IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHARLES ALAN CHAPPELLE, Appellant.	)	No. 63416-0-I
	)	DIVISION ONE
	)	UNPUBLISHED OPINION
	)	FILED: July 18, 2011

Becker, J. — Charles Chappelle appeals convictions for two controlled substances violations and two bail jumping violations. We reverse one of the convictions for bail jumping because there was not sufficient evidence that Chappelle knew he was supposed to appear for the trial date that had been rescheduled. We affirm the remaining convictions.

MOTION TO SUPPRESS

Two of the officers who arrested Chappelle for selling marijuana were King County Sheriff Deputies Patrick McCurdy and Steven Smithmeyer. They testified at the hearing on Chappelle's motion to suppress.

According to the undisputed findings of fact entered by the trial court, on April 24, 2007, deputies McCurdy and Smithmeyer were on duty in downtown Seattle with other members of their Metro bicycle unit. Both deputies were familiar with narcotics and narcotics transactions, having received specific

narcotics training and having considerable job experience with narcotics use and narcotics dealings.

The deputies' team was in a substation located in the Macy's Department Building. At about 5:00 p.m., Macy's staff members called the team to the Macy's surveillance office to view security camera footage that was just recorded. The video quality was high. The footage showed Chappelle and another individual meet and then walk into the Macy's vestibule. They stood there in between the two sets of doors and had a conversation. The conversation was not recorded. The individuals reached in their clothing as if transferring items to each other.

Based on what he saw, Deputy McCurdy believed Chappelle had been "re-upped" by the other individual. "Re-upping" happens when narcotics are given to a street-level dealer by another individual for the purpose of future deliveries. After the suspected exchange, the two individuals left the vestibule and returned to the streets.

After watching the video, the officers returned to their substation and started to monitor the surrounding areas through their own surveillance cameras. These cameras provided a clear image. Twenty minutes later, the deputies spotted Chappelle near the corner of Fourth Avenue and Pine Street with another individual. This individual was later identified as Stormy Jackson.

The deputies observed Jackson take out his wallet and remove what the deputies believed was money and hand it to Chappelle. Chappelle took the

money with his left hand and put it in his pocket. Jackson then handed a small object to Chappelle with his right hand. Deputy Smithmeyer believed the object was a small baggie. Jackson looked at the item and put it in his pants pocket. Before this exchange, both men looked around in what the deputies believed was a suspicious manner. Based on their training and experience, both Deputy McCurdy and Deputy Smithmeyer were certain they witnessed a narcotics delivery. Immediately after witnessing the exchange, the King County Sherriff Office team left the substation and arrested both Chappelle and Jackson. After arresting them, police found marijuana on both men.

The court denied Chappelle's motion to suppress the evidence obtained as a result of his arrest. A jury convicted Chappelle of delivery of a controlled substance and possession with intent to deliver a controlled substance. On appeal, Chappelle challenges the denial of his suppression motion. He contends the facts known to the officers, while perhaps sufficient to form the basis of a reasonable suspicion, did not amount to probable cause for arrest.

Where, as here, an appellant does not challenge a court's factual findings on the suppression motion, they are verities on appeal. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). In an order pertaining to suppression of evidence, we review conclusions of law de novo. Acrey, 148 Wn.2d at 745.

Both article 1, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution require that arrests be supported by probable cause. See State v. Graham, 130 Wn.2d 711, 724, 927 P.2d 227

(1996). Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed. Graham, 130 Wn.2d at 724. In determining whether probable cause to arrest in a narcotics case exists, the court must consider the totality of the facts and circumstances within the officer's knowledge at the time of the arrest. Graham, 130 Wn.2d at 724. The standard of reasonableness to be applied takes into consideration the special experience and expertise of the arresting officer. Graham, 130 Wn.2d at 724.

The cases cited by Chappelle to support his argument that the officers lacked probable cause are, for the most part, not on point because they do not involve observations of a hand-to-hand exchange of a small object for money. This is not a case based on a suspect's mere proximity to a controlled substance. State v. Chavez, 138 Wn. App. 29, 33, 156 P.3d 246 (2007) (no probable cause to arrest defendant for constructive possession of a controlled substance based on his close proximity to another man who had a dollar bill with cocaine on it). This is not a case where police arrested a man who was simply carrying a plastic bag. State v. Glover, 116 Wn.2d 509, 512, 515, 806 P.2d 760 (1991) (suspect walked away from officers and had a clear plastic bag protruding from his closed hand; facts supported reasonable suspicion but not probable cause to arrest for drug activity). This is not a case where the suspect briefly stopped in a high crime area and entered an apartment building that he did not

live or work in. State v. Biegel, 57 Wn. App. 192, 193-94, 787 P.2d 577 (facts supported reasonable suspicion but not probable cause for drug activity), review denied, 115 Wn.2d 1004 (1990). Similarly, this is not a case where the suspect did no more than enter a possible drug house. State v. Doughty, 170 Wn.2d 57, 61, 65, 239 P.3d 573 (2010) (defendant entered suspected drug house at 3:20 in the morning for about two minutes; facts did not support even a reasonable suspicion).

State v. Fore is the one Washington case cited by Chappelle that is somewhat similar to his case. State v. Fore, 56 Wn. App. 339, 783 P.2d 626 (1989), review denied, 114 Wn.2d 1011 (1990). There, officers were using binoculars to watch a park for drug transactions. They saw Fore walk up to a car and exchange a small plastic bag for money with a person in the car. Fore did the same thing again with a person in a different car. A man who appeared to be with Fore did the same. Finally, an officer saw Fore go to a truck, remove a large bag containing smaller packets with green vegetable matter in it, and take some of the packets out. Fore, 56 Wn. App. at 340-41. Based on these facts, this court reversed the trial court's determination that there was not probable cause to arrest Fore. Fore, 56 Wn. App. at 343-44.

Chappelle argues that in contrast to Fore, the deputies here did not see what was being exchanged. It is true that the deputies did not see what was being exchanged, if anything, in the vestibule inside Macy's. And the deputies could not say exactly what Chappelle gave Jackson in exchange for money in

the transaction on streets, though one deputy thought it was a small plastic baggie. But Fore rebukes the proposition that it is necessary for an officer to identify the object exchanged in order to establish probable cause. As stated in Fore, "absolute certainty by an experienced officer as to the identity of a substance is unnecessary to establish probable cause." Fore, 56 Wn. App. at 345. In Fore, "the suspicious circumstances surrounding the exchanges, not the officer's ability to identify the substance, constituted the primary basis for the probable cause determination." Fore, 56 Wn. App. at 345.

Fore distinguished State v. Poirier, 34 Wn. App. 839, 664 P.2d 7 (1983), and People v. Oden, 36 N.Y.2d 382, 329 N.E.2d 188, 368 N.Y.S.2d 508 (1975). In Poirier, this court held that an "exchange between two persons unknown to the arresting officers of white envelopes or packages in plain view in an open parking lot, not itself known for frequent drug transactions, does not establish probable cause to arrest." Poirier, 34 Wn. App. at 843. Similarly, in Oden, the Court of Appeals of New York held that the "mere passing of a glassine envelope in a neighborhood in which narcotics were known to have been present, unsupplemented by any additional relevant behavior or circumstances" was insufficient to establish probable cause. Oden, 36 N.Y.2d at 385. Fore distinguished these cases on the basis that the officer there "saw substantially more than a single incident involving two unknown parties exchanging unknown parcels." Fore, 56 Wn. App. at 344-45.

The same is true here. Officers experienced in identifying drug activity

watched Chappelle engage in a hand-to-hand exchange of an object for money, in a manner consistent with a drug deal. And the same officers earlier watched video footage of Chappelle engage in some kind of transfer of items with another individual inside the Macy's vestibule, activity that Deputy McCurdy believed to be a "re-upping."

Chappelle suggests that Fore establishes "the quantum of information necessary to create probable cause to arrest for drug crimes." Appellant's Brief at 11. We disagree. As the cases cited by the State show, officers need not see exactly what object is exchanged. One transaction may be sufficient. For example, in State v. Rodriguez-Torres, an officer observed Rodriguez-Torres exchange an unknown object in his cupped hand with another man for money. The men left the area when they were made aware that a police officer was approaching. The officer arrested Rodriguez-Torres. State v. Rodriguez-Torres, 77 Wn. App. 687, 689-90, 893 P.2d 650 (1995). This court held there was probable cause to arrest. Rodriguez-Torres, 77 Wn. App. at 693-94. Other cases show the same pattern. See, e.g., State v. White, 76 Wn. App. 801, 803-05, 888 P.2d 169 (1995) (probable cause where officer with binoculars observed circumstances indicating a drug transaction, though officer was unable to identify the object exchanged), aff'd, 129 Wn.2d 105, 915 P.2d 1099 (1996).

The deputies' observations and expertise established probable cause to arrest Chappelle. The trial court did not err in denying Chappelle's motion to suppress.

BAIL JUMPING

Chappelle was also charged and convicted for two counts of bail jumping. One count was for failing to appear on October 5, 2007, and the second count was for failing to appear on January 23, 2008.

Sufficiency of the Evidence

Chappelle argues there was insufficient evidence as to the bail jumping conviction for failing to appear on January 23, 2008, because there was no evidence he knew he was supposed to appear on this date. Evidence is sufficient to support a conviction only if after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The bail jumping statute, as amended in 2001, requires "knowledge of the requirement of a subsequent personal appearance":

> Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

RCW 9A.76.170. "In order to meet the knowledge requirement of the statute, the State is required to prove that a defendant has been given notice of the required court dates." State v. Cardwell, 155 Wn. App. 41, 47, 226 P.3d 243 (2010), citing State v. Fredrick, 123 Wn. App. 347, 353, 97 P.3d 47 (2004).[1]

[1] We are aware that the to-convict instructions (though not the information) appear to be based on the previous version of the bail jumping statute. That version required the defendant to "knowingly fail to appear" rather than having "knowledge of the requirement of a subsequent personal appearance":

> Any person having been released by court order or admitted to bail with the requirement of a subsequent personal appearance before any court of this state, and who knowingly fails to appear as required is guilty of bail jumping.

Former RCW 9A.76.170 (1983); Laws of 1983, 1st Ex. Sess., ch. 4, § 3. Neither party argues that this difference should affect our analysis of the issue. For purposes of analyzing the arguments raised in this case, we assume the knowledge elements in

Given the case law, the issue is whether the State proved Chappelle knew he was required to appear on January 23, 2008.

Chappelle was charged with failing to appear on January 23. To make its case at trial, the State called a courtroom clerk supervisor to testify about the court documents in the matter and about trial scheduling procedures. The State presented a certified copy of an order continuing the trial to January 22, 2008. The order, dated in November 2007, bore Chappelle's signature. Exhibit 26. The State also presented a copy of an order dated January 23, 2008, striking the trial date of January 23, 2008, because defendant failed to appear for trial. Exhibit 27. A copy of an order for a bench warrant for Chappelle's arrest, signed on January 23, 2008, and issued on January 24, 2008, was presented by the State. No documents presented at trial explained why the trial date was moved to January 23. The clerk testified that she viewed electronic copies of the records in the case and based on that, she believed the January 22 trial "was held over until the 23rd." Report of Proceedings (Feb. 26, 2009) at 103. On cross-examination, the clerk opined that Chappelle must not have showed up on January 22 because if he had, the case would have gone to trial that day instead of being held over to January 23.

At trial, Chappelle testified that he did not know his court date was January 22 or January 23, 2008. He stated he "had a lot of family issues," was sick, and was taking medications. Report of Proceedings (March 2, 2009) at 41-

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both versions of the statute require proof that a defendant has been given notice of the required court dates.

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Even when viewed in the light most favorable to the State, the evidence did not prove that Chappelle knew he was supposed to appear on January 23. There is evidence that Chappelle knew he was supposed to appear on January 22 and did not show up either that day or the next. But we do not see how the clerk's testimony supports an inference that Chappelle knew the case was being held over and that he was supposed to appear on January 23.

The State argues that the conviction can be upheld because the to-convict jury instruction required proof that Chappelle knowingly failed to appear "on or about" January 23, 2008. "On or about" is not helpful to the State in this case. The statute requires proof that the defendant has been given notice of the required court dates. Cardwell, 155 Wn. App. at 47; Fredrick, 123 Wn. App. at 353. The required court date that Chappelle was notified about was a particular date, January 22. Chappelle was not given notice that January 23 was also a required date.

Because there was insufficient evidence to prove that Chappelle had knowledge his court date was January 23, 2008, count four must be dismissed with prejudice.

To-Convict Instruction and Information

Chappelle argues that both of the bail jumping convictions must be reversed because the information and the jury instructions failed to include an essential element. He contends that the defendant's receipt of notice of the

particular date on which he is to appear is an essential element of the crime of bail jumping.

All essential elements of the crime charged must be included in the information. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). The failure to instruct the jury as to every element of the crime charged is constitutional error. State v. Aumick, 126 Wn.2d 422, 429, 894 P.2d 1325 (1995).

The statute requires that the defendant have "knowledge of the requirement of a subsequent personal appearance." RCW 9A.76.170. The knowledge requirement is satisfied "when the State proves that the defendant has been given notice of the required court dates." Fredrick, 123 Wn. App. at 353, citing Carver, 122 Wn. App. 300, 93 P.3d 947, 950 (2004).

Neither Fredrick nor Carver added an implied element to the offense of bail jumping. They merely held that the State cannot satisfy the burden of proving the knowledge element without evidence of notice provided to the defendant of the required court dates.

Because receipt of notice is not an element, neither the jury instructions nor the information require reversal. Thus we affirm the bail jumping conviction for failing to appear on October 5, 2007 (count three).

CONCLUSION

We reverse the bail jumping conviction on count four. We affirm the other three convictions.

Becker, J.

WE CONCUR:

Grosse, J.

Ellington, J.