

Supreme Court No. 81498-8
Court of Appeals No. 35947-2-II

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON

Respondent,

vs.

PATRICK DRUM

Appellant.

FILED
JUN 22 2009
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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STATE OF WASHINGTON

Jefferson County Superior Court Cause No. 04-1-00110-8
The Honorable Judge Craddock Verser

RESPONDENT'S SUPPLEMENTARY BRIEF

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ORIGINAL

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II. STATEMENT OF FACTS and Prior Proceedings

Patrick Drum was charged with Residential Burglary in Jefferson County Superior Court. CP 1-2. The police report states that on Sept. 28, 2004, Mr. Drum entered the residence of Mary Sanelli, who saw Mr. Drum in her residence, called 911, and fled to a neighbor's house. A neighbor saw Mr. Drum exit Ms. Sanelli's residence and move toward another house before being scared away by the neighbor. Mr. Drum was arrested shortly thereafter. RP 2.

Mr. Drum claimed he was under the influence of intoxicants and before trial, filed a completed Drug Court Contract with the court on October 29, 2004. RP 30, Supp. CP. The contract contained the following terms:

16. That it is the Judge's decision to determine when the defendant has earned the ability to graduate from the Program and to determine when termination from the Program will occur.

...

19. If the defendant is terminated from the Program, the defendant agrees and stipulates that the Court will determine the issue of guilt on the pending charge(s) solely upon the enforcement/investigative agency reports or declarations, witness statements, field test results, lab test results, or other expert testing or examinations such as fingerprint or handwriting comparisons, which constitutes the basis for the prosecution of the pending charge(s). The defendant further agrees and stipulates that the facts presented by such reports, declarations, statements and/or expert examinations are sufficient for the Court to find the defendant guilty of the pending charge(s).

Prior to accepting the contract the court discussed it with Mr. Drum and established that Mr. Drum had reviewed it thoroughly with his attorney and believed he understood it. RP 31-32. The following colloquy occurred on October 29, 2004:

“THE COURT: Actually, it must. I’ve got here a Drug Court Contract, Mr. Drum. Did you review that thoroughly with Mr. Charleton (Drum’s Attorney).

MR.DRUM: Yes, I did.

THE COURT: Do you understand what you’re getting into?

MR.DRUM: Yes, I do.

THE COURT: This is not an easy way to get out of a felony conviction. It requires a lot of effort on your part, and you’ll be under the scrutiny of the court for the next at least two years, do you understand that?

MR.DRUM: Yes, I do.

THE COURT: And that jail time will be imposed if you violate the conditions of your agreement with the court, and sometimes you end up getting more jail time in Drug Court than you would by pleading guilty, just because you can’t stay straight, you know that?

MR.DRUM: Yes, I do.”

Forty-two days later, on December 10, 2004, Mr. Drum asked to be released from the Drug Court Contract. RP 36. In a January 21, 2005, hearing in Jefferson County Superior court, Mr. Drum made the following statement about the events of Sept. 28, 2004:

"I – I was very intoxicated this day, and I was asking this lady to use the phone. I'm not going to say that my record doesn't show cases where I've entered people's houses high on intoxicants. I've definitely got to quit doing that stuff, 'cause it puts my mind in a state where I just have no respect for property or things. But at the time when she confronted me, my intent was to ask if I could use the phone, 'cause I was high and lost..." RP 71

On February 4, 2005, the court found Mr. Drum guilty of Residential Burglary in a bench trial. During the trial the defense argued that because Mr. Drum was intoxicated, he could not have had the intent to commit residential burglary. RP 68. The court rejected that argument, stating the police report did not adequately set forth the elements of intoxication, citing *State v. Cantu*, 123 Wn.App. 404. The court made a Finding of Fact that Mr. Drum entered the residence with intent to commit a crime. RP 69-70. During the trial the court stated, "I will infer the intent to commit a crime when you entered there because there's no other reason for you to be there." RP 69-70.

Mr. Drum appealed his conviction, arguing first that the stipulated facts were legally insufficient for conviction of residential burglary and that the court's use of a presumption of intent violated due process. Mr. Drum also argued that the Drug Court Contract was equivalent to a guilty plea. Division Two of the Court of Appeals issued a part-published opinion affirming Mr. Drum's judgment and sentence. The court held that Mr. Drum's Drug Court

Contract waived his right to challenge the legal sufficiency of his conviction and was not equivalent to a guilty plea. See *State v. Drum*, 143 Wn.App. 608, 181 P.3d 18 (2008).

Argument

I. The judiciary was not bound by stipulations to legal conclusions.

Mr. Drum argues that the trial court and the Appellate court held themselves to be bound by a stipulation to a matter of law, to wit, that the facts in the police report were sufficient to find him guilty. However this is not what occurred.

RCW 9A.52.040 Inference of Intent. In any prosecution for burglary, any person who enters or remains unlawfully in a building may be inferred to have acted with intent to commit a crime against a person or property therein, unless such entering or remaining shall be explained by evidence satisfactory to the trier of fact to have been made without such criminal intent.

Mr. Drum did stipulate that the facts in the police report were sufficient to find him guilty. However, the trial court did not accept the stipulation, but rather, based on RCW 9A.52.040, considered *de novo* the issue of guilt during trial. Specifically, Mr. Drum admitted he was in the home of another, but that he was intoxicated on inhalants and therefore could not have the requisite intent for residential burglary. The trial court determined that there was

insufficient evidence of intoxication to allow that defense and found guilt. RP 69-70.

On appeal to Division Two, Mr. Drum argued that the trial court made several errors in this regard: insufficient evidence of intent, used the permissive inference from RCW 9A.52.040 as the “sole and sufficient” proof of intent, and thereby found guilt based on a mandatory presumption.

During their analysis, Division Two stated, “[B]ecause Drum stipulated to the sufficiency of the facts in his drug court contract, we cannot now review the issues related to the sufficiency of the evidence...” *State v. Drum* 143 Wn.App. 608, 615, 181 P.3d 18 (2008). Even if this is found to be error, it does not affect the trial court’s proper independent finding of guilt.

Mr. Drum argues that his stipulation that the facts were sufficient to find him guilty was an agreement to a legal conclusion, based on the holding that “whether or not a particular set of facts is sufficient to sustain a conviction is a matter of law.” *State v. Sullivan*, 142 Wn.2d 162, 172, 19 P.3d 1012 (2001).

In this case, however, Mr. Drum’s stipulation did not determine his guilt, it was only an input to the trial court for a bench trial. The trial court, using those facts, determined he was guilty.

The determination that the evidence was sufficient to find Mr. Drum guilty was a conclusion of law made by the court.

Mr. Drum's conviction was proper and his conviction should be affirmed.

A. Drug Court and Deferred Prosecutions stipulations and waivers are equally valid.

Division Two examined the stipulation in Mr. Drum's drug court contract and concluded it should be treated similar to a stipulation under the deferred prosecution statute. The court found that since a deferred prosecution contract and a Mr. Drum's drug court contract both contained stipulations that the evidence was sufficient to find guilt, and the deferred prosecution stipulation has been found legal, that Mr. Drum's stipulation was also legal. *State v. Drum*, 143 Wn.App. 608, 614, 181 P.3d 18 (2008).

1. The stipulations in a Drug Court Contract do not violate the defendant's rights.

Washington law permits parties to waive rights conferred by law as long as the waiver is knowing and voluntary. *Bowman v. Webster*, 44 Wn.2d 667, 269 P.2d 960 (1954). Local court rules and forms requiring petitioners for deferred prosecution to stipulate to accuracy and admissibility of police reports and to waive certain enumerated rights including right to jury did not diminish petitioners'

substantive rights. *Abad v. Cozza*, 128 Wn.2d 575, 911 P.2d 376 (1996).

The Legislature designed deferred prosecution to encourage treatment, by giving culpable persons whose wrongful conduct is caused by a treatable condition the opportunity to avoid conviction if they successfully complete approved treatment. In *State ex rel. Schillberg v. Cascade Dist. Court*, 94 Wn.2d 772, 779, 621 P.2d 115 (1980), the court stated that deferred prosecution is a form of sentencing, noting the “mere label ‘deferred prosecution’ obscures the characteristics of the process” in RCW 10.05, “which is fundamentally a new sentencing alternative of preconviction probation, to be added to the traditional choices of imprisonment, fine, and post conviction probation.” In *State v. Marino*, 100 Wn.2d 719, 674 P.2d 171 (1984), the court re-affirmed that “the Legislature intended deferred prosecution programs [under RCW 10.05] to be sentencing alternatives to the traditional criminal justice system.” *Id.* at 722, 674 P.2d 171. A deferred prosecution is not tantamount to a guilty plea. *State v. Higley*, 78 Wn.App. 172, 187, 902 P.2d 659, review denied, 128 Wn.2d 1003, 907 P.2d 296 (1995).

The courts may apply the principles of chapter 10.05 RCW [deferred prosecution] to drug court prosecutions. *State v. Cassill-Skilton*, 122 Wn.App. 652, 658, 94 P.3d 407 (2004).

3. Drug Court Contracts are analogous to Deferred Prosecution Contracts but the programs are not analogous

On the question as to whether deferred prosecution and drug court are analogous, the three divisions differ. Division One has held that courts may apply the principles of chapter 10.05 RCW, which governs deferred prosecutions, to drug court prosecutions. *State v. Melick*, 131 Wn.App. 835, 844-45, 129 P.3d 816, review denied, 158 Wn.2d 1021, 149 P.3d 379 (2006); see also *State v. Cassill-Skilton*, 122 Wn.App. 652, 658, 94 P.3d 407 (2004) (Division Two finding that deferred prosecution statutes apply by analogy to drug court proceedings); but see *State v. DiLuzio*, 121 Wn.App. 822, 830, 90 P.3d 1141 (2004) (Division Three concluded that deferred prosecutions and drug court proceedings are not analogous and approved the process allowing prosecutors to act as gatekeepers for admission into drug court).

However, this difference is more apparent than real. Divisions One and Two were concerned with whether the stipulations in deferred prosecutions and drug courts were to be

treated the same (the same issue as here.) Division Three was determining whether the court or the prosecutor should act as gatekeeper for drug court.

Deferred prosecution under chapter 10.05 RCW is designed to encourage treatment of culpable people whose wrongful conduct is caused by a treatable condition, such as alcoholism. *City of Richland v. Michel*, 89 Wn.App. 764, 768, 950 P.2d 10 (1998). Deferred prosecution gives these defendants the opportunity to avoid conviction if they successfully complete treatment. *Michel*, 89 Wn.App. at 769, 950 P.2d 10. The petitioner executes a statement acknowledging his or her rights, stipulates to the admissibility and sufficiency of the facts in the police report, and acknowledges that the statement will be entered and used to support a finding of guilt if the deferred prosecution is revoked. RCW 10.05.020(3). The incentive that encourages successful completion of treatment is the possibility that failure will result in prosecution and conviction of the original crime charged. *State v. Shattuck*, 55 Wn.App. 131, 135, 776 P.2d 1001 (1989). The deferred prosecution alternative is “limited to only those who have no reason to argue their innocence.” *Shattuck*, 55 Wn.App. at 135, 776 P.2d 1001. Accordingly, the *Shattuck* court held that an appellant waived his right to raise defenses to his driving under the influence (DUI)

prosecution by stipulating to a deferred prosecution. *Shattuck*, 55 Wn.App. at 133, 776 P.2d 1001.

RCW 2.28.170(2) enables counties to establish drug courts “to achieve a reduction in recidivism and substance abuse among nonviolent, substance abusing felony and nonfelony offenders ... by increasing their likelihood for successful rehabilitation through early, continuous, and intense judicially supervised treatment; mandatory periodic drug testing; and the use of appropriate sanctions and other rehabilitation services.” RCW 2.28.170(2). In *Colquitt*, the court characterized drug court as a “specialized deferred prosecution wherein the prosecution does not proceed and the information is dismissed upon successful completion.” *State v. Colquitt*, 133 Wn.App. 789, 793, 137 P.3d 892 (2006).

Here, as under the deferred prosecution statute, the defendant's incentive for participating in the program is dismissal of the charges. See *State v. J.V.*, 132 Wn.App. 533, 537, 132 P.3d 1116 (2006). In return, he cannot protest his innocence of those charges, as Drum recognized when he stated during his bench trial that it was “too late” for him to try to explain his presence in a stranger's residence. RP at 70. In *Melick*, Division One extended the analysis in *Shattuck* to drug court proceedings, holding that the defendant's stipulation to the use of police reports waived all

subsequent factual, legal, or procedural issues he might raise, except for those related to the validity of the stipulation itself. *State v. Melick*, 131 Wn.App. at 844-45, 129 P.3d 816.

The legislature has set up deferred prosecutions and drug courts quite differently: RCW 10.05 specifies the exact procedure to follow for deferred prosecutions and RCW 2.28.170 allows counties to establish drug courts with requirements only for who can qualify. The legislature's stated purpose for both programs is very similar – to reduce substance abuse. There are many differences however, a deferred prosecution occurs within the misdemeanor framework of district court. Drug court occurs in the shadow of the Sentencing Reform Act of 1981 and the felony framework of superior court. Perhaps the most important difference is this: deferred prosecution is a mandatory sentencing alternative and is controlled by the courts and the legislature believed the public interest required that the rules be uniform in all counties; drug court is optional and a county is allowed to decide if they need such a program, and, if so, to tailor it to the need and the resources available, which both vary greatly between the most populated and least populated counties in Washington.

Divisions One, Two, and Three are not in disagreement.

Rather Divisions One and Two agree that the stipulations in both

deferred prosecution and drug court contracts should be evaluated similarly and Division Three has not addressed that issue yet. Division Three has ruled that, for purposes of entry into the program, a county has discretion to have the prosecutor be the gatekeeper. These positions are not in conflict, are not inconsistent, and comply with the statutory requirements.

The stipulations are permissible and the evidence was sufficient to support a finding of guilty. The conviction should be affirmed.

II. A Drug Court Contract is not equivalent to a guilty plea

Mr. Drum argues that a Drug Court contract is equivalent to a guilty plea and that his contract is invalid because he was not informed of all of the consequences of the contract before he agreed.

A guilty plea, however, is functionally and qualitatively different from a stipulation. A guilty plea generally waives the right to appeal. *State v. Saylor*, 70 Wn.2d 7, 422 P.2d 477 (1966). A guilty plea has been said to be "itself a conviction; nothing remains but to give judgment and determine punishment." *Boykin v. Alabama*, 395 U.S. 238, 242, 23 L.Ed.2d 274, 89 S.Ct. 1709, 1711-1712, (1969).

A stipulation, on the other hand, as was employed in the instant case, is inconclusive. The trial court must make a determination of guilt or innocence. *State v. Gossett*, 120 Ariz. 44, 583 P.2d 1364 (1978). More importantly, a stipulation preserves legal issues for appeal and can operate to keep potentially prejudicial matters from the court's consideration.

A "trial by stipulation" is not tantamount to a guilty plea and does not require compliance with the procedural safeguards of CrR 4.2. *State v. Davis*, 29 Wn. App. 691, 696, 630 P.2d 938 (1981),

review denied 96 Wn.2d 1013 (1981). With a trial by stipulation the defendant does not stipulate to his guilt; the trial court must make that determination. Further, the very fact that defendant's first assignment of error seeks to challenge the legal sufficiency of the "trial by stipulation" emphasizes the distinction between a guilty plea and a stipulated trial. Thus, because the stipulated trial was not equivalent to a guilty plea, there was no need to comply with CrR 4.2.

The courts have held that a drug court agreement, like a deferred prosecution, is not tantamount to a guilty plea. See *Abad v Cozza*, 128 Wn.2d at 579, 911 P.2d 376 (citing *State v. Higley*, 78 Wn.App. 172, 187, 902 P.2d 659, review denied, 128 Wn.2d 1003, 907 P.2d 296 (1995)).

This is consistent with the stated legislative intent to allow a mutual agreement for both deferred prosecution and drug court where the State foregoes punishment in lieu of treatment and retains the possibility of punishment as an incentive for the defendant to follow through with the agreed treatment.

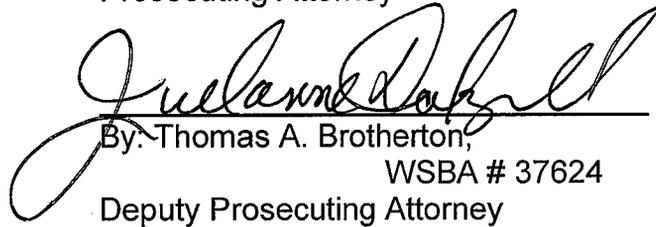
Mr. Drum's drug court contract was not equivalent to a guilty plea and Mr. Drum's conviction should be affirmed.

CONCLUSION

The State respectfully requests that this Court affirm Appellant's sentence as determined by the trial court and that Appellant be ordered to pay costs, including attorney fees, pursuant to RAP 14.3, 18.1 and RCW 10.73.

Respectfully submitted this ^{11th}~~12th~~ day of June, 2009

JUELANNE DALZELL, Jefferson County
Prosecuting Attorney



By: Thomas A. Brotherton,
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Deputy Prosecuting Attorney

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THE SUPREME COURT OF WASHINGTON

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PATRICK DRUM,
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DECLARATION OF MAILING

Janice N. Chadbourne declares:

That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 11th day of June, 2009, I mailed, postage prepaid, a copy of RESPONDENT'S SUPPLEMENTAL BRIEF to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing declaration is true and correct.

Dated this 11th day of June, 2009, at Port Townsend, Washington.


Janice N. Chadbourne
Legal Assistant

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