

NO. 65816-6-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

WOODIE KEES,

Appellant.

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

OPENING BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT.

Woodie Kees's conviction for delivery of cocaine as a violation of the uniform controlled substance act (VUCSA) must be reversed because the State failed to prove every element of the crime beyond a reasonable doubt.

Although an undercover police officer claimed at trial that Mr. Kees was involved in a drug transaction, the only contemporaneous description the officer was able to offer was that a "black male" had sold him drugs. While Mr. Kees is a black male, so too were several other individuals standing nearby the transaction – individuals who were never arrested. Moreover, despite the fact that Mr. Kees was arrested promptly following the transaction, as was the other individual to whom the officer allegedly gave the "buy money," no money was recovered from either man upon arrest.

Because the State's proof of Mr. Kees's identity amounted to little more than proof that he is a black man who happened to be in a larger group of black men at the time of an undercover buy/bust operation, the State failed to prove its case beyond a reasonable doubt.

B. ASSIGNMENTS OF ERROR.

1. The State presented insufficient evidence to convict Woodie Kees of delivery of cocaine.

2. The trial court did not properly determine Mr. Kees's offender score.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. To convict Mr. Kees of delivery of a controlled substance, the State had to prove he delivered cocaine to another person. Must Mr. Kees's conviction be reversed and dismissed where the State failed to prove beyond a reasonable doubt that Mr. Kees was the individual who delivered the controlled substance?

2. A person's offender score must be determined based upon the criminal history as determined by the trial court. Where the trial court's finding of criminal history does not support the offender score, did the trial court err in sentencing Mr. Kees?

D. STATEMENT OF THE CASE.

Woodie Kees was charged with, tried for, and convicted of delivery of a controlled substance, under the Violation of the Uniform

Controlled Substances Act (VUCSA), as a result of his arrest on February 11, 2010. CP 1-6, 35, 37-44.

A police officer in an undercover "buy-bust" operation purchased a rock of crack cocaine from an individual named Mark Smith on a downtown Seattle street corner. RP 32-37.¹ The undercover described engaging Smith in a transaction, involving head-nodding, which in the officer's estimation meant, "Do you have it?" RP 34. The nodding prompted the officer to follow Smith a short distance to the other side of the street, where Smith asked the officer what he wanted. RP 35. After the officer replied that he wanted "40," meaning that he wanted to buy \$40 worth of crack cocaine, Smith agreed to the purchase and asked to see the officer's money. RP 35-37.

The officer stated that his attention was carefully focused on Smith, who appeared to be working alone. RP 37. When the officer told Smith that he believed the rock of crack that Smith sold him was "too small" for the price, another man stepped out of the crowd of people on the corner and offered to assist in completing the deal.

¹ The verbatim report of proceedings consists of one consecutively paginated volume from June 2 and 3, 2010, and will be referred to as "RP." The sentencing is in a separate volume from July 30, 2010, and will be referred to as "2RP."

RP 38-39. This second person, who the officer later claimed was Mr. Kees, approached and said he would give the officer an additional piece of crack. Id. The officer stated that while he did recognize Smith from previous encounters, he had never seen the other individual before. RP 48.

Despite the fact that another officer from the narcotics team stated that he never lost sight of Mr. Smith and Mr. Kees between the transaction and the arrest, the “buy money” was never recovered from either individual. RP 60, 96-97. Neither did any of the officers see Mr. Smith or Mr. Kees pass any money to anyone, drop it, swallow it, or otherwise dispose of it. RP 83-84, 96-97.

After a jury trial, Mr. Kees was convicted of delivery of a controlled substance under the VUCSA. CP 35.

At sentencing, the trial court found Mr. Kees's offender score was an 11, and sentenced him accordingly. CP 37-44. The trial court's finding of criminal history listed 11 prior felonies. CP 43. However, the trial court did not find any intervening offenses which prevented each of those 11 offenses from washing out under RCW 9.4A.525. Id.

E. ARGUMENT.

1. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. KEES OF DELIVERY OF COCAINE.

a. The prosecution bears the burden of proving all essential elements of an offense beyond a reasonable doubt. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in article I, section 3 of the Washington Constitution² and the 14th Amendment of the federal constitution. Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99

² Art. I, section 3 provides, "No person shall be deprived of life, liberty, or property, without due process of law."

S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In a claim of insufficiency, the reviewing court presumes the truth of the State's evidence as well as all inferences that can be reasonably drawn therefrom. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). However, when an innocent explanation is as equally valid as one upon which the inference of guilt may be made, the interpretation consistent with innocence must prevail. United States v. Bautista-Avila, 6 F.3d 1360, 1363 (9th Cir. 1993). “[U]nder these circumstances, a reasonable jury must necessarily entertain a reasonable doubt.” United States v. Lopez, 74 F.3d 575, 577 (5th Cir. 1996). Speculation and conjecture are not a valid basis for upholding a jury’s guilty verdict. State v. Prestegard, 108 Wn. App. 14, 42-43, 28 P.3d 817 (2001).

b. In order to prove that Mr. Kees was guilty of delivery of cocaine, the State was required to prove beyond a reasonable doubt that he was the person involved in the transaction. Identity is, by definition, an essential element that must be proved by the State in any prosecution. See, e.g., State v. Russell, 125 Wn.2d 24, 66-67, 882 P.2d 747 (1994); McCormick’s

Evidence § 190, at 449 (Edward W. Cleary, gen. ed., 2d ed. 1972 ed.).

The jury here was instructed that to convict, the prosecution was required to prove beyond a reasonable doubt that Mr. Kees was the individual who delivered a controlled substance (cocaine). CP 28 (Jury Instruction 8). Here, however, the evidence linking the second individual identified as Mr. Kees to the drug transaction was insufficient to convict him of that crime.

The undercover officer, Tovar, testified at length concerning his transaction with Mr. Smith. RP 32-37. Tovar described approaching Smith and nodding his head to initiate the deal, then following Smith across the street to conduct business. RP 34. Tovar noted that there was a large group of people on the corner, but that he was focused on Smith, who appeared to be working alone. RP 37.

The undercover officer stated that he could not describe the second person who approached him later, other than that he was a “black male.” RP 56-58. The officer also noted that he had never seen Mr. Kees before, unlike Smith, whom he recognized. RP 48. In addition, rather than view a photo montage, the circumstances surrounding the identification were extremely suggestive – the

undercover was simply shown booking photographs of the two arrested individuals, Smith and Kees, at the precinct, in order to confirm their identities. RP 58.

Although another officer identified Mr. Kees in court as the individual who handed cocaine to Tovar, his testimony cannot be relied upon. RP 72. This officer, James Lee, testified that his role in the operation was to observe the transaction and to guarantee the safety of the undercover officer. RP 70-71. The trailing officer also must observe the arrest, in order to ensure that the appropriate individuals are charged. RP 86.

Officer Lee testified that although it was his responsibility to observe the entire transaction to ensure the integrity of the operation and officer safety, he never saw Smith transfer the crack cocaine to Tovar. RP 80. This was the foundation of Tovar's testimony, and Lee somehow missed it entirely. This inconsistency undermines the reliability of the Lee's remaining testimony concerning Mr. Kees.

Although Lee stated that Mr. Kees proceeded to walk onto the scene and participate in the deal, Officer Lee also stated that two additional black males joined the group shortly thereafter. RP 83-84. Although Officer Lee failed to record descriptions of these

two additional black males, he also failed to record a description of Mr. Kees. Id.

Officer Donald Johnson, the arresting officer, testified to the descriptions he received of the two suspects to be placed under arrest. RP 91. He did not, however, recall the other two black males standing right next to Mr. Kees and Mr. Smith – the two black males that his fellow officer had discussed. RP 83-84, 95-96. Without descriptions of these two individuals, the evidence against Mr. Kees is insufficient.

The only evidence linking Mr. Kees to this delivery is the testimony of two undercover officers, both of whom stated that it was dark out and their opportunity to observe was limited. RP 48, 72. In addition, Officer Tovar testified that it is extremely rare in a case where the actual seller has been apprehended, for the buy money not to be recovered. RP 31. Here, both Officers Lee and Johnson testified that they maintained a clear view of both Kees and Smith from the moment of the transaction through the time of arrest, and neither man tried to throw, swallow, trade, or give away anything. RP 83-84, 96-97. The logical conclusion is that the actual second seller remained on the sidewalk with the group, once Mr. Keen was arrested with Mr. Smith, taken to the precinct and

photographed, and then incorrectly identified by the undercover officer.

By failing to offer sufficient evidence that Mr. Kees was the second individual who sold to the undercover, the State failed to prove all essential elements of the charged offense, and the trier of fact erred in finding sufficient evidence to render a verdict of guilt. Where, as here, the State fails to prove all essential elements beyond a reasonable doubt, this Court must reverse a conviction. Green, 94 Wn.2d at 221.

c. The prosecution's failure to prove all essential elements requires reversal. The prosecution failed to sufficiently connect Mr. Kees to the delivery of the cocaine, by failing to prove beyond a reasonable doubt that he was properly identified as the seller, an essential element of the charged offense. Absent proof of every essential element, the conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

2. THE COURT FAILED TO PROPERLY DETERMINE MR. KEES'S OFFENDER SCORE.

a. A sentencing court must make findings to support an offender score. A court must conduct a sentencing hearing

before imposing a sentence upon a defendant. RCW

9.94A.500(1). In addition,

[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record ... Court clerks shall provide, without charge, certified copies of documents relating to criminal convictions requested by prosecuting attorneys.

RCW 9.94A.500(1) (emphasis added).

A defendant's "criminal history" is more than simply a list of prior felonies, although it is often rendered this way. "Criminal history" is defined to include all prior convictions and juvenile adjudications, and even information regarding probation and incarceration terms. RCW 9.94A.030(11).

To establish a defendant's criminal history, "the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing." RCW 9.94A.530(2).

b. There was insufficient evidence to establish Mr. Kees's criminal history and offender score. Here, the State argued that Mr. Kees's offender score was an 11. 2RP 2. No independent evidence was presented that Mr. Kees had any criminal history; nor did Mr. Kees admit or acknowledge any prior convictions. 2RP 2-

14. The document proffered by the State and included in the Judgment and Sentence (as Appendix B) as the “criminal history” indicates that Mr. Kees’s most recent conviction was on August 29, 2002, for VUCSA (possession without a prescription). See Appendix.

Under Washington law, prior Class C felony convictions shall not be included in the offender score unless the court finds the person has not spent five years in the community from the date of release from confinement to the commission of another offense. RCW 9.94A.525(2). This “wash out” provision requires that the State prove that a defendant’s prior convictions have not washed out. Id.

Here, the trial court’s findings of Mr. Kees’ criminal history provided only that his most recent felony conviction was the 2002 VUCSA possession of a controlled substance without a valid prescription. CP 43. Thus, to include any of the prior offense in its offender score calculation, the trial court was required to conclude there was no five-year period in which Mr. Kees was crime free. The court’s findings do not support such a conclusion. The current offense was committed on February 11, 2010. The last offense was sentenced on August 29, 2002. As with each of the other

offenses, the court did not make any findings as to Mr. Kees's date of release from confinement for that offense. And thus, the only available date for purposes of determining whether to include any of the prior offenses is the date of sentence. The present offense was committed more than five years after that date. Thus, the court's findings support an offender score of "0."

The State may respond that it proved Mr. Kees's criminal history in the document appended to the Judgment and Sentence. CP 43. This, however, does not relieve the sentencing court of its obligation to make findings concerning Mr. Kees's criminal history pursuant to RCW 9.94A.500(1). Where there is no finding of fact as to a crucial fact, a reviewing court must presume the party with the burden of proof did not meet its burden. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997). The Judgment and Sentence, including its appendix, makes no findings concerning the length of Mr. Kees's incarceration, if any, or the date of release regarding the August 29, 2002 conviction. CP 43. According to this document, Mr. Kees's next listed offense was the instant arrest.

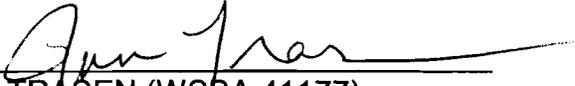
Regardless of whether the State believes it has met its burden, the trial court did not make such a finding.

F. CONCLUSION.

For the foregoing reasons, Mr. Kees respectfully requests this Court reverse his conviction and remand the case for further proceedings. In the alternative, this case should be remanded for a proper calculation of Mr. Kees's offender score and resentencing.

DATED this 21st day of December, 2010.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65816-6-I
v.)	
)	
WOODIE KEES,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF DECEMBER, 2010, I CAUSED THE ORIGINAL **AMENDED OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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