

FILED
NOVEMBER 9, 2015
Court of Appeals
Division III
State of Washington

NO. 33278-1-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DANIEL ALCARAZ MENDOZA,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by admitting testimony of the arresting officer, in the absence of an independent recollection, after he had already improperly refreshed his recollection when he testified from his report.

2. The trial court erred by admitting Exhibit 2 in the absence of an adequate foundation and evidence establishing the chain of custody.

3. The properly admitted evidence was insufficient to establish the unlawful possession of a controlled substance beyond a reasonable doubt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Ultimately, the witness must actually recall the occurrence, event, or matter in his own mind. For a witness to use memoranda to refresh his recollection, the witness' memory must need refreshing, and the trial court must be satisfied that the witness is not using the notes to supplant his own memory. Did the trial court erred by admitting testimony of the arresting officer, in the absence of a demonstrated independent recollection, and after he had already improperly refreshed his recollection, when testified from his report?

2. A physical evidence connected with the commission of a crime may admitted into evidence only if it is satisfactorily identified

and shown to be in substantially the same condition as when the crime was allegedly committed. Where the evidence here was not readily identifiable and was susceptible to alteration by tampering or contamination, and the proponent did not provide the testimony of each custodian in the chain of custody, did the trial court abuse its discretion by admitting Exhibit 2 in the absence of an adequate foundation and evidence establishing the chain of custody?

3. The State had the burden of proving all the elements of unlawful possession of a controlled substance including the nature of the substance and the fact of possession. In the absence of the improperly admitted evidence, supra, was the properly admitted evidence insufficient to establish unlawful possession of a controlled substance beyond a reasonable doubt?

C. STATEMENT OF THE CASE

On July 4, 2013, appellant, Mr. Daniel Alcaraz Mendoza, was contacted and arrested by Kennewick Police Officers Dale Kuehny and Matt Newton, at the tire business where he worked, based on information they had received from another officer.¹ RP 8-9, 16-18.²

¹ Officer Kuehny testified he was contacted by a Detective Long and the affidavit of probable cause referred to allegations of a July 1, 2013, domestic violence incident. RP 17; CP 3. The propriety of the arrest was not litigated.

Following his arrest, Officer Kuehny searched Mr. Alcaraz Mendoza and found a small plastic baggie with a white crystalline substance inside. RP 18. The substance later field tested positive for methamphetamine. RP 18-19.

Officer Newton spoke to Mr. Alcaraz Mendoza in Spanish and, following Miranda, when asked what the substance was that Officer Kuehny had pulled from his pocket, Mr. Alcaraz Mendoza reportedly said, “It’s methamphetamine.” RP 12. Officer Kuehny testified, over defense objection, that he recalled Mr. Alcaraz Mendoza saying “it was his methamphetamine” and “[l]ater at jail [said] he had the crystal meth because he had back pain.” RP 25.

Officers Newton and Kuehny both acknowledged that Mr. Alcaraz Mendoza was very cooperative and readily forthcoming throughout their encounter. RP 14, 26.

Martin McDermot, a chemist with the Washington State Patrol Crime Laboratory, over defense objections to foundation and chain of custody, testified he examined the proffered crystalline substance and

² The verbatim report of proceedings is contained in four separate volumes. The only volume relevant in this appeal contains the February 23, 2015, bench trial and the April 10, 2015, sentencing hearing. It is consecutively paginated and will be referred to as “RP”.

determined that it contained methamphetamine. RP 27, 30, 33 (Exhibit 2).

D. ARGUMENT

1. The trial court erred by admitting testimony of the arresting officer, in the absence of an independent recollection, after he had already improperly refreshed his recollection when testified from his report.

a. Appellant objected to the officer testifying from his report.

During Officer Kuehny's testimony, the defendant objected that the officer was reading directly from his report. RP 22. Counsel sought a specific inquiry to determine whether the officer had any independent recollection. RP 22. While the officer indicated he prepared the report shortly after the incident, he testified he only had "some recollection" of the events:

I don't think I could recall word for word what was said, but I could recall the gist of what was said.

RP 23.

Defense counsel reiterated the objection. "[H]'s indicating that he's got some recollection, not a verbatim recollection. I'd ask that he be allowed to testify from his recollection." RP 24. As the judge explained to the prosecutor, "we need to get the extent of his memory

on the record before you can refresh.” Id. Defense counsel reiterated the objection:

Your Honor, I’m not going to get Officer Kuehny’s words exactly, but he said he remembers the gist of what was in his report. I think that is the basis for a recollection. Verbatim? No, but definitely a recollection of what he placed in the report, so we’re going to renew our objection to allowing him to read from his report.

RP 25. When the judge directed the prosecutor to retrieve the report and explained the prosecutor had “to ask some specific questions before you can be allowed to refresh.” RP 22. The officer subsequently testified, “I recall the defendant admitting that it was his methamphetamine ... or his crystal meth.” RP 25. “Later at the jail he told me he had the crystal meth because he had back pain.” Id.

b. Refreshing a witness’s recollection is only appropriate in limited circumstances.

The proponent of evidence must establish the elements of a required foundation by a preponderance of the evidence. State v. Benn, 120 Wn.2d 631, 653, 845 P.2d 289 (1993) (citing State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981)). Decisions involving evidentiary issues lie within the sound discretion of the trial court. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997). A trial court

abuses this discretion where it improperly applies an evidence rule. State v. Young, 160 Wn.2d 799, 806, 161 P.3d 967 (2007).

Allowing the use of notes to refresh the memory of a witness lies within the discretion of the trial court.

The extent to which the witness may use such a memorandum is for the trial judge in his discretion to determine, and his ruling will not be disturbed unless there has been an abuse of such discretion.

2 C. Torcia, Wharton's Criminal Evidence s 415 (13th ed. 1972).

The use of notes to refresh the memory of witnesses must be closely supervised by the trial court, for, as in so many other fields of law of evidence, the sound discretion of the trial court is the most effective safeguard.

State v. Little, 57 Wn.2d 516, 520, 358 P.2d 120 (1961).

The criteria for the use of notes or other memoranda to refresh a witness' recollection are (1) that the witness' memory needs refreshing, (2) that opposing counsel have the right to examine the writing, and (3) that the trial court be satisfied that the witness is not being coached-that the witness is using the notes to aid, and not to supplant, his own memory. Little, 57 Wn.2d at 521.

Ultimately, the witness must actually recall the occurrence, event, or matter in his own mind. For example, in Preston v. Metropolitan Life Ins. Co., 198 Wash. 157, 87 P.2d 475 (1939), the

witness acknowledged she had no independent recollection. Rejecting her testimony as inadmissible, the Court concluded “the trial court ruled correctly in refusing to permit the witness to appear to be giving evidence from refreshed recollection when she had no recollection.” 198 Wash. at 164; State v. Coffey, 8 Wash.2d 504, 112 P.2d 989 (1941) (“...diaries are inadmissible as evidence although they may be used to refresh the memory of a witness if after such use he can testify from an independent recollection of the matter.”).

A contemporaneous memorandum made by a witness may be used to refresh his memory; that is, a witness may be allowed to refresh his memory by looking at a printed or written paper or memorandum and, if he thereby recollects a fact or circumstance, he may testify to it. It is not the memorandum which is evidence but the recollection. Schmidt v. Van Woerden, 181 Wash. 39, 44, 42 P.2d 3 (1935); State v. Jensen, 194 Wash. 515, 520, 78 P.2d 600 (1938).

Even after reviewing the memorandum, however, the witness must still be able to testify from independent recollection. *See e.g.*, State v. Huelett, 92 Wn.2d 967, 973, 603 P.2d 1258 (1979), *citing inter alia*, Moncrief v. City of Detroit, 398 Mich. 181, 187-90, 247 N.W.2d 783 (1976); Otinger v. State, 53 Ala.App. 287, 291, 299 So.2d 333 (Crim.App. 1974); State v. Crow, 486 S.W.2d 248, 257 (Mo.1972);

Great Atlantic & Pacific Tea Co. v. Nobles, 202 So.2d 603, 605 (Fla.Ct.App.1967); State v. Scott, 199 Kan. 203, 206, 428 P.2d 458 (1967); State v. Adams, 181 Neb. 75, 82, 147 N.W.2d 144 (1966); People v. Griswold, 405 Ill. 533, 541-42, 92 N.E.2d 91 (1950); State v. Perelli, 128 Conn. 172, 175, 21 A.2d 389, 390-91 (1941).

Commentators have also recognized this same requirement. *See e.g.*, State v. Huelett, 92 Wn.2d at 973, *citing inter alia*, 5 C. Chamberlayne, *The Modern Law of Evidence* s 3507, at 4818 n. 1 (1916); 2 E. Conrad, *Modern Trial Evidence* s 1176, at 336 (1956); 2 B. Elliott, *The Law of Evidence* s 872, at 153-54 (1904); J. McKelvey, *Handbook of the Law of Evidence* s 250, at 461 (3d ed. 1924); Annot. Refreshment of Recollection by Use of Memoranda or Other Writings, 82 A.L.R.2d 473, 497 (1962); 10 Am.Jur. Proof of Facts, Refreshing Recollection Proof 1, at 258 (1961); 81 Am.Jur.2d Witnesses s 445, at 453-54 (1976); 98 C.J.S. Witnesses s 358, at 85 (1957).

Finally, in Bank of Poneto v. Kimmel, 91 Ind.App. 325, 168 N.E. 604 (1929), it was held that where cross-examination develops that the witness has no independent recollection, even after seeing the book and entries therein, it is proper to strike the testimony. Similarly, in People v. Jenkins, 10 Ill.App.3d 166, 294 N.E.2d 24 (1973), it was

held that “a witness may refresh his memory by the use of any instrument, but must then testify from his own independent memory.” Jenkins, 10 Ill.App.3d at 171.

c. Defense counsel’s objections were well founded.

The need that a witness establish an independent memory of the subject of the testimony is clear under the law of Washington as well as other jurisdictions. Here Officer Kuehny only had “some recollection” and that was after having already reviewed his report. RP 23.

Allowing the witness testify from his report without initially establishing that he had an independent recollection was equally improper. Given the inculpatory nature of the evidence, the improper admission was certainly prejudicial and a new trial is appropriate remedy.

2. The trial court erred by admitted Exhibit 2 in the absence of an adequate foundation and evidence establishing the chain of custody.

a. The defendant timely objected to the admission of Exhibit 2.

When the prosecutor moved for admission of Exhibit 2, purported to be a crystalline substance found in Mr. Alacarz Mendoza’s pants pocket, defense counsel objected based on lack of foundation and chain of custody. RP 32. The judge overruled the objection:

There is testimony from Officer Kuehny that he received the item and created the packaging; that was as he observed it other than evidence of entry by the lab. There's testimony from Mr. McDermot that there was an indication of his entry into the item. And based on that, that they only changed condition, I believe it does go to weight, not admissibility.

RP 32-33.

b. Chain of custody is essential to establishing the evidentiary foundation for admission.

“Before a physical object connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed.” State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984); State v. Roche, 114 Wn.App. 424, 59 P.3d 682 (2002) Where evidence is not readily identifiable and is susceptible to alteration by tampering or contamination, it must customarily be identified by the testimony of each custodian in the chain of custody from the time the evidence was acquired. 5 KARL B. TEGLAND, WASH. PRAC. § 402.31 (1999). This stringent test requires the proponent to establish a chain of custody “*with sufficient completeness* to render it *improbable* that the original item has either been exchanged with another or been contaminated or tampered with.” United States v. Cardenas, 864 F.2d 1528, 1531 (10th Cir.1989).

Courts consider the nature of the item, the circumstances surrounding the preservation and custody, and the likelihood of tampering or alteration. Campbell, 103 Wn.2d at 21.

c. Crucial elements of the chain of custody were missing, compromising the reliability of the evidence.

Critically in this case, the WSP chemist testified as to Exhibit 2 that “This is the material in its packaging that I received for analysis in this case.” RP 30. Missing however was the essential testimony establishing the continuity of custody from Officer Kuehny.

Officer Kuehny testified simply that Exhibit 2 was the object he retrieved from Mr. Alcaraz Mendoza’s pants pocket. RP 20. While he testified that he recalled the crystalized nature of the contents, Officer Kuehny testified that he “put it into our evidence room into an evidence locker after completing the packaging and submitted it with the form.” Id. “I later completed a form for this to be sent to the crime lab to be tested.” Id. Officer Kuehny further acknowledged that the package had been opened and resealed. RP 21.

Mr. McDermot acknowledged however that he did not receive the item from Officer Kuehny. RP 31. Instead, Mr. McDermot received the evidence from one Victor Alcorey, a property and evidence custodian, who did not testify. RP 31-32. Mr. McDermot

was unable to testify how or where Mr. Alcorey obtained the item. RP 32. This gap was critical in establishing that the evidence was what it was purported to be, i.e., the item taken from Mr. Alcaraz Mendoza, in substantial the same form. Absent this missing link in the chain of custody, the trial court erred in admitting the exhibit and related testimony. A new trial is the proper remedy.

3. The properly admitted evidence was insufficient to establish possession of a controlled substance beyond a reasonable doubt.

a. The State bears the burden of proving all the elements of the crime alleged.

The State has the burden of proving the elements of unlawful possession of a controlled substance as defined in the statute—the nature of the substance and the fact of possession. State v. George, 146 Wn.App. 906, 914-15, 193 P.3d 693 (2008). Sufficient evidence supports a finding of guilt if, 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).

In a prosecution for drug possession, the State must prove that the defendant either actually or constructively possessed the contraband. State v. Cote, 123 Wn.App. 546, 549, 96 P.3d 410 (2004).

Actual possession requires physical custody. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); State v. Cantabrana, 83 Wn.App. 204, 206, 921 P.2d 572 (1996). Mere proximity to drugs is insufficient, even where there is evidence that the defendant handled the drugs, because “possession entails actual control, not a passing control which is only a momentary handling.” Callahan, 77 Wn.2d at 29.

b. The properly admitted evidence was insufficient to establish the elements of the offense beyond a reasonable doubt.

Where the properly admitted evidence failed to establish that Mr. Alcaraz Mendoza knowingly and intentionally possessed a controlled substance, the conviction must be reversed. State v. Spruell, 57 Wn.App. 383, 388, 788 P.2d 21 (1990). *See also* State v. Cote, 123 Wn.App. at 548–50.

As argued, *supra*, the testimony of Mr. McDermot that the substance he tested contained methamphetamine is unavailing if the State cannot establish the chain of custody sufficient to establish that the item tested was the one taken from Mr. Alcaraz Mendoza and was in not otherwise tainted or altered before it was tested. Furthermore, where Officer Kuehny’s testimony was based on his limited recollection improperly supplanted by reference to his earlier report,

the evidence was insufficient to support the trial judge's factual findings as well as the subsequent conclusion of law.

E. CONCLUSION

Mr. Alcaraz Mendoza requests this Court find the evidence was improperly admitted at his bench trial and that the remaining admissible evidence was insufficient to sustain conviction, or he is entitled to a new trial based on properly admitted evidence.

Respectfully submitted this 9th day of November 2015.

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RESPONDENT,)	
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v.)	NO. 33278-1-III
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DANIEL ALCARAZ-MENDOZA,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF NOVEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANDREW MILLER [prosecuting@co.benton.wa.us] BENTON COUNTY PROSECUTOR'S OFFICE 7122 W OKANOGAN AVE KENNEWICK WA 99336-2341	() () (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
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SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF NOVEMBER, 2015.

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