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Court of Appeals
Division III
State of Washington

NO. 32612-8-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,
V.
GERHARD R. WINTERMEIER, JR.,
Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR

1. The State failed to prove, beyond a reasonable doubt, the enhancements alleged in Counts II and III of the Second Amended Information? (CP 13)

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Did the State present sufficient evidence to establish the school bus stop enhancements as set forth in Counts II and III?

STATEMENT OF CASE

Nathan Wooten was working as a confidential informant (CI) for Detective Mathena and Trooper Giacomazzi. Mr. Wooten was working off a charge of delivery of heroin with a school zone enhancement. (RP 173, ll. 17-20; RP 104, ll. 1-10)

On June 5, 2013 Mr. Wooten conducted a “controlled buy” from Gerhard Wintermeier, Jr. It occurred in the parking lot at Walmart. Sergeant Foreman of the Chelan County Sheriff’s Office observed the exchange occur at Mr. Wintermeier’s van. (RP 81, l. 5 to RP 83, l. 8; RP 84,

ll. 23-25; RP 86, ll. 4-5; RP 140, ll. 19-20; RP 142, ll. 3-15; RP 176, l. 16 to RP 177, l. 6)

Prior to the actual transaction occurring Mr. Wooten entered Walmart. He provided the buy money to Mr. Wintermeier for purchase of items at the checkout stand. The money was later recovered from the cashier's till. (RP 87, ll. 5-12; RP 89, l. 23 to RP 90, l. 25; RP 175, ll. 14-24)

A second "controlled buy" occurred on June 26, 2013. This was a buy-bust operation. The exchange was in the parking lot at the Buckboard Café. (RP 91, l. 11 to RP 92, l. 9; RP 137, ll. 3-7)

After the transaction occurred Mr. Wintermeier's van was stopped at Smallwood's Harvest. He was arrested. He was advised of his *Miranda*¹ warnings. He offered to work as a CI for the task force. (RP 94, ll. 17-19; RP 95, ll. 4-6; RP 96, ll. 4-5; ll. 21-22)

Detective Orrell of the task force searched Mr. Wintermeier at Smallwood's. He recovered the buy money. Sergeant Foreman then discussed the CI contract with Mr. Wintermeier at the Wenatchee Police Department. (RP 133, ll. 8-10; RP 138, ll. 2-3; RP 146, ll. 1-12)

The officers conducted an interview of Mr. Wintermeier which was recorded. He admitted that he was a drug dealer. He also admitted

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966)

that he sold an “8-ball” to Mr. Wooten. He further advised the officers that there were drugs in the van and that they were packaged for sale. (RP 98, ll. 8-9; ll. 21-23; RP 99, ll. 1-16)

Prior to Mr. Wintermeier’s signing the CI agreement the officers required him to conduct a “controlled buy” on June 26. He did so. The agreement was then signed. (RP 114, ll. 1-10)

An Information was filed on December 26, 2013 charging Mr. Wintermeier with two (2) counts of delivery of methamphetamine and one (1) count of possession with intent to deliver methamphetamine. (CP 6)

An Amended Information was filed on February 12, 2014 adding an additional count of delivery of methamphetamine and two (2) school bus stop enhancements. (CP 10)

The Second Amended Information added the school bus stop enhancement to each of three (3) counts. One (1) count of delivery of methamphetamine was deleted.

Multiple continuances were granted prior to the commencement of trial on June 3, 2014. (CP 16; CP 19; CP 20; CP 21; CP 22)

A CrR 3.5 hearing was conducted on May 29, 2014 before the Honorable Alicia H. Nakata. Detective Mathena testified that Mr. Wintermeier may have been using drugs on June 26, 2013; but he was not very high. (RP 5, ll. 20-21; RP 9, ll. 7-8)

Mr. Wintermeier admitted that he was advised of his *Miranda* warnings. However, he claimed that he had been using valium and methamphetamine. He was also drinking that day. He stated he was not “in his right frame of mind.” (RP 7, ll. 23-24; RP 26, ll. 10-22; RP 28, l. 18 to RP 29, l. 1; RP 33, ll. 22-23)

On cross-examination Mr. Wintermeier stated that he knew he had to hide the fact that he had been using on June 26 in order to conduct the controlled buy that was required of him for the CI contract. (RP 36, l. 12 to RP 37, l. 7)

Judge Nakata entered an oral ruling denying the CrR 3.5 motion. (RP 48, l. 11 to RP 51, l. 8; RP 51, l. 11 to RP 52, l. 7)

Mr. Wintermeier’s CI contract was cancelled after conducting numerous controlled buys for the task force. It was invalidated due to the fact that he continued to deal drugs and was trafficking in stolen property. (RP 19, l. 25 to RP 20, l. 8; RP 20, ll. 16-21)

Timothy Bentz, the transportation director for Cascade School District, testified concerning two (2) bus stops that were near the Buckboard Café. One (1) was at Rollercoaster Road and U.S. 97. The second was in front of Smallwood’s. (RP 120, l. 21 to RP 121, l. 1)

Katie Harris from the Wenatchee School District transportation department was called as a witness. Mr. Wintermeier objected to her tes-

timony on the basis that he did not know she was a witness until the day prior to trial and could not properly prepare for cross-examination. He moved to exclude her testimony under CrR 4.7. The trial court denied the motion, but gave defense counsel an opportunity to interview her and conduct his own measurements. (RP 62, l. 22 to RP 65, l. 7; RP 68, l. 12 to RP 69, l. 8; RP 154, ll. 9-11)

Ms. Harris testified that there were school bus stops at Horse Lake Road and Honeysett, as well as Harbell and Maiden Lane near the Wenatchee Walmart. (RP 154, ll. 19-23)

A search warrant was issued for the van after it was seized. Methamphetamine was recovered from the van. It was in a lock box under the passenger seat. (RP 224, l. 1 to RP 226, l. 4)

Raymond Kusumi from the Washington State Patrol Crime Lab conducted testing on the items which were obtained pursuant to the “controlled buys” and search of the van. They all contained methamphetamine. (RP 122, ll. 7-9; RP 124, ll. 15-16; RP 125, ll. 7-8; ll. 21-22; RP 126, ll. 11-12; ll. 22-24; RP 127, ll. 8-9)

Trooper Giacomazzi did not conduct any measurements from the school bus stops to the location of the “controlled buys” until the day prior to trial. Using a calibrated wheel he determined that the distance from the school bus stop at Horse Lake Road and Honeysett to the Walmart parking

lot where the van was parked was three hundred and seventy (370) feet. (RP 199, ll. 18-19; RP 208, l. 16 to RP 209, l. 5)

He also measured the distance from the Buckboard Café to the intersection of Rollercoaster Road and U.S. 97. The distance was five hundred and twenty-eight (528) feet. (RP 218, l. 6 to RP 219, l. 2)

No distance measure occurred at Smallwood's since the bus stop is in front of that business. (RP 219, ll. 3-15)

In closing argument the prosecuting attorney argued that since Smallwood's was ground zero the enhancement for Count III was established. Alternatively, he argued that the measurement for the enhancement on Count II could also be used for Count III. (RP 271, ll. 14-20; RP 272, ll. 15-23; RP 272, l. 24 to RP 273, l. 6)

A jury found Mr. Wintermeier guilty of all three (3) counts. They returned a special verdict on all three (3) counts involving the school bus stop enhancement. (CP 82; CP 83; CP 84; CP 85; CP 86; CP 87)

Judgment and Sentence was entered on July 15, 2014. The Judgment and Sentence, insofar as the prison DOSA is concerned, is confusing to say the least. (CP 91)

Mr. Wintermeier filed his Notice of Appeal on July 18, 2014. (CP 105)

SUMMARY OF ARGUMENT

An involuntary stop and arrest of an individual within a school bus stop zone precludes imposition of an enhancement in the absence of a volitional act by the individual.

Failure to establish the exact location of a school bus stop precludes application of the enhancement in a drug case.

ARGUMENT

“... [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*.”

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), *citing Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed.2d 560 (1979).

Mr. Wintermeier contends that the State failed to prove, beyond a reasonable doubt, the school bus stop enhancements for Counts II and III.

RCW 9.94A.533(6) states:

An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of Chapter 60.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827.

All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

RCW 69.50.435(1) provides, in part:

Any person who violates RCW 69.50.401 by ... delivering, or possessing with intent to ... deliver a controlled substance listed under RCW 69.50.401 ... to a person:

...

(c) Within one thousand feet of a school bus stop route designation by the school district

....

“School bus route stop’ means a school bus stop as designated by a school district.” RCW 69.50.435(6)(c)

No documentation of any kind was presented to the jury to allow them to ascertain the exact location of the school bus stops. The measurements taken by Trooper Giacomazzi likewise were not documented so that the jury could make an independent determination as to location.

Mr. Wintermeier recognizes that RCW 69.50.435(5) includes the following language: “This section shall not be construed as precluding the prosecution from introducing or relying upon any other evidence or testimony to establish any element of the offense.”

Initially, Mr. Wintermeier asserts that the enhancement on Count III must be dismissed. Even though Smallwood’s is a school bus stop, Mr.

Wintermeier did not voluntarily go there. Smallwood's is the location where the surveillance officers stopped his vehicle and arrested him.

A comprehensive analysis of the need for a voluntary act in connection with zone enhancements is contained in *State v. Eaton*, 168 Wn.2d 476, 480-85, 229 P.3d 704 (2010).

The *Eaton* case addressed a corrections facility enhancement involving controlled substances. Mr. Eaton was arrested and transported to the county jail. An inventory search revealed a controlled substance. The Court ruled at 485: "For these reasons we hold that RCW 9.94A.533(5) encompasses a volitional element that the State must prove beyond a reasonable doubt."

There was nothing volitional about Mr. Wintermeier stopping in front of Smallwood's when surrounded by police vehicles and officers.

The prosecuting attorney argued that the jury could also consider the school bus stop at Rollercoaster Road and U.S. 97 in connection with Count III.

It is Mr. Wintermeier's position that this constitutes bootstrapping.

There is no independent evidence to indicate that Mr. Wintermeier intended to deliver any other controlled substance (than what was delivered) near the Buckboard Cafe. The evidence reflects that his sole pur-

pose in being there was the transfer of the methamphetamine which was actually transferred to the CI.

Mr. Wintermeier may have possessed additional drugs while he was at the Buckboard Café. However, in the absence of any testimony that he intended to deliver those drugs within that school bus stop zone, the enhancement cannot apply to Count III.

Finally, the evidence as to the measurements for Count II is highly suspect.

There was no testimony as to the exact location of the school bus stop. The reference was to Rollercoaster Road and U.S. 97.

Trooper Giacomazzi testified as follows:

From where I had observed the hand-to-hand of the methamphetamine take place just north of the Buckboard in that parking lot, I used a wheeled device that again, I had confirmed that the device was operable and accurate before making this measurement and I measured from where I observed the hand-to-hand occur to the intersection of Highway 97 and Rollercoaster Road **where I was told the school bus stop was.**

(RP 218, ll. 19-25) (Emphasis supplied.)

Mr. Bentz testified as follows:

Q: ... [W]ere there any school bus stops in the area of Buckboard Café on Highway 97?

A: Yes, I've got several in that vicinity, but one -- probably **the closest one would be Rollercoaster Road and U.S. 97.**

(RP 121, ll. 3-6) (Emphasis supplied.)

The testimony is so vague that there is no credible way that a reasonable juror could conclude that the transaction charged under Count II occurred within one thousand (1,000) feet of a school bus stop.

Where is the school bus stop in relation to the intersection?

Which corner of the intersection is the school bus stop located on?

Does the school bus stop in an adjacent parking lot?

Is there a shelter at that location for students waiting for the bus?

Why was not a map of the location introduced?

Can measurements based upon hearsay concerning the location comport with the State's burden of proof?

The questionable nature of the location and measurements for the school bus stop alleged for the enhancement under Count II precludes a finding that the State carried its burden of proof.

CONCLUSION

The school bus stop enhancements under Counts II and III should be dismissed. Mr. Wintermeier is entitled to be resentenced in the absence of those enhancements.

DATED this 24th day of November, 2014.

Respectfully submitted,

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NO. 32612-8-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	CHELAN COUNTY
Plaintiff,)	NO. 13 1 00640 6
Respondent,)	
)	
v.)	CERTIFICATE OF SERVICE
)	
GERHARD R. WINTERMEIER, JR.,)	
)	
Defendant,)	
Appellant.)	
)	

I certify under penalty of perjury under the laws of the State of Washington that on this 24th day of November, 2014, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

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