



State v. Nobles

101 Wash.App. 1029 (2000) | Cited 0 times | Court of Appeals of Washington | June 30, 2000

UNPUBLISHED OPINION

Willie Lee Nobles appeals his convictions for one count of first degree murder and four counts of first degree assault; each count includes a firearm sentence enhancement. Nobles challenges the search warrant for his residence and argues that the trial court erred in ordering his sentences to run consecutively. In his pro se brief, Nobles argues that the firearm enhancement constituted double jeopardy. Holding the search warrant invalid, but admission of the evidence seized under it to be harmless error, we affirm.

FACTS

I. The Crimes

On January 24, 1997, Brian and Dennis Payopay and Chanthy Khong were visiting a friend's east Tacoma home, celebrating Khong's transfer to another high school. The three teenage boys¹ left at approximately 1:30 a.m. the next morning to ride home on their bicycles. As they rode toward the intersection at East 62nd and East 'S' Street, they saw a black car drive past them, saw a group of kids running towards them, and heard gunfire. Thinking the shots were not meant for them, they continued toward their home and the intersection.

Simultaneously, Fagalulu Filitaula and his cousin Eroni Williams were walking their friend Dennis Rice home. As they approached the same intersection, they saw the three boys on their bicycles; the black car approach the intersection, turn the corner, and stop; and three other young men exit the vehicle. After someone said, '{W}hat's up,' Filitaula, Williams, and Rice ran. The three young men from the black car pulled guns from their jackets and began firing.

In the early morning hours of January 25, 1997, Willie Nobles, Kuame Moore, Phillip Morales, and Tonya Owens had left Owens' apartment complex in a black Chevrolet Geo owned by Morales' girlfriend. The men were armed with 9 mm handguns. Moore had directed Owens to drive them to the east side of Tacoma, where Moore had instructed Owens to pull over and stop the car near the intersection of East 62nd and East 'S' Street.

Nobles, Morales, and Moore exited the car with their guns and began shooting at pedestrians and three boys on bicycles. Owens saw one of the boys fall and people running. Nobles, Moore, and Morales returned to the car and told Owens to drive away. The four returned to Owens' apartment,



State v. Nobles

101 Wash.App. 1029 (2000) | Cited 0 times | Court of Appeals of Washington | June 30, 2000

where Nobles and Morales spent the night, then left together the next morning in the black Geo.

Sixteen-year old Chanthy Khong was shot four times and died at the scene. Brian and Dennis Payopay fled on their bicycles, but Brian's rear tire was hit by the gunfire. Thirteen-year old Fagalulu Filitaula was shot twice: One bullet entered his flank and exited his abdomen; the other bullet entered his right leg and fractured his femur.

Police who processed the scene recovered thirty-three 9 millimeter (mm) shell casings; they also obtained information about the suspects' car -- a black two-door Honda or Geo Metro.

About six hours after the shooting, police spotted a car matching the description. When they pursued the vehicle and stopped it, the occupants fled. Morales and Nobles were apprehended. Brian and Dennis Payopay identified the black Geo Metro as the car used in shooting. The police arrested Morales for an unrelated shooting and released Nobles pending further investigation.

After Morales² told police that Nobles, Moore, and Owens were involved in the shooting that had killed Khong and injured Filitaula, Nobles and Moore were arrested. Nobles called his friend, Danielle Fletcher, saying that he had been caught doing something wrong and was going to jail for 'a long time.' Six days later, police arrested Owens.

Police obtained a search warrant for Moore's and Nobles' residences. From Nobles' bedroom closet, police recovered a 9 mm gun case containing two RP brand 9 mm cartridges, and a Federal brand .38 caliber special cartridge. Before trial, Nobles wrote a letter to Owens, offering to testify on her behalf, in which he: (1) admitted having been present at the shooting, and (2) suggested a self-defense theory. After receiving the letter, Owens called Nobles and he reiterated the same self-defense theory.

At trial, Nobles testified: (1) he had suggested self-defense only because the other inmates had instructed him to do so; and (2) although he had earlier been with Owens, Moore, and Morales, Nobles had remained at Owens' apartment when Moore and Morales shot at the boys on the bikes. Owens' roommate, Michelle Leary, testified that on the evening of January 24, 1997, Nobles, Moore, Morales, and Owens had been together at Owens' apartment, left the apartment, and returned sometime after she went to bed.

II. Procedure

The State charged Willie L. Nobles with one count of first degree murder and five counts of first degree assault, both while armed with a firearm.³ The trial court denied Nobles' motion to suppress evidence recovered from his residence. A jury found Nobles guilty as charged, except for one assault, count IV.

The court sentenced Nobles to 388 months on count I and 123 months on counts II, III, V, and VI,



State v. Nobles

101 Wash.App. 1029 (2000) | Cited 0 times | Court of Appeals of Washington | June 30, 2000

including a 60-month firearm enhancement to run consecutively to each count. Because Nobles' convictions are classified as serious violent offenses, the court ordered all counts, including their corresponding firearm enhancements, to run consecutively. The court sentenced Nobles to a total of 1,180 months with 494 days credit for time served.

ANALYSIS

I. Probable Cause for Warrant to Search Nobles' Residence

The affidavit in support of the warrant to search Nobles' residence recites:

Tacoma Police Officers had developed information in a previous homicide that the gun used in that homicide had been hidden in Noble's {sic} residence after the homicide.

The affidavit does not explain what this 'information' was, its source, or how long ago it had been 'developed.' Nobles argues that these facts were insufficient to establish probable cause to believe that the guns used in the shooting would be located at his residence at the time the warrant was issued. We agree.

A magistrate will issue a search warrant only on a finding of probable cause. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (citing *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995)). The Washington Supreme Court recently addressed the specificity requirements for probable cause. *Thein*, 138 Wn.2d 133. The Court held:

In concluding as we do, we emphasize that the existence of probable cause is to be evaluated on a case-by-case basis. Thus, general rules must be applied to specific factual situations. In each case, the facts stated, the inferences to be drawn, and the specificity required must fall within the ambit of reasonableness. General, exploratory searches are unreasonable, unauthorized, and invalid. 138 Wn.2d at 149 (footnote, citations and quotations omitted).

Thein uses a two-part test to determine whether there is probable cause to support a warrant: Is there a reasonable inference that (1) 'the defendant is probably involved in criminal activity' and (2) 'evidence of the crime can be found at the place to be searched.' *Thein*, 138 Wn.2d at 140 (citations omitted). 'Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law.' 138 Wn.2d at 147.

The affidavit here fails the second part of the test. Previously 'developed information,' that at some unknown time in the past a gun used in another homicide may have been hidden in the house, does not constitute probable cause to believe that a gun used here would be present in Nobles' house at the time the search warrant was issued.⁴ Therefore, the search warrant was erroneously issued and



State v. Nobles

101 Wash.App. 1029 (2000) | Cited 0 times | Court of Appeals of Washington | June 30, 2000

the evidence seized under it should have been suppressed.

II. Harmless Error

A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Constitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless. *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (citing *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980)).

In light of the other overwhelming evidence of Nobles' guilt, admission of the evidence seized from Nobles' residence was harmless error. No reasonable possibility exists that the evidence recovered from Nobles' residence was necessary to reach a guilty verdict. Only two of the thirty-three 9 mm casings recovered from the scene were RP brand, manufactured by Remington-Peters; the others were made by four other manufacturers. The two 9 mm bullets found in Nobles' closet were also RP brand. The third bullet found in Nobles' closet was a .38 caliber bullet, manufactured by Federal, and the fourth was a 9 mm LY brand, neither of which matched the casings found at the scene. The only tie between the two 9 mm bullets found at Nobles' home and the two shell casings found at the scene is that they were both made by Remington-Peters.

The police also recovered a 9 mm Intratec gun case from Nobles' residence. Nobles and his mother testified they had had the gun case for many years and used it to store compact discs. The State's firearm expert opined: (1) the 9 mm casings found at the scene could have been fired from an Intratec weapon, (2) Intratec manufactured a 9 mm weapon, (3) but without it, he could not say whether the bullets found at the scene had been fired from an Intratec 9 mm. Thus, there is no reasonable possibility the four bullets or the gun case recovered from Nobles' closet were necessary to the guilty verdict.

Furthermore, the untainted evidence against Nobles is overwhelming. Owens and Morales gave taped statements to police that Nobles was at the scene and was one of the shooters. Michelle Leary, Owens' roommate, testified that she and the three men, including Nobles, left the apartment together the night of the shooting. Danielle Fletcher testified that Nobles told her that he and Moore had done something wrong and would be gone for a long time. Finally, in the letter he wrote to Owens, Nobles admitted being at the scene and firing a weapon.

Nobles attacks the credibility of Owens, Leary, and the eyewitnesses because they did not identify the shooters by name. Credibility determinations, however, 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 on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).



State v. Nobles

101 Wash.App. 1029 (2000) | Cited 0 times | Court of Appeals of Washington | June 30, 2000

III. Sentence -- Firearm Enhancements

A. Double Jeopardy

Nobles argues in his pro se brief that his underlying crime of first degree assault and the firearm sentencing enhancement contain the same essential element and, therefore, imposition of the firearm enhancement violates the Double Jeopardy Clause.⁵ The State argues that the sentence enhancement does not violate the Double Jeopardy clauses of either constitution because the firearm enhancement is legislatively enacted. We agree.

We have previously rejected the argument that firearm sentence enhancements violate constitutional prohibitions against double jeopardy. *State v. Caldwell*, 47 Wn. App. 317, 734 P.2d 542 (1987).

{T}he double jeopardy clause does no more than prevent greater punishment for a single offense than the Legislature intended. . . . Inasmuch as the legislative intent is clear, the double jeopardy clause does not help Pentland. *Caldwell*, 47 Wn. App. at 319 (quoting *State v. Pentland*, 43 Wn. App 808, 811-12, 719 P.2d 605 (1986), (citing *Missouri v. Hunter*, 459 U.S. 359, 103 S. Ct. 673, 74 L. Ed.2d 535 (1983))).

We held in *Caldwell* that the 'Legislature has clearly expressed its intent in RCW 9.94A.310⁶ that a person who commits certain crimes while armed with a deadly weapon will receive an enhanced sentence, notwithstanding that being armed with a deadly weapon was an element of the offense.' 47 Wn. App. at 320. Therefore, we hold that the firearm sentencing enhancements as mandated by the Legislature similarly do not violate the double jeopardy clause.

B. Exempted Crimes

Nobles next argues, relying on *In re Charles*, 135 Wn.2d 239, 955 P.2d 798 (1998), that the Legislature exempted all crimes that include use of a firearm as an element. RCW 9.94A.310(3)(f) provides:

The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and the use of a machine gun in a felony.

Nobles was convicted of one count of first degree murder and four counts of first degree assault. Neither of these crimes is exempted under the above statute.

C. Consecutive Counts

Nobles argues that the trial court erred in ordering his sentences to run consecutively because 'three



State v. Nobles

101 Wash.App. 1029 (2000) | Cited 0 times | Court of Appeals of Washington | June 30, 2000

statutory options exist {under RCW 9.94A.400(1)(a)} when a defendant is sentenced for multiple current offenses, and those options exist on a spectrum,' and that his crimes were not 'separate and distinct.' The State contends that the trial court properly applied the guidelines of RCW 9.94A.400. We agree. RCW 9.94A.400(1)(b) provides that sentences for 'person{s} {} convicted of two or more serious violent offenses . . . arising from separate and distinct criminal conduct' shall be served consecutively. Murder in the first degree and assault in the first degree are statutorily defined serious violent offenses. RCW 9.94A.030(31). Because Nobles and his cohorts attacked multiple victims, their crimes arose from separate and distinct criminal conduct. *State v. Wilson*, 125 Wn.2d 212, 220, 883 P.2d 320 (1994).

Four assaults, involving four victims, involve four separate and distinct criminal acts--one act for each victim. This conclusion is in accordance with what the "serious violent" exception was designed to accomplish: a significant increase in punishment for certain multiple violent offenders. *Wilson*, 125 Wn.2d at 220 (citing David Boerner, *Sentencing in Washington* sec. 5.8(b), at 5-19 (1985)).⁷

Here, RCW 9.94.400(1)(b), not (1)(a) as Nobles contends, directed the trial court to run Nobles' sentences for multiple, serious violent offenses consecutively.

D. Ex Post Facto

Nobles argues that, in order to avoid an ex post facto violation,⁸ the pre-amendment version of RCW 9.94A.310(3)(e), in effect at the time of his crimes, must be applied.⁹ The State contends the trial court properly ordered Nobles' firearm enhancements to run consecutively with the base sentences for the underlying murder and assaults, and with each other.

We need not reach this issue because the trial court correctly sentenced Nobles under *In re Charles*, 135 Wn.2d 239, 955 P.2d 798 (1998). The *Charles* court held: (1) consecutive firearm enhancements did not necessarily run consecutively to each other; (2) firearm enhancements do run consecutively to the base sentence; (3) and when two or more offenses each carry firearm enhancements, the court must resort to RCW 9.94.A.400 to determine if the enhancements run consecutively or concurrently. In *re Charles*, 135 Wn.2d at 254.

Here, as discussed above, each of Nobles' five convictions are statutorily defined as serious violent offenses. RCW 9.94A.030(31)(a). RCW 9.94A.400(1)(b) addresses how multiple, serious violent offenses run: 'All sentences imposed under (b) . . . shall be served consecutively to each other. . . .' The trial court sentenced Nobles to the high end of the standard range, plus a 60-month firearm enhancement on each count, then ordered the sentences to run consecutively as directed by RCW 9.94A.400(1)(b). The trial court properly ordered Nobles' sentences to run consecutively. Affirmed.

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.



State v. Nobles

101 Wash.App. 1029 (2000) | Cited 0 times | Court of Appeals of Washington | June 30, 2000

Hunt, A.C.J.

We concur:

Morgan, J.

Bridgewater, J.

1. At the time of the trial, Brian Payopay was 17, his brother Dennis and Chanthy Khong were 16.
2. Morales was scheduled to testify in Nobles' trial, but he committed suicide.
3. RCW 9.94A.370(1).
4. Moreover, Morales told police that Moore (not Nobles) was responsible for obtaining and disposing of the guns used in the shooting.
5. U.S. Const. amend. V; Washington Const. art. I, sec. 9.
6. RCW 9.94A.310(3) and (3)(a) state in pertinent part: The following additional times shall be added to the presumptive sentence for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm . . . and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. (a) Five years for any felony defined under any law as a class A felony. .
7. See also State v. Salmanca, 69 Wn. App. 817, 826, 851 P.2d 1242 (1993)(act of shooting into a vehicle with five passengers created as many victims as there were persons in the vehicle; State v. Godwin, 57 Wn. App. 760, 763-64, 790 P.2d 641 (1990)(crimes involving separate victims necessarily arise from separate and distinct conduct, regardless of the factual relationship between the offenses).
8. 'The ex post facto clauses of the state and federal constitutions prohibit the state from enacting any law which imposes punishment for an act which was not punishable when committed, or which increase the quantum of punishment for the offense after the crime was committed.' State v. Hennings, 129 Wn.2d 512, 524-25, 919 P.2d 580 (1996)(citing U.S. Const. art. I, sec. 10; Const. art. I, sec. 23; State v. Ward, 123 Wn.2d 488, 496, 869 P.2d 1062 (1994)).
9. Former RCW 9.94A.310(3)(e) (1996) provided: Notwithstanding any other provision of law, any and all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall not run concurrently with any other sentencing provisions. After Charles, the Legislature amended RCW 9.94A.310(3)(e), effective June 11, 1998, which now provides: Notwithstanding any other provision of law, any and all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. Laws of 1998, ch.



State v. Nobles

101 Wash.App. 1029 (2000) | Cited 0 times | Court of Appeals of Washington | June 30, 2000

235, sec. 1. (Emphasis added.)

