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SUPREME COURT
STATE OF WASHINGTON
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NO. 96035-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

MARC MCKEE,

Respondent.

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

The Honorable Michael E. Rickert, Judge

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

A. SUPPLEMENTAL ISSUE STATEMENTS 1

B. STATEMENT OF THE CASE 1

1. Trial 1

2. Court of Appeals 5

C. SUPPLEMENTAL ARGUMENT 10

THE COURT OF APPEALS ACTED WELL WITHIN ITS DISCRETION WHEN IT DENIED THE STATE'S MOTION FOR RECONSIDERATION. 10

D. CONCLUSION 16

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Cross
99 Wn.2d 373, 662 P.2d 828 (1983) 11, 12

In re Rosier
105 Wn.2d 606, 717 P.2d 1353 (1986). 10

Peralta v. State
187 Wn.2d 888, 389 P.3d 596 (2017) 15

River House Dev. Inc. v. Integrus Architecture, P.S.
167 Wn. App. 221, 272 P.3d 289 (2012) 10

Rivers v. Washington State Conference of Mason Contractors
145 Wn.2d 674, 41 P.3d 1175 (2002) 10

State v. Afana
169 Wn.2d 169, 233 P.3d 879 (2010) 11

State v. Cormier
100 Wn. App. 457, 997 P.2d 950
review denied, 142 Wn.2d 1003, 11 P.3d 826 (2000) 12

State v. Cruz
189 Wn.2d 588, 404 P.3d 70 (2017) 11

State v. E.A.J.
116 Wn. App. 777, 67 P.3d 518 (2003)
review denied, 150 Wn.2d 1028, 82 P.3d 243 (2004) 11, 12

State v. Eckhart
196 Wn. App. 1018 (2016) 14

State v. Elliott
114 Wn.2d 6, 785 P.2d 440
cert. denied, 498 U.S. 838, 111 S. Ct. 110, 112 L. Ed. 80 (1990) 10

TABLE OF AUTHORITIES (CONT'D)

Page

State v. Jasper
174 Wn.2d 96, 271 P.3d 876 (2012) 14

State v. Kinzy
141 Wn.2d 373, 5 P.3d 668 (2000)
cert. denied, 531 U.S. 1104, 121 S. Ct. 843, 148 L. Ed. 2d 723 (2001) 11

State v. McKee
3 Wn. App. 2d 11, 413 P.3d 1049 (2018) 7

State v. Niedergang
43 Wn. App. 656, 719 P.2d 576 (1986) 12

State v. Olson
126 Wn.2d 315, 893 P.2d 629 (1995) 12

State v. Stanton
68 Wn. App. 855, 845 P.2d 1365 (1993) 14

State v. Ward
125 Wn. App. 138, 104 P.3d 61 (2005) 11, 12

State v. Wethered
110 Wn.2d 466, 755 P.2d 797 (1988) 10

FEDERAL CASES

Lockhart v. Nelson
488 U.S. 33, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988) 14

Rosenfeld v. U.S. Dept. of Justice
57 F.3d 803 (9th Cir. 1995) 10

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES

RAP 2.2 12

RAP 12.4 13

RAP 13.7 ..... 1, 15

A. SUPPLEMENTAL ISSUE STATEMENTS

1. Appellate courts have discretion to deem arguments waived where those arguments should have been made prior to a decision in the case. The State failed to address the issue of remedy in its briefing or at oral argument despite the Court of Appeals' clear interest in the issue. Only after the Court of Appeals issued an opinion in McKee's favor did the State seek to address the issue. Has the State demonstrated that the Court of Appeals abused its discretion when it denied the Motion for Reconsideration?

2. Because the Court of Appeals reversed McKee's convictions on four charges and dismissed those charges, it did not decide McKee's arguments that the charges involved the same criminal conduct and should have been scored as a single offense at sentencing. If this Court finds the Court of Appeals abused its discretion when it denied the Motion for Reconsideration, should an appellate court decide McKee's sentencing issue under RAP 13.7(b)?

B. STATEMENT OF THE CASE

1. Trial

McKee was tried on nine criminal charges. The charges in counts 1 through 4 – Possessing Depictions of a Minor Engaged in

Sexually Explicit Conduct – remain relevant in this Court.

Evidence at trial revealed that, in 2012, 16-year-old A.Z. lived with her mother, Brenda Brickley, and older brother Robert Gora. 4RP[1] 89-92. All three were drug addicts who regularly used heroin and methamphetamine. 4RP 95-104; 6RP 60-63; 7RP 9. In January 2012, Brickley introduced A.Z. to 40-year-old Marc McKee, whom she had met during a drug deal. 4RP 104; 6RP 57-58; CP 23. Thereafter, McKee spent considerable time with the family, supplied them drugs, and often got high with them. 4RP 105-106, 112-132; 6RP 59-60; 7RP 11.

In late summer 2012, A.Z.'s relationship with McKee became sexual during a three-day drug binge at a Burlington motel. 4RP 128-132; 5RP 5-10. And, shortly thereafter in September 2012, the two spent three days together at a home in Clear Lake, where McKee was staying at the time. 5RP 11-13. The two got high on methamphetamine and heroin. 5RP 13-16. They also had sex again and, using his cell phone camera, McKee created three short

[1] This brief refers to the verbatim report of proceedings as follows: 1RP – November 21, 2014; 2RP – December 3, 2014; 3RP – June 1, 2015 (voir dire); 4RP – June 1, 2015 and June 2, 2015 (a.m. session); 5RP – June 2, 2015; 6RP – June 3, 2015 (a.m. session); 7RP – June 3, 2015 (p.m. session); 8RP – June 4, 2015; 9RP – June 5, 2015; 10RP – June 8, August 5, and September 1, 2015.

video clips and some still shots to memorialize some of those acts. 5RP 17, 29-43.

Brickley suspected that her daughter and McKee were having sex, but A.Z. denied it. 6RP 75-77. These suspicions were confirmed, however, on October 28, 2012. A.Z. and Brickley argued that day and A.Z. left home claiming she was going to see a friend. 5RP 50-54. Instead, McKee picked her up and took her to a home in Mr. Vernon owned by Gary Ness. 5RP 54-57. When Brickley discovered A.Z.'s whereabouts, she, Gora, Chris Deason (one of Gora's friends), and Chris Seifert (a longtime father figure to A.Z. and Gora) drove to Ness's home to retrieve A.Z. 4RP 92-93; 6RP 77-88; 7RP 29-31, 58, 62-63, 114-115. Once there, they beat McKee, stole his cell phone, and removed A.Z. from the premises. 6RP 90-95, 133-142; 7RP 35-41, 67-69, 116-121.

On McKee's phone, Gora found the video clips of A.Z. and McKee having sex at the house in Clear Lake and found the still shots of A.Z. without clothing. 7RP 41-45. He gave the phone to Brickley, who turned it over to police. 6RP 96-102, 113-114.

The defense moved to suppress evidence law enforcement found on McKee's cell phone on several grounds, including that the warrant authorizing the search was not supported by probable

cause and failed to satisfy the particularity requirement of the Fourth Amendment. CP 191-230; 2RP 2-25. The motion was denied. CP 233.

Jurors convicted McKee on counts 1 through 3 (Possessing Depictions of a Minor Engaged in Sexually Explicit Conduct in the First Degree) based on three video clips from his phone depicting sex with A.Z. CP 23-24, 253-255; 9RP 114-124. They convicted him on count 4 (Possessing Depictions of a Minor Engaged in Sexually Explicit Conduct in the Second Degree) based on still images from his phone depicting A.Z. unclothed. CP 24, 256: 9RP 131-134.

At sentencing, defense counsel indicated there were no grounds for the court to find that the convictions in counts 1 through 4 involved the "same criminal conduct." 10RP 39. Scoring each of these four convictions as a separate crime, McKee's total sentence was 110 months plus 90 days. CP 144; 10RP 62.

2. Court of Appeals

On Appeal, McKee argued the warrant permitting a search of his cell phone was not sufficiently particular to satisfy the Fourth Amendment. See Brief of Appellant (BOA) at 6-16; Reply Brief at 1-5. He also argued trial counsel had been ineffective at sentencing for failing to argue that his convictions on counts 1 through 4 involved the same criminal conduct. See BOA at 16-21; Reply Brief at 5-9.

Regarding remedy for the Fourth Amendment violation, McKee contended that the fruits of the search of his phone "formed the basis for the charges in counts 1 through 4." BOA at 16. McKee therefore asked the Court of Appeals to vacate his convictions on counts 1 through 4, BOA at 24, which he specified to mean "convictions on these counts should be reversed and dismissed." BOA at 16.

The State's brief defended the content of the search warrant. The brief did not argue for some remedy other than dismissal of the charges in counts 1 through 4 if the warrant were declared unconstitutional. The brief does not address remedy at all. See Brief of Respondent (BOR) at 3-14, 18. The State also defended defense counsel's failure to argue same criminal conduct at

sentencing. See BOR at 14-18.

The parties argued the case on September 14, 2017. See https://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showOralArgAudioList&courtId=a01&docketDate=20170914 (last visited 11/7/18). And the topic of the appropriate remedy was clearly a focus.

Early at the hearing, the court had me confirm that, if it agreed with defense arguments as to the warrant, it would not be necessary to decide the offender score issue. Oral Argument, at 1:24 – 1:30. The court also specifically raised and addressed with me the topic of remedy from 7:54 to 8:54 of the oral argument.

Judge Schindler asked:

> "Was the only evidence that was introduced at trial for the four counts that you're seeking reversal based on what the police were able to obtain from the search warrant?"

Oral Argument at 7:54 – 8:08. I responded that, although there was other evidence based on what had been seen on the phone prior to Brickley giving it to police, A.Z. had no memory of events surrounding the depictions.[2] Her testimony concerning them – like the bulk of the State's evidence – was a direct product of the

[2] She testified she had been too high to remember the sex, the pictures, or the

warrant. Oral Argument, at 8:08 – 8:50. Judge Schindler then asked, "So if we excluded that evidence [gained with the warrant], is there sufficient evidence?" Oral Argument, at 8:50 – 8:53. I argued there would not be sufficient evidence to prove the crimes. Oral Argument, at 8:53.

Although the State's argument began shortly after this discussion, the prosecutor did not continue the discussion by immediately addressing the issue of remedy. Oral Argument, at 9:43-9:57. In fact, at no time did the prosecutor address the issue of remedy during the State's 10 minutes of argument. The State never argued the evidence would be sufficient to convict McKee at any retrial. See Oral Argument, at 9:43 - 19:43.

In a published decision, the Court of Appeals found the search warrant violated the particularity requirement of the Fourth Amendment, reversed, and remanded to dismiss the four convictions for Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct. State v. McKee, 3 Wn. App. 2d 11, 14-15, 29, 413 P.3d 1049 (2018). Because the court found for McKee on the warrant issue and granted his requested relief, it did not address his same criminal conduct argument concerning those four convictions.

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videos. 5RP 125-126.

The State moved for reconsideration and, for the first time, finally addressed remedy. The Court of Appeals had discussed in its opinion that Robert Gora, Chris Deason, and Brenda Brickley looked at images on the phone before the phone was turned over to police. The State argued their testimony would be admissible at any retrial because it was not a product of the defective warrant. Therefore, the proper remedy was reversal and remand for further proceedings, including possible retrial on counts 1 through 4. Motion, at 1-10. The State also argued the Court of Appeals could grant its motion without deciding McKee's same criminal conduct argument. Motion, at 10.

McKee made three arguments in his Answer.

First, by failing to argue against his request for dismissal of the charges – either in its briefing or at oral argument (where the issue's importance was apparent) – the State had waived its new argument and should not be heard to complain that the Court had somehow overlooked or misapprehended an important point of law or fact. Answer, at 2-3.

Second, McKee discussed the evidence left unaffected by the warrant. He again pointed out that A.Z. had no memory of the events that produced the images leading to charges in counts 1

through 4, and her trial testimony had been the product of examining the images illegally obtained. Moreover, the other witnesses who looked at images on the phone were vague in their recollections and descriptions. McKee again contended the evidence available for any retrial was insufficient to convince jurors beyond a reasonable doubt of his guilt. Answer, at 3-5.

Third, McKee argued that – if the Court of Appeals found no waiver and agreed with the State on the merits of its newly expressed position -- it should decide his sentencing argument, since the proper offender score and potential sentences would help the State decide if it was worth expending resources on another trial. It also would prevent any possible repeat of the sentencing mistake. Answer, at 6-7.

The Court of Appeals denied the State's Motion for Reconsideration. This Court subsequently granted the State's Petition for Review.

C. SUPPLEMENTAL ARGUMENT

THE COURT OF APPEALS ACTED WELL WITHIN ITS DISCRETION WHEN IT DENIED THE STATE'S MOTION FOR RECONSIDERATION.

"[Appellate courts] will not consider claims insufficiently argued by the parties." State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440, cert. denied, 498 U.S. 838, 111 S. Ct. 110, 112 L. Ed. 80 (1990). There is a policy not to consider matters unless they were timely argued. State v. Wethered, 110 Wn.2d 466, 472, 755 P.2d 797 (1988) (citing In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

For trial courts, "discretion extends to refusing to consider an argument raised for the first time on reconsideration absent a good excuse." River House Dev. Inc. v. Integrus Architecture, P.S., 167 Wn. App. 221, 231, 272 P.3d 289 (2012) (citing Rosenfeld v. U.S. Dept. of Justice, 57 F.3d 803, 811 (9th Cir. 1995)); see also Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 685, 41 P.3d 1175 (2002) (decisions on motions for reconsideration reviewed for abuse of discretion). There is no reason appellate courts should have any less discretion to deny an untimely argument for reconsideration.

Here, McKee's request for reversal and dismissal in his

opening brief and the discussion during oral argument alerted the State that remedy was very much at issue. Yet, the prosecution failed to address it in its briefing or at oral argument. The absence of any contrary argument suggested the State agreed with McKee's assessment that the remaining evidence available for prosecution was insufficient to prove the charges in counts 1 through 4. See In re Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("By failing to argue this point, respondents appear to concede it."); State v. Ward, 125 Wn. App. 138, 144, 104 P.3d 61 (2005) (defense argues remand for trial prohibited; "The State does not respond and thus, concedes this point."); State v. E.A.J., 116 Wn. App. 777, 789, 67 P.3d 518 (2003) (by failing to address appellant's contention, "the State apparently concedes the issue"), review denied, 150 Wn.2d 1028, 82 P.3d 243 (2004).

Courts bar retrial when convinced the State will not have sufficient admissible evidence to obtain a conviction. See State v. Cruz, 189 Wn.2d 588, 592-597, 404 P.3d 70 (2017); State v. Afana, 169 Wn.2d 169, 175, 233 P.3d 879 (2010); State v. Kinzy, 141 Wn.2d 373, 393-394, 5 P.3d 668 (2000), cert. denied, 531 U.S. 1104, 121 S. Ct. 843, 148 L. Ed. 2d 723 (2001); State v. Cormier, 100 Wn. App. 457, 460, 997 P.2d 950, review denied, 142 Wn.2d

1003, 11 P.3d 826 (2000); State v. Niedergang, 43 Wn. App. 656, 658, 663, 719 P.2d 576 (1986); see also RAP 2.2(b)(2) (contemplating State's appeal where practical effect of suppression is termination of case).

And sometimes an order of dismissal is a consequence of the State's own concession that any lawfully obtained evidence is insufficient to support a conviction. See Niedergang, 43 Wn. App. at 658. In McKee's case, the Court of Appeals was well within its discretion to treat the State's failure to argue against dismissal in its brief or at oral argument as a concession on this very point. See Cross, 99 Wn.2d at 379; Ward, 125 Wn. App. at 144; E.A.J., 116 Wn. App. at 789.

Appellate courts may choose to overlook *technical* violations of the appellate rules where an argument was nonetheless clearly presented and deciding the issue is not a major inconvenience for the court. State v. Olson, 126 Wn.2d 315, 323, 893 P.2d 629 (1995). But this case does not involve a mere technical violation. There was a total failure to address remedy and, on reconsideration, the State failed to offer any justification for its earlier silence. Moreover, considering the State's argument for the first time after issuance of the published opinion meant considerable inconvenience

to the Court of Appeals, since dismissal of the four charges had made it unnecessary to decide McKee's offender score challenge, a challenge the Court may otherwise have been inclined to decide.

Motions for reconsideration are designed to ensure appellate courts have not overlooked or misapprehended a point of law or fact. RAP 12.4(c). They are not designed to permit a party to stay silent on an important issue, wait for an adverse opinion in the case, and then attempt to change the result by finally addressing that issue. This Court can and should sustain the Court of Appeals' legitimate exercise of discretion to deny the State's Motion for Reconsideration based on waiver. Nothing was overlooked or misapprehended by that court. The argument was made for the time on reconsideration without good excuse, providing ample cause for the Court of Appeals to deem it waived.[3]

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[3] Consistent with appellate courts' usual practice, the Court of Appeals order denying reconsideration did not specify on what grounds the denial rested. But given that McKee's lead argument was waiver, and the record supports waiver, it is a likely and valid basis.

One additional point on the issue of remedy. The situation here, where the Court of Appeals considered sufficiency of the evidence moving forward, should be distinguished from the situation where an appellant successfully challenges the introduction of evidence at trial and argues the remaining evidence *at that trial* was insufficient to convict, therefore barring any retrial under double jeopardy principles. In this latter situation, sufficiency of the evidence is assessed using even the evidence wrongly admitted, and retrial is barred only if the combination of admissible and inadmissible evidence was insufficient to prove guilt. See Lockhart v. Nelson, 488 U.S. 33, 40-42, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988); State v. Jasper, 174 Wn.2d 96, 120, 271 P.3d 876 (2012); State v. Stanton, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

The State has not cited Lockhart or argued its applicability. But Judge Schindler, who authored the opinion in McKee's case, is aware of the circumstances in which it would apply. See State v. Eckhart, 196 Wn. App. 1018, at *4-*5 (2016) (Judge Schindler concurs in decision applying Lockhart).[4] While Lockhart addresses sufficiency of the evidence already presented at trial, the focus in

[4] Under GR 14.1, McKee cites this unpublished decision for whatever persuasive authority this Court deems appropriate.

McKee's case is sufficiency of the available evidence at any retrial. In the absence of timely argument contradicting the defense position that the remaining evidence is insufficient to obtain convictions, the Court of Appeals properly dismissed the four charges at issue and, later, properly denied the State's Motion for Reconsideration.

Finally, as McKee argued in response to the State's Motion for Reconsideration, if this Court is inclined to provide the State with another opportunity to try him on the four dismissed counts, this Court should decide his same criminal conduct argument or remand for the Court of Appeals to decide. See RAP 13.7(b) ("If the Supreme Court reverses a decision of the Court of Appeals that did not consider all of the issues raised which might support that decision, the Supreme Court will either consider and decide those issues or remand the case to the Court of Appeals to decide those issues."); Peralta v. State, 187 Wn.2d 888, 904, 389 P.3d 596 (2017) (remand to Court of Appeals under RAP 13.7(b) for consideration of unresolved issue beyond scope of current petition and cross-petition).

This issue was extensively briefed by both parties in the Court of Appeals. See BOA at 16-22; BOR at 14-17; Reply Brief at 5-9. Moreover, a decision that the four convictions would merely count as

one crime for sentencing could impact the State's decision on whether to seek a retrial if given the opportunity.

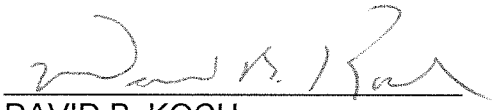
D. CONCLUSION

This Court should conclude that the Court of Appeals acted within in its discretion when it dismissed the four charges and denied the State's Motion for Reconsideration. Alternatively, McKee asks this Court to decide his same criminal conduct arguments or remand for the Court of Appeals to decide these arguments.

DATED this 9th day of November, 2018.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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