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JUNE 28, 2013
Court of Appeals
Division III
State of Washington

31108-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

PETR V. RUDNITSKY, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF BENTON COUNTY

APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

1. The trial court erred in finding Mr. Rudnitskyy guilty of unlawful possession of a controlled substance, where the evidence was insufficient.

B. ISSUE

1. The evidence showed heroin was found in the car Mr. Rudnitskyy was driving. The front seat passenger testified the heroin belonged to him. Mr. Rudnitskyy's only connection to the heroin was his mere proximity. There was no evidence that he owned the drugs or used drugs that day. There was also no evidence that Mr. Rudnitskyy legally owned the car. Under these facts, was the evidence sufficient to support a finding that Mr. Rudnitskyy constructively possessed the heroin, as required to find him guilty of unlawful possession of a controlled substance?

C. STATEMENT OF THE CASE

City of Kennewick Police Officer John Greenough stopped a car in relation to a theft investigation. (RP¹ 39, 41-44). Three males were inside the

¹ The report of proceedings consists of six volumes. The references to "RP" herein refer to the single volume containing some pretrial matters, the jury trial on July 31, 2012, and sentencing. References herein to the other volumes include the date.

car, and Petr Rudnitskyy was the driver. (RP 44). The front seat passenger was Sergey Anischenko. (RP 92-96). A sign in the window of the car stated “For Sale by Owner” and listed the name “Petr” and a phone number. (RP 58).

Another officer arrived, and detained the passengers. (RP 46). After the officer had removed Mr. Anischenko from the front passenger seat, officers saw a piece of plastic on the seat that they thought contained the plunger end of a syringe. (RP 47-50, 53).

Officers obtained a search warrant and searched the car. (RP 54, 67). Officers found a plastic wrapper containing a hypodermic needle on the front passenger seat, and a glass smoking device in the door of the front passenger seat. (RP 53-54, 59-61, 64-65). A plastic bindle was found along with the needle. (RP 55, 64-65). This bindle tested positive for heroin. (RP 84).

Officers also found a hypodermic needle, some spoons, and a plastic bag in the center console of the car. (RP 71-73). Inside the plastic bag, officers found a small piece of plastic containing a dark tar-like substance. (RP 73-74, 79). The piece of plastic tested positive for heroin. (RP 85).

The hypodermic needles, the spoons, and the glass smoking device found in the car were not sent for laboratory testing. (RP 60, 76-77, 80).

The State charged Mr. Rudnitskyy with one count of unlawful possession of a controlled substance. (CP 4-5). His first trial ended in a hung jury, and the

trial court declared a mistrial. (RP (Feb. 10, 2012) 152-162). The case proceeded to a second jury trial. (RP 38-107).

Kennewick Police Detective Juan Dorame, who searched the vehicle, testified that the plastic bag found in the center console “was smashed up as if somebody had just balled it up and crammed it - - stuffing it inside that little area.” (RP 71).

Mr. Anischenko testified that the heroin in the car was his. (RP 93). He also stated that the hypodermic needles, the spoons, and the glass smoking device found in the car were his. (RP 93). Mr. Anischenko testified that when he saw a police car driving behind the car he “started panicking because I had narcotics in my pocket, narcotics on me.” (RP 93-94). He stated he pulled everything out of his pockets and put it in the car, including on his seat and in the center console. (RP 94-98).

The trial court instructed the jury that in order to find Mr. Rudnitsky guilty of unlawful possession of a controlled substance, it had to find:

- (1) That on or about September 8th, 2011, the defendant possessed a controlled substance, heroin; and
- (2) That this act occurred in the State of Washington.

(CP 71).

The trial court found Mr. Rudnitsky guilty as charged. (CP 77; RP (Aug. 1, 2012) 2). Mr. Rudnitsky appealed. (CP 89).

D. ARGUMENT

1. THE TRIAL COURT ERRED IN FINDING MR. RUDNITSKY GUILTY OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, WHERE THE EVIDENCE WAS INSUFFICIENT.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

In order to find Mr. Rudnitsky guilty of unlawful possession of a controlled substance, the jury had to find that he possessed heroin. (CP 71); *see also* RCW 69.50.4013(1) (defining unlawful possession of a controlled

substance). Possession may be actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Mr. Rudnitsky did not have actual possession of the heroin. *See State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969) (“[a]ctual possession means that the goods are in the personal custody of the person charged with possession”). Therefore, the issue for the jury was whether Mr. Rudnitsky had constructive possession of the heroin.

Constructive possession of a controlled substance is established by looking at the totality of the circumstances to determine if there is substantial evidence from which the fact finder can reasonably infer that the defendant had dominion and control of the drugs. *State v. Porter*, 58 Wn. App. 57, 60, 791 P.2d 905 (1990) (*quoting State v. Partin*, 88 Wn.2d at 906). A fact finder may infer that a defendant has constructive possession if the defendant has dominion and control over the premises where the item is located. *State v. Turner*, 103 Wn. App. 515, 524, 13 P.3d 234 (2000).

“The ability to reduce an object to actual possession is an aspect of dominion and control.” *State v. Murphy*, 98 Wn. App. 42, 46, 988 P.2d 1018 (1999) (*quoting State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997)). Mere proximity to a controlled substance is not sufficient to support a conviction for constructive possession. *State v. Spruell*, 57 Wn. App. 383, 388, 788 P.2d 21 (1990). Another factor in determining constructive possession is

whether another person claimed ownership of the item. *Staley*, 123 Wn.2d at 801; *Callahan*, 77 Wn.2d at 30-31.

The facts presented at trial only established Mr. Rudnitsky's mere proximity to the heroin. *See Spruell*, 57 Wn. App. at 388. There was no evidence that Mr. Rudnitsky owned the drugs, or used drugs that day. *Cf. State v. Mathews*, 4 Wn. App. 653, 656-657, 484 P.2d 942 (1971) (finding constructive possession of heroin, where the defendant was a known heroin user, had purchased heroin, and had used some that day). The hypodermic needles, the spoons, and the glass smoking device found in the car were not sent for laboratory testing, so there was no evidence of drug use in the car that day. (RP 60, 76-77, 80). There was also no evidence that Mr. Rudnitsky knew that Mr. Anischenko had drugs with him.

Mr. Anischenko testified that the drugs belonged to him. (RP 93); *see also Staley*, 123 Wn.2d at 801; *Callahan*, 77 Wn.2d at 30-31. Detective Dorame's testimony supports Mr. Anischenko's testimony that he put his drugs in the car as the police approached. (RP 71).

Mr. Rudnitsky was not able to reduce the drugs to actual possession, because he was driving the car when Mr. Anischenko took out his drugs. (RP 93-94); *see also Murphy*, 98 Wn. App. at 46 (*quoting Echeverria*, 85 Wn. App. at 783).

Given all of these facts, Mr. Rudnitskyy did not have constructive possession of the heroin found in the car. In regard to proof of dominion and control over the premises, there was no evidence presented that Mr. Rudnitskyy legally owned the car.

Evaluating the totality of the circumstances shows that Mr. Rudnitskyy did not have dominion and control over the heroin, or over the premises where the heroin was located. A rational jury could not have found Mr. Rudnitskyy guilty, beyond a reasonable doubt, of unlawful possession of a controlled substance. *See Salinas*, 119 Wn.2d at 201 (*citing Green*, 94 Wn.2d at 220-22). The evidence presented at trial was insufficient to support Mr. Rudnitskyy's conviction, and the conviction should be reversed and the charge dismissed with prejudice. *See State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005) (stating “[r]etrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.”) (*quoting State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998)).

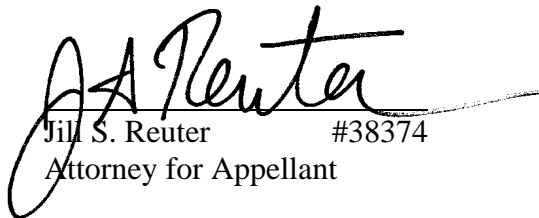
E. CONCLUSION

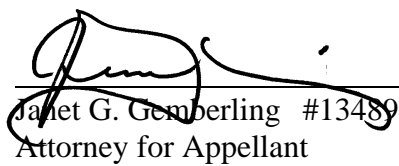
The evidence was insufficient to support Mr. Rudnitskyy's conviction for unlawful possession of a controlled substance, because the State failed to prove constructive possession. Mr. Rudnitskyy's conviction for unlawful possession of

a controlled substance should be reversed and the charge dismissed with prejudice.

Dated this 28th day of June, 2013.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 31108-2-III
)	
vs.)	CERTIFICATE
)	OF MAILING
PETR V. RUDNITSKY, Y,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on June 28, 2013, I emailed a copy of Appellant's Brief in this matter to the attorney for the respondent, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on June 28, 2013, I mailed a copy of Appellant's Brief in this matter to:

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Signed at Spokane, Washington on June 28, 2013.


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