

FILED
January 11, 2016
Court of Appeals
Division I
State of Washington

NO. 73364-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRIAN SCOTT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

TRAVIS STEARNS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

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A. ARGUMENT IN REPLY

The failure of the State to prove every element necessary to prove possession with an intent to deliver entitles Mr. Scott to dismissal.

Due Process protects an accused against conviction, except where the State is able to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (citing U.S. Const. amend. 14; Const. art. I, § 22; *Jackson v. Virginia*, 443 U.S. 307, 311, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). Evidence is only sufficient where a rational trier of fact could find the essential elements of the crime charged beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 192, 194, 4 P.3d 115 (2000). When Mr. Scott moved for a new trial it was because he believed a substantial right of his had been materially affected in that a substantial injustice had been done. CrR 7.5 (a)(8); see also, *State v. Chanthabouly*, 164 Wn. App. 104, 140, 262 P.3d 144 (2011), *review denied*, 173 Wn.2d 1018, 272 P.3d 247 (2012).

The State did not prove beyond a reasonable doubt Mr. Scott intended to deliver the controlled substances alleged to have been in his possession. While the State presented evidence a drug transaction may

have occurred, it did not establish Mr. Scott participated in the exchange. While the State alleges in its brief Mr. Scott was observed until his arrest, this is not consistent with the record. He was arrested “coming out of the Déjà Vu, which is in the 1500 block of First Avenue on the east side.” 2/24/15 RP 46. No witness testified they saw the person who engaged in the transaction go into Déjà Vu. In fact, when the observing officer was asked whether Déjà Vu had any significance to this case, he replied, “None for me.” 2/26/15 RP 57. It is not possible for Det. Collier to have never lost sight of Mr. Scott and yet for the arresting team to have seen him leave Déjà Vu. This Court must examine whether a rational juror would have rejected the testimony of the arresting team and found, despite the fact the team arrested Mr. Scott coming out of Déjà Vu, the team did not actually see what they said they saw.

Instead, in analyzing the sufficiency of the sufficiency of the evidence, this Court must give credit to the testimony of the arresting officer. This Court cannot have confidence the person arrested is the same person the observing officer saw make a possible drug transaction. This is true, especially in light of difficulties the arresting officer had in recalling facts of the arrest. At trial, he admitted

“sometimes it’s just hard to keep track of one arrest from another.”
2/26/15 RP 47. Under a rational view of the evidence analyzed in the light most favorable to the State, this Court must reject the claim that Mr. Scott was involved in the drug transactions. The arresting officer’s testimony is inconsistent with the remainder of the State’s evidence and his ability to recall is impacted by the extraordinary number of arrests he was involved in.

An analysis of the sufficiency of the evidence must be based upon the evidence the State introduced which is not in conflict with itself. In examining this evidence, it is clear Mr. Scott did not have the intent to commit a delivery. “Washington case law forbids the inference of an intent to deliver based on ‘bare possession of a controlled substance, absent other facts and circumstances.’” *State v. Brown*, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993) (*relying on State v. Johnson*, 61 Wn. App. 539, 811 P.2d 687 (1991)). Possession of a controlled substance with intent to deliver requires proof of both drug possession and some additional factor supporting an inference of intent to deliver it. *State v. Zunker*, 112 Wn. App. 130, 135–36, 48 P.3d 344 (2002) (*citing State v. Campos*, 100 Wn. App. 218, 222, 998 P.2d 893 (2000)).
Mr. Scott was arrested with a minimal amount of drugs, very little

money and no hallmarks which would indicate he was involved in the drug trade. Under this analysis, this Court should find the State presented insufficient evidence of Mr. Scott's intent to deliver.

Possession and intent to deliver must also refer to the same quantity of controlled substance. *State v. Robbins*, 68 Wn. App. 873, 876, 846 P.2d 585 (1993). It is not sufficient to show the accused intended to deliver drugs other than those he was alleged to have possessed. *Id.* The State did not prove beyond a reasonable doubt that Mr. Scott intended to deliver the controlled substances alleged to have been in his possession. Mr. Scott was not arrested with any of the hallmarks which would indicate he had intended to deliver the controlled substances he was accused of possessing. He was arrested "coming out of the Déjà Vu, which is in the 1500 block of First Avenue on the east side." 2/24/15 RP 46. He had a twenty dollar bill in his pocket and an additional fifty eight dollars in his wallet. 2/24/15 RP 76. The cocaine found by the State was only a "baggie" which would fit into his pocket. *Id.* at 62. There were also no scales that would help weigh drugs. 2/24/15 RP 70.

This Court must should find the State failed to present sufficient evidence Mr. Scott intended to deliver the controlled substances he was

found to be in possession of. The testimony does not establish he was the person engaged in the transactions observed by the observing officer who had a limited ability to recall anything beyond his observation of the transaction. This Court cannot have confidence in the sufficiency of this evidence when the arresting officers providing conflicting testimony regarding where Mr. Scott was arrested. The remainder of the evidence presented by the State was insufficient to sustain the State's burden of presenting His testimony is inconsistent with the remainder of the State's evidence and his ability to recall is impacted by the extraordinary number of arrests he was involved in. Instead, an analysis of the sufficiency of the evidence must be based upon the evidence the State introduced which is not in conflict with itself. In examining this evidence, it is clear Mr. Scott did not have the intent to commit a delivery. He was arrested with a minimal amount of drugs, very little money and no hallmarks which would indicate he was involved in the drug trade. Under this analysis, this Court should find the State presented insufficient evidence to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. *Winship*, 397 U.S. at 364.

B. CONCLUSION

The State failed to present sufficient evidence that Mr. Scott intended to deliver the drugs he was alleged to have possessed. Because the State failed to establish an essential element of the crime charge, this court should dismiss. In the alternative, because the court abused its discretion in failing to order a new trial under CrR 7.5 (a)(8), this court should remand this matter for a new trial.

DATED this 11th day of January 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

TRAVIS STEARNS (WSBA 29935)
Washington Appellate Project (91052)
Attorneys for Appellant

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STATE OF WASHINGTON,)	
)	
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v.)	NO. 73364-8-I
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Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 11TH DAY OF JANUARY, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JOSEPH MARCHESANO, DPA [paoappellateunitmail@kingcounty.gov] [joseph.marchesano@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	() () (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] BRIAN SCOTT 332139 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL, WA 99326	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 11TH DAY OF JANUARY, 2016.

X _____ 

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710