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Supreme Court No. _____
(Court of Appeals No. 76960-0-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JASON SMITH,

Petitioner.

PETITION FOR REVIEW

LILA J. SILVERSTEIN
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711
lila@washapp.org

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Jason Smith, through his attorney, Lila J. Silverstein, asks this Court to review the opinion of the Court of Appeals in *State v. Smith*, No. 76960-0-I (filed December 3, 2018). A copy of the opinion is attached as Appendix A.

B. ISSUE PRESENTED FOR REVIEW

A prosecutor commits misconduct by misrepresenting the law. Here, the prosecutor in closing argument told the jury that Mr. Smith was guilty of “constructive transfer” of drugs if, as he testified, he and his live-in girlfriend jointly purchased the drugs and kept them in a community jar in their home. Where the jury later posed a question to the court essentially asking if this misstatement was correct, is Mr. Smith entitled to a new trial due to prejudicial prosecutorial misconduct?

C. STATEMENT OF THE CASE

The State charged Jason Smith with one count of possession with intent to manufacture or deliver methamphetamine. CP 58; RCW 69.50.401(2)(b).

At trial, a detective testified that he searched Mr. Smith’s car and found drugs packaged in separate Ziploc baggies, as well as a scale

and a pipe. RP (1/9/17) 145-49. The detective said that Mr. Smith admitted to him that he was dealing drugs. RP (1/9/17) 144-45.

Mr. Smith, in contrast, testified that he does not sell drugs and is only an addict and user. RP (1/9/17) 199-204, 207-08. He said that on the day in question he and his girlfriend pooled their money to buy methamphetamines for their personal use. RP (1/10/17) 226-27. After she gave him her share of the money, he purchased the drugs and planned to take them home and put them in the container they share. RP (1/10/17) 227-28. He indicated that this was their usual practice. RP (1/10/17) 228 (“whenever I pick it up, we go in together and get one lump sum”). In light of this testimony, the court instructed the jury on the lesser-included offense of possession. CP 44-47.

In closing argument, the prosecutor told the jury that even if Mr. Smith’s testimony was credible, the couple’s joint purchase and use constituted “constructive transfer” of drugs. RP (1/10/17) 336. During deliberations, the jury sent out a question asking if pooling funds for purchase of drugs to be put in a shared container for household use constitutes delivery or transfer. CP 48. The court referred the jury to its instructions. CP 48. The relevant instruction states, “Deliver or delivery

means the actual or constructive or attempted transfer of a controlled substance from one person to another.” CP 43.

The jury found Mr. Smith guilty of possession with intent to deliver as charged. CP 26. He was sentenced to 10 years in prison. CP 11.

On appeal, Mr. Smith argued the prosecutor committed prejudicial misconduct by mischaracterizing the law of constructive transfer. The Court of Appeals rejected the argument, holding that the prosecutor did not misstate the law.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should grant review to address whether one member of a couple can be convicted of “possession with intent to deliver” if he buys drugs with community funds for the couple.

1. The prosecutor told the jury Mr. Smith was guilty of constructive transfer if he and his girlfriend pooled funds to buy drugs together.

A prosecutor commits misconduct by misstating the law. *State v. Allen*, 182 Wn.2d 364, 373, 341 P.3d 268 (2015). Here, the prosecutor described the law of constructive transfer at the end of rebuttal closing argument:

But really, the, I guess, icing on defendant’s position here is that even if you believe every single thing the

defendant testified to, every single thing, he's still guilty of possession with intent to distribute, because you heard him on the stand say that he collected some money from his girlfriend, who he lived with, and his plan was to use that money, in part, to go buy some meth at his dealer's house, which he was then apparently going to put into some kind of jar where his girlfriend could reach in and take some meth out to smoke. And if you look at the jury instruction's definition of distribute, it includes actual or constructive transfer. And much like the example with the pen's in my hand, actual possession, pen's on the rail, constructive possession, constructive transfer is leaving the meth in a jar knowing that it's there for the purpose of having your girlfriend get access to it and smoke it. So even if he's telling the truth, he is still guilty of possession with intent to distribute. It is the only just verdict in this case. I'm going to ask you to return it. Thank you for your time.

RP (1/10/17) 336 (emphases added).

2. This Court should hold that joint purchase and possession of drugs is not constructive transfer.

Although the Court of Appeals endorsed the above description of the law, Mr. Smith asks this Court to grant review and hold that this representation is incorrect. One member of a couple should not be liable for delivery of a controlled substance (or possession with intent to deliver) if the couple pools money for a joint purchase. In such circumstances, both are guilty of possession, but neither is guilty of delivery.

Mr. Smith testified that he and his girlfriend pooled their money to purchase drugs and then kept it in a shared container. Thus, the two of them jointly possessed the methamphetamines. Neither person was transferring the drug to the other. *See State v. Morgan*, 78 Wn. App. 208, 212-13, 896 P.2d 731 (1995) (stating, “Possession of the contraband may be joint” and concluding that driver and passenger who had equal access to drug paraphernalia on hood of truck had joint constructive possession of the paraphernalia, such that probable cause supported arrest of either person). Accordingly, when Mr. Smith was stopped on his way home from picking up the drugs he and his girlfriend jointly purchased and owned – which he intended to put in the community container – he could not be guilty of possession with intent to deliver.

The Court of Appeals set forth the correct definition of “constructive transfer” in *State v. Campbell*, 59 Wn. App. 61, 795 P.2d 750 (1990). There, the defendant placed cocaine on a car seat and directed an intermediary to pick it up and hand it to the purchaser (an undercover officer). *Id.* at 62. The defendant was convicted of delivery of a controlled substance, and the court held that sufficient evidence

supported the conviction under a theory of constructive transfer. *Id.* at 63-64.

The court noted that under the statute, delivery may be accomplished by either actual or constructive transfer. *Id.* at 63 (citing RCW 69.50.101(f)¹). The court defined “constructive transfer” as “the transfer of a controlled substance either belonging to the defendant or under his direct or indirect control, by some other person or manner at the instance or direction of the defendant.” *Id.* (internal citation omitted).

Under the definition of “constructive transfer” established by *Campbell*, the prosecutor misstated the law by telling the jury that Mr. Smith engaged in “constructive transfer” by leaving the couple’s jointly purchased drugs in a jar accessible to both. RP (1/10/17) 336. If Mr. Smith had put the drugs in the jar and directed his girlfriend to deliver its contents to another party, that scenario would constitute constructive transfer. *See Campbell*, 59 Wn. App. at 62-64. But the facts Mr. Smith described in his testimony, and the prosecutor described in rebuttal, constitute joint constructive possession, not transfer. *See Morgan*, 78 Wn. App. at 212-13; *see also State v. Morris*, 77 Wn. App. 948, 949-

¹ This definition is now at RCW 69.50.101(g).

50, 896 P.2d 81 (1995) (drug purchaser may be convicted of possession, but not delivery). The Court of Appeals' decision here is contrary to these cases.

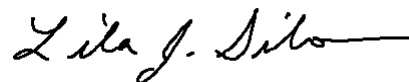
Moreover, it is manifestly unfair to convict one member of a couple of delivery of a controlled substance simply because that person performed an errand for both. Again, Mr. Smith does not dispute that he (and his partner) are guilty of possession in these circumstances. But delivery is an improper charge for a couple's joint purchase.

Indeed, the jury seemed to think it made little sense, and questioned the prosecutor's assertion. It asked the court: "If there are pooled funds for purchase of meth, put into a common container for household use, does this count as 'delivering' & 'transfer'?" CP 48. The answer to the question should be "no," and Mr. Smith asks this Court to grant review and address the issue.

E. CONCLUSION

Jason Smith respectfully requests that this Court grant review.

Respectfully submitted this 20th day of December, 2018.



Lila J. Silverstein
WSBA #38394
Attorney for Petitioner

APPENDIX A

FILED
COURT OF APPEALS DIV. I
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)	No. 76960-0-1
)	
Respondent,)	
)	
v.)	
)	
JASON MICHAEL SMITH,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: December 3, 2018
)	

VERELLEN, J. — Jason Smith appeals his conviction for possession of methamphetamine with intent to manufacture or deliver. Because the prosecutor’s comment during closing argument concerning constructive transfer was not improper, Smith fails to establish prosecutorial misconduct.

Therefore, we affirm.

FACTS

On January 21, 2016, Sergeant Rory Bolter arrested Smith on probable cause developed by the Snohomish County Regional Drug Task Force that Smith was dealing drugs. After Smith was read his rights, he agreed to talk to Detective William McCormick. Smith admitted there was approximately half an ounce of methamphetamine in his vehicle.

The State charged Smith with one count of possession of methamphetamine with intent to manufacturer or deliver.

At trial, Smith testified that he purchased the methamphetamine for himself and his girlfriend with both of their money. Smith also testified that after purchasing drugs, he usually put the drugs in a container for him and his girlfriend to share.

During closing argument, defense counsel argued the State failed to show Smith intended to deliver the methamphetamine. On rebuttal, the prosecutor argued, “[C]onstructive transfer is leaving the meth in a jar knowing that it's there for the purpose of having your girlfriend get access to it and smoke it.”¹ Defense counsel did not object. The jury convicted Smith as charged.

Smith appeals.

ANALYSIS

Smith contends a new trial is required because the State committed prosecutorial misconduct during closing argument.

“Allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard.”² To prevail on a claim of prosecutorial misconduct, the defendant bears the burden of establishing that the conduct was both improper

¹ Report of Proceedings (RP) (Jan. 10, 2017) at 336.

² State v. Brett, 126 Wn.2d 136, 174, 892 P.2d 29 (1995).

and prejudicial.³ “A prosecuting attorney commits misconduct by misstating the law.”⁴

Smith argues the prosecutor’s comments were improper because he misstated the law of constructive transfer.

Under the Uniform Controlled Substances Act, “it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.”⁵ “‘Deliver’ or ‘delivery’ means the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship.”⁶

The Uniform Controlled Substances Act does not define “transfer.” “In the absence of a legislative definition, we look to a common understanding of the term as found in dictionaries.”⁷ “Transfer” means “to carry or take from one person or place to another,” “to move or send to a different location,” or “to cause to pass from one person or thing to another.”⁸

In accord with this definition, this court previously defined “constructive transfer” in the context of delivery of a controlled substance as “the transfer of a controlled substance either belonging to the defendant or under his direct or

³ State v. Thorgerson, 172 Wn.2d 438, 442, 258 P.3d 43 (2011) (quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

⁴ State v. Allen, 182 Wn.2d 364, 373, 341 P.3d 268 (2015).

⁵ RCW 69.50.401(1).

⁶ RCW 69.50.101(h).

⁷ State v. Morris, 77 Wn. App. 948, 950, 896 P.2d 81 (1995).

⁸ WEBSTER’S THIRD INTERNATIONAL DICTIONARY at 2426-27 (2002).

indirect control, by some other person or manner at the instance or direction of the defendant.”⁹

Here, during closing argument, the prosecutor argued, “[C]onstructive transfer is leaving the meth in a jar knowing that it's there for the purpose of having your girlfriend get access to it and smoke it.”¹⁰

Smith argues this comment was improper because it misstated the law of constructive transfer. Specifically, Smith contends he and his girlfriend had joint possession of the methamphetamine, and he could not “transfer” the methamphetamine to a joint possessor. Even accepting this contention, which is unsupported by citation to authority, Smith fails to show his girlfriend had joint possession of the methamphetamine.

Although two people may jointly possess a controlled substance, possession requires “dominion and control over the contraband or the premises where the contraband is found.”¹¹ Smith fails to provide evidence that his girlfriend had dominion and control over the methamphetamine when it was in his vehicle. The evidence shows only that Smith had actual exclusive control of the methamphetamine when it was in his vehicle.

“Because of the nature of the charge of possession with intent to deliver, evidence is usually circumstantial. But evidence of an intent to deliver must be

⁹ State v. Campbell, 59 Wn. App. 61, 63, 795 P.2d 750 (1990) (quoting Davila v. State, 664 S.W.2d 722, 724 (Tex. Ct. App. 1984)).

¹⁰ RP (Jan. 10, 2017) at 336.

¹¹ State v. Morgan, 78 Wn. App. 208, 212, 896 P.2d 731 (1995).

sufficiently compelling that 'the specific criminal intent of the accused may be inferred where it is plainly indicated as a matter of logical probability.'"¹²

At trial, Smith testified that he purchased the methamphetamine for himself and his girlfriend with both of their money. Smith also testified that after purchasing drugs, "I put it in a container that's for both of us. And I keep it on the shelf by my bed so she can smoke when she wants and I smoke."¹³ Smith's intent to transfer the methamphetamine to his girlfriend is plainly indicated by this evidence as a matter of logical probability. The intended transfer to a container in the bedroom was constructive because Smith planned to place the methamphetamine in a container to share with his girlfriend. As a result, the prosecutor's statement that such evidence constituted constructive transfer was not improper.

Because the prosecutor's conduct was not improper, Smith fails to establish prosecutorial misconduct.

Smith filed a supplemental brief challenging the imposition of the \$100 deoxyribonucleic acid (DNA) fee and the \$200 criminal filing fee. When Smith was sentenced, these two fees were mandatory. Effective June 7, 2018, the legislature amended the DNA fee statute, adding the words "unless the [S]tate has previously collected the offender's DNA as a result of a prior conviction."¹⁴ The legislature

¹² State v. Davis, 79 Wn. App. 591, 594, 904 P.2d 306 (1995) (internal quotation marks omitted) (quoting State v. Kovac, 50 Wn. App. 117, 120, 747 P.2d 484 (1987)).

¹³ RP (Jan. 10, 2017) at 228.

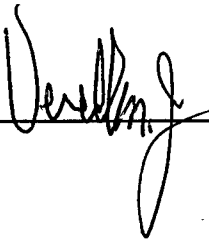
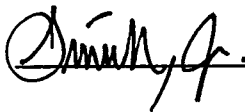
¹⁴ LAWS OF 2018, ch. 269, § 18.

also has exempted indigent defendants from the \$200 filing fee.¹⁵ These amendments apply prospectively to cases pending appeal.¹⁶

The State acknowledges that the amendments apply to Smith and that “this court should remand the matter to the trial court to strike the \$200 filing fee and the \$100 [DNA] fee.”¹⁷

We affirm Smith’s conviction but remand for the trial court to strike the \$100 DNA fee and the \$200 criminal filing fee.

WE CONCUR:


_____
_____

¹⁵ State v. Ramirez, ___ Wn.2d ___, 426 P.3d 714, 722 (2018).

¹⁶ Id. at 721-23.

¹⁷ Resp’t’s Supp. Br. at 4. The State notes there is no need to address interest accrual on the fees to be stricken on remand. We agree. Upon striking the DNA fee and the criminal filing fee, no interest will have accrued on those stricken fees.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 76960-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

respondent Mary Kathleen Webber
[kwebber@co.snohomish.wa.us]
[Diane.Kremenich@co.snohomish.wa.us]
Snohomish County Prosecuting Attorney

petitioner

Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: December 20, 2018

WASHINGTON APPELLATE PROJECT

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