IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. AZAEL ORTIZ-LOPEZ, Appellant.	No. 38565-1-II (consolidated with 39890-7-II) UNPUBLISHED OPINION

Penoyar, C.J. — Azael Ortiz-Lopez appeals his conviction of unlawful delivery of a controlled substance, methamphetamine, within 1,000 feet of a school bus route stop.[1] He challenges the constitutionality of a paraphernalia restriction in his community custody conditions. In his personal restraint petition and statement of additional grounds, he claims ineffective assistance of counsel for counsel's failure to challenge the legality of a police stop, insufficient evidence to support the school bus route stop enhancement, and prosecutorial misconduct for a discovery violation. We reverse the community custody condition but otherwise affirm Ortiz-Lopez's conviction and deny his personal restraint petition.

Facts

On February 20, 2008, Vancouver Police Officer Spencer Harris used a confidential informant (CI) to purchase methamphetamine from a man known as "Jose." Report of Proceedings (RP) at 100. While parked near 9404 Ward Road in Clark County, Harris watched a blue Chevrolet Malibu pull into the driveway at 8:25 p.m. The driver stepped out of the car and went into the residence where the CI and Officers Brian Billingsley and Bethaney Graves were

[1] A violation of RCW 69.50.401(1), (2)(b); RCW 69.50.435(1)(c); and RCW 9.94A.533(6).

waiting. When the driver returned, Harris followed the Malibu and asked Officer Wilken, who was in a patrol car, to stop the Malibu. After the stop, Harris followed the Malibu to a home at 1411 East 30th Street.

Wilken explained that he stopped the car as instructed in order to identify the driver and his passenger. He did not issue any traffic citations. The driver produced his driver's license showing his name as Azael Ortiz-Lopez and with an October 11, 1987 birth date.

Graves, a Community Corrections Officer for the Department of Corrections, was present at the Ward residence to serve as an undercover witness to the drug transaction with "Jose." RP at 118. She explained that she was sitting about 5 to 10 feet away when the suspect measured methamphetamine out of a baggie into another and then exchanged it for money with the CI. She also identified Ortiz-Lopez in open court as the person that sold the methamphetamine.

Officer Billingsley was working undercover as part of the Neighborhood Response Team and was sitting at the table with the CI during the transaction. He identified Ortiz-Lopez in open court and was part of the team that arrested Ortiz-Lopez on May 1, 2008, at 1411 East 30th Street, the same location Harris had followed Ortiz-Lopez to after the drug transaction. He identified the location of the drug transaction as being at 9404 Northeast Ward Road and showed its location on exhibit 2, a GIS map of the area.

Daniel Kalen, the GIS Coordinator for Clark County, explained exhibit 2 as an aerial photograph containing concentric circles at set distances from the residence. Based on the Hockinson School District Superintendent's testimony that there was a bus route stop at 9203 Northeast Ward Road, Kalen concluded that the residence was within 1,000 feet of a school bus route stop.

Following a bench trial, the court found Ortiz-Lopez guilty of unlawful delivery of methamphetamine and found specially that the transaction took place within 1,000 feet of a school bus route stop.[2] The sentencing court then imposed a standard range sentence plus 9 to 12 months of community custody. One condition of that community custody included that "Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances . . . ." Clerk's Papers (CP) at 13.

analysis

I. Paraphernalia-Community-Custody Condition

Ortiz-Lopez argues that the paraphernalia-community-custody condition is not crime-related and is constitutionally vague. As this condition is identical to that stricken in *State v. Valencia,* 169 Wn.2d 782, 239 P.3d 1059 (2010), we agree and remand for the sentencing court to strike this community custody condition. 169 Wn.2d at 795.

II. Personal Restraint Petition and Statement of Additional Grounds

A. Effective Assistance of Counsel

Ortiz-Lopez first claims that trial counsel was ineffective in his failure to challenge the pretextual stop of his car after the drug transaction. He likens the stop to that in *State v. Ladson*, 138 Wn.2d 343, 346-74, 979 P.2d 833 (1999), and *State v. Montes-Malindas*, 144 Wn. App. 254, 259, 182 P.3d 999 (2008). In order to succeed on this claim, however, Ortiz-Lopez must show that but for counsel's failure to challenge the vehicle stop, the trial result would have differed.

[2] The trial court did not enter findings of fact and conclusions of law at this time orally or in writing. While Ortiz-Lopez did not object to this on appeal, the better practice would be to have contemporaneous findings of fact and conclusions of law. *See* CrR 6.1(d) ("the court shall enter findings of fact and conclusions of law").

To succeed on a claim of ineffective assistance of counsel, the proponent must make two showings. One, the defendant must show that defense counsel's conduct was deficient, *i.e.*, that it fell below an objective standard of reasonableness. Two, the defendant must show that such conduct caused actual prejudice, *i.e.*, that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test from *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Here, the investigative stop was inconsequential. "When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." *Ladson*, 138 Wn.2d at 359. What Officer Wilken learned during the investigative stop was Ortiz-Lopez's name. And even without knowing Ortiz-Lopez's name, the evidence against him was overwhelming. Two officers witnessed the drug transaction, one officer followed Ortiz-Lopez to his residence, and when they went to the residence to arrest Ortiz-Lopez, he opened the door, and the officers arrested him. It made no difference in this case what name he used. Simply put, Ortiz-Lopez cannot show that trial counsel's failure to challenge Wilken's stop had any effect on the trial outcome.

B. Sufficiency of the Evidence Supporting Bus Route Stop Enhancement

Ortiz-Lopez next claims that the State failed to present sufficient evidence to show that the transaction took place within 1,000 feet of a school bus route stop. He claims there is no sign indicating where the bus route stop is and he would not know how to find such information.

When facing a challenge to the sufficiency of the evidence, we ask whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the

essential elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Because credibility determinations are for the trier of fact and are not subject to review, *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), we defer to the trier of fact's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

In *State v. Coria,* 120 Wn.2d 156, 164, 839 P.2d 890 (1992), our Supreme Court upheld the constitutionality of the school-bus-route-stop enhancement because due process does not mandate that drug dealers subjectively know they are in a drug-free zone. The court also rejected the defendant's due process claim that he did not have notice that the bus route stop existed. The court noted that, while the stop was not marked, information about the bus routes was available through observation, by contacting local schools, or by contacting the school district's director of transportation. 120 Wn.2d at 167.

Here, two officers testified to the actual location of the residence where the drug transaction took place, the school superintendent testified to the actual location of the nearest bus route stop, and the County GIS Coordinator testified, and demonstrated using a GIS map, that the school bus route stop was within the 1,000 feet concentric circle on the map. Finally, the school superintendent also testified that all the bus route information is readily available on the internet. Ample evidence supported the enhancement. Ortiz-Lopez's claim fails.[3]

C. Prosecutorial Misconduct

[3] Ortiz-Lopez attaches a GIS map to his personal restraint petition to show that the map is of a different area in Vancouver. But he does not state that this is the same map as used at trial admitted as exhibit 2.

In a related claim, Ortiz-Lopez claims that the prosecutor committed misconduct in violating the discovery rules when he provided a GIS map to defense counsel depicting a different area of Vancouver, not near where the drug transaction took place. But a copy of this map alone is insufficient to show any misconduct. The record provides no explanation and other than Ortiz-Lopez's name being on the map, there is nothing to show that it was even part of this case.

"Dismissal of a case for discovery abuse is an extraordinary remedy that is generally available only when the defendant has been prejudiced by the prosecution's actions." *State v. Cannon,* 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). Whether dismissal is an appropriate remedy for discovery violations is a fact-specific inquiry decided on a case-by-case basis. *State v. Ramos,* 83 Wn. App. 622, 637, 922 P.2d 193 (1996). Not only does Ortiz-Lopez fail to show a discovery violation, but he fails to show it affected his trial and sentence result. His claim fails.

We reverse the community custody condition but otherwise affirm Ortiz-Lopez's conviction and deny his personal restraint petition.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Penoyar, C.J.

We concur:

Van Deren, J.

Johanson, J.