Supreme Court Case No. 90771-4

WASHINGTON STATE SUPREME COURT

Miguel Garcia,

Petitioner Pro Se,

v.

Washington State,

Respondent.

On Appeal from the Division Two Court of Appeals

Case No. 45075-5-II

Motion for Discretionary Review

Miguel Garcia
D.O.C.# 367050 /A1062
Stafford Creek Corrections Center
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Aberdeen, WA 98520

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Miguel Garcia asks this court to accept review of the decision or parts of the decision designated in Part B of this motion.

B. DECISION

Mr. Garcia seeks review of the Ruling denying modification of the Commissioner's erroneous order dismissing Mr. Garcia's direct appeal on 08/22/14. A copy of the decisions are attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Division Two Court of Appeals err in not modifying the erroneously entered Commissioner's Ruling dismissing Mr. Garcia's direct appeal?

2. Was there sufficient evidence presented at trial to convict Mr. Garcia with possession with intent to deliver methamphetamine as charged in count one?

D. STATEMENT OF THE CASE

Procedural History

On March 4, 2013, the Cowlitz County Prosecuting Attorney charged Mr. Miguel Garcia with one count of possession with intent to deliver methamphetamine. CP 1-2; RCW 69.50.401(1). The information alleged that the offense occurred within 1000 feet of a school bus route stop and also sought an exceptional sentence, alleging that the offense was a major violation of the Uniform Controlled Substances Act. RCW 69.50.435(1)(c); RCW 9.94A.535(3)(e).

The case proceeded to a jury trial before the Honorable Michael Evans, and the jury returned a guilty verdict. CP 50. The jury answered the special verdicts in the affirmative. CP 51-53. The court imposed an exceptional sentence of 70 months, including a 24-month school zone enhancement. CP 60, 67.

Mr. Garcia, filed a timely appeal through appellate counsel Catherine E. Glinski. On June 16, 2014 a Commissioner of the Division Two Court of Appeals entered a Ruling Granting Motion on the Merits to Affirm. Through counsel, Mr. Garcia sought modification under RAP 17.7. The Division Two Court of Appeals subsequently denied Mr. Garcia's request.

This timely Motion for Discretionary Review follows.

Substantive Facts

On February 27, 2013, members of several law enforcement agencies were working on a fugitive apprehension team in Cowlitz County. RP 18. Acting on information that the suspect they were looking for was at a house in Longview, the team set up surveillance around the house. RP 21. Members of the team knocked on the front door, explained why they were there, and received permission to search the house. RP 23. They did not locate the suspect. RP 24.

While inside, Officer Fila Matua kept his eye on a shed in the backyard. He had seen people walking in and out of the shed earlier, and when he saw a woman exit the shed, he stepped outside to talk to her. RP 22, 24-25. Daphne Kraabell told Matua that there was one more man inside the shed, so Matua and Detective Kevin Sawyer approached the shed and asked him to come out. RP 25-26, 92.

Miguel Garcia exited the shed in a matter of seconds. RP 92, 133. He appeared calm, and he stopped for Matua to conduct a pat down search. RP 93, 136. Mr. Garcia was unarmed, and he was not the suspect the team was looking for. RP 93. He did not appear nervous, and he made no effort to run away. RP 138.

Matua and Sawyer went into the shed to search for the suspect. RP 27. They did not find him, but they saw, on a shelf along the side of the shed, a one-pound package of methamphetamine. RP 27-28, 95. They also noticed a large amount of cash, some digital scales, packaging, and plastic bags. RP 28, 94. The officers left the shed immediately and placed Mr. Garcia and Ms. Knabell under arrest. RP 28, 133.

Officer Raymond Hartley obtained a warrant to search the shed. RP 55. The search team located the methamphetamine, scales, currency, some baggies, bags of needles, containers with residue, and a small video monitor. RP 59, 79-80. The shed also contained numerous other items, such as a work bench, yard tools, duct tape, an air compressor, a hand-held camcorder, and a socket set. RP 75, 77-78, 80, 101.

Garcia was charged with possession of methamphetamine with intent to deliver, based on the evidence found in the shed. At trial, Matua testified that he found a large amount of a crystal substance wrapped in Saran Wrap in the shed, which looked like an eight-inch tube of something white. RP 39-40. It was not labeled, but he recognized it as methamphetamine, because he is trained in recognizing narcotics paraphernalia. RP 40-41. Someone, like Mr. Garcia, without his training might not recognize the same things as being narcotics related. RP 38.

Hartley is a detective with the Longview police street crimes unit, whose primary focus is on drug enforcement. RP 53. He testified that he saw a large package wrapped in cellophane, as well as some measuring equipment, baggies, and needles. RP 59. Hartley is

also specifically trained to notice and identify narcotics, and to him the package looked like a pound of methamphetamine. RP 59, 66, 68. To the untrained eye, however, it simply looked like a tube of salami or something wrapped in cellophane. RP 60, 68.

Sawyer also testified that when he saw the cellophane package, he could tell it was methamphetamine. RP 95. He, too, is specifically trained to recognize drugs and has made arrests in over 300 drug cases. RP 135-36.

Detective Seth Libbey of the Longview Police street crimes unit also described his narcotics training. RP 189-90. He testified that he has been involved in narcotics investigations, and he knows what methamphetamine looks like when packaged in large qualities. RP 192, 194. Libbey testified that he saw a summer sausage-sized package wrapped in cellophane, which he recognized as a pound of methamphetamine. RP 204.

There was no evidence introduced establishing that Mr. Garcia had any training or experience with narcotics. He was not an officer, and has no prior drug related convictions. More importantly, there was no evidence introduced establishing Mr. Garcia's dominion and control over the contraband, or the premises.

E. STANDARD OF REVIEW

A petition for review will be accepted by the Supreme Court only:

1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or

3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

In all reality, this case meets all four criteria enumerated under RAP 13.4 (b). Review by this court is thus appropriate.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. The Division Two Court of Appeals erred in failing to modify the Commissioner's Ruling dismissing Mr. Garcia's appeal.

Based on RAP 18.14(a) and 18.14(e)(1), a Commissioner of the Division Two Court of Appeals dismissed Mr. Garcia's appeal finding that it was **clearly without merit.** This finding was made in error as there was no evidence produced during trial establishing either Mr. Garica's knowledge of the contraband in the shed or his dominion and control over said contraband.

Generally proving mere presence around narcotics is insufficient to convict someone of possession with intent to distribute under current jurisprudence.

RAP 18.14(e)(1) certainly allows for a court commissioner to, on their own motion, a motion on the merits to affirm, if it is determined that the case is **clearly without merit.** However, the only thing this case is clearly without is evidence sufficient to find Mr. Garica guilty of possession of methamphetamine with intent to distribute.

As such, it was error to not conduct a de novo review of Mr. Garcia's direct appeal. See e.g., In re Detention of Peterson, 138 Wn.2d 70, 89, 980 P.2d 1204 (1999); State v. Rolax, 104 Wn.2d 125, 702 P.2d 1185 (1985); State v. Nolan, 93 Wn.App. 75, 76, 968 P.2d 473

(1999); and State v. Vasquez, 95 Wn.App. 12, 15, 972 P.2d 109 (1998).

2. There was insufficient evidence presented at trial to convict Mr. Garcia with possession with intent to deliver methamphetamine.

In a prosecution of possession of methamphetamine with intent to deliver, the state must prove that the defendant either actually or constructively possessed the contraband. State v. Roberts, 80 Wash.App. 342, 353, 908 P.2d 892 (1996). Actual possession requires physical custody. State v. Contabrana, 83 Wash.App. 204, 206, 921 P.2d 575 (1996). Constructive possession requires dominion and control over the contraband or the premises containing it. Id.

Mr. Garica was not in actual possession of the contraband upon his arrest. The question, therefore, is whether the evidence showing his presence in a shed containing contraband is sufficient to establish constructive possession?

To determine whether there is constructive possession, a court must examine the "totality of the situation" in order to effectively ascertain if substantial evidence tending to establish circumstances from which the trier of fact can reasonably infer the defendant had dominion and control over the contraband. State v. Partin, 88 Wash.2d at 906, 567 P.2d 1136. While exclusive control is not necessary to establish constructive possession; more proximity to the contraband is insufficient. State v. Davis, 117 Wash.App. 702, 708-09, 72 P.3d 1134 (2003), review denied, 151 Wash.2d 1007, 87 P.3d 1185 (2004).

The evidence in this case revealed that Officer Fila Natua observed people walking in and out of the shed containing the contraband. Mr. Garcia was not the only other person in the shed with

Daphne Kraabell. The evidence further established that there were illegal drugs and other contraband present in the shed, but it did not establish either Mr. Garica's knowledge of it, nor his possession or intent to distribute it.

There was not one shred of evidence even alluding to the allegation that Mr. Garcia was there to sell drugs. There were no drugs on his person, and he was completely cooperative with Law Enforcement, and was not jumpy or nervous. What the evidence showed was a large quantity of methamphetamine packaged in Saran Wrap, that according to police officers looked like nothing more than a salami to the untrained eye in a tool shed where Mr. Garcia was present.

This is insufficient to support the conviction lodged against Mr. Garcia.

Support is found for Mr. Garcia's argument in this Court's opinion in State v. Callahan, 77 Wash.2d 27, 459 P.2d 400 (1969) and the Appellate Court's opinion in State v. Spruell, 57 Wash.App. 383, 788 P.2d 21 (1990).

In Callahan, drugs were found in a houseboat near the defendant, who admitted to handling the drugs earlier that day. Callahan, at 28-29. This court held that Clallahan's mere momentary handling of the drugs was insufficient to establish actual possession. Id. Moreover, this court held that because Callahan was only a guest on the houseboat, the circumstances did not establish dominion and control over the drugs sufficient to prove constructive possession. Id. at 31.

Unlike in Callahan, the State did not allege Mr. Garcia had

actual possession of the methamphetamine, nor did it establish that Mr. Garcia was a resident of the residence. However, similar to Callahan, the evidence established only Mr. Garcia's proximity to the drugs and that Mr. Garcia was solely a guest. This court found in Callahan these circumstances to be insufficient to establish constructive possession. Callahan, 77 Wash.2d at 31, 459 P.2d 400.

Likewise, in Spruell, the defendant was arrested in close proximity to drugs found in a house, but the state failed to present evidence that the defendant had dominion and control over the premises. Spruell, 57 Wash.App. at 387-88. The state thus failed to prove the defendant actually or constructively possessed the drugs. Id. at 388

Simply put, evidence showing Mr. Garcia's presence in a shed where drug paraphernalia was found is insufficient for a trier of fact to reasonably infer that Mr. Garcia was in possession of methamphetamine with intent to deliver. Even coupled with the fact that Ms. Craabell plead guilty, admitting that she conspired with another to deliver drugs does nothing to help the State's case. The officer testified he witnessed other people entering and exiting the shed. If it was Mr. Garcia she had conspired with, she would have said so, she had already plead guilty and had nothing to lose in doing so.

Again, the evidence offered at Mr. Garcia's trial only established that he was in mere proximity to methamphetamine, that was packaged in such a manner as to appear as nothing more than an innocuous salami. There was nothing more than his presence, nobody

testified it was his, his fingerprints were not found on any of the contraband, nor were any drugs or other illegal items found on his person.

Mr. Garcia is entitled to relief as it has been shown that upon the record the evidence adduced at trial was insufficient for a rational trier of fact to have found proof beyond a reasonable doubt. Jackson v. Virgina, 99 S.Ct. 2781, 2791, 92.

G. CONCLUSION

Under the holdings of both State v. Callahan, 77 Wash.2d 27, 459 P.2d 400 and State v. Spruell, 57 Wash.App. 383, 788 P.2d 21 (1990) the evidence presented in this case was insufficient to establish guilt. The determination of the Court of Appeals to the contrary was made in direct opposition to a decision out of not only this court but also the Court of Appeals, it also contains a question of law under the Constitution and involves an issue of substantial public interest.

Review is appropriate, and, therefore, Mr. Garcia respectfully asks that review be granted by this court.

Respectfully Submitted this 28 day of October, 2014.

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MIGUEL GARCIA,

Appellant.

No. 45075-5-II

ORDER DENYING MOTION TO MODIFY

APPELLANT filed a motion to modify a Commissioner's ruling dated June 16, 2014, in the above-entitled matter. Following consideration, the court denies the motion. Accordingly, it is

SO ORDERED.

DATED this 22nd day of August, 2014.

PANEL: Jj. Johanson, Worswick, Melnick

FOR THE COURT:

Johanson, C.J.
CHIEF JUDGE

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

THE STATE OF WASHINGTON, Respondent, v. MIGUEL GARCIA, Appellant.	No. 45075-5-II RULING GRANTING MOTION ON THE MERITS TO AFFIRM

Miguel Garcia appeals his conviction for possession of a controlled substance with intent to deliver. Pursuant to RAP 18.14(a)[1] and RAP 18.14(e)(1),[2] this court affirms his conviction.

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[1] RAP 18.14(a) provides, in relevant part:

> The appellate court may, on its own motion or on motion of a party, affirm or reverse a decision or any part thereof on the merits in accordance with the procedures defined in this rule.

[2] RAP 18.14(e)(1) provides:

> A motion on the merits to affirm will be granted in whole or in part if the appeal or any part thereof is determined to be clearly without merit. In making these determinations, the judge or commissioner will consider all relevant factors including whether the issues on review (a) are clearly controlled by settled law, (b) are factual and supported by the evidence, or (c) are matters of judicial discretion and the decision was clearly within the discretion of the trial court or administrative agency.

FACTS

On February 13, 2013, a fugitive enforcement team surveilled a residence located at 863 7th Avenue, Longview, Washington, while attempting to locate a wanted person. Officers watched the home for five to ten minutes before knocking on the door and receiving permission to search the home. The individual they were searching for was not in the home.

During the search, officers saw a woman emerging from a shed in the back yard. She said her name was Daphne Kraabell and that there was a man in the shed. An officer knocked on the door and identified himself and the defendant emerged from the shed. Officers entered the shed and observed a cellophane-wrapped package of methamphetamine (approximately 44 grams), currency bundled in various denominations (totaling $6,800), a scale with residue, measuring cups, needles, and plastic bags. Officers received a warrant to search the shed and discovered a surveillance camera attached to the outside of the shed. A video monitor inside the shed displayed the approach to the shed. The shed also contained yard tools, duct tape, and an air compressor.

At trial, Garcia stipulated that the drugs were located within 1,000 feet of a school bus stop. He also stipulated, "Daphne Kraabell was charged with conspiracy to commit a drug crime, delivery of methamphetamine, alleged to have occurred on February 27, 2013. She pled guilty to that charge on May 20, 2013, by admitting that she had the intent to deliver methamphetamine and she agreed with another person to engage in that conduct, and she took a substantial step in pursuance of that agreement." Report of Proceedings (RP) at 296.

ANALYSIS

Standard of Review

Sufficient evidence exists to support a conviction if any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). A defendant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from that evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). This court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415–16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

Knowing Possession of a Controlled Substance

To convict Garcia of unlawful possession of a controlled substance, the State had to prove beyond a reasonable doubt that he "possesse[d]" a controlled substance without a valid prescription or other authorization. RCW 69.50.4013(1). Possession may be actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). "A defendant has actual possession when he or she has physical custody of the item and constructive possession if he or she has dominion and control over the item. Dominion and control means that the object may be reduced to actual possession immediately." *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002) (internal citation omitted).

Courts determine dominion and control in light of all the circumstances.[3] *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977).

In addition, the State conceded that it was required to prove that Garcia "possessed methamphetamine with knowledge." RP at 270. In general, a person acts knowingly if "he or she is aware of a fact, facts, or circumstances or result described by a statute defining an offense." RCW 9A.08.010(1)(b)(i).

Garcia argues that the State failed to prove that he knowingly possessed the drug. He relies heavily on the argument that the methamphetamine was wrapped and may have appeared to be a salami or sausage to inexpert eyes. Criminal intent may be inferred "from conduct that plainly indicates such intent as a matter of logical probability." *State v. Abuan*, 161 Wn. App. 135, 155, 257 P.3d 1 (2011). Looking at the evidence in the light most favorable to the State, including that Kraabell left Garcia in a video-monitored shed with wrapped methamphetamine, drug packaging, residue-encrusted measuring equipment, and cash in open sight, Garcia's knowledge that he possessed drugs may be inferred as a matter of logical probability. Accordingly, it is hereby

[3] Although control need not be exclusive, the State must show more than mere proximity to the substance. *State v. Raleigh*, 157 Wn. App. 728, 737, 238 P.3d 1211 (2010), *review denied,* 170 Wn.2d 1029 (2011). *See also State v. George*, 146 Wn. App. 906, 923, 193 P.3d 693 (2008) (insufficient evidence of constructive possession where State proved only that drugs had been found under rear floorboard where defendant had been a passenger); *State v. Cote*, 123 Wn. App. 546, 550, 96 P.3d 410 (2004) (evidence that defendant was at one point in proximity to drugs found in vehicle in which he was a passenger was insufficient to prove constructive possession).

ORDERED that this court's motion on the merits to affirm is granted.

DATED this 16th day of June, 2014.

Aurora R. Bearse
Court Commissioner

cc: Catherine Glinski
Aaron Bartlett
Hon. Michael Evans

WASHINGTON STATE SUPREME COURT

Miguel Garcia, Petitioner, v. WASHINGTON STATE, Respondent.	No. 90771-4 CERTIFICATE OF SERVICE

Mr. Garcia, hereby certifies that a true and correct copy of the attached pleading entitled 'MOTION FOR DISCRETIONARY REVIEW' was served upon the following parties in the manner indicated:

[X] WASHINGTON SUPREME COURT
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I, Miguel Garcia, hereby swear under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Respectfully Submitted this 28 day of October, 2014.

Miguel Garcia
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