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Court of Appeals Division I
State of Washington

Opinion Information Sheet

Docket Number: 62518-7
Title of Case: State Of Washington, Respondent V. Joe Lacey Jones, Appellant
File Date: 07/20/2009

SOURCE OF APPEAL

Appeal from King County Superior Court
Docket No: 08-1-03336-4
Judgment or order under review
Date filed: 10/17/2008
Judge signing: Honorable Joan E Dubuque

JUDGES

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

STATE OF WASHINGTON,

Respondent,

v.

JOE LACEY JONES,

Appellant.

No. 62518-7-I

UNPUBLISHED OPINION

FILED: July 20, 2009

Schindler, C.J. -- A jury found Joe Lacey Jones guilty of two counts of violation of the Uniform Controlled Substance Act for possession of cocaine and possession of less than 40 grams of marijuana. On appeal, Jones asserts that (1) the trial court erred in finding the police officers had probable cause to arrest based solely on the odor of marijuana, (2) the court abused its discretion in refusing to give a jury instruction on proximity, and (3) the court erred in calculating his offender score. We affirm.

FACTS

On December 20, 2007 at approximately 1:00 a.m., Seattle Police Department Officer Matthew Lilje and Officer Ryan Keith saw Joe Lacey Jones standing in the middle of an unmarked crosswalk. Jones appeared to be taking pictures of cars with

a cellular phone. There was no one else within a 30-foot radius of where Jones was standing.

When the officers approached Jones, they noticed the strong odor of fresh marijuana, which seemed to be coming from Jones. The officers asked Jones to move out of the street. When Jones walked away from the officers, they noticed the odor of marijuana also went away.

The officers approached Jones again after he had walked away and noticed the strong odor of marijuana. The officers arrested Jones for possession of marijuana. In a search incident to arrest, Officer Lilje found a clear plastic bag containing marijuana in Jones's right front pocket. Because a crowd of people had gathered around the officers and Jones, Officer Lilje did not complete the search. The officers put Jones in the back of the patrol car and took him to the precinct. When they arrived, Officer Keith found a clear plastic bag with rocks of crack cocaine in it on the floor of the patrol car.

The State charged Jones with two counts of violation of the Uniform Controlled Substance Act for possession of cocaine and possession of less than 40 grams of marijuana. Jones filed a motion under CrR 3.6 to suppress all the evidence obtained from the search.

At the CrR 3.6 hearing, Jones argued that the odor of marijuana was insufficient probable cause to arrest and that the arrest was a pretext to conduct an unrelated criminal investigation. Officer Lilje testified about approaching Jones, the smell of fresh marijuana, the arrest, and how Officer Keith found the narcotics in the

back of the patrol car. Officer Lilje also testified that he had arrested Jones approximately a week before this arrest, also on a marijuana charge. Officer Lilje said that the arrest on December 20 was for a "completely different reason" than the previous arrest on December 13. The court concluded that there were individualized grounds for probable cause and the arrest was not pretextual.

Officer Lilje's testimony at trial was consistent with his testimony at the CrR 3.6 hearing. Officer Lilje also testified that he searched the backseat of the patrol car before Jones's arrest and there was nothing in the backseat. A forensic scientist from the Washington State Patrol Crime Laboratory confirmed that the substances the officers seized were marijuana and cocaine.

Officer Keith also testified. His testimony contradicted Officer Lilje's testimony in a few respects. Although Officer Lilje testified that Jones remained in the street, Officer Keith testified that Jones was in a crosswalk and moved to the sidewalk when the officers asked him to leave the street. And while Officer Lilje testified that Jones

walked back toward them, Officer Keith stated that they decided to approach Jones again and walked toward him. No witnesses testified on behalf of the defense.

In closing, the State argued that Jones had actual possession of the marijuana in his pocket and actual possession of the cocaine when he was in the back of the patrol car. In the alternative, the State argued that Jones had constructive possession of the cocaine because it was under his dominion and control. The crux of Jones's closing argument was that someone else left the cocaine in the back of the patrol car. Jones also argued that he could not have constructive possession of the cocaine

because he did not have control over the back of the patrol car.

Following closing argument, Jones asked the court to reconsider its decision on the motion to suppress because Officer Keith's testimony contradicted Officer Lilje's testimony. Jones argued again that the stop was pretextual. The court decided to reserve the ruling for the motion to reconsider until after the jury returned a verdict. The jury found Jones guilty as charged.

After the jury verdict, the court reopened the CrR 3.6 hearing to take testimony from Officer Keith. Officer Keith's testimony was consistent with his testimony at trial. The court and concluded that there was probable cause to arrest Jones, the arrest was not pretextual, and entered findings of fact and conclusions of law.

At sentencing the court ruled that Jones had an offender score of three. The court sentenced Jones to standard range sentence of seven months for possession of cocaine and a concurrent sentence of 90 days for possession of less than 40 grams of marijuana, with 12 months of community custody on each charge, to run concurrently.

Jones appeals.

ANALYSIS

Probable Cause

Jones asserts that the trial court erred in finding that the officers had probable cause to arrest based solely on the odor of marijuana. We review the court's findings of fact after a CrR 3.6 hearing for substantial evidence. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Unchallenged findings are verities on appeal. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). We review the court's conclusion of

law de novo. Acrey, 148 Wn.2d at 745.

Warrantless searches and seizures violate the Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution and

are presumptively unreasonable unless they fall within an exception to the warrant requirement. State v. Gocken, 71 Wn. App. 267, 274, 857 P.2d 1074 (1993).1

"A lawful arrest is a prerequisite to a lawful search." State v. Grande, 164 Wn.2d 135, 139-40, 187 P.3d 248 (2008). Under RCW 10.31.100(1), "Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving . . . the use or possession of cannabis . . . shall have the authority to arrest the person." Probable cause to arrest exists if, under the circumstances, a reasonably cautious person would believe an offense is being committed. O'Neill v. Dep't of Licensing, 62 Wn. App. 112, 116-17, 813 P.2d 166 (1991). Courts give consideration to the arresting officer's special expertise in identifying criminal behavior. State v. Scott, 93 Wn.2d 7, 11, 604 P.2d 943 (1980).

Jones relies on Grande to argue that the odor of marijuana alone is insufficient to establish probable cause. Jones misreads the holding in Grande. The issue in Grande was "whether the moderate smell of marijuana emanating from a vehicle, without more, establishes probable cause to arrest all occupants of the vehicle and conduct a search incident to arrest." Grande, 164 Wn.2d at 138. The crux of the

1 "[T]he probable cause analysis under the Fourth Amendment is substantively the same analysis as the probable cause inquiry under article I, section 7." State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008).

court's analysis in Grande was that a police officer must clearly associate a crime with an individual to establish probable cause. Grande, 164 Wn.2d at 145. The court held that "the smell of marijuana in the general area where an individual is located is insufficient, without more, to support probable cause for arrest. Where no other evidence exists linking the passenger to any criminal activity, an arrest of the passenger on the suspicion of possession of illegal substances, and any subsequent searches, is invalid and an unconstitutional invasion of that individual's right to privacy." Grande, 164 Wn.2d at 146-47.

Here, unlike in Grande, the officers had individualized probable cause to arrest Jones. It is an unchallenged finding of fact that when the officers approached Jones and spoke to him, "they both smelled the odor of fresh marijuana." It is also unchallenged that when Jones moved away from the officers "the officers noticed that the odor of marijuana decreased or was absent." In addition, the court found, "When the defendant was again in close proximity to the officers . . . Officer Lilje once again noticed the odor of marijuana." Finally, it is an uncontested finding that "During this encounter, there were many people in the area but there were no other persons within

a 30 foot radius of where the defendant was standing and the nearest building was 50 feet away." This is not a case in which there is the smell of marijuana in the general area where an individual is located. The police had individualized reason to believe that Jones had marijuana on his person. We therefore conclude the court did not err in finding the officers had probable cause to arrest Jones.

Jones argues that in Grande, the court distinguished State v. Compton, 13 Wn.

App. 641, 538 P.2d 861 (1975), because of concerns for officer safety and Compton's ability to drive. In Grande, the court distinguished Compton in part because the search began with a frisk out of concern for the officer's safety, but also stated, "More importantly is the fact that Compton was the only occupant in the vehicle where the smell was emanating." Grande, 164 Wn.2d at 144.

Our recent decision in State v. Marcum, 149 Wn. App. 894, 205 P.3d 969 (2009), also supports this conclusion. In Marcum, we upheld a finding of probable cause because "Marcum was the only person in his truck. The odor of marijuana emanating from the truck could not be associated with anyone other than Marcum." Marcum, 149 Wn. App. at 912. We held that "the odor created sufficient individualized probable cause for Detective Haner to believe that Marcum possessed marijuana for Detective Haner to arrest Marcum and search his truck incident to that arrest." Marcum, 149 Wn. App. at 912.

Because Jones was the only person in the area and the smell of marijuana was emanating from him, we conclude the officers had probable cause to arrest.

Proposed Jury Instruction

Jones asserts that the trial court erred in refusing to give his proposed jury instruction that "Proximity alone without proof of dominion and control over the substance is insufficient to establish constructive possession." The court gave the standard Washington Pattern Jury Instruction:

> Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when

> there is no actual physical possession but there is dominion and control over the substance. Dominion and control need not be exclusive to establish constructive possession.2

The court stated that it would not give Jones's proposed jury instruction because it would confuse the jury and Jones could still argue the theory of his case under the

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>
> FN2. Washington Pattern Jury Instructions: Criminal 50.03, at 949 (3rd ed.2008).

The court stated that it would not give **Jones's** proposed jury instruction because it would confuse the jury and **Jones** could still argue the theory of his case under the possession instruction. The **State** contends that the jury instructions gave **Jones** the opportunity to argue his theory of the case and the court did not err in refusing to give **Jones's** proposed jury instruction because the **State's** case did not rest solely on **Jones's** proximity to the controlled substance.

Jury instructions are sufficient if, when read as a whole, the instructions properly inform the jury of the applicable law, permit each party to argue its theory of the case, and are not misleading. ***State** v. Pesta,* 87 Wn.App. 515, 524, 942 P.2d 1013 (1997). The trial court has considerable discretion in selecting the wording of a jury instruction. ***State** v. Rosul,* 95 Wn.App. 175, 187, 974 P.2d 916 (1999). "It is not error to refuse to give a specific instruction when a more general instruction adequately explains the law and allows each party to argue its theory of the case." ***State** v. Castle,* 86 Wn.App. 48, 62, 935 P.2d 656 (1997).

The decision in *Castle* is analogous. In *Castle,* Castle asked the court to instruct the jury that " '[m]ere proximity of the defendant to an alleged controlled substance is not sufficient evidence to establish possession.' " *Castle,* 86 Wn.App. at 60-61. The court refused to give the instruction and instead gave an instruction identical to the possession instruction in this case.[FN3] The court concluded in *Castle* that the instruction did not prevent Castle from arguing the theory that he did not have constructive possession of cocaine. *Castle,* 86 Wn.App. at 61.

> FN3. Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. Dominion and control need not be exclusive to establish constructive possession.
>
> *Castle,* 86 Wn.App. at 61.

Here, the **State's** primary argument was that **Jones** had actual possession of the cocaine. At trial, Officer Lilje testified that he searched the back seat of the patrol car before **Jones's** arrest. Officer Keith testified that he found the bag of cocaine after they took **Jones** to the precinct. In closing, the **State** argued that **Jones** had actual possession of the cocaine when he was in the back of the patrol car. Although the **State** argued constructive possession in the alternative, the prosecutor told the jury, "But you don't even need to get there because, with the evidence you have, the items are within his actual

possession because that's the only way they could have gotten on the floor of that back seat." And in rebuttal, the **State** reiterated that "the **State's** theory is actually that the defendant was in actual possession of the cocaine because it had to have been on his body."

5** As in *Castle,* "The **State** did not rely on mere proximity, nor was there a danger the jury would do so." *Castle,* 86 Wn.App. at 62; *see also* ***State *v. Portrey,* 102 Wn.App. 898, 903, 10 P.3d 481 (2000) (concluding there was no error in refusing to give a proximity instruction when "the **State's** case did not rest solely on mere proximity."). The constructive possession instruction the court gave allowed **Jones** to make his argument that he could not have constructive possession of the cocaine because he did not have control over the back of the patrol car. Because the trial court properly instructed the jury and **Jones** had the opportunity to argue his theory of the case, the court did not abuse its discretion by refusing to give his proposed jury instruction.

Criminal History

Jones asserts that the court erred in concluding that his offender score was three because the **State** did not meet its burden of proving **Jones's** juvenile conviction by a preponderance of the evidence. Specifically, **Jones** argues that because the juvenile court order of disposition lists the offense as "VUCSA," there was insufficient evidence that the crime should be counted as a felony instead of as a misdemeanor.

We review the trial court's calculation of a defendant's offender score de novo. ***State*** *v. Roche,* 75 Wn.App. 500, 513, 878 P.2d 497 (1994). "The **State** bears the burden of proving the existence of prior convictions by a preponderance of the evidence." ***State*** *v. Bergstrom,* 162 Wn.2d 87, 93, 169 P.3d 816 (2007). RCW 9.94A.500(1) provides in part:

> A criminal history summary relating to the defendant from the prosecuting authority or from a **state**, federal, or foreign governmental agency shall be prima facie evidence of the existence and validity of the convictions listed therein. If 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.

At sentencing, the **State** argued that **Jones's** offender score was three, based on two prior adult felonies, each worth one point, and three juvenile felonies, each worth half a point. The order of disposition from 1992 **states** that **Jones** was "A middle offender" and he was found guilty of the offense of "VUCSA." [FN4] **Jones** argued that because the 1992 conviction only stated "VUCSA," it could be a misdemeanor. The court concluded "looking at the nature of the sentence" that the VUSCA offense was a felony.

> FN4. " 'Middle offender' means a person who has committed an offense and who is neither a minor or first offender nor a serious offender [.]" Former RCW 13.40.020 (13) (1991).

When **Jones** was sentenced in 1992, he was 16 years old. Under former RCW 13.40.0357 (1991), possession of a controlled substance is a category C offense and possession of less than 40 grams of marijuana is a category E offense. The juvenile sentencing range depended on a number of factors, including the type of offense, the offender's age, and the offender's criminal history. Under former RCW 13.40.0357 (1991), the number of points assigned to a 16-year-old with a category C offense was 50; the number of points for a category E offense was 8.

***6** The standard range for a middle offender with 50 points was three to six months on community supervision, confinement of five to 10 days, and 24-40 hours of community service. Former RCW 13.40.0357 (1991). The standard range for a middle

offender with eight points was zero to three months of community supervision, zero days in confinement, and zero to eight community service hours. Former RCW 13.40.0357 (1991). **Jones** was sentenced to six months on community supervision, 24 hours of community service, and five days in custody. The court correctly concluded that based on the sentence, the VUSCA offense was a felony.

In any event, as the **State** points out, it is irrelevant whether the VUSCA offense was a felony. Because **Jones** does not challenge his two other juvenile convictions for assault in the third degree and malicious mischief in the first degree on appeal, even without the VUCSA disposition, each of the other juvenile convictions would count for half a point and his offender score would still be three.

In the alternative, **Jones** asserts that the court erred in concluding that his prior convictions did not wash out because the **State's** evidence was unreliable and therefore, the **State** did not meet its burden of proving **Jones's** criminal history by a preponderance of the evidence.

Under RCW 9.94A.525(2)(c),

> [C]lass C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

At sentencing, the **State** submitted an affidavit from **Jones's** community corrections officer, Kelly Kilkenny, stating that **Jones** had been released from custody on April 7, 2003. If the **State** alleges the existence of prior convictions at sentencing and the defense acknowledges those prior convictions, the sentencing court can rely on the defense acknowledgement of prior convictions without further proof. ***State*** *v. Bergstrom,* 162 Wn.2d 87, 94, 169 P.3d 816 (2007). **Jones** is correct that "[t]he mere failure to object to a prosecutor's assertions of criminal history does not constitute such an acknowledgment." ***State*** *v. Mendoza,* 165 Wn.2d 913, 928, 205 P.3d 113 (2009). But here, **Jones** did not merely fail to object to the prosecutor's assertions of criminal history. Instead, **Jones** relied on Kilkenny's affidavit to argue that because he began work release on December 4, 2002, the five year period to wash his convictions began then. Because **Jones's** work release was revoked and he was taken back into custody, the court concluded that the five year period began on his final release of April 7, 2003. Consequently, **Jones** had not spent five consecutive years in the community without committing any crime resulting in a conviction and his prior Class C felonies did not wash. **Jones's** reliance on the affidavit constitutes acknowledgment. Accordingly, we conclude the trial court did not err in relying on the affidavit to establish **Jones's** release date.

*7 We affirm.

WE CONCUR: DWYER, A.C.J., and AGID, J.

Wash.App. Div. 1,2009.
State v. Jones
Not Reported in P.3d, 151 Wash.App. 1015, 2009 WL 2151885 (Wash.App. Div. 1)

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DO NOT CITE. SEE RAP 10.4(h).

Court of Appeals Division I
State of Washington

Opinion Information Sheet

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Title of Case: State Of Washington, Resp. vs. Tony Lee Wilford, App.
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