

COURT OF APPEALS DIV I
STATE OF WASHINGTON

2010 JUN 13 PM 2:44

NO. 69642-4-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KYLE HEWSON,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CHERYL CAREY

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DENIS A. O'LEARY
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 296-9000

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A. ISSUES PRESENTED

Did the court properly rule that sufficient evidence existed to establish beyond a reasonable doubt that the recovered drugs were methadone when it had as evidence: a statement that the defendant negotiated the delivery of methadone pills to the confidential informant, text messages that establish the defendant to frequently have offered the sale of methadone to others, and a sworn statement by the Detective with special drug recognition certification that after comparing the pills with the 2010 Drug Bible, he concluded the pills were methadone.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On March 14, 2011, The Honorable Mary Roberts authorized the filing of a felony possession with the intent to deliver methadone charge against the appellant, Kyle Hewson. CP 1-6. With the assurance that the criminal charge against him would be dismissed with prejudice if he successfully completed the Superior Court's Drug Court Program, the defendant substantially waived many of his constitutional rights to contest the charge against him and entered into the Drug Court Waiver and Agreement. CP 7-11.

With respect to this/these charge(s), I understand that I have a right to contest and object to evidence that the State may present against me and to present evidence on my own behalf. With respect to this/these charge(s), I give up the right to contest and object to any evidence presented against me and to present evidence on my own behalf as to my guilt or innocence. I understand and agree that if I do not comply with the conditions of this agreement, a hearing will be held at which the State will present evidence related to this/these charge(s) including but not limited to the police report and the results of any law enforcement field test. I stipulate that the field test used in this case was accurate and reliable, and is admissible. This stipulation is not an admission of guilt, and is not sufficient, by itself, to warrant a finding of guilt. I understand that the judge will review the evidence presented by the State and will decide if I am guilty or not guilty of this charge based solely on that evidence. I waive my right under Criminal Rule 6.1(d) to written findings of fact and conclusions of law.

CP 7.

Fourteen months after entering the Waiver and Agreement, the defendant asked to be released from the program through his voluntary termination. CP 13. In keeping with the agreement, the court reviewed the police reports and heard argument of counsel. The court found the defendant guilty of the charge of violation of the uniform controlled substances act, possession with the intent to deliver methadone. Findings of Fact and Conclusions of Law were signed by the Court on May 22, 2013.

2. SUBSTANTIVE FACTS

As established through the confidential witness' September 2, 2010 tape recorded statement to King County Sheriff's Detective Mullinax, it is typical for drug dealers to text their clients information regarding what drugs they have, followed by details in how to execute the delivery. CP 40. In the deal that led to the charge before this court, Hewson was known to the confidential witness (hereafter referred to as CW) as both a drug dealer and user. At one point, the two ran into each other in a Fred Meyer parking lot when Hewson passed the CW his number and told him to call if he needed anything. Following this interaction, Hewson texted the CW "kinda out of the blue, actually" asking if he wanted some drones. (Drones is the street vernacular for methadone.) CP 38. The two then negotiated what was seen as a reasonable price of ten methadone pills for \$60. CP 39. Additionally, the CW and Hewson settled on the delivery location, and what type of car Hewson would be in to get to the location.

King County Sheriff's Detectives Mullinax and Hillman arrived first at the meet up scene. Previously, Detective Mullinax had confirmed information about both Hewson and his girlfriend Amanda Meehan. The two were stopped by the detectives after

they arrived at the meet up scene in the car matching the description of the car Hewson told the CW he would be in. Hewson told Detective Mullinax that he was meeting someone that he was going to "hook up" (which the detective understood to mean- supply drugs). Hewson also told the detective that he was actually just going to steal the CW's money and that there were no pills in the car. CP 23.

On August 31, 2010, The Honorable Charles DeLaurenti authorized the search of the red GEO driven to the scene by Meehan and in which Hewson was the passenger. Recovered from the search of the car were 13 pills and a cell phone with the number of 253-332-5043, registered to Amanda Meehan. This is the number the CW received the texts from and both Hewson and Meehan stated that they use that phone. CP 24.

A review of the text messages sent from that cell phone establishes that it was used to communicate about methadone dealing to 14 separate individual numbers. CP 67-73.

In his application for the search warrant of the red GEO, Detective Mullinax laid out his training. He completed the 720 hour Washington State Criminal Justice Training Academy that included narcotic investigation training. Additionally, he is identified as a

Drug Recognition Expert where he was specifically trained in the identification of prescription drugs- especially those which are commonly abused. CP 27-28. Using this training, Detective Mullinax reviewed the 2010 Drug Bible photographs and identified ten pills as methadone and three pills as Ativan. CP 24.

C. ARGUMENT

In determining whether sufficient evidence exists to support the court's finding that the pills were methadone, this court must review the evidence in the light most favorable to the State. State v. Bryant, 89 Wn. App. 857, 869, 950 P.2d 1004 (1998). A lab test is not required to establish beyond a reasonable doubt the identification of the substance. State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997). The Waiver and Agreement does not alter the due process requirement that the State prove each element of the crime beyond a reasonable doubt. State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995).

State v. Colquitt, 133 Wn. App. 789, 801, 137 P.3d 892 (2006), offers a non-exclusive list of factors under which a sufficiency challenge might be analyzed.

(1) testimony by witnesses who have a significant amount of experience with the drug in question, so that their identification of the drug as the same as the drug in their past experience is highly credible; (2) corroborating testimony by officers or other experts as to the identification of the substance; (3) references made to the drug by the defendant and others, either by the drug's name or a slang term commonly used to connote the drug; (4) prior involvement by the defendant in drug trafficking; (5) behavior characteristic of use or possession of the particular controlled substance; and (6) sensory identification of the substance if the substance is sufficiently unique. State v. Watson, 231 Neb. 507, 514-17, 437 N.W.2d 142 (1989).

In Colquitt, the evidence presented was a field test and an equivocal statement from the officer that the substance appeared to be cocaine. The Court found that had the State offered more than the officer's statement that the substance appeared to be rock cocaine, it could evaluate whether the officer based his visual identification on more than simply conjecture. Colquitt, at 802.

Applying the Colquitt factors to the Hewson case, establishes that it was appropriate for the trial court to find beyond a reasonable doubt that the drugs were methadone pills. Detective Mullinax has extensive experience in law enforcement and special training as a Drug Recognition Expert- including recognition of commonly abused prescription medication. His expert analysis of the pills coupled with the corroborative pictures in the Drug Bible

led him to conclude that ten of the thirteen pills were methadone. Hewson and the CW specifically negotiated the delivery of ten drones (methadone pills). Of the thirteen pills recovered, ten were identified as methadone. The cell phone used by Hewson and his girlfriend referenced fourteen different possible drone deliveries in a ten day period of time and Hewson is known to the CW as a drug dealer.

Finally, Hewson's behavior was characteristic of his possessing methadone pills. After being arrested in the vehicle he reported he would be in to make the deal, he denied to the police that any pills were in the car. CP 23. This was proven to be false when law enforcement searched the vehicle subject to a warrant. CP 24. Hewson's behavior of saying there were no pills in the car when in fact there were pills is characteristic of his wanting to not get caught with an illegal substance. A defendant's behavior, including the furtive nature of the transaction is circumstantial evidence to prove the item was a controlled substance. State v. Hernandez, 85 Wn. App. 672, 935 P.2d 623 (1997).

Hewson's case is similar to the evidence which was found to be sufficient in In re Pers. Restraint of Delmarter, 124 Wn. App. 154, 163-64, 101 P.3d 111 (2004), in that the defendant's

statements could in part establish the identity of the substance. In Delmarter, a defendant's confession was used to help identify the substance. In Hewson's case, his text negotiating the delivery of drones is evidence of their identity. As is the statement from the CW which established that the negotiated price for the methadone pills was in keeping with the market price. CP 39. Hernandez, at 680.

D. CONCLUSION

Viewing the evidence in the light most favorable to the State, this court should conclude that a rational trier of fact could conclude beyond a reasonable doubt that the recovered pills were methadone. The Appellant's argument should be rejected and the conviction affirmed.

DATED this 13th day of June, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
DENIS A. O'LEARY, WSBA #16400
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. KYLE HEWSON, Cause No. 69642-4-1, in the Court of Appeals, Division I, for the State of Washington.

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

Betty A. Huddleston
Name

Done in Seattle, Washington

6/13/13
Date