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NO. 64733-4-I

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

REC'D
JUN 29 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

WILLIE MAYES,

Appellant.

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

The Honorable Jeffrey M. Ramsdell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The State failed to present sufficient evidence to support appellant's conviction for delivery of a controlled substance.

Issue Pertaining to Assignment of Error

The State charged appellant Willie Mayes with delivery of cocaine. To convict Mayes of delivery by means of a constructive transfer, the State had to prove that the cocaine either belonged to Mayes or was under his direct or indirect control. The evidence introduced at trial demonstrated that Mayes never had possession of either the cocaine or the money received during the drug transaction. At most, Mayes was an observer who interjected his own commentary into an ongoing drug transaction. Did the State fail to present sufficient evidence to convict on this charge?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecuting Attorney charged Willie Mayes with delivery of a controlled substance (cocaine). CP 1. The information alleged that Mayes, along with two other men, sold cocaine in violation of RCW 69.50.401(1), (2)(a) on September 22, 2008. CP 1. A jury trial commenced in July 2009. The jury concluded that Mayes was guilty of delivering cocaine. CP 43.

Based on an offender score of six, the trial court sentenced Mayes to 75 months of confinement. CP 45, 47. Mayes filed a timely notice of appeal. CP 55.

2. Trial Testimony

Detective Adley Shepherd came into contact with Mayes during a buy-bust operation targeting drug activity along Rainier Avenue.¹ 2RP 17-18. Shepherd was the undercover buyer in the operation. 2RP 18. Shepherd saw Mayes standing with two other men and a woman on the corner of Rainier Avenue at 11:50 p.m. 2RP 19. He approached the group and recognized one man, James Jones, as the same person who had helped facilitate a drug deal earlier in the evening. 2RP 20. Shepherd greeted Jones, said the crack he had purchased earlier was really good, and asked if Jones had any more. 2RP 21.

Jones replied to Shepherd "it's happening," meaning that there were narcotics in the area. 2RP 22. Shepherd told Jones he wanted a "40" which amounts to \$40.00 worth of crack cocaine. 2RP 23. Jones asked Shepherd if he was going to "hook him up this time." 2RP 23. Shepherd explained that when someone

¹ 1RP is July 20, 2009; 2RP is July 21, 2009 and July 22, 2009; 3RP is July 23, 2009 and December 18, 2009.

facilitates a drug deal, it is common for the facilitator to ask the buyer to break off a piece of the crack cocaine. 2RP 23. Shepherd replied that he would “hook him up.” 2RP 23.

The two men that had initially been standing with Jones on the corner had begun walking away. 2RP 23. Jones yelled “Slow” in their direction and Mayes turned around. 2RP 24. Mayes tapped the arm of the man he was walking with, Daniel Mills, and both men turned around to meet up with Shepherd and Jones. 2RP 24. Jones told Mayes that Shepherd wanted “a 40.” 2RP 25. Mayes told Mills to give Shepherd a 40. 2RP 25. Mills reached into his coat pocket and then gave Shepherd two pieces of crack cocaine wrapped in plastic. 2RP 25. Mayes asked for the money, and then Shepherd handed the money to Mills. 2RP 25-26. Once he received the cocaine, Shepherd took a look at it, and Mayes said, “It is what it is, man. That’s a 40.” 2RP 26. The State attempted to show that Mayes’s comments to Mills demonstrated that he was the actual dealer. 2RP 26.

Shepherd walked away and gave the good buy sign to the arrest teams stationed in the area. 2RP 28. Jones approached Shepherd and asked for Shepherd to “hook him up.” 2RP 29. Shepherd refused to give Jones a piece of the cocaine, but did give

him \$20.00 for setting up the drug deal. 2RP 29. Shepherd estimated that the entire transaction took less than two minutes. 2RP 54.

Officer Thomas Barnett arrested Mayes at a bus shelter after Shepherd indicated that the sale had been successful. 2RP 68. Officer Steven Smith was also part of the arrest team. 2RP 158. When Smith received direction to arrest the two men standing at a bus stop on the corner of Rainer Avenue South and South Othello Street, he drove his patrol car right up to the bus stop. 2RP 159-60. As Smith approached the bus stop, he saw Mills reach into his pocket and throw two plastic bags of what appeared to be cocaine on the ground. 2RP 160.

Mills resisted arrest, so Smith pulled him to the ground with the assistance of another officer and placed him in handcuffs. 2RP 160. Mills was aggressive and argumentative with the officers during the arrest. 2RP 172. Smith found a wad of money on Mills. 2RP 173. The money found included the \$40.00 worth of buy money Shepherd had given him as well as an additional \$39.00. 2RP 173-74. In contrast to Mills, Mayes was very cooperative with police. 2RP 176. Smith described Mayes's demeanor as

“sluggish.” 2RP 176. Police searched Mayes, but did not find any money, plastic bags, razors, or drugs on him. 2RP 176-77.

Cynthia Graff, a forensic scientist from the Washington State Patrol Crime Lab, confirmed that one of the chips sold to Shepherd was cocaine. 2RP 97. Graff did not test the other bag sold to Shepherd. 2RP 97. Graff also tested the materials that Mills threw to the ground prior to his arrest and concluded that those plastic bags also contained cocaine. 2RP 140-41.

The defense theory of the case was that Mayes was incapable of directing either Jones or Mills to sell drugs based on his limited mental faculties. 2RP 134. To substantiate this theory, the defense called Dr. David White, a board certified rehabilitation medicine psychologist, to testify about a traumatic brain injury that impacted Mayes’s ability to function. 3RP 43-55. White had recently done a forensic evaluation of Mayes. 3RP 43. White testified that Mayes had memory problems, would frequently slur words together, talked very slow, and sometimes had a hard time finding the words to express himself. 3RP 50-51.

White conducted an IQ test and concluded that Mayes had a score of 72, which is in the range between mildly impaired and low average. 3RP 53-54. Based on a review of medical records and

an independent, in-person evaluation of Mayes, White concluded that Mayes would be able to follow simple commands, but “would have very significant difficulty directing others for a number of reasons.” 3RP 60-61. White explained that Mayes’s problems with executive functioning, his slow rate of speech, slurring of his words, and slow processing speed would impact his ability to take a leadership role and direct others. 3RP 61-62.

C. ARGUMENT

THE STATE DID NOT PRESENT SUFFICIENT EVIDENCE TO CONVICT MAYES OF DELIVERING A CONTROLLED SUBSTANCE.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

The State charged Mayes with delivering cocaine in violation of the Washington Uniform Controlled Substances Act. CP 1. RCW 69.50.401(1) states: "Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." The act states that "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." RCW 69.50.1010(f). Neither transfer nor constructive transfer are defined by the act.

In 1990, Division One of the Court of Appeals adopted a definition of "constructive transfer" from a Texas case. State v. Campbell, 59 Wn. App. 61, 63, 795 P.2d 750 (1990). 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." Campbell, 59 Wn. App. at 63 (quoting Davila v. State, 664 S.W.2d 722, 724 (Tex.Cr.App. 1984)). The court included a parenthetical explaining that the parallel provision of the Texas code, like RCW 69.50, was derived from the Uniform Controlled Substances Act. Campbell, 59 Wn. App. at 63. A

subsequent Texas case interpreting Davila concludes that the State must present some evidence of an agency relationship:

CAVEAT: Although the statute seems to expressly provide that a “delivery” can occur through the means of a “constructive transfer” without the existence of an agency relationship between the transferor and the transferee, the term “constructive delivery” as defined in Davila implies that an agency relationship must exist in every case involving constructive delivery of a controlled substance.

State v. Reed, 733 S.W.2d 556, 558 fn.6 (Tex.Cr.App. 1986).

Following Davila, the court of appeals in Campbell affirmed that trial court judgment that the defendant had sold cocaine to an undercover officer by means of a constructive transfer. Campbell, 59 Wn. App. at 62. Campbell had placed the cocaine on a car seat, where at his direction it was picked up by a third person and handed to the undercover officer. Campbell, 59 Wn. App. at 62. The facts presented by the State were sufficient for the jury to find that Campbell had delivered a controlled substance. Campbell, 59 Wn. App. at 63.

Conversely, in Davila, the State failed to present sufficient evidence to show that the defendant delivered heroin by constructive transfer. Davila, 664 S.W.2d at 724-25. An undercover agent and an informant arrived at a residence to buy drugs. Davila, 664 S.W.2d at 723. Upon entering the home,

Davila, who had been acquainted with the undercover agent for approximately two weeks, asked what the pair wanted. Davila, 664 S.W.2d at 723. The undercover agent replied “four,” so Davila went outside and talked briefly with a man named Cosme. Davila, 664 S.W.2d at 723. Shortly thereafter, the man entered the house, confirmed that the agent wanted “four,” and then handed the agent four party balloons tied at the opening in exchange for \$120.00. Davila, 664 S.W.2d at 723-24. A jury convicted Davila of constructive transfer, but the court of appeals reversed and the Supreme Court of Texas affirmed the judgment, quoting the sound reasoning presented by the court of appeals:

In the present case, the evidence fails to establish that the controlled substance in question belonged to appellant, or that prior to its delivery by Cosme, it was under her direct or indirect control. The evidence equally fails to establish that Cosme was acting as appellant's agent or under her direction. The only facts linking appellant to the offense charged are that she was on the scene and spoke to Cosme after Chism [the undercover agent] told her what he wanted and before Cosme made the delivery. However, those facts do not satisfactorily evidence either her ownership or control of the contraband, particularly since any control of the premises by her was negated, and they do no more than raise a suspicion that Cosme was either her agent or acting under her direction.

Davila, 664 S.W.2d at 724. The court concluded that the State had failed to prove that Davila “had direct or indirect control of the contraband prior to its delivery.” Davila, 664 S.W.2d at 724. Davila’s act of “merely relaying an offer from buyer to seller is not sufficient to prove that the seller acted at the ‘instance or direction’” of Davila. Davila, 664 S.W.2d at 725.

Here, unlike the facts in Campbell, Mayes never touched the cocaine. The State did not present any evidence that the cocaine belonged to Mayes or was in his possession at any time prior to the delivery. At most, the evidence demonstrates that Mayes interjected his own commentary into a drug transaction that was in progress. Mayes never touched the money involved in the transaction. Detective Shepherd testified that he believed that Mayes was directing Mills, but notably Shepherd did not give the money to Mayes. Mills had direct control over both the cocaine and the money during the transaction. Mills did not transfer any of the money to Mayes in the time that they had together prior to their arrests. During the search incident to arrest, police discovered that Mills held additional amounts of cocaine in his pocket. The State failed to present sufficient evidence that Mayes had any control over Mills’s actions.

This court should reverse Mayes's conviction based on insufficient evidence and remand the case to the trial court with instructions to dismiss the charge with prejudice. State v. Martinez, 123 Wn. App. 841, 847, 99 P.3d 418 (2004).

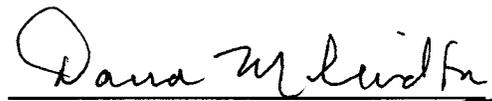
D. CONCLUSION

The State did not present sufficient evidence to support the charge of delivery of a controlled substance. This court should reverse the conviction and remand the case to the trial court for resentencing.

DATED this 29th day of June 2010.

Respectfully submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64733-4-1
)	
WILLIE MAYES,)	
)	
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 29TH DAY OF JUNE, 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] WILLIE MAYES
DOC NO. 907652
WASHINGTON STATE PENITENTIARY
1313 N 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF JUNE, 2010.

x *Patrick Mayovsky*