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COURT OF APPEALS

No. 44884-0-II

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

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STATE OF WASHINGTON,

Respondent,

v.

ANDREW STEARMAN,

Appellant.

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

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The Honorable Edmund Murphy (venue motion judge)  
and the Honorable Katherine M. Stolz (trial judge)

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*OPENING BRIEF OF APPELLANT*

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KATHRYN RUSSELL SELK, No. 23879  
Counsel for Appellant

RUSSELL SELK LAW OFFICE  
Post Office Box 31017  
Seattle, Washington 98103  
(206) 782-3353

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A. ASSIGNMENT OF ERROR

The trial court abused its discretion in failing to grant the motion for change of venue, allowing the prosecution to defeat the motion by adding an unsupported charge, and failing to address appellant's argument regarding venue at the close of the state's case.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Where a defendant timely objects to venue in Pierce County and the elements of the charged crimes occurred in King County, did the trial court err in denying the motion to change venue?
2. Did the trial court also err in allowing the prosecution to add a charge of conspiracy which was unsupported by the evidence in order to defeat the motion to change venue?
3. After the prosecution had presented its case, counsel again objected that venue was improper, arguing that the prosecution had failed to prove any over acts occurred in Pierce County. Did the court further err in failing to address the issue properly?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Andrew Stearman was charged by information with trafficking in stolen property in the first degree and possession of a stolen firearm, both charged with the aggravating factor that the crime was committed with intent to benefit a criminal street gang. CP 1-2; RCW 9A.56.140(1), RCW 9A.56.310, RCW 9A.82.050(1), RCW 9.94A.030, RCW 9.94A.130, RCW 9.94A.535. Stearman moved for a change of venue and the prosecution moved to amend the information to include a new charge of conspiracy to commit trafficking in stolen property in the first degree. CP 30-31; RCW 9A.28.040. The motion to change venue was denied by the Honorable Edmund Murphy on July 10, 2013. 1RP 9-

11.<sup>1</sup>

After several continuances including one before the Honorable Bryan Chuschcoff over Stearman's objection on January 24, 2013, pretrial and trial proceedings were held before the Honorable Katherine M. Stolz on March 28, April 1, 2, 3, 4 and 8, 2013. 2RP 7-8; RP 1. The prosecutor also amended the information again, adding firearm enhancements for the trafficking and conspiracy counts and adding a new, fourth count of second-degree unlawful possession of a firearm, again with a "criminal street gang" aggravating factor. RP 68-71; CP 58-60; RCW 9.41.010, RCW 9.41.040, RCW 9.94A.030, RCW 9.94A.530, RCW 9.94A.533. A third amended information was filed amending the dates of the alleged conduct. RP 106; CP 114-16.

At trial, the prosecutor declared that he would not be pursuing the "gang aggravator" for any of the counts. RP 38, 71. Judge Stolz dismissed the conspiracy charge for insufficiency of the evidence at the close of the state's case. RP 142-43. The jury subsequently acquitted Stearman of the trafficking charge but convicted him for second-degree unlawful possession of a firearm and possession of a stolen firearm. RP 229; CP 137-41.

Stearman appealed, and this pleading timely follows. See CP 182-

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<sup>1</sup>The verbatim report of proceedings in this case consists of 5 volumes, which will be referred to as follows:  
the volume containing the July 10, 2012 proceedings, as "1RP;"  
January 24, 2013, as "2RP;"  
the chronologically paginated volumes containing the proceedings of March 28, April 1, 2, 3, 4, 8 and 12, 2013, as "RP;"  
the supplemental verbatim report of proceedings containing the interview of April 11, 2012, as "3RP."

94.

2. Overview of evidence at trial

On December 17, 2011, a “Sportco” store in Fife, Washington, was robbed at about 3:30 in the morning and 41 working firearms were stolen. RP 107-108. The three people who committed the burglary were Soeun Sun, Joseph Soeung and David Bunta. RP 108. Soeun Sun was also known as “Mop.” SRP 52.

After several months of investigation, a man named Andrew Stearman and his brother were arrested on April 11, 2012, and interrogated. RP 95-110. The interrogation included a federal special agent from the Bureau of Alcohol, Tobacco and Firearms. RP 109. The local officer involved was Jeff Nolta of the Fife Police Department. RP 109-14.

The hours-long videotape of Stearman’s interrogation was played at trial and was the bulk of the prosecution’s evidence. RP 95, 116-17, 123. The prosecutor also featured it repeatedly during closing argument. RP 193, 195, 196, 198, 199, 200, 201, 203, 204, 205. In the interrogation, Nolta told Stearman that the officers had been investigating the Sportco burglary for four months and it was “not an accident” that Stearman had been arrested. SRP 7. The officer declared that the police knew that, after the burglary, the guns “first went to south Tacoma” and then “came to West Seattle,” to Stearman’s house. SRP 7. The officer also said police knew the guns not only were at Stearman’s house but also “got distributed out from there[.]” SRP 7.

Nolta told Stearman that sometimes people get sucked into a

conspiracy and “get to take the full ride” even though they only “have a little part.” SRP 9. The officer told Stearman that the only way he could avoid getting caught up was to tell the officers what he knew and that would keep him “out of that whole bigger conspiracy.” SRP 9.

Stearman told the officers that Mop had shown up at Stearman’s house and said he was going to meet somebody there, then paced back and forth there for a few hours before leaving with a duffle bag. SRP 12-13. Stearman said Mop obviously had more than two guns with him and it seemed like he had maybe 10. SRP 16. Mop said he was trying to get rid of them and offered Stearman a good deal on a gun, but Mop did not tell Stearman where the guns came from. SRP 16.

Stearman initially claimed that Mop never sold any guns to anyone at his house. SRP 21-25. The officers then repeatedly told Stearman, “[w]e know” that people got guns at Stearman’s house and that the guns were “getting used in drive-bys” and robberies, asking Stearman “[i]s that something you want to be part of?” SRP 25. Ultimately Stearman admitted that someone named “Alec” came over to Stearman’s house and picked up three or four guns. SRP 25-26. But a few minutes later Stearman was not sure that Alec had shown up at the house on the night the officers were asking about. SRP 33. Stearman thought Alec had actually bought the guns several days later somehow. SRP 33. Stearman recalled going to Alec’s house so Stearman’s girlfriend could get a tattoo and said that, while they were there, Alec showed Stearman Alec’s new guns. SRP 33.

Stearman said he had seen the Sportco robbery on the news and put

“two and two together” after Mop had come by with all the stuff. SRP 27. Stearman also said, however, that the people who brought the guns by, including Mop, said they stole the guns. SRP 36. Stearman explained he had thought they meant from a person, not a store. SRP 36.

Mop owed Stearman some money and Stearman admitted he got and sent some text messages from Mop about paying him back, seeing as how Mop was making all this money selling guns. SRP 29-30, 36-38. Stearman said he got those messages the day after the robbery but thought they were just saying Mop was going to bring money or give him something in collateral. SRP 37. The officers then asked if Mop had brought the guns to Stearman’s home to pay off Stearman but Stearman denied it. SRP 32. Stearman said Mop tried to pay him with a gun but Stearman declined. SRP 46.

Stearman admitted sending text messages to Mop saying “I can’t be out here with no strap. I need it hella bad. Hit me up, bro.” SRP 60. Stearman admitted that, when he sent that, he was referring to getting a gun. SRP 60.

The officers said they thought the people who stole the guns had been at the home right after the burglary and then again later. SRP 60. Stearman said he was not there the first time but that his brother told him that Mop had come by and had something to give him. SRP 85, 90. Stearman also said Mop sent him a picture of a “bedful” of guns that Stearman had thought was “like, some fake shit off line.” SRP 91. Mop asked if he knew anyone that might want to buy them. SRP 101-102.

Stearman stipulated that he had a prior conviction which made him

ineligible by law to possess a firearm. RP 108.

D. ARGUMENT

THE TRIAL COURT ERRED IN DENYING STEARMAN'S  
MOTION FOR CHANGE OF VENUE, ALLOWING THE  
STATE TO ADD THE NEW CONSPIRACY CHARGE AND  
REFUSING TO GRANT RELIEF LATER AT TRIAL

The Washington Constitution provides that the accused in a criminal case shall have the right not only to a speedy, public trial before an impartial jury but that the jury be “of the county in which the offense is charged to have been committed.” Art. I, § 22; see State v. Dent, 123 Wn.2d 467, 479, 869 P.2d 392 (1994). The right to proper venue is not an element of the crime but is instead a constitutional right. Id. Where, as here, a defendant properly raises a challenge to venue before jeopardy attaches and the jury is sworn, the right to proper venue has not been waived. See, State v. McCorkell, 63 Wn. App. 798, 801, 822 P.2d 795, review denied, 119 Wn.2d 1004 (1992).

In this case, this Court should reverse, because Mr. Stearman properly raised his motion to change venue and the trial court abused its discretion in denying that motion. Further, the court should not have permitted the prosecution to defeat the motion by adding the unsupported charge of conspiracy. Finally, the court should have addressed the issue properly when counsel raised it again at the close of the state's case.

a. Relevant facts

Before trial, Stearman filed a motion for change of venue, arguing that the case should be tried in King County, not Pierce County. CP 9-26. In the motion, he noted that Stearman and his brother lived in a house in

Seattle and that the charged crimes all occurred at that home. CP 10. He agreed that while Pierce County was the “appropriate venue” for those who committed the burglary at Sportco, which was in that county. CP 10. He pointed out, however, that the possession of the stolen guns and all the alleged trafficking acts occurred at the residence in King County, not in Pierce County, and argued that he was entitled to have the case tried in King County under CrR 5.1 and the Washington constitution. CP 10.

The hearing on the motion was heard by Judge Murphy on July 10, 2012. 1RP 1. In response to the defendants’ motion, the prosecution had brought a motion to amend the information in order to add a count of conspiracy. 1RP 4. Counsel told the court he thought the amendment was an improper effort to try to keep the case in Pierce County and that “none of the overt acts occurred” in Pierce County. 1RP 4.<sup>2</sup>

Counsel argued that the law provided that, “where there is a reasonable doubt whether an offense has been committed in one or two or more counties, the action may be commenced in any such county.” 1RP 5; see 1RP 6 (counsel for Stearman adopting arguments). He also noted that the defendant has the right to change venue if there is “a reasonable doubt” as to where the actions occurred. 1RP 5. He argued that Stearman had the right to pick venue. 1RP 5-6.

Specific to Stearman, counsel questioned the factual basis for the proposed conspiracy charge. 1RP 6. He also stated his concern that the amendment to the information was “a tactical move to attempt to defeat

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<sup>2</sup>Counsel incorrectly referred to the existing charges as “three counts,” but the original information had charged only two. 1RP 5; see CP 1-2.

the venue motion[.]” 1RP 6-7.

The prosecutor told the court that he had met with the defense attorneys after the motion to change venue was filed, telling them that he was getting evidence on an ongoing fashion and it was possible Stearman and his then co-defendant, his brother, would be charged with conspiracy. 1RP 7. The prosecutor said the state had been waiting to get cell tower information and now knew that the various codefendants had contacted Stearman and his brother by phone from Pierce County the early morning of the incident and had then ended up in King County at their home. 1RP 8. The prosecutor said that the drive from King County to Pierce County would amount to an “overt act” for a conspiracy, so that an element of the conspiracy was committed in Pierce County. 1RP 9.

The prosecutor did not deny that the attempt to amend the information to add conspiracy was a tactical decision. 1RP 9. Instead, he just said, “[t]actics or not, it is supported by both facts and the law.” 1RP 9.

In response, counsel argued that the prosecution had not proven beyond a reasonable doubt that any of the acts occurred in Pierce County. 1RP 11. The prosecution had given no information about where any phone calls made after the burglary had occurred. 1RP 11. Counsel also raised questions about whether the evidence showed what the prosecution claimed about the cell tower. 1RP 11. Finally, he argued that venue is based on the offense and that, if the court was going to allow amending of the information, it should still move the existing counts to King County. 1RP 11.

In ruling, the court said that, in situations where there is a doubt as to whether a crime occurred in one county or another, the defendant has the right to change venue to any other county where the offense may have been committed. 1RP 14. The court made it clear, however, that this right did not mean the defendant could change venue “if there was a portion of a crime committed in one county and a portion of a crime committed in another county[.]” 1RP 14. The court looked at the trafficking in stolen property charge, noting that the allegation was that Stearman and his brother had acted as accomplices. 1RP 15. The judge went on:

There are two ways to commit trafficking in stolen property. One is to initiate, organize, plan, finance, direct, manage or supervise the theft of property for sale to others. The other is to knowingly traffic in stolen property. Both have been charged.

The theft of the firearms clearly occurred in Pierce County. The fact they were stolen firearms was generated because of actions that occurred in Pierce County. Both defendants were charged in Count II with possession of stolen firearms. The firearms were allegedly stolen because of actions that occurred in Pierce County.

1RP 15. The court then denied the motion for change of venue based on the original charges. 1RP 15. Regarding the state’s motion to add the conspiracy count, the court said that “additional evidence. . . has come to light that would indicate there were phone calls that were made from Pierce County” from the alleged burglars to the defendants in King County. 1RP 15-16. The court concluded that there were “clearly elements of the offenses of trafficking in stolen property and also conspiracy to commit trafficking in stolen property that took place in Pierce County that would give Pierce County venue.” 1RP 16.

At trial, after the prosecution rested, Stearman again raised his

objection to venue. RP 147. Counsel noted that Judge Murphy had denied the motion pretrial but argued that Article I, § 22 of the state constitution guaranteed the defendant the right to have a crime charged in the county where the crime occurred. RP 147. He argued that the unlawful possession and possession of a stolen firearm had all occurred in King County and there was no evidence of any trafficking in Pierce County. RP 147. He also pointed out that, while the weapons were stolen in Pierce County, there was no evidence that any of the elements of the crimes Mr. Stearman was accused of had occurred anywhere but King County. RP 147-48. The prosecutor said that another judge had already ruled on the issue and said, “certainly after the evidence and the State’s close” of evidence, the motion was “not exactly timely.” RP 148. The court said that the ruling on the motion was already part of the record and declined to consider it further, noting that Stearman could appeal. RP 148.

A few minutes later, the court dismissed the conspiracy charge for lack of evidence, declaring that there were not “enough overt acts over a protracted period of time that would indicate that he was doing anything other than wanting to possess stolen goods and facilitate the trafficking” rather than being involved in a conspiracy. RP 165.

- b. The trial court erred in denying the motion to change venue, in allowing the prosecution to add the conspiracy charge and in failing to properly address the issue after the state had rested

In general, under CrR 5.1, an action may be commenced and there is “venue” in 1) the county where the offense was committed or 2) in any county where an element of the offense occurred. See, State v. Rockl, 130

Wn. App. 293, 296, 122 P.3d 759 (2005). Under CrR 5.2(a), a court “shall order a change of venue upon a motion and showing that the action has not been prosecuted in the proper county.”

Here, at the time of the motion, Stearman faced two charges: Count I, trafficking in stolen property and Count II, possessing a stolen gun, for allowing the guns to remain at his home for a time knowing they were stolen. CP 114-16. Both of those crimes occurred wholly in King County. To prove the stolen gun possession offense, the prosecution had to show that Stearman had possession of a gun knowing it was stolen. See RCW 9A.56.130; RCW 9A.56.140. The operative criminal act is the possession, which here occurred in King County, at Stearman’s home. For the other offense, trafficking in stolen property, the prosecution had to prove that Stearman knowingly initiated, organized, planned, financed, directed, managed or supervised the theft of property for sale to others, or that he knowingly trafficked in stolen property. See RCW 9A.82.050. Here, the only allegation was that Stearman allowed his home to be used by another as a place to meet and sell guns that person - not Stearman - had stolen. Again, that conduct occurred only in King County, at Stearman’s home. The trial court erred in concluding that the trafficking and possession charges were properly tried in Pierce County.

But even if there was some question about whether part of the trafficking might have occurred in Pierce County, Stearman was still entitled to have the case heard in King County. CrR 5.1 provides, in relevant part:

- (b) **Two or more counties.** When there is a reasonable doubt whether an offense has been committed in one of two or more counties, the action may be commenced in any such county.
- (c) **Right to change.** When a case is filed pursuant to section (b) of this rule, **the defendant shall have the right to change venue to any other county in which the offense may have been committed.**

(Emphasis added). Under the plain language of the rule, when there is a reasonable doubt as to whether an offense has been committed in one of two counties, the action may be commenced in either. CrR 5.1(b). Regardless where an action is commenced, however, under subsection (c), the defendant has the right to change venue to any other county where the offense may have been committed. CrR 5.1(c); see State v. Harris, 48 Wn. App. 279, 282, 738 P.3d 1059 (1987).

Thus, even assuming there was a reasonable doubt whether all of the acts constituting “trafficking” had occurred in King County at Stearman’s home, Stearman still had the right to change venue to that county, and the trial court erred in denying the motion.

The trial court also erred in allowing the prosecution to add a charge of conspiracy in order to defeat the motion for change of venue. As noted in Dent, when there is a conspiracy charge, “venue is proper in any county where an overt act in furtherance of the conspiracy took place.” 123 Wn.2d at 481. Phone calls which further the conspiracy can be such an “overt act.” Id.

But here, the prosecution simply declared that there were such phone calls without producing any evidence of them to defeat the motion.

Further, at trial, the prosecution did not introduce evidence of any such phone calls, or of any conspiracy. Indeed, the utter lack of evidence to prove conspiracy caused the trial court to take the rare step of dismissing the conspiracy charge for insufficiency of the evidence. Notably, the jury also found insufficient evidence of trafficking, acquitting Stearman of that count. See CP 137-19. The prosecution's addition of an unsupported conspiracy charge should not have been allowed to defeat Stearman's motion for change of venue.

Finally, the trial court also erred in failing to address the issue at the close of the prosecution's case. It is proper to raise venue again during trial, or even for the first time, when the evidence introduced at trial raises a question of venue. See Dent, 123 Wn.2d at 480. In Dent, the Court held that, when a defendant demonstrates that there is not sufficient proof of venue at the close of the prosecution's case, the court should allow the prosecution to "reopen" their case to present such evidence, unless the defendant makes a showing of actual prejudice. 123 Wn.2d at 480. If, after such reopening (or if the prosecution chooses not to reopen), there remains a genuine issue of fact about venue, the issue should be submitted to the jury, because it "becomes a matter for resolution by the trier of fact." Id.

Here, instead of examining the issue to determine whether the prosecution had in fact shown any acts taken in Pierce County which would support venue, when counsel raised the issue again, the trial court simply declared that the issue had already been decided pretrial and could be addressed on appeal. Under Dent, however, where, as here, the

prosecution failed to present evidence that any of the elements of the charged crimes occurred in the county and thus has failed to support venue, the trial court is required to examine the issue again and, if questions remain, submit the question of venue to the jury. The trial court was unwilling to even consider the issue, assuming, incorrectly, it need not do so.

The trial court erred in denying Stearman's pretrial motion to change venue, in allowing the prosecution to add an unsupported conspiracy charge in its efforts to defeat venue and in failing to properly address the issue and dismiss the charges for improper venue. This Court should so hold and should reverse.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and dismiss the convictions based on improper venue.

DATED this 21st day of April, 2014.

Respectfully submitted,  
/s/ Kathryn Russell Selk  
KATHRYN RUSSELL SELK, No. 23879  
Counsel for Appellant  
RUSSELL SELK LAW OFFICE  
Post Office Box 31017  
Seattle, Washington 98103  
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel via first class postage prepaid at the following address, Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402, and to Mr. Andrew Stearnan, 12270 Second Avenue S.W., Seattle, WA. 98416.

DATED this 21st day of April, 2014.

/s/ Kathryn Russell Selk  
KATHRYN RUSSELL SELK, No. 23879  
Counsel for Appellant  
RUSSELL SELK LAW OFFICE  
Post Office Box 31017  
Seattle, Washington 98103  
(206) 782-3353