# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>AZAEL ORTIZ-LOPEZ,<br><br>Appellant. | No. 38558-9-II<br><br><br><br><br><br>UNPUBLISHED OPINION |

Penoyar, C.J. — Azael Ortiz-Lopez appeals his convictions of unlawful possession of methamphetamine with intent to deliver within 1,000 feet of a school bus route stop,[1] tampering with the evidence,[2] and two counts of bail jumping.[3] He challenges the constitutionality of a paraphernalia restriction in his community custody conditions, and he claims that the sentencing court improperly imposed probation on the tampering with evidence conviction. In his statement of additional grounds, he claims that the two bail jumping convictions violate double jeopardy protections, that counsel provided ineffective assistance by failing to present exculpatory evidence and object to a prosecutorial misstatement, and that insufficient evidence supports the intent to deliver element of the drug charge. We reverse the community custody condition and the order imposing probation, but affirm Ortiz-Lopez's convictions.

Facts

On April 5, 2007, members of the Clark-Skamania Drug Task Force served a warrant on

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

[2] A violation of RCW 9A.08.020(3) and RCW 9A.72.150(1)(a).

[3] Violations of RCW 9A.76.170(1) and (3)(a).

an apartment in the Evergreen Park Apartment complex in Vancouver, Washington. After pounding on the door and announcing in both English and Spanish that they were the police, the officers breached the door and entered the apartment. There, they seized Julio Cabrera-Cardoza near the bathroom and Ortiz-Lopez near the kitchen sink. The bathroom toilet was flowing and the floor was littered with a crystalline substance. In the kitchen, the faucet was running, several baggies were in the sink, a crystalline substance was scattered across the counter, as well as several bags of the same substance. After securing Cabrera-Cardoza and Ortiz-Lopez, the officers searched them and their wallets. The officers found $735 in Cabrera-Cardoza's back right pants pocket and $270 from his wallet. Ortiz-Lopez had identification showing that he was Jonathan Ortiz-Lopez and was born August 2, 1986. They found no money, drugs, or paraphernalia on Ortiz-Lopez.

The officer's search recovered over 64 grams of what was later determined to be methamphetamine, a digital scale, many baggies, a cellular phone, and an address book. The cellular phone logs showed multiple calls to Mr. Quadas, a known large-scale drug dealer.

The State initially charged Ortiz-Lopez with one count of unlawful possession of methamphetamine with intent to deliver and one count of tampering with evidence. Ortiz Lopez posted bail following his arraignment but failed to appear for his scheduled omnibus and readiness hearings. Consequently, the State additionally charged Ortiz-Lopez with two counts of bail jumping.

In addition to the events already noted, the State presented testimony that the apartment was less than 1,000 feet from five school bus route stops. It also presented evidence about the current street value of methamphetamine as $21,000 per pound, $1,500 per ounce, and $120-150

for a teener (1.7 grams). A jury found Ortiz-Lopez guilty of all charged counts and by special verdict that the drug offense occurred within 1000 feet of a school bus route stop. The sentencing court then imposed a standard range sentence including a 24-month protected zone enhancement and 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 at 66. As to his misdemeanor tampering with evidence conviction, the sentencing court imposed 365 days to be served concurrently with his felonies and, additionally, 24 months of probation.[4] Ortiz-Lopez appeals.

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. Probation

Ortiz-Lopez argues that because the sentencing court imposed the maximum sentence for his tampering with evidence misdemeanor conviction, it erred in imposing probation. The State concedes this was error and asks us to remand for resentencing.

RCW 9.95.210(1) defines the superior court's authority to impose probation:

In granting probation, the superior court may suspend the imposition or the

[4] The parties stipulate that Ortiz-Lopez received 24 months of probation. The record does not reflect the probation period. RCW 9.95.210 allows up to 24 months of probation.

> execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence of two years, whichever is longer.

Interpreting this provision, Division One of this court has held that a sentencing court may not impose probation when it imposes the maximum jail sentence allowed. *State v. Gailus*, 136 Wn. App. 191, 201, 147 P.3d 1300 (2006), *overruled on other grounds by State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009). As the sentencing court here imposed the maximum allowable sentence and did not suspend any of it, it lacked authority to impose probation. As such, on remand the sentencing court shall strike the probation from Ortiz-Lopez's misdemeanor judgment and sentence.

III. Statement of Additional Grounds

A. Double Jeopardy

Ortiz-Lopez claims that his two bail jumping convictions violate double jeopardy provisions because his failure to appear at the omnibus hearing nullified his readiness hearing date. In the order allowing Ortiz-Lopez to be released on bail before trial, he agreed to appear at a May 10, 2007 omnibus hearing, a May 31, 2007 readiness hearing, and a later trial date.[5] He does not, however, claim that the trial court ever rescinded its order or scheduled a new readiness hearing before he failed to appear at the readiness hearing.

[5] The order is not part of the appeal record. *See* RAP 9.1(a) (record on review consists of verbatim report of proceedings, clerk's papers designated under RAP 9.6, exhibits, and administrative record). Because this document is not part of the record, we cannot consider Ortiz-Lopez's assertions about the order's contents. *State v. Detrick,* 90 Wn. App. 939, 941 n. 1, 954 P.2d 949 (1998) (refusing to review claimed error in denying motion to sever where motion was not included in record); *State v. Garcia,* 45 Wn. App. 132, 140, 724 P.2d 412 (1986) (declining to address ineffective assistance claim where appellant failed to provide relevant record or photograph to which counsel allegedly should have objected).

The double jeopardy clause of the United States Constitution guarantees that no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. 5. Similarly, our state constitution indicates that "[n]o person shall be ... twice put in jeopardy for the same offense." Wash. Const. art. I, § 9. We give our constitutional double jeopardy provisions "the same interpretation [as] the [United States] Supreme Court gives to the Fifth Amendment." *State v. Gocken,* 127 Wn.2d 95, 107, 896 P.2d 1267 (1995).

"One aspect of double jeopardy protects a defendant from being punished multiple times for the same offense." *State v. Adel,* 136 Wn.2d 629, 632, 965 P.2d 1072 (1998). The proper inquiry when a defendant is charged with violating the same statute twice is to examine the "unit of prosecution" the legislature has defined as the punishable act. *Adel*, 136 Wn.2d at 634 (quoting *Bell v. United States*, 349 U.S. 81, 83, 75 S. Ct. 99 L. Ed. 905 (1955)). "If the Legislature has failed to denote the unit of prosecution in a criminal statute, the United States Supreme Court has declared the ambiguity should be construed in favor of lenity." *Adel,* 136 Wn.2d at 634-35.

In order to convict a defendant of bail jumping, the State had to prove that the defendant: (1) was held, charged with, or convicted of a particular crime, (2) was released by court order or admitted to bail knowing that he had a subsequent required personal appearance in court, and (3) he subsequently failed to appear. RCW 9A.76.170. The legislature has not defined the unit of prosecution for this offense.

To prove count III, the State had to show that Ortiz-Lopez was charged with unlawful delivery of methamphetamine, that he was released on bail knowing that he was required to appear on May 10, 2007, for an omnibus hearing, and that he failed to appear on that date. To

prove count IV, the State had to show that Ortiz-Lopez was charged with unlawful delivery of methamphetamine, that he was released on bail knowing that he was required to appear on May 31, 2007, for a readiness hearing, and that he failed to appear on that date.

Even applying the rule of lenity, we hold that these two offenses, committed three weeks apart and involving completely separate failures to appear were not one criminal offense. To hold otherwise would allow a defendant to ignore required court appearances, as Ortiz-Lopez did here, without any consequence for the disruptive and costly effect it would have on our justice system. This is not a case where the same act of failing to appear at the same time for two cause numbers resulted in multiple bail jumping charges. *Cf. State v. Fisher*, 139 Wn. App. 578, 161 P.3d 1054 (2007) (two counts of bail jumping from single appeal bond not same criminal conduct). There was no double jeopardy violation here.

B. Effective Assistance

Ortiz-Lopez next claims that defense counsel denied him his constitutional right to effective assistance when he failed to introduce evidence at trial that Cabrera-Cardoza admitted, post-*Miranda*,[6] that the methamphetamine was his. He also claims that trial counsel failed to object to false evidence the State introduced about the amount of methamphetamine the police seized. During a discussion about the proposed jury instructions, the prosecutor stated, "There was over 43 grams left of methamphetamine that was on the counter, and in fact in the sink there was over ten grams of methamphetamine still." 3 Report of Proceedings (RP) at 342.

The test for ineffective assistance of counsel has two parts. One, the defendant must show that defense counsel's conduct was deficient, *i.e.*, that it fell below an objective standard of

[6] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

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)). We begin with the presumption that counsel's assistance was effective. *State v. Sardinia*, 42 Wn. App. 533, 539, 713 P.2d 122 (1986). This presumption continues until the defendant shows in the record the absence of legitimate or tactical reasons supporting his counsel's conduct. *State v. McFarland*, 127 Wn.2d 322, 334-38, 899 P.2d 1251 (1995).

Defense counsel at trial sought to show that Ortiz-Lopez was at the wrong place at the wrong time and that the drugs belonged to Cabrera-Cardoza. He pointed out that Cabrera-Cardoza was the focus of the search warrant, that the police discovered over a $1,000 on Cabrera-Cardoza, that the police discovered no money in Ortiz-Lopez's possession, and that the only evidence the State produced was that Ortiz-Lopez was standing next to the sink when the police charged into the apartment. Now Ortiz-Lopez relies on a document, not part of the record on appeal, in which Cabrera-Cardoza allegedly admitted that the methamphetamine belonged to him.

First, as we noted in footnote 5, we cannot consider this document as it is not part of the record. Second, Ortiz-Lopez was charged as an accomplice to Cabrera-Cardoza and that the State's theory was that Ortiz-Lopez assisted Cabrera-Cardoza by helping to destroy the methamphetamine by flushing it down the sink before the police could seize it. This proffered statement would not have changed the trial outcome or put into doubt any of the State's evidence. It does not support an ineffective assistance of counsel claim.

Second, three exhibits, tested by the Washington State Crime Lab, were admitted at trial

as exhibits 39-41. Exhibit 39 was a baggie containing 43 grams of methamphetamine found on the kitchen counter. Exhibit 40 was a baggie containing 10.8 grams of methamphetamine and was also found on the kitchen counter. Exhibit 41 was a baggie containing 10.8 grams of methamphetamine scraped from a glass bowl found in the dishwasher.

The State's argument that there were 43 grams of methamphetamine found on the counter and 10.8 grams found on the sink may have misstated the testimony but it was not false testimony. In fact, it was not evidence. The prosecutor made the statement while the jury was absent and the attorneys and trial court were discussing the jury instructions. Counsel's failure to correct the prosecutor certainly did not affect Ortiz-Lopez's right to a fair trial or prejudice him in any way. His ineffective assistance of counsel claim fails.

C. Sufficiency of the Evidence

Lastly, Ortiz-Lopez argues that the State failed to prove that he intended to deliver the methamphetamine.

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).

Viewing the evidence in this manner, there was overwhelming evidence of intent to

deliver. First, the police seized over 64 grams of methamphetamine and found additional untested amounts in the bathroom and in the kitchen sink, and this does not include any drugs that Cabrera-Cardoza flushed down the toilet or that Ortiz-Lopez washed down the sink. Second, Detective Gardner testified that the current street rate for methamphetamine was $1,500 per ounce, making the amount tested worth more than $3,000. Third, the police found baggies and a digital scale indicative of repackaging. Fourth, the police found no drug paraphernalia on either defendant or in the apartment that would suggest personal use. Fifth, Detective Gardner testified that the apartment was similar to other "flop houses" he had seen, which is a place used for storing, weighing, cutting, and packaging drugs but not necessarily to live in. 2 RP at 163. Sixth, the police recovered a cell phone and its log showing multiple phone calls to a large-scale drug dealer. Finally, the police recovered large amounts of cash. All of this evidence coupled with the jury's duty to determine if Ortiz-Lopez intended to deliver or act as accomplice to delivery was sufficient to support the verdicts.

We reverse the community custody condition and the order imposing probation, but affirm Ortiz-Lopez's convictions.

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.