State v. Taylor

Court of Appeals of Washington, Division Three

April 12, 2012, Filed

No. 29708-0-III

Reporter
2012 Wash. App. LEXIS 859

THE STATE OF WASHINGTON, *RESPONDENT*, v. CHRISTOPHER WAYNE TAYLOR, *APPELLANT*.

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Subsequent History: Reported at *State v. Taylor, 2012 Wash. App. LEXIS 907 (Wash. Ct. App., Apr. 12, 2012)*

Prior History: [*1] Appeal from Grant Superior Court. Docket No: 09-1-00302-8. Judgment or order under review. Date filed: 02/01/2011. Judge signing: Honorable Evan E Sperline.

Counsel: *Eric J. Nielsen*, *Christopher Gibson*, Nielsen Broman & Koch PLLC, Seattle, WA, for Appellant(s).

D. Angus Lee, Grant County Prosecuting Attorney, Ephrata, WA; *Ryan S. Valaas*, Attorney at Law, Ephrata, WA, for Respondent(s).

Judges: AUTHOR: Dennis J. Sweeney, J. WE CONCUR: Kevin M. Korsmo, C.J., Stephen M. Brown, J.

Opinion by: Dennis J. Sweeney

Opinion

¶1 SWEENEY, J. — The State must rely on only a single act to convict, where there is evidence of multiple acts to support a crime, or the court must instruct the jury to unanimously agree on a single act. But multiple acts that amount to a continuing course of conduct do not require an election by the State or a unanimity instruction by the court. And that is what we have here. Police seized and searched the defendant and found heroin, in various stages of production, together with drug paraphernalia. The State was then not required to elect what drugs it relied on for the charge of possession and the court did not have to give a unanimity instruction. We affirm the conviction for possession of heroin and possession [*2] of drug paraphernalia.

FACTS

¶2 Police stopped a car for a defective headlight. Four people were in the car. The officer arrested the driver and placed him in the back of a patrol car. Another officer noticed Christopher Taylor, the passenger in the front seat, digging under his seat. He ordered Mr. Taylor to stop and show his hands but Mr. Taylor continued digging. The officer threatened to use a stun gun on him. Mr. Taylor promptly raised his hands. He held hypodermic needles. Mr. Taylor then discharged the liquid in the syringes onto his shorts and threw the syringes out of the car. The officer removed Mr. Taylor from the car, handcuffed him, and placed him in the back of a patrol car.

¶3 Police ordered the two remaining passengers out of the car and searched them and the car. An officer found a spoon covered in a brown sticky residue on the front right corner where Mr. Taylor sat. The sticky substance looked and smelled like black tar heroin. The officer also found two pill bottles with Mr. Taylor's name on them on the floor behind the passenger seat. The bottles contained pills, plastic bags with a black tar substance inside, and a baggy

with a green vegetable substance inside. The syringes [*3] Mr. Taylor discarded also contained heroin.

¶4 The State charged Mr. Taylor with one count of possession of heroin and one count of unlawful use of drug paraphernalia. Mr. Taylor moved to suppress the physical evidence. The trial court denied his motion but without entering written findings of fact or conclusion of law

¶5 The case proceeded to a jury trial. The arresting officer testified. He testified generally on the use of, form of, and preparation of heroin. And the officer testified that material and paraphernalia he found near Mr. Taylor's seat were all related to heroin use. The jury found Mr. Taylor guilty of both charges.

DISCUSSION

Unanimous Verdict

¶6 Mr. Taylor contends that he was denied his constitutional right to a unanimous verdict because the evidence showed multiple acts, any of which could have satisfied the elements of the crimes with which he was charged. He claims he was entitled to a unanimity instruction. He did not ask the court to so instruct but argues for it now because of the constitutional implications when the State fails to rely on a single act. Const. art. I, § 21; RAP 2.5(a)(3); State v. Fiallo-Lopez, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995). We review his assignment [*4] of error de novo. State v. Bradshaw, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004).

¶7 Mr. Taylor is correct. The State must elect to rely on a single act or the court must instruct the jury to agree unanimously on a single act when multiple acts could support a single charged crime. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), *overruled in part by* State v. Kitchen, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988). But no election or unanimity instruction is needed if the defendant's acts were part of a continuing course of conduct. State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). The conclusion—continuing course of conduct—follows when the acts promoted one objective and occurred at the same time and place. Petrich, 101 Wn.2d at 571; State v. Love, 80 Wn. App. 357, 361, 908 P.2d 395 (1996).

¶8 Division One of this court considered the concept of continuing course of conduct in a drug possession case in *State v. King*. [1] Police stopped a car. Mr. King was a passenger in the car. King, 75 Wn. App. at 901. Police searched and found cocaine between the seats and in Mr. King's fanny pack. *Id.* The State charged Mr. King with a single count of possession and the matter proceeded to trial [*5] before a jury. Mr. King argued that police planted the cocaine in the fanny pack. Id. at 901-02. The jury found him guilty. He appealed and assigned error to the court's failure to give a unanimity instruction. Division One reversed. The court concluded that, rather than a continuing course of conduct, the evidence showed "two distinct instances of cocaine possession occurring at different times, in different places, and involving two different containers." Id. at 903. And the evidence varied on both drug possessions; one instance was constructive, the other was actual. *Id.*

¶9 Division One also addressed the question of continuing course of conduct in *Love*. There police found five rocks of cocaine in Mr. Love's pocket but no paraphernalia needed to use the cocaine. Love, 80 Wn. App. at 359. They also found 40 rocks of cocaine in Mr. Love's home, along with drug paraphernalia and a large amount of money. *Id.* The State charged Mr. Love with a single count of possession with intent to deliver. At trial, Mr. Love contended that police planted all of the cocaine. Id. at 359-60. The jury found him guilty. He appealed and assigned error to [*6] the court's failure to give a unanimity instruction. Id. at 360. Division One concluded that the possessions amounted to a continuing course of conduct because the single objective was to sell cocaine. Id. at 362. And so unlike *King*, there was no reason to distinguish between the cocaine found in Mr. Love's pocket and the cocaine found in his home, his theory of the case was that the police planted all of it. Id. at 363.

¶10 Here possession occurred at the same time (the traffic stop) and place (the car and near the seat he occupied) and promoted a single objective (use of heroin). And Mr. Taylor did not claim that the police planted any of it. The

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[1] State v. King, 75 Wn. App. 899, 878 P.2d 466 (1994).

evidence taken together showed heroin in its different stages of production. We conclude that these are not then separate discrete acts but rather amount to a continuous course of conduct.

FAILURE TO ENTER FINDINGS AND CONCLUSIONS

¶11 Mr. Taylor contends that his case must be remanded because the court failed to enter written findings of fact and conclusions of law after ruling on his motion to suppress. *See* CrR 3.6(b); *State v. Cunningham, 116 Wn. App. 219, 226, 65 P.3d 325 (2003)*. He [*7] does not challenge the court's refusal to suppress the drug evidence.

¶12 The court was required to make written findings of fact and conclusions of law following an evidentiary hearing on a motion to suppress. *Cunningham, 116 Wn. App. at 226*. It did not do so here. And the failure to do so is a reoccurring and troublesome problem, at least here in eastern Washington. We cannot divine what the court did (other than deny a motion to suppress) without conclusions of law. And we cannot determine why the court did it without specific findings of fact. And, while the court's oral opinion is sometimes sufficient, it is just as often incomplete, ambiguous or vague on what specifically the judge found and his or her legal reasons for refusing to suppress the evidence. So whether written findings and conclusions are prepared by the State or dictated into the record by the judge, as part of her ruling, they are important and should be an automatic part of the process.

¶13 Here, we are able to glean the essential findings necessary to pass on the challenge from the court's ruling:

> But, first of all as to my findings of fact, I was quite impressed with the prosecutor's recitation of the facts. I had comprehensive [*8] notes, and I think she had all the facts just right on point, and they were all as I heard the testimony and as I would find. So that would simply be my findings of fact. [2]
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> And then I think the attorneys then just focused in on the one big issue that we have, or the one nub, if you will, in this case, and that is whether or not the officer was permitted to search the vehicle without a search warrant, and he found the spoon with the alleged heroin on it, and the prescription bottles with — what he believed to be black tar heroin.
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> And he didn't have probable cause to search those vehicles [sic] for evidence of a crime, I suppose — Well, he didn't. And he didn't have a search warrant. So there has to be some other warrantless exception that applies in order for that search to be upheld, in order for the evidence seized from that search to be admitted. If there's not a recognized exception in law for the search warrant requirement then that evidence found in the car, to wit, the spoon with the substance on it and the prescription bottles, must be suppressed in this case.
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> . . . .
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> And so we have that as a background, where we have a passenger, the defendant, not complying with the officer's [*9] orders — He's not threatening the officer directly but he's not complying with the orders of the officer. We have that as a background. We have two passengers who have decided to stay, and one has a double-bladed knife, and as testified by the officer that creates even more danger than a single-bladed knife. And we have this in the evening, and the officer testified that he felt he'd be safer if he had the two passengers placed back in the car; that way he had them in a — in a location where they were secured and he'd be safer, rather than just walking around and maybe coming out of a secreted location, bushes, for instance.
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> . . . I think that it was reasonable to search the car, then, for weapons.
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> And so, the defendant's motion to suppress the evidence in this case is denied. The authority I cite, again, for searching the vehicle was — the *Kennedy* case [*107 Wn.2d 1, 726 P.2d 445 (1986)]*, and also parts of the *Glossbrener* case, [*146 Wn.2d 670, 49 P.3d 128 (2002)]*.

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[2] The prosecutor's recitation of the facts, as adopted by the court, can be found at Report of Proceedings (RP) (Oct. 21, 2010) at 233-37.

Report of Proceedings (Oct. 21, 2010) at 251-56.

¶14 The court's oral ruling, then, sufficiently [*10] outlined the facts and legal authority supporting its decision to deny the suppression motion. It found that Officer Hintz had a reasonable belief that there were weapons in the area that Mr. Taylor had been reaching (under the seat). *Id.* at 255. It also found that Officer Hintz was justified in looking in that area for weapons. *Id.*

¶15 We affirm the convictions.

¶16 A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to *RCW 2.06.040*.

Korsmo, C.J., and Brown, J., concur.