IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JOHN W. PRESTON, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-12113 Trial Court No. 3KN-14-437 CR MEMORANDUM OPINION No. 6666 — August 8, 2018

Appeal from the Superior Court, Third Judicial District, Kenai, Carl Bauman, Judge.

Appearances: Lars Johnson (opening brief) and Douglas O. Moody (reply brief), Assistant Public Defenders, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Eric A. Ringsmuth, Assistant Attorney General, Office of Criminal Appeals, Anchorage, and Jahna Lindemuth, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge MANNHEIMER.

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

John W. Preston appeals his convictions for evidence tampering and violating the conditions of his release.[1] (At the time of the evidence tampering, Preston was on bail release in another case, and his conditions of release required him to obey all laws.)

With respect to his conviction for evidence tampering, Preston argues that even if the evidence at his trial is viewed in the light most favorable to upholding the jury's verdict, his underlying conduct should not be deemed to fall within the scope of the evidence tampering statute, AS 11.56.610(a).

Preston was convicted of evidence tampering based on his actions during a traffic stop. Kenai police officers stopped a van because it had been reported stolen. Preston was riding as a passenger in the rear seat of this van. One of the officers asked Preston to slide open the van's side door. When Preston did so, the officer observed a small plastic bag on the floor of the van, between Preston's feet.

The officer believed that this plastic bag was a "dime bag" (*i.e.*, that it contained drugs), so she told Preston several times not to touch the bag. However, while Preston was getting out of the van, his body blocked the officer's view of the bag — and by the time Preston was standing outside the van, the bag was no longer there.

When the officer questioned Preston about this, Preston denied having the bag, but he declined to say what had happened to it. The officer then asked Preston to turn his pockets inside-out. When Preston did so, the officer saw the plastic bag clinging to the inside fabric of Preston's pocket. At this point, the officer's suspicions about the bag were corroborated: she saw that the bag contained a white substance.

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[1] AS 11.56.610(a)(1) & (4), and AS 11.56.757(a), respectively.

The officer ordered Preston to either drop the bag or hand it to her. Instead, Preston reached for the bag, put it into his mouth, and swallowed it. Preston then explained, "I can't afford this."

Based on these events, the State charged Preston with the crime of evidence tampering, AS 11.56.610(a). This statute makes it a crime for a person to "destroy", "suppress", "conceal", or "remove" physical evidence with intent to impair its verity or availability in an official proceeding or a criminal investigation.

On appeal, Preston argues that, as a legal matter, his actions should not be deemed to constitute evidence tampering. Preston relies on a series of New Jersey cases construing that state's evidence tampering statute. The New Jersey courts have held that, when a person's underlying crime is a possessory offense (such as controlled substance misconduct), the notion of "conceal" should not be construed so broadly as to require the person to openly carry or voluntarily reveal the prohibited item. [2]

But even if we were to construe Alaska's evidence tampering statute in this same manner, it would not affect Preston's conviction. Preston was not prosecuted for failing to openly carry, or failing to immediately reveal, the plastic bag containing the controlled substance. Instead, Preston was prosecuted for surreptitiously removing the bag from the floor of the van, temporarily hiding the bag in his clothing, and then swallowing it.

For these reasons, we uphold Preston's conviction for evidence tampering.

Preston also challenges his conviction for violating the conditions of his bail release — not on the ground that the State's evidence was insufficient to support this

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[2] *See State v. Mendez*, 814 A.2d 1043, 1049-1050 (N.J. 2002); *State v. Sharpless*, 715 A.2d 333, 342-43 (N.J. App. 1998); *State v. Fuqua*, 696 A.2d 44, 47-48 (N.J. App. 1997).

conviction, but rather on the ground that he was denied his right to jury trial on this offense. This issue arose because Preston's trial was bifurcated.

As we have explained, the State charged Preston with violating the conditions of his release because, at the time of the evidence tampering, Preston was on bail release in a separate criminal case, and the conditions of his release required him to obey the law. The parties apparently agreed that Preston would be unduly prejudiced if the jury was apprised of both charges at the same time — because, to prosecute the violation of bail conditions charge, the State would have to introduce evidence that Preston had been charged with a crime in another case.

The parties' agreed-upon solution was to bifurcate the trial of the two charges, so that the jury would not hear about the violation of bail conditions charge unless and until the jury found Preston guilty of evidence tampering. There was, however, one problem with this solution: The parties did not clarify, before trial, whether the violation of bail conditions charge would be tried to the same jury, or whether the jury would be excused and this remaining charge would be tried to the judge.

Because this matter was not clarified, the judge did not conduct a "waiver of jury" inquiry before Preston's trial began. That is, the judge did not address Preston personally (1) to make sure that Preston understood the elements that the State would have to prove in order to convict him of violating the conditions of his release, (2) to make sure that Preston understood that he had the right to a jury trial on this charge, and (3) to ascertain whether Preston wished to assert his right to trial by jury, or whether Preston was willing to waive this right and have the judge decide his guilt or innocence of the violation of bail conditions charge.

This matter remained unresolved until the jury was ready to begin its deliberations on the evidence tampering charge. At that point, the judge and the parties

held their first substantive discussion as to how the violation of conditions of release charge was going to be handled if the jury found Preston guilty of evidence tampering.

During this discussion, the prosecutor, the defense attorney, and the judge agreed that if the jury found Preston guilty of evidence tampering, there would be a bench trial on the remaining charge.

The prosecutor then asked for formal confirmation that there would be a bench trial on the charge that Preston violated the conditions of his bail release. The defense attorney apparently held a short private conversation with Preston, and then the following colloquy took place:

> *Defense Attorney*: [Addressing Preston] And so we'll just leave it up to the judge?
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> *Preston*: Yes, sir.
>
> *Defense Attorney*: Okay.
>
> *Prosecutor*: Okay. I just wanted to make sure on that.
>
> *The Court*: All right. Let's bring the jury in.

Later, immediately after the jury found Preston guilty of evidence tampering, the trial judge found Preston guilty of violating the conditions of his bail release (based on the jury's finding that Preston had tampered with evidence).

On appeal, the State concedes that the above-quoted colloquy was not sufficient to constitute a valid waiver of jury trial.[3] As this Court clarified in *McGlauflin v. State*, 857 P.2d 366, 369 (Alaska App. 1993), a waiver of jury trial is not valid unless

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[3] *See*, *e.g.*, *Walker v. State*, 578 P.2d 1388, 1389-1390 (Alaska 1978).

the record "explicitly demonstrate[s] that the defendant understood and personally relinquished the right to trial by jury."

The State argues that, notwithstanding this procedural lapse, we should not assume that Preston's waiver of jury trial was necessarily flawed. The State points out that the attorneys and the judge discussed the elements of the crime in Preston's presence, as well as Preston's right to a jury trial on that charge. But the real question is whether Preston *understood* everything that the attorneys and the judge were talking about — and whether, armed with that understanding, Preston was willing to waive his right to jury trial and agree to have the judge decide his guilt or innocence of the remaining charge. The record does not demonstrate this.

Because there was no valid waiver of the right to jury trial, we reverse Preston's conviction for violating the conditions of his release.

In conclusion: We AFFIRM Preston's conviction for evidence tampering, but we REVERSE Preston's conviction for violating the conditions of his bail release. The superior court shall ascertain whether the State intends to retry Preston for this latter offense. If so, the superior court shall take steps to make sure that this matter is brought to trial expeditiously. If the State chooses not to retry Preston for violating the conditions of his bail release, the superior court shall vacate Preston's conviction for this crime and shall re-sentence Preston.

We do not retain jurisdiction of this case.