

Supreme Court No. 81348-5
Court of Appeals No. 34911-6-II
Clark County No. 05-1-02126-8

STATE OF WASHINGTON,

Petitioner,

vs.

THOMAS HARRY EATON

Respondent.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT *(Supplemental)*

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A. QUESTION PRESENTED ON REVIEW

I. WHETHER A SENTENCE ENHANCEMENT MAY BE IMPOSED WHEN A DEFENDANT IS SEARCHED AFTER HE IS ARRESTED AND TAKEN TO A COUNTY JAIL, AND FOUND TO BE IN POSSESSION OF METHAMPHETAMINE AT THE JAIL.

B. ISSUE PERTAINING TO QUESTION ON REVIEW

I. WHETHER A SENTENCE ENHANCEMENT FOR POSSESSION OF METHAMPHETAMINE IN A COUNTY JAIL MAY BE IMPOSED AGAINST A DEFENDANT WHO WAS ONLY FOUND TO BE IN POSSESSION OF THE METHAMPHETAMINE AFTER HIS ARREST AND INVOLUNTARY PRESENCE AT THE JAIL.

C. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

The Clark County Prosecuting Attorney charged Appellant, Thomas Harry Eaton, with Possession of Methamphetamine and Driving Under the Influence, alleged to have occurred on September 22nd, 2005. CP 14. By Amended Information, the State charged Mr. Eaton with a statutory penalty enhancement alleging that he committed the possession of methamphetamine while in a county jail pursuant to RCW 9.94A.533 (5). CP 14. A jury trial commenced on May 1st, 2006. Report of Proceedings. Mr. Eaton was convicted on both counts, and the jury answered "yes" on the penalty enhancement. CP 75-77. A timely appeal followed in which Mr. Eaton challenged the imposition of the sentence

enhancement on the basis that his presence in the jail, and thus his possession of methamphetamine in the jail, was not voluntary. The Court of Appeals sitting in Division II agreed with Mr. Eaton and ordered his sentence enhancement reversed and dismissed. (See Opinion of the Court of Appeals). This Court granted the State's timely Petition for Review of the decision of the Court of Appeals.

2. FACTUAL HISTORY

On September 22nd, 2005 Appellant Thomas Eaton was traveling westbound on McLoughlin Boulevard in Vancouver when he was stopped by Officer Starks of the Vancouver Police Department because his headlights were not on. I RP 79-80. As a result of this traffic stop Mr. Eaton was subsequently arrested for DUI. I RP 92. Mr. Eaton was apparently not searched at the time of his arrest. I RP 77-131 (testimony of Officer Starks). When brought to the jail, Mr. Eaton was searched by the jail staff. I RP 97. During this search, a baggie of methamphetamine was found in Mr. Eaton's sock. I RP 99.

The State charged Mr. Eaton with DUI and with possession of methamphetamine with an enhancement alleging that he committed the offense while in a county jail per RCW 9.94A.533 (5). CP 14. At trial, counsel for Mr. Eaton moved to dismiss the special allegation that Mr. Eaton committed the crime of possession of methamphetamine while in a

county jail. Defense counsel argued that Mr. Eaton could not be convicted of this enhancement where the State would be unable to prove he had knowledge he was going to be taken to the jail when he made the choice to possess methamphetamine, and that a conviction of this enhancement would violate the Fifth Amendment to the United States Constitution because the only way he could have avoided possessing methamphetamine in the county jail, once he was arrested, would have been to offer evidence against himself by notifying Officer Starks that he was carrying methamphetamine. II RP 159-60. The court denied the motion, stating that it was without authority to interpret law but merely required to apply it as written. II RP 159.

The jury returned a verdict of guilty to both charges, and answered “yes” to the special verdict as to Count I—that Mr. Eaton committed the crime in of possession of methamphetamine while in a county jail. CP 75-77. The standard range on Count I would have been zero to six months based upon Mr. Eaton’s lack of criminal history, but was reset to twelve to eighteen months based upon the jury’s answer of “yes” on the special verdict form. CP 88. Mr. Eaton was given a standard range sentence based on that range. CP 91. The Court of Appeals unanimously concluded that Mr. Eaton did not commit a voluntary act, and imposition of the enhancement therefore led to absurd, unlikely, or strained

consequence of RCW 9.94A.533 (5). (See Opinion of the Court of Appeals).

D. ARGUMENT

I. WHETHER A SENTENCE ENHANCEMENT FOR POSSESSION OF METHAMPHETAMINE IN A COUNTY JAIL MAY BE IMPOSED AGAINST A DEFENDANT WHO WAS ONLY FOUND TO BE IN POSSESSION OF THE METHAMPHETAMINE AFTER HIS ARREST AND INVOLUNTARY PRESENCE AT THE JAIL.

RCW 9.94A.533 (5) (c) provides that where an offender or an accomplice commits the crime of possession of methamphetamine in a county jail or state correctional facility, an additional twelve months will be added to the offender's standard range. The imposition of the statutory enhancement for committing the crime of possession of methamphetamine in a county jail violates due process in Mr. Eaton's case because he did not commit a voluntary act when he entered the jail.

Principles of criminal liability impose two requirements for culpability: Actus reus and mens rea. *Carter v. United States*, 530 U.S. 255, 269, 120 S.Ct. 2159 (2000); *City of Seattle v. Hill*, 72 Wn.2d 786, 794, 435 P.2d 692 (1967) (criminal liability requires volitional conduct); *State v. Lindberg*, 125 Wash. 51, 215 Pac. 41 (1923) (strict liability, or mala prohibita, crimes comport with due process so long as one acts voluntarily).

There are two components of every crime. One is objective—the actus reus; the other subjective—the mens rea. The actus reus is the culpable act itself, the mens rea is the criminal intent with which one performs the criminal act. However, the mens rea does not encompass the entire mental process of one accused of a crime. There is a certain minimal mental element required in order to establish the actus reus itself. This is the element of volition.

State v. Utter, 4 Wn. App. 137, 139, 479 P.2d 946 (1971). In *Utter*, the Court explained this concept by quoting the following text from Perkins on Criminal Law:

It is sometimes said that no crime has been committed unless the harmful result was brought about by a ‘voluntary act.’ Analysis of such a statement will disclose, however, that as so used the phrase ‘voluntary act’ means no more than the mere word ‘act.’ An act must be a willed movement or the omission of a possible and legally-required performance. This is essential to the actus reus rather than to the mens rea. ‘A spasm is not an act.’

Perkins, *Criminal Law*, page 660 (1957) (footnotes omitted), cited in *Utter* at 140.

The decision in *Martin v. State*, 31 Ala.App. 334, 17 So.2d 427 (1944) is perhaps one of the most oft-cited decisions on the subject of actus reus. See *People v. Gastello*, 149 Cal.App.4th 943, 57 Cal.Rptr.3d 293 (2007) (“*Martin* is a criminal-law classic on the subject of actus reus and is a favorite of casebooks and law review articles.”). In *Martin*, police officers arrested the defendant who was in his home at the time and drunk. The officers then took the defendant to a public highway, where he “manifested a drunken condition by using loud and profane language.”

The State later convicted the defendant of violating a criminal statute that made it illegal for a person who was intoxicated or drunk to “appear” in any public place where one or more persons are present and then “manifest a drunken condition by using loud and profane language.” The defendant appealed, arguing that he did not commit the actus reus of the offense because he did not voluntarily “appear” in a public place; the police forced him there. The appellate court agreed and reversed, stating:

Under the plain terms of this statute, a voluntary appearance is presupposed. The rule has been declared, and we think it sound, that an accusation of drunkenness in a designated public place cannot be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer.

Martin at 335.

While there are no Washington decisions, save for this published opinion by the Court of Appeals, on what constitutes the actus reus for the sentencing enhancement under RCW 9.94A.533 (5), there are a number of recent decisions out of other jurisdictions finding that one who is involuntarily taken to a jail while in possession of illegal drugs has not committed the actus reus of possessing the drugs in the jail. The Oregon Court of Appeals has addressed this question in numerous cases, consistently holding that one cannot be held criminally liable for an involuntary act. Oregon Revised Statutes 162.185 (1) (b) is the

comparable statute to our RCW 9.94A.533 (5). It provides: “(1) A person commits the crime of supplying contraband if: (b) Being confined in a correctional facility, youth correction facility or state hospital, the person knowingly makes, obtains, or **possesses** any contraband.”

In *State v. Tippetts*, 180 Or.App. 350, 43 P.3d 455 (2002), the defendant was arrested at his home following the execution of a search warrant. He was taken to the Washington County Jail where he was turned over to the custody of a corrections officer who searched the defendant and found marijuana in his pants pocket. *Id.* at 352. The State charged Mr. Tippetts with supplying contraband under ORS 162.185 and he was convicted. *Id.* at 352-353. At trial, and again on appeal, he argued that proof of a voluntary act was a “necessary prerequisite to proving criminal liability and that he did not voluntarily introduce marijuana into the jail.” *Id.* at 353. Mr. Tippetts relied upon ORS 161.095 (1), which codifies the common law requirement of actus reus in statutory form and states: “The minimal requirement for criminal liability is the performance by a person of conduct which includes a voluntary act or the omission to perform an act which the person is capable of performing.” *Tippetts* at 353. The trial court denied his motion, holding that Mr. Tippetts could have avoided commission of the crime by confessing to the possession of marijuana before it was discovered. *Id.*

The Court of Appeals rejected the trial court's reasoning and agreed with Mr. Tippetts, holding that Mr. Tippetts did not cause the marijuana to be introduced into the jail, but rather the marijuana was only introduced into the jail "because the police took defendant (and the contraband) there against his will." *Id.* at 354. Following *Tippetts*, the Oregon Court of Appeals consistently reversed convictions for defendants who were charged with supplying contraband when they were taken to a jail involuntarily while under a lawful arrest and found to have drugs on their person. See *State v. Gotchall*, 180 Or.App. 458, 43 P.3d 1121 (2002); *State v. Becker*, 187 Or.App. 274, 66 P.3d 584 (2003); *State v. Delaney*, 187 Or.App. 717, 71 P.3d 93 (2003); *State v. Gonzales*, 188 Or.App. 430, 71 P.3d 573 (2003); *State v. Getzinger*, 189 Or.App. 431, 76 P.3d 148 (2003); *State v. Thaxton*, 190 Or.App. 351, 79 P.3d 897 (2003); *State v. Ortiz-Valdez*, 190 Or.App. 511, 79 P.3d 371 (2003).

The state of California also follows this holding that one who is arrested while in possession of drugs does not commit the actus reus of possessing those drugs in a jail when they are discovered during the booking process at jail. In *People v. Gastello*, *supra*, the defendant appealed his conviction for bringing drugs into a county jail, arguing that he had not committed the actus reus of the offense because his appearance

at the jail was involuntary because the police had arrested him and taken him to the jail while he happened to be in possession of drugs.

In addressing the defendant's claims, the court first noted that the commission of an actus reus, an affirmative act, was one of the fundamental requirements of criminal liability under the common law, and was also a statutory requirement under California law. The court then noted that the actus reus or affirmative act of the crime charges was to "bring drugs into the jail." The court then addressed whether the defendant had committed this affirmative act and concluded he did not, reversing his conviction. *Gastello* at 296-97 (citing *Tippetts*, supra).

New Mexico follows this rule for persons involuntarily taken to jail while in possession of drugs. *New Mexico v. Cole*, 164 P.3d 1024 (2007) (defendant who was arrested while in possession of a controlled substance and booked into county jail not guilty of "carrying contraband into the confines of a county or municipal jail" because he did not commit the actus reus of the offense even though he could have told the police that he had the drugs). Ohio follows this rule for persons involuntarily taken to jail while in possession of drugs. *State v. Sowry*, 155 Ohio App.3d 742, 803 N.E.2d 867 (2004) (defendant's possession of contraband in a jail was not the result of a voluntary act on his part because officers brought him into the jail under arrest). New York follows a similar rule for crimes that

include a *locus* requirement under circumstances in which the defendant was involuntarily taken to the specific locus. *People v. Newton*, 72 Misc.2d 646, 340 N.Y.S.2d 77 (1973) (no actus reus to support conviction under New York law for possessing an unlicensed firearm when the defendant's flight made an unscheduled landing in New York); *People v. Shaughnessy*, 66 Misc.2d 19, 319 N.Y.S.2d 626 (1971) (no actus reus to support conviction for trespassing where defendant was a passenger in a car that entered property).

Here, there similarly was no proof that Mr. Eaton voluntarily possessed methamphetamine in a county jail. Mr. Eaton did not, for example, attempt to introduce methamphetamine into the county jail by smuggling it in while residing there, or attempt to transfer it to another who was residing there. He had no intention of going to the county jail on September 22nd, 2005 and was taken there against his will. Furthermore, it is a denial of due process to allow the State to decide that the commission of this offense occurred not at the scene of the traffic stop, but rather at the county jail. Once arrested, Mr. Eaton no longer had control over his location or over any of his possessions. That control rested with Officer Starks and the corrections officers at the jail. The State should not be allowed to physically force a subject into an enhancement zone and then be permitted to choose whether he will be penalized for possessing

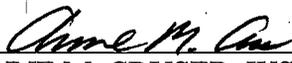
contraband in the enhancement zone or the non-enhancement zone in which his possession could also be established. There was no suggestion by the State in the proceedings below, for example, that Mr. Eaton did not possess this methamphetamine at the scene of the traffic stop and somehow acquired it after his arrest.

The State, confusing the concepts of actus reus and mens rea, argued at the trial court that because it was not required to prove the element of knowledge then Mr. Eaton could properly be held criminally liable for an act that was admittedly not voluntary. Mr. Eaton's conviction for an enhancement that was premised upon an involuntary act violated his right to due process under both the Fifth Amendment to the United States Constitution and Article 1, Section 3 of the Washington State Constitution.

E. CONCLUSION

This Court should affirm the decision of the Court of Appeals, Division II, which reversed the imposition of the enhancement of Mr. Eaton's sentence under RCW 9.94A.533 (5).

RESPECTFULLY SUBMITTED this 15th day of October, 2008.


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