (1988) and State v. Willis, 64 Wn.2d 634, 825 P.2d 357 (1992) is off the mark. In Sergeant and Willis the State was allowed to present, in its case in chief, custodial statements made by the defendant to his community corrections officer. Sergeant and Willis properly held that un-mirandized custodial statements made to a community corrections officer may not be used by the State, in its case in chief, to prosecute the defendant. Neither case disallowed the use of un-mirandized custodial statement to establish reasonable cause under RCW 9.94A.631.

In the case at hand, neither Corrections Officer Shaffer nor Corrections Officer Perry testified in the State's case in chief concerning the out-of-court statements of the defendant. (RP 87-101, 102-107). It was not until the defendant testified at trial that these statements were used

to cross examine the defendant. (RP 157-159). Corrections Officer Shaffer was allowed to testify concerning the defendant's statements in rebuttal. (RP 162-165).

The un-mirandized statements of a defendant, which are otherwise voluntary, may be used by the State to impeach the defendant. Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed. 2d 1 (1971). The trial court specifically found that the defendant's statements to his community corrections officer were voluntary. (CP 38, Conclusion of Law 4). The defendant's statements may be used for impeachment. State v. Holland, 98 Wn.2d 507, 519-20, 656 P.2d 1056 (1983). That is what occurred herein.

This assignment of error must be denied.

CONCLUSION

For the reasons set forth, the convictions must be affirmed.

DATED this 30 day of July, 2013.

Respectfully Submitted,

By: Gerald R Fuller
GERALD R. FULLER
Chief Criminal Deputy
WSBA #5143

GRF/ws

FILED
COURT OF APPEALS
DIVISION II

2013 JUL 31 PM 1:01

STATE OF WASHINGTON

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

STATE OF WASHINGTON,

Respondent,

No.: 44083-1-II

v.

DECLARATION OF MAILING

ROBERT D. BONNELL,

Appellant.

DECLARATION

I, Randi M. Toyra hereby declare as follows:

On the 30th day of July, 2013, I mailed a copy of the Brief of Respondent to Jared B. Steed, Nielsen, Broman & Koch, P.L.L.C., 1908 East Madison Street, Seattle, WA 98122, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 30th day of July, 2013, at Montesano, Washington.

Randi M. Toyra