

**FILED**

JUN 27 2014

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

Supreme Ct No. 902941

COA No. 311082

SUPREME COURT OF THE STATE OF WASHINGTON

**FILED**  
JUL - 8 2014

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STATE OF WASHINGTON, Respondent

v.

PETR V. RUDNITSKY, Petitioner

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON  
CRF

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PETITION FOR REVIEW

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PETR V. RUDNITSKY  
Pro Se Petitioner

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A. IDENTITY OF PETITIONER

Petr Rudnitsky asks this court to accept review of the decision of Division Three of the Court of Appeals terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The opinion filed on February 20, 2014. A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

1. The evidence showed heroin was found in the car I was driving. The front seat passenger testified the heroin belonged to him. My only connection to the heroin was my mere proximity. There was no evidence that I owned the drugs or used drugs. Under these facts, was the evidence sufficient to support a finding that I constructively possessed the heroin, as required to find me guilty of unlawful possession of a controlled substance?

D. STATEMENT OF THE CASE

City of Kennewick Police Officer John Greenough stopped my car in relation to a theft investigation. (RP <sup>1</sup> 39, 41-44). Three males were inside the car, and I 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 my name "Petr" and a phone number. (RP 58).

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<sup>1</sup>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.

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 wrapped 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 place 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 me with one count of unlawful possession of a controlled substance. (CP 4-5). My 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). This was accessible with an easy access to the passenger.

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

- (1) That on or about September 8<sup>th</sup>, 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 me guilty as charged. (CP 77; RP (Aug. 1, 2012) 2). I appealed. (CP 89). The appeal court found me guilty and the motion on the merits is granted and the decision of the trial court is affirmed.

#### E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be granted when a decision of the Court of Appeals conflicts with a decision of the Supreme Court or another division of the Court of Appeals, or involves a significant question of constitutional law or an issue of substantial public interest. RAP 13.4(b).

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. All. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

In order to find me guilty of unlawful possession of a controlled substance, the jury had to find that I 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). I 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 I 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 of 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 my mere proximity to the heroin. See *Spruell*, 57 Wn. App. at 388. There was no evidence that I 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 has 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 I 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).

I was not able to reduce the drugs to actual possession, because I was driving the car when Mr. Anischenko took out his drugs. (RP 93-94); see also Murphy, 9 Wn. App. at 46 (*quoting Echeverria*, 85 Wn. App. at 783).

Given all of the facts, I 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 I legally owned the car.

Evaluating the totality of the circumstances shows that I 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 me guilty, beyond 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 my conviction, and the conviction should be reviewed 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)).

F. CONCLUSION

The evidence was insufficient to support my conviction for unlawful possession of a controlled substance, because the State failed to prove constructive possession. My conviction for unlawful possession of a controlled substance should be review and be granted and the Court of Appeals decision should be reversed.

Dated this June day of twenty, 2014.

Respectfully submitted,



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PETR V. RUDNITSKY  
Petitioner

# APPENDIX

The Court of Appeals  
of the  
State of Washington  
Division III

FILED

FEB 20 2014

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	COMMISSIONER'S RULING
	)	NO. 31108-2-III
v.	)	
	)	
PETR V. RUDNITSKYY,	)	
	)	
Appellant.	)	

Petr Rudnitskyk appeals his Benton County Superior Court conviction of unlawful possession of a controlled substance. He contends that there is insufficient evidence to support a finding that he constructively possessed heroin and therefore the court erred in finding him guilty of the charged crime. This Court's motion on the merits is granted.

Kennewick police stopped a car driven by Mr. Rudnitskyk in relation to a theft investigation. There were two passengers in the car. There was a sign in the car window that stated "For Sale by Owner," and listed the name "Petr" with a phone number. Another officer arrived and removed the passengers from the car and detained

them. It was then that the officers saw a piece of plastic on the seat that appeared to be the plunger end of a syringe.

The police officers obtained a search warrant for the car. On the front passenger side of the car they found a hypodermic needle, a glass smoking device and a plastic bindle that tested positive for heroin. In the center console of the car, which was accessible to the driver, the police found a hypodermic needle, spoons and a plastic bag with a piece of plastic containing a dark tar-like substance, which tested positive for heroin.

The State charged Mr. Rudnitsky with one count of unlawful possession of a controlled substance.

At trial, one of the passengers testified that the heroin in the car was his, along with all the other drug paraphernalia. He stated that when he saw the police car he panicked and took all of the drugs he was holding on his person and placed them in the car. On cross-examination the passenger testified that he also was charged with possession of a controlled substance and theft, but he entered a plea of guilty to theft in exchange for the possession charge being dropped, and therefore he knew that he could not be charged with possession. He admitted that he initially denied possessing the heroin. He said he went into an AT&T store and stole four cell phones and stuffed the phones in his pockets before running out of the store and that no one followed or chased him as he walked out of the store. He also testified that the car they were riding in that day was Mr. Rudnitsky's.

The jury found Mr. Rudnitskyy guilty of the charge. He appeals.

Mr. Rudnitskyy contends that there is insufficient evidence to support a finding that he possessed heroin and therefore the court erred in finding him guilty of the charged crime.

The standard of review for determining sufficiency of the evidence is whether, when examining the evidence in the light most favorable to the State, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Treat*, 109 Wn. App. 419, 426, 35 P.3d 1192 (2001). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial and direct evidence are viewed as equally reliable. *State v. Paulson*, 131 Wn. App. 579, 586, 128 P.3d 133 (2006). The reviewing court need not be convinced of a defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence to support the defendant's conviction, *State v. Prestegard*, 108 Wn. App. 14, 22-23, 28 P.3d 817 (2001), and further, the appellate court may not substitute its view of the evidence for that of the trier of fact. *State v. Hagler*, 74 Wn. App. 232, 235, 872 P.2d 1994). Credibility determinations are for the trier of fact and not subject to review, and thus this Court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses,

and the evidence's overall persuasiveness. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996).

As stated in Mr. Rudnitskyy's opening brief: In order to find him guilty of unlawful possession of a controlled substance, the jury had to find that he possessed heroin. 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. Rudnitskyy 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. Rudnitskyy had constructive possession of the heroin.

Here, the evidence shows that heroin was found in two different places in the car driven by Mr. Rudnitskyy. The car had a sign advertising it as being for sale by Mr. Rudnitskyy and the passenger testified at trial that the car was Mr. Rudnitskyy's. Since Mr. Rudnitskyy had dominion and control over the center console area of his own vehicle he was driving at the time of the stop, there is no doubt that he had constructive possession of the heroin found in the center console.

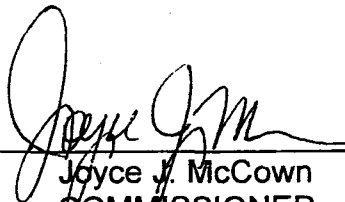
Was Mr. Rudnitskyy's constructive possession knowing or unwitting? The only evidence introduced by the defense to support an unknowing or unwitting possession of the controlled substance was the testimony of the passenger. The passenger claimed that the drugs were his. However, he admitted that he had committed several crimes of



dishonesty in the past and that once he entered a plea of guilty to this most recent theft, he knew he could not be charged with possession of a control substance, so therefore he was testifying on behalf of his friend, Mr. Rudnitsky. However, the passenger's testimony conflicted with other witnesses' testimony, including the store manager who testified he chased the passenger out of the store. Also, given the passenger's account, that he was wearing shorts, went into the AT&T store and stole four phones, which he stuffed into his pockets, which pockets according to his testimony, were already filled with several needles, spoons, bindles of heroin, and a pipe, the jury most likely doubted his credibility. Since credibility determinations are for the trier of fact, this Court will not disturb them.

There is sufficient evidence in the record to support the jury's decision. Therefore, the motion on the merits is granted and the decision of the trial court is affirmed.

February 20, 2014.

  
\_\_\_\_\_  
Joyce J. McCown  
COMMISSIONER