

STATE v. TORGERSON, 49579-8-I (Wash.App. 3-31-2003)

STATE OF WASHINGTON, Respondent, v. MARC WADE TORGERSON,
Appellant.

No. 49579-8-I. The Court of Appeals of Washington, Division One.

Filed: March 31, 2003. DO NOT CITE. SEE RAP 10.4(h).
UNPUBLISHED OPINION

[EDITOR'S NOTE: This case is unpublished as indicated by the issuing court.]

Appeal from Superior Court of Snohomish County, Docket No: 99-1-01947-9 Judgment or order under review, Date filed: 11/08/2001.

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PER CURIAM.

Marc Torgerson was arrested after police discovered methamphetamine and a loaded revolver in a bedroom where he was staying. He was subsequently convicted by jury verdict of

possession of methamphetamine while armed with a firearm. He contends here, as he did below, that the trial court's instructions on the firearm enhancement were deficient because the State was relieved of its burden of affirmatively proving beyond a reasonable doubt that there was a nexus between Torgerson, the crime, and the firearm. In light of our Supreme Court's recent decision in *State v. Schelin*, 147 Wn.2d 562, 55 P.3d 632 (2002), we are compelled to agree and reverse the 18-month firearm sentence enhancement. But because Torgerson's contention that he was denied his right to a speedy trial is without merit, we affirm Torgerson's underlying conviction for simple possession.

FACTS

On March 16, 1999, Deputy Castillo and other law enforcement officers went to a residence in Everett to serve an arrest warrant. After arresting the suspect, the deputy asked the homeowner whether anyone else was in the house. The homeowner then walked to a closed bedroom door, opened it, and called out the name "Marc." The man inside the bedroom, later identified as Torgerson, was standing near the door's entry. Through the open door, Deputy Castillo observed drug paraphernalia on a table next to a bed and what appeared to be a small silver revolver on the floor. When Torgerson was asked about having any weapons, he replied that there was a gun in the bedroom. A loaded revolver was found tucked between the wall and the mattress at the head of the bed. Methamphetamine and other items commonly used in the manufacture of methamphetamine were also discovered in the bedroom where Torgerson was staying. Torgerson was originally charged in Snohomish County Superior Court with one count of possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine, with a firearm. That charge was filed on October 22, 1999.

A two-day CrR 3.6 suppression hearing was held on February 24 and March 3, 2000. After considering the evidence presented,

the trial court denied the suppression motion.

When Torgerson next appeared in court on October 16, 2000,[1] trial was set for December 1, 2000. Over the next approximately six months, Torgerson and the State agreed to three separate trial continuances. Trial was eventually set for July 20, 2001. On that date, the State moved to continue the trial once again because several material witnesses were unavailable due to scheduled vacations.

The court granted the continuance and postponed Torgerson's trial until September 2001. Trial began on September 17, 2001. On that date, the State amended the information to add a separate count of possession of methamphetamine with a firearm enhancement.

At the trial, several police officers testified regarding the circumstances surrounding Torgerson's arrest. Torgerson testified that he often stayed at the residence where he was arrested. He admitted being a methamphetamine addict and possessing quantities of the drug in the bedroom where he stayed. Torgerson also admitted knowing about the revolver, but claimed the gun did not belong to him and that he would never have used the weapon in defense of the drugs he possessed. Torgerson further testified that most of the other items recovered by police belonged to others in the "drug house." The jury found Torgerson guilty of possession of methamphetamine, but not guilty of possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine. The jury also returned a special verdict that Torgerson was armed with a firearm at the time he possessed the methamphetamine. The trial court imposed a standard range sentence of 21 months, which included an 18-month firearm enhancement. This appeal followed.

DECISION

Torgerson contends that his speedy trial and due process rights were violated when the trial court agreed to continue

the trial until September 2001. He argues the trial court abused its discretion in granting the continuance. We review the grant of a continuance for a manifest abuse of discretion.[2] CrR 3.3, the speedy trial rule, requires that criminal defendants be brought to trial within certain time limits. However, the provisions of this rule are not constitutionally based and dismissal is mandated only when the speedy trial period has expired.[3] "Absent such a violation, a defendant must demonstrate actual prejudice to obtain dismissal." [4] Pursuant to CrR 3.3(h)(2), a trial court may grant a continuance "when required in the administration of justice and the defendant will not be substantially prejudiced in the presentation of the defense." Here, the trial court continued the trial until September because several of the State's witnesses and the prosecutor were unavailable due to overlapping, planned vacations. Unavailability of a material State witness or the prosecutor may each constitute a valid ground for continuing a criminal trial.[5] There is no dispute that the State's witnesses were both unavailable and material. Nor is it disputed that the State subpoenaed these witnesses. "[T]he issuance of a subpoena is a critical factor in granting a continuance." [6] Torgerson has not alleged, nor does the record show, that he was prejudiced by the delay. And while we share the trial court's concern that the State could have acted more responsibly in this matter, the court ultimately granted the requested continuance. We find no manifest abuse of discretion.

We are next asked to determine whether the trial court erred in imposing the 18-month firearm enhancement. Torgerson contends that the trial court erroneously instructed the jury on the firearm enhancement. He argues that the court erred in giving certain instructions[7] and in refusing to give one of his requested instructions.[8] Thus, Torgerson argues the firearm enhancement must be reversed. We agree.

We review alleged instructional errors de novo.[9] "Jury

instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and when read as a whole properly inform the jury of the applicable law.”[10] Just as a jury instruction that misstates the law is prejudicial error, so too is one that does not make the relevant legal standard manifestly apparent to the average juror.[11] “Whether a person is armed is a mixed question of law and fact.”[12] Former RCW 9.94A.310(3) (1998) authorized an enhanced sentence if the defendant was armed with a firearm at the time of the commission of the offense.[13] “Proof that defendant was armed must be shown beyond a reasonable doubt[.]”[14] In *State v. Valdobinos*,[15] a constructive possession case similar to this one, our Supreme Court held that a person is “armed” for purposes of the enhancement statute “if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes.”[16] In refining that test, the Schelin court held recently that, for a person to be “armed” under the deadly weapon enhancement statute,

A deadly weapon must be accessible and readily available, and a nexus must be established between the defendant (or an accomplice) and the weapon, and the crime.

Schelin, 147 Wn.2d at 572.

Torgerson argues the court’s instructions in this case failed to adequately convey to the jury that the State bore the burden of proving, not only that the revolver was both accessible and readily available, but that a nexus existed between him, the firearm, and the drugs he possessed.

The State concedes that the challenged instructions do not comply with the mandate of *State v. Schelin*. [17] We accept the concession. The majority in *Schelin* held that the State must affirmatively prove beyond a reasonable doubt that there is a nexus between the defendant, the crime, and the deadly

weapon.[18] Given the serious nature of the defect, the fact Torgerson was never found in actual possession of the weapon and the way in which this case was argued in closing, we conclude the instructional error was not harmless and therefore reverse the sentence enhancement.[19] In view of our holding, we find it unnecessary to address Torgerson's remaining challenges to the sentence enhancement.

We reverse the firearm sentence enhancement and affirm the underlying conviction for possession of methamphetamine.

APPELWICK and AGID, JJ., concur.

[1] In the interim, it appears Torgerson spent much of the time defending against federal charges arising from the March 16, 1999 incident.

[2] State v. Terrovona, 105 Wn.2d 632, 651, 716 P.2d 295 (1986).

[3] State v. Hall, 55 Wn. App. 834, 841, 780 P.2d 1337 (1989).

[4] Hall, 55 Wn. App. at 841.

[5] State v. Williams. 104 Wn. App. 516, 522-23, 17 P.3d 648 (2001); State v. Day, 51 Wn. App. 544, 549, 754 P.2d 1021 (1988).

[6] State v. Wake, 56 Wn. App. 472, 476, 783 P.2d 1131 (1989).

[7] Court instruction 16 provides:

For purposes of a special verdict, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime in Count II.

A "firearm" is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

Court instruction 17 provides:

A person is armed with a firearm only if the firearm is easily accessible and readily available for use by that person for either offensive or defensive purposes at the time of the commission of the crime.

[8] Torgerson proposed the following instruction:

A person is "armed with firearm" if the firearm is easily accessible and readily available for use, either for offensive or defensive purposes. However, a person is not armed simply because a weapon is present during the commission of a crime. A defendant in constructive possession of a deadly weapon, even if that weapon is next to controlled substances is not "armed" as the term is used here. There must be a nexus between the crime, the defendant and the weapon when contacted by police.

[9] State v. Woods, 143 Wn.2d 561, 590, 23 P.3d 1046 (2001).

[10] State v. Irons, 101 Wn. App. 544, 549, 4 P.3d 174 (2000).

[11] Irons, 101 Wn. App. at 550.

[12] State v. Mills, 80 Wn. App. 231, 234-35, 907 P.2d 316 (1995).

[13] Although the State must prove that the defendant is armed with a deadly weapon, a loaded firearm is considered a deadly weapon. Schein, 147 Wn.2d at 567 n. 2.

[14] State v. Sabala, 44 Wn. App. 444, 448, 723 P.2d 5 (1986).

[15] 122 Wn.2d 270, 858 P.2d 199 (1993).

[16] Valdobinos, 122 Wn.2d at 282.

[17] 147 Wn.2d 562.

[18] Schelin, 147 Wn.2d at 577.

[19] State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (citing Neder v. United States, 527 U.S. 1, 19, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999)).