

ORIGINAL

Supreme Court No. 85791-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,
Respondent,

v.

DOUGLAS CRAIG ROSE
Petitioner.

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STATE OF WASHINGTON
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PETITION FOR REVIEW OF THE COURT OF APPEALS,
DIVISION III
NO. 284034

Respondent's Supplemental Brief
~~ANSWER TO THE PETITION FOR REVIEW~~

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I. STATEMENT OF RELEVANT FACTS

On September 16, 2008, Officer Croskrey of the Richland Police Department was dispatched to a possible trespass or burglary in progress. (RP 5/21/09, 3). Officer Croskrey began looking for the suspect using a description provided by the 911 caller and relayed by Dispatch. (RP 5/21/09, 6). The description provided was that of a white male with black hair and some gray, wearing tan shorts, black shoes, white socks, and carrying a green army bag. (RP 5/21/09, 8).

Officer Croskrey saw a white male matching the description provided about five apartment units north of the caller's location, which was consistent with the caller's report of the suspect's direction of travel. (RP 5/21/09, 7). Officer Croskrey stopped his patrol car, exited, and asked the male to stop. (RP 5/21/09, 7).

Officer Croskrey could see a knife clipped to the male's front pocket. (RP 5/21/09, 9, 11). The male fidgeted as he was contacted by Officer

Croskrey, so Officer Croskrey asked him to set down the bag he was carrying and step away from it. (RP 5/21/09, 9, 11). Officer Croskrey handcuffed the male for officer safety. (RP 5/21/09 9, 11). Officer Croskrey saw the defendant's hand moving rapidly, and his feet shifting around, which he described as fidgeting. (RP 5/21/09, 24). Officer Croskrey removed the knife, patted down the male for additional weapons, and had the male sit in the back of Officer Croskrey's patrol car. (RP 5/21/09, 11). Officer Croskrey told the male that he was not under arrest, but that he was being detained in reference to the reported trespass. (RP 5/21/09, 25). The male was identified as the defendant, Douglas Rose. (RP 6/30/09, 26). Officer Croskrey then waited for Officer Jenkins to arrive. (RP 5/21/09, 11-12, 25).

Officer Jenkins initially responded to the reporting party's apartment at 345 Van Giesen in Richland, remained there for a few minutes, then

went to assist Officer Croskrey. (RP 6/30/09, 12-13). As Officer Croskrey was speaking to Officer Jenkins, he looked at the green army bag on the ground and could see a glass pipe protruding from a side pocket with a white-chalky substance attached to the inner portion of the pipe. (RP 5/21/09, 12, 26). Officer Croskrey recognized the pipe as consistent with what he believed to be drug paraphernalia. RP, 5/21/09, 12. Officer Croskrey then arrested Rose for possession of drug paraphernalia. (RP 5/21/09, 26).

Officer Croskrey also located a credit card in the defendant's pocket during a search incident to this arrest. (RP 6/30/09, 41). When Officer Croskrey removed the card from the defendant's pocket, the defendant stated that he had just found it. (RP 6/30/09, 41). The card had the name of Ruth Georges on it. (RP 6/30/09, 84). Ms. Georges never gave anyone permission to have it. (RP 6/30/09, 84). The card had been sitting on Ruth Georges' coffee table until she

placed it in a cigarette box, which she then placed in a garbage can within her apartment. (RP 6/30/09, 84, 86). The defendant left Ms. Georges' apartment approximately one hour before an officer called to ask her about the card. (RP 6/30/09, 89).

II. RELEVANT PROCEDURAL HISTORY

The defendant was charged with one count of Possession of Stolen Property in the Second Degree and one count of Unlawful Possession of a Controlled Substance, Methamphetamine. (CP 1-2).

The defendant moved to suppress the evidence in this case. (CP 5-8). A CrR 3.6 hearing was held on May 21, 2009. (RP 5/21/09, 1-2). The CrR 3.6 motion to suppress was denied. (R, 5/21/09, 37-40).

On May 28, 2009, defense counsel stated that he was ready for trial, filed motions regarding the defendant's right to a speedy trial, and indicated that on this case, the defendant wished to proceed either to a bench trial or a

stipulated facts trial. (RP 5/28/09, 2-3). The court then conducted a colloquy with the defendant, wherein the defendant indicated that he understood and wished to give up his right to a jury trial. (RP 5/28/09, 3-4). The court stated that it "would want his written waiver of his right to a jury trial". (RP 5/28/09, 4, line 21-22). No written waiver was ever provided to the court.

A bench trial was held on June 30, 2009. (RP 6/30/09). After the evidence was presented, the court entered judgments of guilty on both charges. (CP 23-25). The defendant sought review of the convictions. In an opinion published in part, Division III of the Court of Appeals affirmed the convictions. See Court of Appeals' 02/08/11, Opinion No. 28403-4-III. The defendant then sought discretionary review. This supplemental brief follows.

III. ARGUMENT

1. LAW ENFORCEMENT PROPERLY DETAINED THE DEFENDANT WHILE INVESTIGATING POTENTIAL CRIMES.

It is a well settled point of law that an individual may be detained for investigative purposes when an officer has "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Armenta*, 134 Wn.2d 1, 20, 948 P.2d 1280 (1997). There must be "a substantial possibility that criminal conduct has occurred or is about to occur." *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

In this case, a 911 caller reported a trespass, informed the officers of the description of the suspect, and advised which direction the suspect had gone after leaving. (RP 5/21/09, 6-7). Officer Croskrey located the defendant, who matched the physical description

provided, on the street named by the reporting party and in the immediate vicinity of the alleged trespass. (RP 05/21/09, 7-8). Based on those facts, Officer Croskrey lawfully detained the defendant to investigate the reported trespass. (RP 05/21/09, 10-11).

An officer may make a limited search for weapons for the purpose of officer safety during an investigative detention when the officer has a reason to believe that the person with whom he is dealing may be armed and dangerous. *Terry v. Ohio*, 392 U.S. at 30-31. The question then is whether a reasonably-prudent person in the same circumstances would be warranted in the belief that his or her safety was in danger. *Id.* at 27; *State v. Harvey*, 41 Wn. App 870, 874-75, 707 P.2d 146 (1985). A frisk for weapons is justified when an officer learns of or observes one weapon on the individual being detained. See *State v. Olsson*, 78 Wn. App 202, 895 P.2d 867 (1995); *State v. Swaite*, 33 Wn. App 477, 481, 656 P.2d

520 (1982) (a frisk for weapons is justified when a detainee has a knife on his belt).

During his contact with the defendant, Officer Croskrey observed the defendant to have a weapon, and saw the defendant move his hands and feet in an erratic manner. (RP 05/21/09, 24). Based on those facts, Officer Croskrey lawfully handcuffed the defendant, removed the weapon he did see, and performed a frisk for additional weapons. (RP 05/21/09, 25). The defendant was not arrested at the time that he was handcuffed, as Officer Croskrey informed him, but was detained in handcuffs for officer safety. (RP 05/21/09, 25). The defendant was detained for only a few minutes while Officer Jenkins took the initial report at the victim's apartment, then met with Officer Croskrey. (RP 05/21/09, 25). The officers then observed the pipe in the defendant's bag. (RP 05/21/09, 25-26).

**2. THE DEFENDANT WAS PROPERLY ARRESTED FOR
UNLAWFUL POSSESSION OF DRUG
PARAPHERNALIA**

An officer may arrest an individual when the officer has probable cause to believe a misdemeanor is being committed when the misdemeanor occurs in the presence of the officer. RCW 10.31.100.

The possession of paraphernalia, coupled with bizarre and emotionally unstable behavior . . . gives rise to probable cause to arrest for violation of RCW 69.50.412(1). *State v. Lowrimore*, 67 Wn. App. 949, 959, 841 P.2d 779 (1992). In this case, the defendant walked into a woman's apartment and exhibited fidgety behavior while speaking with the officer. This information, combined with the presence of a pipe with residue, clearly gives the officer probable cause to believe that the defendant is unlawfully in possession of drug paraphernalia.

The defendant also states that the court did not find that the officer had probable cause to believe that the defendant used the paraphernalia. (Petitioner's brief at 14).

However, this issue was never raised in the Superior Court. Accordingly, this statement should not be relied upon to determine whether the officer had probable cause to arrest the defendant.

3. THE DEFENDANT VALIDLY WAIVED HIS RIGHT TO A TRIAL BY JURY.

A defendant has a right to a trial by jury. Washington Constitution Article 1, Section 21. However, a defendant may waive the right to a jury. *State v. Valdobinos*, 122 Wn.2d 270, 288, 858 P.2d 199 (1993). A defendant waiving the right to a jury must do so knowingly, intelligently, and voluntarily. *State v. Vasquez*, 109 Wn. App. 310, 319, 34 P.3d 1255 (2001), citing *State v. Bugai*, 30 Wn. App. 156, 157, 632 P.2d 917 (1981). The waiver of a right to a jury may be done either in writing or orally on the record. *Id.* (citing *State v. Wicke*, 91 Wn.2d 638, 645-46, 591 P.2d 452 (1979)) and *State v. Rangel*, 33 Wn. App. 774, 775-76, 657 P.2d 809 (1983).

Jury waivers should be made in writing. *State v. Vasquez*, 109 Wn. App. at 321. But they are nonetheless effective if made knowingly, intelligently, and voluntarily in open court. *Id.*, citing CrR 6.1(a); *State v. Wicke*, 91 Wn.2d 638, 645-46, 591 P.2d 452 (1979) (waiver may be made orally in open court)); and *State v. Rangel*, 33 Wn. App. at 775-76. Failure to complete a written waiver pursuant to CrR 6.1 does not result in reversal if the record is otherwise sufficient to show a valid waiver. *State v. Hos*, 154 Wn. App. 238, 250, 225 P.3d 389 (2010).

In this case, the defendant expressed understanding on the record that he wanted to waive his right to a trial by jury, that he understood that the case would now be decided only by a judge, and that he had discussed it with his attorney. (RP 05/28/09, 3-4). The defendant further expressed his understanding which case of the two pending would be proceeding

without a jury, and indicated that he wished to waive his right to a jury. (RP 5/28/09, 3-4).

The defendant relies in part on *State v. Hos*, 154 Wn. App. 238, 225 P.3d 389 (2010). However, the defendant in *Hos* filed neither a written waiver nor engaged in any sort of colloquy on the record with the judge regarding her right to a trial by jury. *Id.* at 244. This is clearly distinguishable in this case where the defendant unequivocally expressed his desire to waive his right to a jury. Accordingly, the Court should find that the defendant validly waived his right to a jury trial.

**4. SUFFICIENT EVIDENCE SUPPORTS THE
CONVICTION OF POSSESSION STOLEN
PROPERTY IN THE SECOND DEGREE.**

Evidence is sufficient to support a finding of guilt if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980).

"When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted *most strongly* against the defendant." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (emphasis added). An inquiry on appeal regarding the sufficiency of the evidence does not require the reviewing court to determine whether it believes the evidence at trial proves guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d at 221. Instead, the reviewing court must only ascertain that any reasonable fact-finder could have found guilt beyond a reasonable doubt based on the evidence presented at trial. *Id.*

In evaluating the sufficiency of the evidence on appeal, the court is obliged to defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences therefrom. *State v. Hays*, 81 Wn. App. 425, 430, 914 P.2d 788 (1996), *review denied*, 130

Wn.2d 1013, 928 P.2d 413 (1996). Furthermore, circumstantial evidence is considered as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 637, 618 P.2d 99 (1980).

A. The card found on the defendant was an access device.

The defendant asserts that the card found in his pocket is not an access device because it required the payment of thirty dollars to activate the card. An access device is defined as any card, plate, code, account number, or other means of account access that can be used alone or in conjunction with another access device to obtain money, goods, services, or anything else of value, or that can be used to initiate a transfer of funds, other than a transfer originated solely by paper instrument. RCW 9A.56.010(1). The definition of an access device has been addressed in several cases.

The first case to address the status of an access device was *State v. Schloredt*, 97 Wn. App

789, 987 P.2d 647 (1999). In *Schloredt*, the defendant argued that the State did not present evidence that the credit cards found in his possession were operational on the date that he possessed them. *Id.* at 793. The *Schloredt* Court held that this reading has no merit and yields an absurd result. *Id.* at 794. The Court went on to state that the important question is the "status of the access device when last in possession of its lawful owner." *Id.* at 794.

A similar question was then addressed in *State v. Clay*, 144 Wn. App. 894, 184 P.3d 674 (2008). The defendant in *Clay* cited to the language in *Schloredt*, and argued that the card found in his possession was not an access device because it had never been in possession of the lawful owner. *Id.* at 897. The *Clay* Court discusses the fact that *Schloredt* never discussed the question of whether activation affected the status of a card as an access device. *Id.* at 898. The *Clay* Court goes on to say that the card need

not have been activated in order to be an access device. *Id.* at 898-899. According to the *Clay* Court, the appropriate question is whether the card could have been used to obtain anything as defined in RCW 9A.56.010, not the status of the card with its issuer. *Id.* at 899. As the *Clay* Court concluded, "no evidence was offered that would prevent a rational juror from concluding that the card had been, or could be, activated by someone else or used without activation." *Id.* at 899.

Another case addressing the access device is *State v. Chang*, 147 Wn. App. 490, 195 P.3d 1008 (2008). *Chang* addressed the possession of stolen account numbers, rather than credit cards. However, the *Chang* Court mentions in summary that "[t]he statute permits the State to prosecute those who possess stolen checking account numbers without waiting to see whether there will be an actual attempt at passing bad checks." *Id.* at 504. The same logic applies here. The defendant

could have used the account number on the card or unactivated card itself to obtain goods or services; no actual attempt to do so is required by the definition of an access device.

The status of the card with the issuer does not mean that the card cannot be used to obtain money, goods, or services. Not all merchants have the ability to immediately check the status of a credit card when presented for payment. Many merchants continue to take imprints of the card, then submit the charge slip to the issuing company, rather than sending the information digitally. Had he attempted to do so, the defendant could have used the card to obtain goods or services. It also seems to be an absurd result that the status of an access device would be different based on actions taken by the victim prior to the crime having occurred. Two credit cards, which appear identical, would result in two different charges; one would be an access device and one would not.

In this case, the victim would have been required to pay thirty dollars in order to activate the card with the issuing company. This case is indistinguishable from that of *State v. Clay*. The State presented sufficient evidence that the defendant was in possession of stolen property in the second degree based on the fact that the card was an access device.

B. The card remained the property of Ruth Georges despite its presence in her garbage.

A person commits the crime of Possession of Stolen Property in the Second Degree when he or she possesses a stolen access device. RCW 9A.56.160. Stealing information from an individual's garbage deprives the owner of the authorized use. *State v. Askham*, 120 Wn. App. 872, 885, 86 P.3d 1224 (2004). In *Askham*, the defendant removed the victim's credit card number from the curbside garbage. *Id.* at 877.

In this case, the State presented evidence that the owner of the card, Ruth Georges, did not

intend to use the card, but placed it in a cigarette box inside a garbage can. (RP 6/30/09, 84, 86). She did not give the defendant permission to take or have the card. (RP 6/30/09, 84). The defendant testified that he was unaware of the card, and that it was simply in a bag of garbage that he obtained from Ms. Georges. (RP 6/30/09, 106-107). Officer Croskrey testified that when he removed the card from the defendant's pocket, the defendant stated that he had just found it. (RP 6/30/09, 41). The finder of fact specifically found that the defendant did not have permission to remove the card from Ms. Georges' garbage and that he knowingly possessed the stolen card.

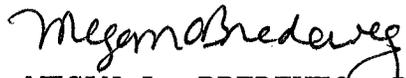
CONCLUSION

The defendant was properly detained while law enforcement investigated the situation. The defendant was properly arrested for Unlawful Possession of Drug Paraphernalia. The defendant knowingly, intelligently, and voluntarily waived

his right to a jury trial. Sufficient evidence was presented to convict the defendant of Possessing Stolen Property in the Second Degree. Accordingly, the defendant's convictions for Possessing Stolen Property in the Second Degree and Unlawful Possession of a Controlled Substance, Methamphetamine, should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of November 2011.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

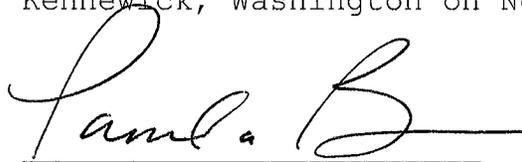
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