

FILED  
March 15, 2016  
Court of Appeals  
Division III  
State of Washington

COA No. 33041-9-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

RUVIM DEZHNYUK,

Appellant.

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BRIEF OF APPELLANT

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## I. ASSIGNMENT OF ERROR

1. The State's evidence was insufficient to support the conviction for possession of a controlled substance, heroin.

### *Issue Pertaining to Assignment of Error*

A. Was the State's evidence insufficient to support the conviction? (Assignment of Error 1). .

## II. STATEMENT OF THE CASE

Ruvim Dezhnyuk was charged by information with one count of possession of a controlled substance, heroin, in violation of RCW 69.50.4013 (1) and RCW 9A.08.020. (CP 2). The case proceeded to jury trial.

Mr. Dezhnyuk was driving a car belonging to Jessica Robinson-Willers, who was in the right front passenger seat. (RP 154, 158). The car was stopped by a Washington State Patrol Trooper Paul Woodside for speeding, while Trooper Charles Ferrell arrived to assist. (RP 153-54). Trooper Ferrell smelled what he thought was heroin. (RP 159-60). Upon searching the car with the owner's permission, he found a digital scale between a child's car seat frame and the padding in the back seat. (RP 161-64). Black, sticky residue, appearing to be heroin, was on the scale. (RP 165, 169-70).

Trooper Woodside read *Miranda* rights to Mr. Dezhnyuk, who was outside the car. (RP 184). On searching the car, the trooper found the barrel of a pen and a clear plastic baggie shoved down between the driver's seat and the console. (RP 185). The tube, *i.e.*, the pen barrel, contained black residue. (RP 187). Trooper Woodside testified tubes were used to suck up smoke from drugs. (RP 188). The tube field-tested for heroin and it was also submitted to the Washington State Patrol Crime Lab for testing. (RP 195-96).

Devon Hause, a drug chemist for the crime lab, testified she tested the tube with residue in it and concluded it contained heroin. (RP 198, 207-08). The tube was not offered or admitted into evidence. (RP 198-208).

Mr. Dezhnyuk was convicted of possession of a controlled substance, heroin. (RP 327). He was sentenced within the standard range. (CP 89).

### III. ARGUMENT

A. The State's evidence was insufficient to support the conviction.

The State has the burden of proving the elements of a crime beyond a reasonable doubt. *State v. Borrero*, 147 Wn.2d 353, 364,

58 P.3d 245 (2002). In a sufficiency challenge, the evidence must be viewed in a light most favorable to the State to determine whether any rational trier of fact could find the crime's essential elements beyond a reasonable doubt. *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014). Such a challenge admits the truth of the State's evidence. *Id.*

To convict a person for the crime of possession of a controlled substance, heroin, the State must prove the defendant possessed a controlled substance, heroin, in the State of Washington. See RCW 69.50.4013(1). Those essential elements of the offense were reflected in the to-convict instruction, no. 9. (CP 74).

Even if it is assumed the crime lab testing showed the tube contained heroin residue, the tube itself was neither offered by the State as evidence nor admitted by the court. (RP 196-215). Indeed, the State did not produce the heroin at trial. The offense charged here requires proof of the controlled substance. See *State v. Solomon*, 73 Wn. App. 724, 728-29, 870 P.2d 1019, review denied, 124 Wn.2d 1028 (1994). When the State did not have the heroin admitted as evidence at the trial, the effect of its failure to do so was the equivalent of granting of a motion to suppress the

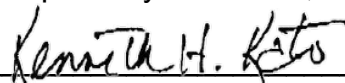
evidence, thereby requiring dismissal of the charge. *State v. Adams*, 144 Wn. App. 100, 107, 181 P.3d 37, *review denied*, 164 Wn.2d 1033 (2008); *State v. Creed*, 179 Wn. App. 534, 545, 319 P.3d 80, *review denied*, 180 Wn.2d 1023 (2014). Without the heroin, there is no crime. *State v. Rudd*, 70 Wn. App. 871, 874, 856 P.2d 699 (1993). The conviction must be reversed.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Dezhnyuk respectfully urges this Court to reverse his conviction and dismiss the charge.

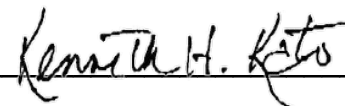
DATED this 15<sup>th</sup> day of March, 2016.

Respectfully submitted,

  
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#### CERTIFICATE OF SERVICE

I certify that on March 15, 2016, I served a copy of the Brief of Appellant by USPS on Ruvim Dezhnyuk, 29833 - 125<sup>th</sup> PI. SE, Auburn, WA 98092 ; and by email, as agreed, on Jodi Hammond at [jodi.hammond@co.kittitas.wa.us](mailto:jodi.hammond@co.kittitas.wa.us).

  
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