

NO. 46456-0-II

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

STATE OF WASHINGTON, Respondent

v.

ROBERT EDWARD DOTY JR, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.12-1-01664-0

BRIEF OF RESPONDENT

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A. ANSWERS TO ASSIGNMENTS OF ERROR

- I. THE TRIAL COURT DID NOT ERR IN FINDING THAT DEFENDANT, BY WAY OF A POSITIVE URINE TEST, VIOLATED A SUPERVISION CONDITION AGAINST USING CONTROLLED SUBSTANCES.
- II. THE TRIAL COURT DID NOT ERR WHEN IT DID NOT ENTER A FINDING REGARDING THE SUBSEQUENT LAB ANALYSIS OF THE URINE TEST.
- III. THE TRIAL COURT DID NOT ERR WHEN IT DID NOT ENTER A FINDING ABOUT DEFENDANT'S TWO PREVIOUS URINE TESTS.
- IV. FINDING OF FACT #7 IS SUPPORTED BY THE REPORT OF PROCEEDINGS.
- V. THE TRIAL COURT DID NOT ERR IN CONCLUDING THAT THE POSITIVE URINE TEST RESULT GAVE DEPARTMENT OF CORRECTIONS AUTHORITY TO ARREST DEFENDANT.
- VI. THE TRIAL COURT DID NOT ERR WHEN IT FOUND THAT DEFENDANT WAS LAWFULLY SEIZED.
- VII. THE TRIAL COURT DID NOT ERR IN FINDING THAT THE ARREST AND SEARCH OF DEFENDANT WAS LAWFUL.
- VIII. THE STATE DID NOT FAIL TO MEET ITS BURDEN TO PROVE DEFENDANT'S CRIMINAL HISTORY AT SENTENCING.
- IX. THE TRIAL COURT DID NOT ERR IN IMPOSING DEFENDANT'S SENTENCE.

B. STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Robert Doty Jr. was charged by an amended information with Possession of a Controlled Substance – Methamphetamine for an incident that happened on or about September 11, 2012, and Bail Jumping on a Class B or C Felony for missing a court date for a CrR 3.6 hearing on or about January 10, 2014. CP 46-47. The Possession of a Controlled Substance count was the basis of CrR 3.6 motion to suppress that was heard by The Honorable John Nichols on May 21, 2014. RP 33-109, CP 2-4, 6-14. Following the denial of the motion to suppress, the case proceeded to a stipulated facts bench trial before The Honorable John Nichols which commenced on June 13, 2014, and concluded the same day with the trial court's verdict and dismissal of the Bail Jump on the State's motion. RP 112-133.

The trial court found Mr. Doty guilty of Possession of a Controlled Substance - Methamphetamine and sentenced him to a standard range sentence of 14 months. RP 117, 124; CP 60-79. Mr. Doty filed a timely notice of appeal. CP 80.

II. STATEMENT OF FACTS¹

On September 11, 2012, Mr. Doty reported to Ron Woolcock's office to provide a urine sample. RP 39. Officer Woolcock was Mr. Doty's supervising community corrections officer. RP 38-39. Officer Woolcock was supervising Mr. Doty as the result of a possession charge in Oregon where the supervision was transferred to Washington. RP 38. A condition of Mr. Doty's supervision was that he not use methamphetamine. RP 43. The urine sample that Mr. Doty provided on September 11, 2012, tested positive for the presence of methamphetamine using the "InstaCup" test. RP 39-40. Mr. Doty denied using methamphetamine. RP 45-46.

The "InstaCup" test has been used by the Clark County Department of Corrections for two to three years. RP 40. Officer Woolcock testified that the "InstaCup" test has a lower threshold for when it reports a positive compared to the laboratory test and that he believed that the threshold amount for the "InstaCup" test was five nanograms whereas the threshold amount for the laboratory test is around fifty

¹ No exhibits were entered into evidence at the CrR 3.6 hearing. Consequently, the evidence before the trial court, and the only evidence on which it could base its decision, was in the form of testimony of the witnesses called. RP 37-93. This court should decline Mr. Doty's invitation to look at documents not admitted into evidence and other comments or arguments not adduced at the suppression hearing. Br. of App. at 4-8, 15-17; CrR 3.6 ("Motions to suppress physical . . . evidence . . . shall be in writing supported by an affidavit or document setting forth the facts the moving party *anticipates will be elicited at a hearing*. . . .") (emphasis added). To the extent that the court considers matters outside of the evidence actually admitted at the suppression hearing the State respectfully requests the court review the whole record.

nanograms. RP 40-42, 44. That means that the “InstaCup” test will test positive at a lower amount of a controlled substance in a person’s system as compared to the laboratory test. RP 42.

Following the positive test, Officer Woolcock decided not to arrest Mr. Doty. RP 40-41, 45. Instead, Officer Woolcock decided to send Mr. Doty’s urine to the laboratory because, according to him, Oregon prefers to have the laboratory results and he wanted the backup of the lab in case the probation violation allegation went to hearing. RP 41, 44, 46, 51. Later that same day, Officer Woolcock communicated the results of Officer Woolcock’s urine test to Rees² Campbell also of the Department of Corrections. RP 43, 45, 49-50. Officer Woolcock let Officer Campbell know that he did not arrest Mr. Doty. RP 65.

Officer Campbell, as a result of his work, had known Mr. Doty for almost 16 years and had arrested him numerous times for probation violations and new violations of law. RP 48, 58. Because of this relationship, Officer Campbell was not fond of Mr. Doty. RP 58-59.³ Officer Campbell had noticed in the Department of Corrections (DOC) computer system that Mr. Doty had tested positive for methamphetamine use in addition to hearing the information from Officer Woolcock. RP 49-

² While spelled throughout the transcript as Reece, Mr. Campbell spells the phonetically indistinguishable name he goes by as Rees.

³ Mr. Doty called his mother at the suppression hearing. RP 68-73. Her testimony focused on her perception that Officer Campbell did not like her son and that he was rude to her.

50, 60, 65. According to Officer Campbell, Mr. Doty had provided urine numerous times in the past that tested positive for drug use. RP 50, 60-61. Officer Campbell informed Officer Woolcock that he would probably be arresting Mr. Doty if he ended up making contact with him. RP 50.

During that same day, Officer Campbell was out with the West Neighborhood Response Team actively looking for people with felony warrants and in particular one Joseph Crumley. RP 51. Officer Campbell wanted to check a specific address because he had received information that Mr. Crumely was at that location. RP 52. Upon arriving at that location, Officer Campbell saw Mr. Doty sitting in his vehicle speaking with Angela Stewart, a felon and known drug user who Officer Campbell had previously supervised. RP 53-54, 63. Officer Campbell arrested Mr. Doty. RP 54-55.

Officer Campbell testified that Mr. Doty told him that he had stopped by to speak with Ms. Stewart because they used to date. RP 54-55, 64. Additionally, Officer Campbell testified that Ms. Stewart said that Mr. Doty had stopped by to catch up since they had not seen each other for such a long time. RP 54-55, 64. Ms. Stewart, testifying while serving a prison sentence, stated that the only contact she had with Mr. Doty that day was when she saw him backing out of her driveway and she waved goodbye to him. RP 86-87. She testified that two did not converse.

RP 86-87. Ms. Stewart and Mr. Doty had known each other for 15 years and dated for six or seven of those years. RP 88.

Officer Campbell told the court that he arrested Mr. Doty for being in violation of his supervision as a result of the positive urine test, having prohibited contact with Ms. Stewart, and having prohibited contact with another person. RP 55, 57. Following Mr. Doty's arrest, his person and vehicle were searched and the drugs that led to this prosecution were discovered. RP 56-57. Ultimately, days after the arrest and search of Mr. Doty, the test results from the September 11, 2012, urine that was sent to laboratory came back as negative. RP 41.

C. **ARGUMENT**

I. **OFFICER CAMPBELL HAD A WELL-FOUNDED SUSPICION THAT MR. DOTY VIOLATED THE CONDITIONS OF HIS SUPERVISION BY USING METHAMPHETAMINE WHEN MR. DOTY PROVIDED A URINE SAMPLE THAT TESTED POSITIVE FOR METHAMPHETAMINE.**

When a defendant challenges a trial court's denial of a suppression motion, "an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). "Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational

person of the truth of the finding.” *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Findings of fact are verities on appeal when unchallenged. *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009). A trial court’s conclusions of law following a suppression hearing are reviewed de novo. *Garvin*, 166 Wn.2d at 249.

Persons on community custody, i.e., probationers, have “diminished privacy rights.” *State v. Jardinez*, --- Wn.App. ----, 338 P.3d 292, 294 (2014). Thus, the State may “supervise and scrutinize a probationer . . . closely.” *Id.* (citation omitted). Washington law allows a probationer to be arrested, searched, or both when “there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence.” RCW 9.94A.631(1). Reasonable cause means that an officer has a “well-founded suspicion that a violation has occurred.” *Jardinez*, 338 P.3d at 295 (quoting *State v. Massey*, 81 Wn.App. 198, 200, 913 P.2d 424 (1996)).

In determining whether an officer’s suspicion was well-founded, courts must look at “the totality of circumstances known to the officer at the inception of the stop.” *State v. Lee*, 147 Wn.App. 912, 917, 199 P.3d 445 (2008) (quotation omitted) (“the whole picture [] must be taken into account when evaluating whether there is reasonable suspicion.”). Thus,

the focus is on “what the officer knew at the time of the stop.” *State v. Z.U.E.*, 178 Wn.App. 769, 780, 315 P.3d 1158 (2014) (citing *Lee*, 147 Wn.App. at 917). That said, even if an officer’s suspicion is well-founded and has requisite legal authority to arrest a probationer, he need not act immediately. *Hoffa v. U.S.*, 385 U.S. 293, 310, 87 S.Ct. 408 (1996) (“There is no constitutional right to be arrested.”); *Accord State v. Quezadas-Gomez*, 165 Wn.App. 593, 267 P.3d 1036 (2011). Additionally, the Fourth Amendment “does not proscribe inaccurate search only unreasonable ones.” *State v. Seagull*, 95 Wn.2d 898, 908, 632 P.2d 44 (1981); *State v. Anderson*, 51 Wn.App. 775, 780, 755 P.2d 191 (1988) (holding that “police officers must be permitted to act before their reasonable belief is verified”) (citation omitted). Consequently, that an officer’s reasonable suspicion may turn out to be mistaken does invalidate the initial search or seizure. *See State v. Snapp*, 174 Wn.2d 177, 275 P.3d 289 (2012); *State v. Creed*, 179 Wn.App. 534, 319 P.3d 80 (2014) (“An officer’s suspicion, even if mistaken, must still be reasonable in light of the objective reality with which he or she is presented.”); *Seagull*, 95 Wn.2d at 907-908.

Here, Mr. Doty’s positive urine result for methamphetamine use using the “InstaCup” test provided Officer Campbell with a well-founded suspicion that Mr. Doty had violated a condition of his supervision by

using methamphetamine. As testified to by Officer Woolcock, the Department of Corrections has been using the “InstaCup” test for two to three years. RP 40. It is unfathomable that the Department of Corrections would continue to use a drug test that is so inaccurate that it fails to not even give its officers a reasonable suspicion that a probationer who tests positive for drug use is actually using drugs.

Mr. Doty’s attempt to portray the “InstaCup” test as unreliable is unpersuasive. For one, he relies on documents and argument outside the evidence presented at the suppression hearing and two, in their proper context, neither the documents nor argument stand for the proposition the “InstaCup” test is near as inaccurate as Mr. Doty would like this court to believe. For example, Mr. Doty claims that Officer Woolcock’s September 12th report proves that the “InstaCup” test has twice otherwise generated false positives on urine samples he supplied and then generously credits his trial counsel’s argument at a supervised release hearing that he (Mr. Doty) provided “three positives by the rapid test but when they go up to the laboratory they’re – they’re negative every single time.” Br. of App. at 15-16 (citing CP 36; RP 14). On the contrary, “questionable” does not equal “false positive” and certainly not in the sense that the tests falsely conveyed that Mr. Doty was using methamphetamine, especially in light of the fact that the Supervised Release Officer had a laboratory confirmed

positive at the time of the hearing, and Officer Woolcock and the laboratory otherwise believed that Mr. Doty was diluting his samples. *See* RP 21-26.

Moreover, the totality of the circumstances known to Officer Campbell supported the suspicion that Mr. Doty had used methamphetamine rather than militated against that suggestion, as according to Officer Campbell (1) Mr. Doty had previously provided “dirty UAs”; (2) he had received a phone call from an informant telling him that Mr. Doty and his current girlfriend were using and selling methamphetamine; and (3) he found Mr. Doty at the home of Ms. Stewart, who Mr. Campbell had previously arrested for both possession and intent to deliver methamphetamine. RP 49-50, 52-53, 59-60. Additionally, Mr. Doty was on probation for a controlled substance offense. RP 38. Thus, the timing and circumstance of Officer Campbell’s arrest and search of Mr. Doty was lawful and based on a well-founded suspicion that Mr. Doty was violating the conditions of his community custody. Moreover, there is substantial evidence supporting the findings of fact that Mr. Doty challenges.

II. THERE WAS NO PRETEXTUAL ARREST.

Mr. Doty cites *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999), for the proposition that case law forbids the type of arrest that

occurred here. But *Ladson* addressed pretextual traffic stops, holding that a stop for a traffic offense may not be used as a pretext to investigate another crime. *Ladson*, 138 Wn.2d at 352-53, 360. This holding does not apply here because Officer Campbell seized Mr. Doty to arrest him for his probation violation, not as a pretext to investigate another crime, and he did not utilize a traffic offense to attempt to justify the seizure.

III. MR. DOTY WAIVED HIS CHALLENGE TO HIS OFFENDER SCORE BECAUSE HE AFFIRMATIVELY ACKNOWLEDGED THAT HIS OUT-OF-STATE CONVICTIONS WERE PROPERLY INCLUDED IN HIS OFFENDER SCORE.

The right to argue that an offender score “has been miscalculated can be waived.” *State v. Collins*, 144 Wn.App 547, 555, 182 P.3d 1016 (2008). Waiver applies where “the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.” *Id.* at 555-56 (quoting *In re Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002)).

Consequently, “[w]hen a defendant affirmatively acknowledges that a foreign conviction is properly included in the offender score, the trial court does not need further proof of classification before imposing a sentence based on that score” and the defendant cannot then raise the argument for the first time on appeal that his offender score was

miscalculated. *Id.* at 555-56 (citing *State v. Ford*, 137 Wn.2d 472, 483 FN. 5, 973 P.2d 452 (1999); *State v. Mendoza*, 165 Wn.2d 913, 927-28, 205 P.3d 113 (2009)) (holding that absent an obvious error in the sentence, “any objection the inclusion of acknowledged criminal history was waived.”) *State v. Ross*, 152 Wn.2d 220, 230-31, 95 P.3d 1225 (2004) (holding that “[a]lthough the State generally bears the burden of proving the existence and comparability of a defendant's prior out-of-state and/or federal convictions, we have stated a defendant's affirmative acknowledgment that his prior out-of-state and/or federal convictions are properly included in his offender score satisfies SRA requirements” and waives further challenges to his offender score). A defendant’s “mere failure to object to a prosecutor's assertions of criminal history does not constitute such an acknowledgment,” instead, some “facts and information introduced for the purposes of sentencing” must be admitted to suffice as an affirmative acknowledgement under the case law. *Mendoza*, 165 Wn.2d at 928 (citing *Ford*, 137 Wn.2d at 482-483).

State v. Birch is instructive. 151 Wn.App. 504, 213 P.3d 63 (2009). There, the defendant challenged the trial court’s decision to count his California robbery conviction as a strike under the POAA. *Id.* *Birch* held that because the defendant affirmatively acknowledged that his “California robbery conviction was properly included in his offender score, the

conviction was “properly included without further proof of classification.” *Birch*, 151 Wn.App. at 518. In determining that the defendant affirmatively acknowledged the out-of-state robbery conviction, the Court of Appeals relied on two statements from the defendant’s trial counsel that follow: “we are here, obviously, because [the defendant] is going to receive a life sentence.” *Id.* at 517. And: “I suggested the possibility that [the defendant] may not want to agree to that conviction. . . . And I talked with [the defendant] about that possibility today. And his response is, that was a conviction that I received, and I am not going to say I didn’t because it is what happened.” *Id.* at 518. In addition, *Birch* noted that the defendant and his attorney signed a document entitled, “Understanding of Defendant’s Criminal History.” *Id.* at 517.

Here, at sentencing, Mr. Doty’s trial attorney stated: “I *know* that that [sic] Mr. Doty is maxed out.” RP 120 (emphasis added). In addition, Mr. Doty’s attorney referenced Mr. Doty’s Oregon convictions in making his sentencing pitch and thereby necessarily acknowledged they were properly a part of Mr. Doty’s criminal history and offender score, he stated:

“We have a string of PCS charges. We have a couple of, I gue - - was it identity theft or – or what did you say, Counsel?”

[STATE]: There – there was an identity theft

...

[MR. DOTY'S COUNSEL]: "And – and as the Court knows, you know, possession of stolen property, identity theft – they're basically one and the same with the PCS charges. It's – it's the addict trying to get by. And we're talking some stuff that goes back quite a ways.

RP 120-21. Mr. Doty could only be "maxed out" (an offender score of 9 or greater) if his Oregon convictions were included in his offender score. CP 74-77. That Mr. Doty refused to sign the supplied Declaration of Criminal History is of no matter given his attorney's affirmative acknowledgment at the sentencing hearing and the fact that both he and his attorney signed the Judgement and Sentence in which Mr. Doty's offender score was listed as a 9. CP 64-73. Consequently, Mr. Doty waived his challenge to his offender score calculation.

If this court determines, however, that Mr. Doty did not affirmatively acknowledge his criminal history then his remedy is a resentencing. RCW 9.94A.530(2). At such a resentencing, "both parties have the opportunity to present any evidence relevant to ensure the accuracy of the criminal history." *State v. Jones*, 182 Wn.2d. 1, 10-11, 338 P.3d 278 (2014); *State v. Cobos*, 182 Wn.2d 12, 338 P.3d 283 (2014) (holding that the State was not limited to evidence regarding defendant's criminal history presented at original sentencing).

D. CONCLUSION

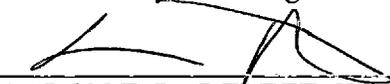
For the reasons argued above, Mr. Doty's conviction and sentence should be affirmed.

DATED this 3 day of April, 2015.

Respectfully submitted:

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