

FILED
SUPREME COURT
STATE OF WASHINGTON
3/8/2019 4:15 PM
BY SUSAN L. CARLSON
CLERK

No. 96354-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

A.M.,

Petitioner.

PETITIONER'S SUPPLEMENTAL BRIEF

RICHARD W. LECHICH
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ISSUES..... 1

C. STATEMENT OF THE CASE..... 2

D. ARGUMENT 5

 1. The drug possession statute must be interpreted to have a knowledge element or else be held unconstitutional in violation of due process..... 5

 a. The presumption of innocence and the requirement of proof beyond a reasonable doubt are fundamental principles. These principles restrict a state’s authority to create strict liability crimes or to shift the burden of proof to defendants..... 5

 b. As currently interpreted, drug possession is a strict liability crime. The innocent must prove unwitting possession. At a minimum, the constitutionality of this burden shifting scheme is doubtful. 7

 c. The drug possession statute must be interpreted to require proof of knowledge or be declared unconstitutional. 12

 d. Reversal of the guilty adjudication is required. 14

 2. The admission of A.M.’s compelled statements that a backpack was her property violated her privilege against self-incrimination. 15

 a. The state and federal constitutions afford defendants a privilege against self-incrimination..... 15

 b. A.M.’s privilege against self-incrimination was violated by the admission of a property sheet A.M. was compelled to sign when processed in and out of juvenile detention. 16

c. The error was properly raised in the Court of Appeals as manifest constitutional error.	19
d. The error is prejudicial.....	20
E. CONCLUSION	20

TABLE OF AUTHORITIES

United States Supreme Court

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)..... 6, 7, 9

Coffin v. United States, 156 U.S. 432, 15 S. Ct. 394 (1895)..... 6

Gomez v. United States, 490 U.S. 858, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989)..... 13

In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... 6, 8, 12

J.D.B. v. North Carolina, 564 U.S. 261, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011)..... 16

Lambert v. California, 355 U.S. 225, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957)..... 6

McFarland v. Am. Sugar Ref. Co., 241 U.S. 79, 36 S. Ct. 498, 60 L. Ed. 899 (1916)..... 7

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)..... 15

Morissette v. United States, 342 U.S. 246, 72 S. Ct. 240, 96 L. Ed. 288 (1952)..... 6

Morrison v. People of State of California, 291 U.S. 82, 54 S. Ct. 281, 78 L. Ed. 664 (1934)..... 9

Mullaney v. Wilbur, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975)..... 6, 12

Nelson v. Colorado, ___ U.S. ___, 137 S. Ct. 1249, 197 L. Ed. 2d 611 (2017)..... 5

Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)..... 5, 7

<u>Rhode Island v. Innis</u> , 446 U.S. 291, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980).....	16
<u>Schad v. Arizona</u> , 501 U.S. 624, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991).....	8, 11
<u>Speiser v. Randall</u> , 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958).....	7
<u>United States v. United States Gypsum Co.</u> , 438 U.S. 422, 98 S. Ct. 2864, 57 L.Ed.2d 854 (1978).....	14

Washington Supreme Court

<u>City of Seattle v. Grundy</u> , 86 Wn.2d 49, 541 P.2d 994 (1975).....	14
<u>Fast v. Kennewick Pub. Hosp. Dist.</u> , 187 Wn.2d 27, 384 P.3d 232 (2016).....	14
<u>In re Pers. Restraint of Cross</u> , 180 Wn.2d 664, 327 P.3d 660 (2014).	17, 18
<u>In re Pers. Restraint of Stockwell</u> , 179 Wn.2d 588, 316 P.3d 1007 (2014).....	13
<u>State v. Anderson</u> , 141 Wn.2d 357, 5 P.3d 1247 (2000)	14
<u>State v. Banks</u> , 149 Wn.2d 38, 65 P.3d 1198 (2003).....	15
<u>State v. Bradshaw</u> , 152 Wn.2d 528, 98 P.3d 1190 (2004).....	8, 13, 14
<u>State v. Cleppe</u> , 96 Wn.2d 373, 635 P.2d 435 (1981).....	passim
<u>State v. Coristine</u> , 177 Wn.2d 370, 300 P.3d 400 (2013)	15
<u>State v. DeLeon</u> , 185 Wn.2d 478, 374 P.3d 95 (2016).....	16, 18, 20
<u>State v. Henker</u> , 50 Wn.2d 809, 314 P.2d 645 (1957)	11
<u>State v. Kalebaugh</u> , 183 Wn.2d 578, 355 P.3d 253 (2015).....	19
<u>State v. Lamar</u> , 180 Wn.2d 576, 327 P.3d 46 (2014)	19
<u>State v. Moen</u> , 129 Wn.2d 535, 919 P.2d 69 (1996).....	14

<u>State v. Morris</u> , 70 Wn.2d 27, 422 P.2d 27 (1966).....	11
<u>State v. Roberts</u> , 88 Wn.2d 337, 562 P.2d 1259 (1977)	11
<u>State v. Sargent</u> , 111 Wn.2d 641, 762 P.2d 1127 (1988).....	16
<u>Utter v. Bldg. Indus. Ass’n of Washington</u> , 182 Wn.2d 398, 341 P.3d 953 (2015).....	13

Washington Court of Appeals

<u>State v. Denney</u> , 152 Wn. App. 665, 218 P.3d 633 (2009).....	18
---	----

Other Cases

<u>Dawkins v. State</u> , 313 Md. 638, 547 A.2d 1041 (1988)	8
<u>State v. Adkins</u> , 96 So. 3d 412 (Fla. 2012).....	8
<u>State v. Bell</u> , 649 N.W.2d 243 (2002).....	8
<u>State v. Harms</u> , 137 Idaho 891, 55 P.3d 884 (Ct. App. 2002)	18
<u>States v. Williams</u> , 842 F.3d 1143 (9th Cir. 2016)	18

Constitutional Provisions

Const. art. I, § 3.....	5
Const. art. I, § 9.....	15
U.S. Const. amend. V.....	15
U.S. Const. amend. XIV	5

Statutes

RCW 69.50.4013(1).....	7
RCW 69.50.4013(2).....	7
RCW 69.50.4014	7
RCW 9A.20.021(1)(c)	7

Rules

RAP 2.5(a)(3)..... 19

A. INTRODUCTION

The presumption of innocence and the requirement that the prosecution prove every element of the offense beyond a reasonable doubt are bedrock constitutional principles. As interpreted, the drug possession statute upends these principles. The prosecution need only prove the fact of possession, not that the possession was knowing. To avoid becoming a convicted felon, the innocent bear the burden of disproving knowledge.

This burden shifting scheme cannot stand. At a minimum, its constitutionality is doubtful. Consistent with the canon that statutes are interpreted to avoid constitutional doubts and the presumption that all criminal statutes are read to have a mental element, this Court should hold the drug possession statute requires the prosecution prove knowledge. If not, the possession statute must be declared unconstitutional. Either way, A.M.'s guilty adjudication for drug possession must be reversed.

The guilty adjudication must also be reversed due to a violation of A.M.'s constitutional right against self-incrimination. Upon being booked in and out of juvenile detention, A.M. was compelled to sign a form regarding her property. The admission of her compelled statements at trial was manifest constitutional error, demanding reversal.

B. ISSUES

1. Due process forbids states from shifting an “inherent” element

of an offense to the defendant to disprove. For drug possession, every state besides Washington requires the prosecution prove *knowing* possession. In Washington, the drug possession statute has been interpreted to be a strict liability offense unless the defendant disproves knowledge. Given the constitutional doubts about this burden shifting scheme, should the drug possession statute be interpreted to require the prosecution prove knowledge? If not, is the drug possession statute unconstitutional?

2. Compelled statements are inadmissible because they violate the privilege against self-incrimination. A.M. was arrested after trying to shoplift costumes by concealing them in a backpack. The arresting officer found drugs in the backpack. He did not seize the backpack as evidence and instead included it among A.M.'s "property." When booked in and out of juvenile detention, A.M. was compelled to review and sign a form asking if the backpack was her property. Did the admission of this form at trial violate A.M.'s privilege against self-incrimination?

C. STATEMENT OF THE CASE

One week before Halloween, A.M., a 15-year-old girl, was hanging out with her friend, Augustina. See CP 54; RP 107-09. The teens accompanied Augustina's mother to a thrift store, planning to get Halloween costumes for Augustina's younger siblings. RP 107. Before leaving, A.M. saw Augustina or Augustina's mother retrieve a backpack

from Augustina's house that belonged to a family member. RP 107-08.

A.M. believed that Augustina's mother was under the influence of substances. RP 109. She reeked of beer and was drinking a beer on the walk to the store. RP 107, 109. Augustina's mother had the appearance of a drug user. See Ex. 1; RP 121-22.

At the store, they tried to shoplift two children's Halloween costumes because Augustina's mother did not have money. RP 107-09. Augustina's mother placed two costumes in a shopping cart being pushed by her daughter. Ex. 1; RP 27. The backpack was in the shopping cart. Ex. 1; RP 28. Shortly thereafter, A.M. put the costumes in the large compartment of the backpack. Ex. 1; RP 46. Later on, A.M. put the backpack on and walked out of the store. Ex. 1; RP 28-29.

A loss prevention officer, who had been observing using a surveillance system, detained A.M. RP 22-29, 47. Augustina and her mother fled. RP 47; Ex. 4. The loss prevention officer called the police. RP 31. An officer who responded to the report of theft was advised by dispatch that one of the suspects who had fled, the adult woman, appeared "drugged up." RP 78-80; Ex. 4.

Following A.M.'s arrest for theft, a police officer searched the backpack. RP 28, 62. Inside a compartment different from the one where the costumes had been concealed, the officer found a small bottle

containing methamphetamine. RP 62-63. The officer informed A.M. she was also under arrest “for a felony.” RP 63-64.

A.M. invoked her right to silence. RP 10-11, 60; CP 51-52. A.M. was booked into juvenile detention. RP 63-64; Ex. 3. Instead of seizing the backpack as evidence, the arresting officer put the backpack, along with A.M.’s “personal property,” in the property room at the facility. RP 64. A “property sheet” from the facility recounts that this backpack was among A.M.’s items. Ex. 3. A.M. was required to review this form. See RP 89, 91. If A.M. did not sign the form, her refusal would be noted. See RP 96-97. A.M.’s signature appears on the form. Ex. 3.

When A.M. was picked up from the juvenile facility a day later, the facility gave her the backpack. RP 110. A.M. returned it to Augustina’s family. RP 110. A.M. was upset at them for leaving her. RP 110-11.

A.M. was charged with possession of a controlled substance, methamphetamine. CP 54. A.M. raised the defense of unwitting possession, which required her to prove that she did not know the drugs were in the backpack. RP 133-34. A.M. testified the backpack was not hers and that she had not known the drugs were in it. RP 108, 111.

Over A.M.’s relevance objection, the court admitted the form from juvenile detention. RP 97-99; Ex. 3. During closing argument, the

prosecution cited this evidence in support of its argument that the court should reject A.M.'s defense of unwitting possession. RP 118-19. The prosecution maintained this position, arguing later that A.M. "couldn't explain why she signed for the backpack." RP 149. The trial court found A.M. guilty, concluding that A.M. had not met her "burden" to prove unwitting possession. RP 133-34, 150-51.

D. ARGUMENT

1. The drug possession statute must be interpreted to have a knowledge element or else be held unconstitutional in violation of due process.

a. The presumption of innocence and the requirement of proof beyond a reasonable doubt are fundamental principles. These principles restrict a state's authority to create strict liability crimes or to shift the burden of proof to defendants.

The State cannot deprive persons of liberty without due process of law. U.S. Const. amend. XIV; Const. art. I, § 3. A state's criminal procedures, including an allocation of the burden of proof and persuasion, violates due process if it "offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental." Patterson v. New York, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977). Fundamental to the traditions and conscience of our people is the presumption of innocence in favor of the accused. Nelson v. Colorado, ___ U.S. ___, 137 S. Ct. 1249, 1256 n.9, 197 L. Ed. 2d 611 (2017); Coffin v.

United States, 156 U.S. 432, 453, 15 S. Ct. 394 (1895). Also fundamental is the requirement that the prosecution prove every element of an offense beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The beyond a reasonable doubt “standard provides concrete substance for the presumption of innocence.” Id. at 363.

Consistent with these principles, it is fundamental that “wrongdoing must be conscious to be criminal.” Morissette v. United States, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952). A “defendant’s intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense ‘element.’” Apprendi v. New Jersey, 530 U.S. 466, 493, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

Accordingly, although legislatures have broad authority to define crimes and some kind of strict liability crimes may be permitted, “due process places some limits on its exercise.” Lambert v. California, 355 U.S. 225, 228, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957) (strict liability registration scheme violated due process when applied to person who had no knowledge of duty to register). This makes sense because the due process principles of proof beyond a reasonable doubt and the presumption of innocence, as recognized in Winship, are “concerned with substance,” not “formalism.” Mullaney v. Wilbur, 421 U.S. 684, 699, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).

Were it otherwise, states could evade these constitutional principles through labels. For this reason, in defining the elements of crimes and allocating the burdens of proof and persuasion, “there are obviously constitutional limits beyond which the States may not go.” Patterson, 432 U.S. at 210; see Apprendi, 530 U.S. at 467 (recounting that the Supreme Court had not “budge[d] from the position that . . . constitutional limits exist to States’ authority to define away facts necessary to constitute a criminal offense”). For example, “it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime.” McFarland v. Am. Sugar Ref. Co., 241 U.S. 79, 86, 36 S. Ct. 498, 60 L. Ed. 899 (1916); accord Speiser v. Randall, 357 U.S. 513, 523-25, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958).

b. As currently interpreted, drug possession is a strict liability crime. The innocent must prove unwitting possession. At a minimum, the constitutionality of this burden shifting scheme is doubtful.

Under Washington law, possession of a controlled substance is a felony offense punishable by up to five years in prison and a fine of up to ten thousand dollars. RCW 69.50.4013(1), (2)¹; RCW 9A.20.021(1)(c). Notwithstanding these serious consequences, this Court has held the offense is a strict liability crime with no *mens rea*. State v. Bradshaw, 152

¹ Unlawful possession of marijuana, being a misdemeanor, is the exception. RCW 69.50.4013(2); RCW 69.50.4014.

Wn.2d 528, 537, 98 P.3d 1190 (2004); State v. Cleppe, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). The prosecution need only prove the nature of the substance and the fact of possession. Bradshaw, 152 Wn.2d at 537-38. For the innocent to avoid conviction, they bear the burden of proving, by a preponderance of the evidence, that their possession was unwitting. Id. at 538. In other words, instead of a presumption of innocence, there is a presumption of guilt.

At a minimum, the constitutionality of this scheme is doubtful. To reiterate, the presumption of innocence and the requirement of proof beyond a reasonable doubt are fundamental values enshrined by due process. Winship, 397 U.S. at 363-64. By allocating the burden of disproving knowledge to the defendant, the drug possession statute upends these fundamental values.

Contrary to every other state and the Uniform Controlled Substances Act, Washington alone makes drug possession a true strict liability crime.² This is strong evidence that Washington “has shifted the burden of proof as to what is an inherent element of the offense.” Schad v. Arizona, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality). By not requiring the prosecution to prove knowledge,

² State v. Adkins, 96 So. 3d 412, 424 n.1 (Fla. 2012) (Pariente, J., concurring); Bradshaw, 152 Wn.2d at 534; State v. Bell, 649 N.W.2d 243, 252 (2002); Dawkins v. State, 313 Md. 638, 547 A.2d 1041, 1045 n.7 (1988); Unif. Controlled Substances Act 1970 § 401(c).

Washington’s drug possession law has a “freakish definition of the elements” unlike “the criminal law of other jurisdictions.” Id.

That Washington permits defendants to avoid guilt if they prove “unwitting” possession further shows that knowledge is an “inherent” element of the offense of drug possession. If what the law was truly concerned with is mere possession (regardless of knowledge), it makes no sense to have an unwitting possession defense. See Cleppe, 96 Wn.2d at 380 (recognizing defense of unwitting possession “may seem anomalous”). Instead, unwitting possession is the key issue. Stated more colorfully, unwitting possession is the “tail which wags the dog of the substantive offense” of drug possession. Apprendi, 530 U.S. at 495 (internal quotation omitted).

“For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance.” Morrison v. People of State of California, 291 U.S. 82, 90, 54 S. Ct. 281, 78 L. Ed. 664 (1934). In other words, “[s]hifting what used to be an element to a defense is not fatal if what remains of the stripped-down crime still may be criminalized and is reasonably what the state set out to punish.” May v. Ryan, 245 F. Supp. 3d 1145, 1163 (D. Ariz. 2017).
Formalized,

If the ‘affirmative’ defense is to disprove a positive—and

that positive is the only wrongful quality about the conduct as a whole—it is a nearly conclusive sign that the state is unconstitutionally shifting the burden of proof for an essential element of a crime.

Id. at 1164.

May, a case that held Arizona’s child molestation law unconstitutional, is illustrative. Id. at 1162-65. Arizona eliminated the requirement that the State prove sexual motivation for child molestation, effectively criminalizing broad swaths of innocent conduct (such as changing a baby’s diaper). Id. at 1155-56. Defendants bore the burden of proving that their touching lacked sexual motivation. Id. at 1156. This scheme violated due process because Arizona had “a freakish definition of the elements” contrary to other states and the elements were grounded on nothing of “sinister significance.” Id. at 1161. Moreover, although the burden had been shifted to defendants, sexual motivation or intent remained at the core of the law. Id. at 1164-65.

Likewise, stripped of the traditional mental element of knowledge, there is nothing inherently “wrongful” or “sinister” about possessing a controlled substance. For example, if a person rents or buys a car, and drugs are hidden inside, there is nothing blameworthy about the person’s conduct. The same is true if a person borrows a backpack and, unknown to that person, there are drugs inside. These people have done nothing other

than innocently possess property. Similar to May, making defendants disprove knowledge unconstitutionally shifts the burden of proof.

To be sure, Washington has a recent history of interpreting its drug possession laws to not require guilty knowledge. In 1951, Washington adopted the Uniform Narcotic Drug Act, the predecessor to the Uniform Controlled Substances Act.³ Because the language of the provision outlawing drug possession omitted the words “intent to sell,” which had existed in the previous unlawful possession statute, this Court reasoned the legislature had not “intended to retain guilty knowledge or intent as an element of the crime of possession.” State v. Henker, 50 Wn.2d 809, 812, 314 P.2d 645 (1957). Unwitting possession was then construed to be an affirmative defense. State v. Morris, 70 Wn.2d 27, 34, 422 P.2d 27 (1966). This Court interpreted the current drug possession statute similarly. Cleppe, 96 Wn.2d 378-79.

Setting aside whether the Court correctly interpreted the drug possession statutes in these cases, this way of defining drug possession does not constitute “a long history.” Schad, 501 U.S. at 640 (plurality). And in any event, history is not dispositive. Id. at 642-43; see, e.g., State v. Roberts, 88 Wn.2d 337, 341-43, 562 P.2d 1259 (1977) (longstanding statutory presumption that any homicide constituted second-degree murder

³ Laws of 1951, 2nd Ex. Sess., chapter 22.

held to violate due process). Thus, history does not save the statute.

It might also be argued that defendants are better positioned to explain what they know. But this does not justify shifting the burden of proof to them. Mullaney, 421 U.S. at 702; Tot v. United States, 319 U.S. 463, 469, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943).

“It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.” Winship, 397 U.S. at 364. As this case illustrates, shifting the burden to defendants to disprove knowledge creates an unacceptable risk of condemning the innocent. Despite A.M.’s testimony that she did not know drugs were in the backpack—which the court did not find incredible or dishonest—the court found A.M. had not met her burden to prove unwitting possession. Due process demands better.

c. The drug possession statute must be interpreted to require proof of knowledge or be declared unconstitutional.

To say the least, the constitutionality of the drug possession statute is doubtful. Consistent with the constitutional-doubt canon of statutory construction, this Court should interpret the drug possession statute to require knowledge. If not, the statute is unconstitutional.

The constitutional-doubt canon instructs that statutes are interpreted to avoid constitutional doubts when statutory language

reasonably permits. Utter v. Bldg. Indus. Ass'n of Washington, 182 Wn.2d 398, 434, 341 P.3d 953 (2015); Gomez v. United States, 490 U.S. 858, 864, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989). Interpreting the drug possession statute to require proof of knowledge avoids the grave constitutional issue regarding the statute's validity.

In concluding that drug possession is a strict liability crime, Cleppe and Bradshaw overlooked this canon of construction and did not consider the due process argument presented in this case.⁴ Thus, these decisions do not control and stare decisis does not apply:

Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court. An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered.

In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) (internal quotation omitted).

A reasonable reading of the drug possession statute is that it requires proof of knowledge. That the legislature omitted explicit language setting out a *mens rea* is not dispositive and contravenes the general rule that all criminal statutes are presumed to have one. United States v. United

⁴ In Bradshaw, the Court stated that the defendant's constitutional arguments were insufficiently briefed. Bradshaw, 152 Wn.2d at 539.

States Gypsum Co., 438 U.S. 422, 438, 98 S. Ct. 2864, 57 L.Ed.2d 854 (1978); State v. Anderson, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000).

Further, that the legislature has not amended the drug possession statute since Cleppe and Bradshaw is not dispositive. Fast v. Kennewick Pub. Hosp. Dist., 187 Wn.2d 27, 39, 384 P.3d 232 (2016) (“evidence of legislative acquiescence is not conclusive, but is merely one factor to consider”).

If the Court concludes that the legislature truly intended to make drug possession a strict liability offense, the statute must be declared unconstitutional for the reasons outlined earlier.

d. Reversal of the guilty adjudication is required.

If the drug possession statute is declared unconstitutional, A.M.’s guilty adjudication must be reversed because unconstitutional statutes are void. City of Seattle v. Grundy, 86 Wn.2d 49, 50, 541 P.2d 994 (1975).

If interpreted to require proof of knowledge, however, the trial court erred by failing to require the prosecution to prove beyond a reasonable doubt that A.M. knowingly possessed the drugs. See State v. Moen, 129 Wn.2d 535, 538, 919 P.2d 69 (1996) (court’s interpretation of statute is deemed to be what the statute has meant since its enactment). A trial court’s failure to consider an essential element of an offense in a bench trial is subject to constitutional harmless error analysis. State v.

Banks, 149 Wn.2d 38, 44, 65 P.3d 1198 (2003). Prejudice is presumed and the prosecution must prove the error harmless beyond a reasonable doubt. State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013).

The prosecution cannot meet its burden. A.M.'s testimony that she did not know the drugs were in the backpack was uncontroverted. RP 111. The court did not find her testimony incredible or dishonest, instead rejecting A.M.'s defense of unwitting possession because she had not met her "burden." RP 150, 157-58. The court remarked that it was "a close case." RP 133-34. The record does not establish beyond a reasonable doubt that the result would have been same if the prosecution had been required to prove knowledge. Reversal is required.

2. The admission of A.M.'s compelled statements that a backpack was her property violated her privilege against self-incrimination.

a. The state and federal constitutions afford defendants a privilege against self-incrimination.

The federal and state constitutions protect against self-incrimination. U.S. Const. amend. V; Const. art. I, § 9. To secure the privilege, the police must advise suspects in custody of their right to remain silent and the presence of an attorney before interrogation.

Miranda v. Arizona, 384 U.S. 436, 445, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Absent a valid waiver, statements obtained from custodial

interrogation are involuntary. State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988). “Interrogation” means “any words or actions” that a person “should know are reasonably likely to elicit an incriminating response from the suspect.” Rhode Island v. Innis, 446 U.S. 291, 301, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). This is an objective test. Sargent, 111 Wn.2d at 651.⁵ Regardless of Miranda, statements that are otherwise compelled are inadmissible because they are involuntary. See State v. DeLeon, 185 Wn.2d 478, 487, 374 P.3d 95 (2016).

b. A.M.’s privilege against self-incrimination was violated by the admission of a property sheet A.M. was compelled to sign when processed in and out of juvenile detention.

Following her arrest, A.M. was booked into juvenile detention. Rather than seize the backpack found to contain drugs as evidence, the officer sent the backpack to the property room. RP 64.

During the booking process for juveniles, the facility memorializes the items juveniles have on a “property sheet.” RP 89; Ex. 3. The juveniles are required to review the form with staff and sign it. RP 89, 91; Ex. 3. Using the same form, a similar process occurs for outtake. RP 90-91; Ex. 3. Any refusal or disagreement by the juvenile is noted. RP 96.

⁵ See J.D.B. v. North Carolina, 564 U.S. 261, 277 n.8, 131 S. Ct. 2394, 180 L. Ed. 2d 310 (2011) (noting “the basic principle that an interrogating officer’s unarticulated, internal thoughts are never—in and of themselves—objective circumstances of an interrogation”).

Over A.M.'s objection for relevance, the court admitted the form. A.M. appears to have signed the form when booked in and out of juvenile detention. RP 97-99; Ex. 3. The form contains A.M.'s signature, stating that she "read the above accounting of my property and money and find it to be accurate." Ex. 3. Another signature appearing to belong to A.M., states that "I have received the above listed property." Ex. 3. One of the items listed was the backpack found to contain the drugs. Ex. 3. Because A.M. signed the form, the State argued that this evidence supported rejection of A.M.'s defense of unwitting possession. RP 118-19, 149.

The trial court's admission of the property sheet containing A.M.'s compelled statements violated A.M.'s privilege against self-incrimination. A.M. invoked her Miranda rights following her arrest. CP 51-52; RP 10-11, 60-61. She was plainly in custody.

As for "interrogation," demanding that A.M. answer whether the backpack was her property qualified because it was reasonably likely to elicit an incriminating response. She was charged with possession of a controlled substance and this substance was found in the backpack. Any response was potentially incriminating. See In re Pers. Restraint of Cross, 180 Wn.2d 664, 686, 327 P.3d 660 (2014) (abrogated on other grounds by State v. Gregory, 192 Wn.2d 1, 427 P.3d 621 (2018)).

To be sure, routine booking questions may not constitute

“interrogation.” State v. Denney, 152 Wn. App. 665, 671, 218 P.3d 633 (2009) (abrogated on other grounds by Cross, 180 Wn.2d at 681 n.8). But even a “legitimate question [during booking], asked with good intentions, will still violate a defendant’s *Miranda* rights if it is reasonably likely to produce an incriminating response.” Id. at 673; accord States v. Williams, 842 F.3d 1143, 1148-49 (9th Cir. 2016) (question about gang affiliation for a person booked on a murder charge likely to produce an incriminating response). For example, the Court of Appeals held a standard questionnaire administered by jail staff about drug use constituted interrogation in light of the defendant being arrested on drug charges. Denney, 152 Wn. App. at 667-68; accord State v. Harms, 137 Idaho 891, 55 P.3d 884, 886-88 (Ct. App. 2002) (“interrogation” to request that defendant, who was facing unlawful possession of firearm charges, sign property invoice that listed firearms removed from home).

Similarly, it was interrogation to ask A.M. if the backpack—found to contain drugs—was her property. Further, A.M.’s “statements” were involuntary because they were compelled. DeLeon, 185 Wn.2d at 487. In DeLeon, without any discussion of Miranda, this Court held that statements obtained from detainees during booking about gang affiliation were compelled. Id. Likewise, A.M. was forced to make statements regarding her property, rendering those statements involuntary.

c. The error was properly raised in the Court of Appeals as manifest constitutional error.

The foregoing error was properly raised for the first time on appeal as manifest constitutional error. RAP 2.5(a)(3). The Court of Appeals improperly refused to consider it on the theory that A.M. had not proved prejudice. This is not the correct analysis.

In analyzing a claim of manifest constitutional error, the appellate court asks: (1) is the error of constitutional magnitude, and (2) is the error manifest? State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). To be “manifest,” there must be a showing of “actual prejudice,” meaning “that the claimed error had practical and identifiable consequences in the trial.” State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). This standard is satisfied when “the record shows that there is a fairly strong likelihood that serious constitutional error occurred.” Id. The Court may examine whether the trial court could have corrected the error. Kalebaugh, 183 Wn.2d at 583. The analysis previews the claim and should not be confused with establishing an actual violation. Lamar, 180 Wn.2d at 583.

The error was plainly constitutional. It was also manifest. The record is adequate to review the claimed error. The property sheet and testimony explaining the booking process is in the record. Ex. 3; RP 89-94, 97-99. The trial court had the opportunity to correct the error because

A.M. objected to the admission of the property sheet, albeit on different grounds. And the error had identifiable consequences. The trial court found the evidence probative, overruling A.M.'s relevance objection. RP 97-99. The State relied on this evidence to prove its case and argued it rebutted A.M.'s claim of unwitting possession. RP 118-19, 149. It was a "close case," as the trial court remarked. RP 133.

d. The error is prejudicial.

The State cannot meet its burden to rebut the presumption of prejudice and prove the error harmless beyond a reasonable doubt. DeLeon, 185 Wn.2d at 488. Although the court remarked that the evidence about A.M. signing for the backpack was not a "big factor," this appears to have related to the issue of possession, not A.M.'s affirmative defense of unwitting possession. RP 133-34. The court also remarked it was a "close case." RP 133. The error was not harmless.

E. CONCLUSION

For the foregoing reasons, A.M. requests that this Court reverse her guilty adjudication for drug possession.

Respectfully submitted this 8th day of March, 2019.

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project – #91052
Attorney for Petitioner

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
) NO. 96354-1-I
)
)
 A.M.,)
)
 Juvenile Petitioner.)

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF MARCH, 2019, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE WASHINGTON STATE SUPREME COURT AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | | |
|-------------------------------------|---|-------------------------------------|----------------------|
| <input checked="" type="checkbox"/> | J. SCOTT HALLORAN, DPA
[shalloran@co.snohomish.wa.us]
[Diane.Kremenich@co.snohomish.wa.us]
SNOHOMISH COUNTY PROSECUTOR'S OFFICE
3000 ROCKEFELLER
EVERETT, WA 98201 | <input type="checkbox"/> | U.S. MAIL |
| | | <input type="checkbox"/> | HAND DELIVERY |
| | | <input checked="" type="checkbox"/> | E-SERVICE VIA PORTAL |
| <input checked="" type="checkbox"/> | A.M.
1829 MADISON ST
EVERETT, WA 98203 | <input checked="" type="checkbox"/> | U.S. MAIL |
| | | <input type="checkbox"/> | HAND DELIVERY |
| | | <input type="checkbox"/> | _____ |

SIGNED IN SEATTLE, WASHINGTON, THIS 8TH DAY OF MARCH, 2019.



X _____

WASHINGTON APPELLATE PROJECT

March 08, 2019 - 4:15 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96354-1
Appellate Court Case Title: Access to case information is limited
Superior Court Case Number: 16-8-01007-5

The following documents have been uploaded:

- 963541_Briefs_20190308161449SC863587_7677.pdf
This File Contains:
Briefs - Petitioners Supplemental
The Original File Name was washapp.030819-01.pdf

A copy of the uploaded files will be sent to:

- diane.kremenich@snoco.org
- shalloran@co.snohomish.wa.us

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Richard Wayne Lechich - Email: richard@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20190308161449SC863587