

64044-5

64044-5

NO. 64044-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KEN CHARLES DAUSEY,

Appellant.

RECEIVED
COURT OF APPEALS
DIVISION ONE

JAN 27 2010

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

The Honorable Alan R. Hancock, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to sustain two of appellant's nine convictions for unlawful possession of a firearm.

2. The trial court failed to enter written findings of fact and conclusions of law after the bench trial.

Issues Pertaining to Assignments of Error

1. In a stipulated bench trial for nine counts of unlawful possession of a firearm, the only evidence presented was a two-page police report and a one-page property report listing the firearms confiscated. According to the police report, appellant admitted inheriting seven firearms. One other firearm, however, appellant insisted belonged his wife, and another of the firearms was neither mentioned by appellant, nor raised by the arresting officer in any questioning. The weapons were found in a home seemingly occupied by appellant, but no evidence showed whether he lived in the house on a permanent or temporary basis; no evidence showed whose bedroom the weapons were found in; no evidence showed who had access to the weapons, which were in a gun case; and no evidence was presented of fingerprints or any other showing that appellant had handled the weapons. Under these circumstances, do the two convictions not supported by the appellant's admissions fail?

2. Should this court remand for entry of written findings of fact and conclusions of law as required by CrR 6.1(d)?

B. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Ken Charles Dausey was charged with nine counts of second-degree unlawful possession of a firearm. CP 36-41. Following denial of Dausey's pretrial motion to exclude the associated firearms, the parties agreed to a stipulated bench trial. CP 4-10, 28-35; 2RP 3-4.¹

Based on the police report, the court found Dausey guilty of all counts and imposed a standard range sentence. 2RP 7-10; Supp. CP ___ (sub no. 31, 8/20/09, Felony Judgment and Sentence). Dausey appeals. CP 1-2.

2. Substantive Facts

The parties stipulated to Dausey's 1993 third degree child rape conviction and that his firearms rights had not been restored afterwards. CP 4-5. The only evidence presented regarding Dausey's alleged possession of the guns was the report of the arresting officer, Island County Sheriff's Detective Sergeant Michael Beech. CP 8-10.² This

¹ There are two volumes of the record of proceedings, cited as: 1RP – July 1, 2009 (motion to suppress); and 2RP – August 20, 2009 (trial on stipulated facts and sentencing).

includes the property report in which Beech listed the nine firearms in question. CP 10.

According to Beech's report, he received a CPS report regarding the two children of Dausey and Kari Fisher-Dausey.³ CP 8. Apparently, pornography was being produced in the Dausey home, and CPS wanted to make certain that Dausey's two children were not being exposed to the activity. Id. Beech reviewed the reports and concluded that no crime appeared to have been committed, but he still agreed to accompany the CPS caseworker to the house. Id. Before going to the residence, Beech examined some of the pornography online and had concerns about the age of one of the models. Id.

When Beech and the CPS worker arrived at the residence, the CPS worker explained to Dausey why they were there. CP 8. Dausey invited them inside, and Beech saw two teenage boys and two younger children in the house, all of whom appeared to live there. Id. At the CPS worker request, Dausey agreed to let her speak to the children privately, and accordingly went down a hallway to an office so the CPS worker and Beech could be alone with the children. Id.

² Because these three pages form the sole basis for conviction, they are attached as Appendix A for the Court's convenience.

³ For clarity, Kari Fisher-Dausey will be referred to hereinafter as "Kari."

After a few minutes Beech called out to Dausey, “as [he] walked down the short hallway.” CP 8. Beech asked Dausey if he could speak with him, and Dausey opened the office door and invited the detective inside. Id. While walking down the hall to the office, Beech noticed a partially opened bedroom door, and spotted a large wood and glass gun cabinet inside the bedroom. Id.

In the office, Beech and Dausey talked about the pornography operation. CP 8. Dausey agreed that some of the shots had been taken inside the residence, but none of the children were ever present for such activities. Id. Beech asked about the ages of the girls in the photos, specifying the one who looked young, and Dausey explained that he had proof of age for the model and would provide it to the detective. Id.⁴

Beech asked Dausey about his prior felony, which Dausey acknowledged. CP 8. Beech then asked Dausey about the guns he saw in the bedroom, and Dausey first said that his father had left the guns to him as an inheritance. Id. Beech mentioned that Dausey, as a felon, could not own firearms, and Dausey then explained that his father’s guns had actually been inherited by his wife, Kari. Id.

Beech asked about the number of guns, and Dausey invited Beech into the bedroom, explaining there were about seven “long-guns” and one

⁴ There is no allegation that Dausey either exposed children in the house to the making of pornography or that he had any involvement in child pornography.

handgun. CP 8-10. The handgun was the only modern weapon, and Dausey explained it belonged to his wife Kari, who had purchased it. CP 8. The others were from Dausey's father. CP 8.

After being arrested and advised of his rights, Dausey admitted the "long-guns" were his, but maintained the handgun was Kari's. CP 8. Beech confiscated all the weapons, finding a total of eight long-guns and a handgun. CP 8-10.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT TWO OF DAUSEY'S CONVICTIONS.

The evidence is insufficient to support two of Dausey's conviction for unlawful possession of a firearm. The State failed to prove Dausey possessed one of the eight long guns and failed to prove he possessed his wife's hand gun. Therefore, two of Dausey's conviction must be reversed and dismissed.

When reviewing the sufficiency of the evidence, a reviewing court asks whether, after viewing 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. Brockob, 159 Wn.2d 311, 336, 150 P.2d 59 (2006). On review, circumstantial and direct evidence carry equal weight. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410

(2004). If the evidence is insufficient to support the verdict, the court must reverse and dismiss the conviction. State v. Stanton, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

Usually, credibility determinations are for the trier of fact and are not subject to review. See, e.g., State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533, review denied, 119 Wn.2d 1011 (1992). In a trial or finding based entirely on stipulated facts, however, no facts are at issue, and the reviewing court can examine de novo any issues presented. See State v. Thorn, 129 Wn.2d 347, 351 n.2, 917 P.2d 108 (1996), overruled on other grounds by State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003).

A person commits the crime of second degree unlawful possession of a firearm if he or she “owns, has in his or her possession, or has in his or her control any firearm” and the person has previously been convicted of a felony that does not constitute a “serious felony.” RCW 9A.10.040(2)(a). The only issue is thus whether Dausey “own[ed], ha[d] in his or her possession, or ha[d] in his or her control” all nine firearms listed in the police report.

Possession of contraband may be either actual or constructive. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Actual possession occurs when the firearm is in the personal custody of the

person charged. State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). The State never alleged Dausey had actual possession of the firearms, but relied on constructive possession.

A person has constructive possession of an item if he has dominion or control over the item such that the item may be reduced to actual possession immediately. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Constructive possession need not be exclusive. State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000).

When a defendant has dominion and control over premises, there is a rebuttable presumption that he has dominion and control over items in the premises. State v. Tadeo-Mares, 86 Wn. App. 813, 816, 939 P.2d 220 (1997). However, temporary residence, personal possessions on the premises, or knowledge of the presence of contraband, without more, are insufficient to show dominion and control. State v. Hystad, 36 Wn. App. 42, 49, 671 P.2d 793 (1983). A court reviews the totality of the circumstances to determine whether dominion and control exist. State v. Alvarez, 105 Wn. App. 215, 221, 19 P.3d 485 (2001); State v. Bradford, 60 Wn. App. 857, 862-63, 808 P.2d 174, review denied, 117 Wn.2d 1003 (1991).

Dausey made admissions regarding “about 7 [seven] long guns,” and those corresponding convictions are not challenged. Dominion and

control by Dausey over the eight long gun and the handgun belonging to Kari, however, are not established by the stipulated evidence.

Beech's report infers Dausey lived in the house, but no actual evidence of dominion and control is contained therein. CP 8. No documents were confiscated to show his residence, so Dausey's residence might have been permanent, or it might have been temporary. CP 8, 10. Compare Alvarez, 105 Wn. App. at 221-22 (ordinarily, evidence of permanent residence includes showing a defendant owned or leased the residence, paid rent, received bills, possessed keys, received phone calls, or the like at the residence; evidence of temporary residence or possessions at the location is insufficient) (internal citations omitted).

The guns were found in a gun cabinet. CP 8. The police report does not indicate whether the cabinet was locked or unlocked. CP 8-10. If the cabinet was locked, there is no evidence regarding who possessed the key. The gun cabinet was found in a bedroom, but nothing in the police report indicates whose bedroom it was. CP 8-10. Thus, there is no proof that Dausey could have "reduce[d] the object[s] to actual possession," the heart of dominion and control. State v. Echevarria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997) (gun at driver's feet in automobile was constructively possessed, while throwing star hidden under a seat was not). There is certainly no indication that the cabinet or

firearms were ever checked for fingerprints, which might show Dausey had handled the cabinet or weapons. Compare State v. Spruell, 57 Wn. App. 383, 384, 788 P.2d 21 (1990) (defendant's fingerprint found on a plate of drugs).

This case therefore bears a strong similarity to Callahan and Spruell, both of which held that close proximity to contraband was insufficient to prove constructive possession. Although Callahan and Spruell involve drugs, rather than firearms, Washington courts treat such situations nearly identically. See State v. Summers, 107 Wn. App. 373, 383 n.7, 28 P.3d 780 (2001), case remanded on different grounds, 145 Wn.2d 1015 (2002).

In Callahan, a defendant admitted to staying on the premises – a houseboat – for a few days and further admitted to having briefly handled the drugs on which the charges were based. 77 Wn.2d at 28. The Supreme Court found, however, that Callahan's handling the drugs only amounted to “a momentary handling,” not possession, and that his temporary residence on the houseboat did not establish dominion and control over the premises. 77 Wn.2d at 29-31. See also Spruell, 57 Wn. App. at 384, 388-89 (insufficient evidence of dominion and control where defendant was arrested in another person's kitchen near a table covered

with drugs and drug paraphernalia, even though defendant's fingerprint was found on a plate that appeared to contain drugs).

As in Callahan and Spruell, the evidence here is insufficient to support two of the nine counts – the count related to handgun and the count related to the “eighth” long-gun. Dausey always maintained that the one handgun recovered by Beech, a Llama Minima .45 caliber handgun, belonged to his wife, Kari. CP 8, 10. This firearm is associated with Count 1. CP 8, 10, 36. Given the paucity of evidence that Dausey constructively possessed this gun, its ownership by Kari precludes his conviction for ownership or possession of it. Compare Callahan 77 Wn.2d at 31-32 (where “undisputed direct proof places exclusive possession in some other person,” constructive possession not found). Count 1 must therefore be reversed and dismissed.

Similarly, Dausey told Beech twice that he only owned “about 7 [seven] long-guns.” CP 8-9. Beech confiscated eight long guns, however, and Dausey was convicted of possessing all eight. CP 8-10; 2RP 7-10. Given the lack of proof of constructive possession, the gun that was not specifically acknowledged by Dausey cannot support a conviction. Another person – Kari or someone else living in the house – might easily have added an additional gun to the collection without Dausey's

knowledge. Thus, one of the convictions based on a "long gun" should also be reversed and dismissed as well.

2. BECAUSE THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW, THIS COURT SHOULD REMAND TO THE TRIAL COURT.

CrR 6.1(d) requires written findings of fact and conclusions of law be entered after a bench trial. State v. Head, 136 Wn.2d 619, 621-22, 624, 964 P.2d 1187 (1998). The purpose of this rule is to enable effective appellate review. Id. at 622. Absent written findings of fact and conclusions of law, an appellant cannot properly assign error and the court cannot review whether the findings of fact and conclusions of law are supported by the record. See, e.g., Mairs v. Dep't of Licensing, 70 Wn. App. 541, 545, 954 P.2d 665 (1993) (appellate court reviews only whether findings of fact are supported by substantial evidence and whether findings of fact support conclusions of law); State v. Reynolds, 80 Wn. App. 851, 860 n.7, 912 P.2d 494 (1996) (error cannot be predicated on trial court's oral findings).

The court's oral findings are not binding and cannot replace written findings of fact and conclusions of law. Head, 136 Wn.2d at 622. The appellate court should not have to comb through oral rulings to

determine if appropriate findings were made, nor should an appellant be forced to interpret oral rulings. Id. at 624.

The proper remedy for the failure to enter written findings of fact and conclusions of law under CrR 6.1(d) is remand to the trial court for entry of findings. Id. at 622. Assuming written findings are ultimately entered, reversal will be required if the delay prejudices Dausey. Id. at 624-25. Dausey reserves the right to offer further argument depending on the content of any written findings.

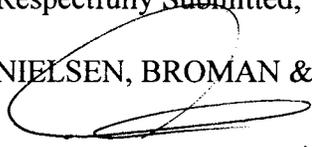
D. CONCLUSION

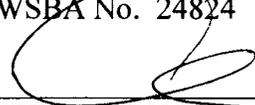
This Court should reverse and dismiss two of Dausey's nine convictions for second degree unlawful possession of a firearm because there is insufficient evidence to support those two convictions. This Court should also remand for entry of written findings and conclusions.

DATED this 27th day of January, 2010.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.


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WSBA No. 24824


CHRISTOPHER H. GIBSON,
WSBA No. 25097
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Attorneys for Appellant

Island County Sheriff's Office
Officer's Additional Narrative

ICSO Case Number: 09-100301

Incident: Felon in Possession of Firearms

Suspect / Subject: Dausey, Ken

I am commissioned by the Sheriff of Island County to enforce the laws of the State of Washington and the County of Island. At the time of this incident I was incident I was serving in the position of Detective Sergeant, supervising the Investigations Division of the Island County Sheriff's Office.

On 010609 ICSO received a faxed referral from CPS regarding the children living with Ken Dausey and Kari Fisher-Dausey at 1835 Fort Nugent Rd. I read the referral and saw that it appeared no crime was or had been committed, unless the children were somehow involved in the pornography allegedly being manufactured there. I also browsed the websites provided in the referral and was concerned over the age of one of the models. In researching Dausey, I found that he is a convicted sex offender who no longer has to register. I contacted CPS case worked Leona Wellman and agreed to go with her to the house to investigate.

On 070709 Det. Nieder and I went to the house with Leona and stood by as she explained why we were there. Ken Dausey invited us inside and I saw that there were two young children present as well as two teenage boys who were apparently living at the home. The living conditions inside were dirty and messy, but not as bad as I have seen in the past. Leona asked Dausey if she could speak to the young children in private, and he agreed to go back to his office so she could do so.

I waited a few minutes and then called out to Ken as I walked down the short hallway. I called out to ask if I could speak with him and he opened the door to his office and said to come on in. As I walked down the hall, I could see through the partially opened door of the bedroom and saw a large wood and glass gun cabinet. I could clearly see several rifles in this cabinet.

I spoke with Dausey regarding the pornographic websites and the fact that it appeared to me that the photos I had seen on the internet had been taken in his home. Dausey said that some of them were, but added that the children are not present while this is happening. I asked about the ages of the girls - and especially about the one that appeared underage. Dausey told me that he met her through a friend named "Johnny Nice Guy" that runs a film production company called "Fair Trade Pink Films" and that her age was confirmed. Dausey agreed to provide me with her identification via email as soon as possible so I could verify her age.

I then asked Dausey about his conviction and he stated that he was a convicted sex offender and felon. I then asked him about the guns I saw in his room and first he told me that his Dad had left them to him. I commented that as a convicted felon he is not allowed to own firearms and then he said that his Dad left them to his wife. I asked him how many guns were in the cabinet and he invited me into the bedroom. He told me there were about 7 long-guns and one handgun. Dausey told me that the handgun belonged to his wife and that the others all came from him father. I advised him that it was a violation for him to be in possession of the firearms and told him that I would be taking them with me. I then formally advised him that he was under arrest for Unlawful Possession of Firearms and read him his Miranda rights. Dausey said he understood his rights and then told me that all the guns were his, except the handgun which he said his wife had purchased.

I certify (declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Due to the small children in the home and Dausey's health problems, I decided not to physically arrest him at the scene. I recovered a total of eight long guns and one handgun. The long guns include .22 rifles, shotguns and one large caliber hunting rifle.

Case forwarded to the Prosecutor's Office for formal charging.



Det. Sergeant Michael Beech #1084

Signed this 21st day of January 2009 in Coupeville WA.

INCIDENT #: 09-I 0031

DATE: 1-7-09

ISLAND COUNTY SHERIFF'S OFFICE
101 N.E. SIXTH ST/PO BOX 5000
COUPEVILLE, WA 98239-5000

PROPERTY RECEIVED/RETURNED FORM

PHONE: (360) Central/N. Whidbey: 678-4422 x7310 • S. Whidbey: 321-5111x7310 • Camano Island: 629-4523x7310

Reason Property Received: Safe Keeping Found Property Evidence Seized Property

Received From

Date: JAN 7, 2009

Name: (Print) DAUSEY, KEN C

Address: 1835 FT. NUGENT Rd

City, State Oak Harbor WA 98277

Phone: 679 6431

Description of Property

	Make	Model	Serial Number	Description	Value
1	LLAMA	MINIMA	71-0411300-03	.45 CAL HANDGUN	
2	Remington	Mohawk	5252490	.12 GAUGE AUTO-SHOTGUN	
3	H+R	Plainsman #25	NONE	BOLT ACTION .22	
4	Ruger	M77	75-68807	.270 WIN bolt action w/Bushnell scope	
5	Remington	522 VIPER	3221880	.22 RIFLE	
6	Springfield	Model 18	026163	.22 bolt action "SERIES F"	
7	Remington	Model 12	779406	.22 pump action rifle	
8	Winchester	Model 1906	61036	.22 pump action rifle (broken stock)	
9	Remington	Model 11-48	5025975	.12 GAUGE AUTO (NO STOCK ATTACHED)	
10					
11					
12					
13					
14					
15					

Pursuant to RCW 63.40.010 you have sixty (60) days from receipt of this notice to claim and take away the listed property. If you fail to remove said property from the Island County Sheriff's Office within sixty (60) days the property may be destroyed, sold at auction, or retained as property of the Sheriff's Office, depending on the item and circumstances. You may claim and take away your property by calling The Sheriff's Office, during business hours, to schedule an appointment with the evidence technician. Please bring your copy of this receipt with you when you come to claim your property, and bring one piece of photo ID. You may appoint someone to retrieve the property for you, as long as they have photo ID, a written consent signed by you, and a copy of your photo ID.

[] (initials) I have read and understand the above notice.

Deputy: MJB #1084 SGT. MICHAEL BEECH No. 1084 Date: 1/7/09
(signature)

Received From: [Signature] Date: _____
(signature)

Released To: _____ Date: _____
(signature)

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 64044-5-1
)	
KEN CHARLES DAUSEY,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 27TH DAY OF JANUARY 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] COLLEEN KENIMOND
ISLAND COUNTY PROSECUTING ATTORNEY
P.O. BOX 5000
COUPEVILLE, WA 98239

- [X] KEN DAUSEY
1835 FORT NUGENT ROAD
OAK HARBOR, WA 98277

SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF JANUARY 2010.

x *Patrick Mayovsky*