66121-3

66121-3

NO. 66121-3-I

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

REC'D
DEC 16 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

D.T.,

Appellant.

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

The Honorable Michael Trickey, Judge

BRIEF OF APPELLANT

DAVID B. KOCH
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A. ASSIGNMENTS OF ERROR

1. The evidence is insufficient to support appellant's conviction for delivering cocaine.

2. The trial court erred when it entered findings of fact 28 and 29 and conclusions of law 1 through 3.[1]

Issues Pertaining to Assignments of Error

1. Accomplice liability requires more than presence at the crime scene and knowledge that another is committing a crime. It requires knowing assistance. Where there is no evidence of such assistance, is the evidence insufficient to support appellant's conviction?

2. Findings of fact must be established by substantial evidence and those findings must support the court's ultimate conclusions. Where neither the evidence nor the law supports the trial court's findings and conclusions on accomplice liability, are they erroneous?

B. STATEMENT OF THE CASE

The King County Prosecutor's Office charged D.T. with one count of delivering cocaine. CP 1. The defense filed a motion to

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[1] The court's written findings and conclusions are attached to this brief as an appendix.

dismiss under State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986), arguing the evidence was insufficient to prove D.T.'s guilt. CP 7-13; 1RP[2] 5-12, 16-19. The State responded that D.T. could be found guilty under a theory of accomplice liability for acting as a lookout during the sale in question. 1RP 12-16. The Honorable Michael Trickey denied the motion to dismiss. 1RP 20-21.

Evidence at trial revealed the following. On the evening of March 22, 2010, at about 6:00 p.m., Seattle Police Officer Terry Bailey was stationed in the Pioneer Square area as part of an undercover buy/bust operation. Bailey was an undercover "trailing officer," assigned to observe and broadcast information to other officers. 1RP 39-40. He stood at the southwest corner of Second Extension South and South Washington Street. 1RP 43.

Bailey spotted two individuals – later identified as Mark Skinner and D.T. – walking southbound on Second Extension South. 1RP 45-46. The two stopped at a corner across the street and diagonal from where Bailey was stationed. 1RP 47. Skinner

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[2] This brief refers to the verbatim report of proceedings as follows: 1RP – August 30 and September 2, 2010; 2RP – September 3 and September 22, 2010.

separated from D.T. and stood near a business adjacent to an alley. He was 20 to 25 feet away from D.T. 1RP 48-49.

According to Officer Bailey, D.T. was looking up and down the street. 1RP 52-53. For approximately the next two minutes, several individuals approached Skinner and engaged in what appeared to be hand-to-hand drug sales. 1RP 51, 69-70. On five occasions, an individual took an item from Skinner's palm and gave him something in return. 1RP 51-52, 70-71.

None of the suspected purchasers spoke to D.T., who remained approximately 25 feet away the entire time. 1RP 52-53. At no time did Bailey see D.T. hand drugs, money, or anything else to Skinner or vice versa. 1RP 67-68. Nor did it appear that D.T. had contact with any of the individuals purchasing from Skinner – he did not bring the individuals to Skinner, call out to them, or in any other way interact with them. 1RP 71-73.

Skinner and D.T. met again at the corner and crossed the street, heading in Bailey's direction. D.T. was looking directly at Bailey, who was dressed as someone who might be homeless. 1RP 54-55, 64-66. The two walked past Bailey and around a corner, heading south on Second Avenue South. Bailey could still see them, however, through the building's glass walls. 1RP 56-57.

They had only walked a few feet in that direction when Bailey made eye contact with D.T. through the glass. 1RP 59, 77-78. D.T. then grabbed onto Skinner and the two changed direction, first heading northwest and then west on South Washington Street. 1RP 59-60. As they left Bailey's view and headed toward Occidental Park, Bailey provided a description for other officers. 1RP 61, 78-79, 89-90.

Officer Paul Vaca was an undercover purchaser. 1RP 104-105. Having been given a description of Skinner and D.T., he made his way on foot to Occidental Park. 1RP 119-121. Once there, he spotted Skinner and D.T. standing about five feet apart. 1RP 122. It appeared Skinner was engaged in a sale. 1RP 123. A group – somewhere between 3 and 10 people – was standing near Skinner. Vaca moved in closer and saw that Skinner had what appeared to be crack cocaine in his hand. 1RP 126.

D.T. was standing on one side of Skinner. Officer Vaca was standing on the other side. 1RP 125, 163-164. At one point, Vaca heard D.T. say, "Hurry up, man," but Vaca could not determine to whom D.T. was speaking. 1RP 127. Vaca cut in line, gave Skinner $60.00 in prerecorded buy money, and Skinner gave him crack cocaine. 1RP 127-128. Vaca stood there momentarily looking at

the crack. D.T. then said, "Leave, man." 1RP 128-129. Vaca left and gave his "good buy" signal. 1RP 129-130.

Vaca conceded he did not recall anyone in the group around Skinner speaking to D.T. 1RP 150-151. He did not see anything exchanged between D.T. and these individuals. There were no gestures between D.T. and these individuals. 1RP 152. D.T. was not seeking these people out or announcing the presence of crack. 1RP 154-155. Nor did Vaca see any type of exchange occur between D.T. and Skinner. 1RP 155.

Another undercover trailing officer – Officer Matthew Pasquan – observed the entire interaction between Vaca, Skinner, and D.T. from across the street. 1RP 165-168. He confirmed that D.T. was just standing and looking around while Skinner sold cocaine to Vaca. He did not exchange anything with anyone, call out to anyone, approach anyone, or throw anything down on the ground. 1RP 179-180, 182. Upon seeing Officer Vaca's signal, Pasquan called in an arrest team by radio. He noticed Skinner and D.T. looking at him and the two began to leave the park. Before they left the area, however, they were arrested without incident. 1RP 173-175, 180, 185, 192.

Skinner was carrying cocaine, the prerecorded buy money, plus $39.00 in additional cash. 1RP 195. A search of D.T. revealed "nothing of evidentiary value." 1RP 194. Subsequent testing of the material Vaca purchased from Skinner confirmed it contained cocaine. 1RP 100-101.

At the close of the State's case, the defense moved to dismiss, arguing the evidence was insufficient to convict D.T. as an accomplice to Skinner's sale. 2RP 3-8. The motion was denied, and the defense then rested as well. 2RP 11-12.

During closing argument, the State agreed D.T.'s conviction depended on accomplice liability. 2RP 14. The prosecutor argued that by serving as a lookout, D.T. had aided Skinner in the sale of cocaine to Officer Vaca. 2RP 15-26. The defense argued that D.T. had not assisted Skinner and his mere presence and proximity to the transactions was insufficient to find him guilty. 2RP 27-40.

Judge Trickey found that the State had successfully proved that D.T. knowingly aided Skinner in the sale to Officer Vaca through is presence and his statements. Therefore, he was guilty. 2RP 47-55. Subsequently, Judge Trickey entered detailed written findings and conclusions in support his decision. CP 40-47.

At sentencing, Judge Trickey imposed a manifest injustice disposition well below the standard range based, in part, on D.T.'s low level of involvement in the crime. 2RP 69-70; CP 48-52. D.T. timely filed his Notice of Appeal. CP 32-39.

C. ARGUMENT

THERE IS INSUFFICIENT EVIDENCE TO SUSTAIN D.T.'S CONVICTION AS AN ACCOMPLICE.

In all criminal prosecutions, 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 accomplice liability statute, RCW 9A.08.020, provides:

> (3) A person is an accomplice of another person in the commission of a crime if:

> (a) With knowledge that it will promote or facilitate the commission of the crime, he
>
> (i) solicits, commands, encourages, or requests such other person to commit it; or
>
> (ii) aids or agrees to aid such other person in planning or committing it. . . .

RCW 9A.08.020(3)(a)(i-ii).

Under this statute, an accomplice must have the purpose to promote or facilitate the conduct forming the basis for the charge. State v. Roberts, 142 Wn.2d 471, 510-11, 14 P.3d 713 (2000) (citing Model Penal Code § 2.06 cmt. 6(b)(1985)). Stated another way, an individual cannot be an accomplice unless "he associates himself with the undertaking, participates in it as something he desires to bring about, and seeks by action to make it succeed." In re Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979) (quoting State v. J-R Distribs., Inc., 82 Wn.2d 584, 593, 512 P.2d 1049 (1973)).

Notably, awareness and physical presence at the scene of an ongoing crime – even when coupled with assent – are not enough unless the purported accomplice stands "ready to assist" in the crime at issue. Wilson, 91 Wn.2d at 491; State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). Moreover, foreseeability

that another might commit the crime is also insufficient. State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2001).

As Judge Trickey correctly found, D.T. certainly knew or should have known that Skinner was selling cocaine while standing on Second Extension South and later in Occidental Park. CP 42 (finding 9). But each of the State's witnesses agreed that at no time during any of these transactions did D.T. summon potential customers, handle money, handle cocaine, physically interact with purchasers, or warn Skinner of potential threats. 1RP 67-68, 71-73, 150-155, 179-180, 182. Consistent with these observations, Skinner was found in possession of cocaine, buy money, and additional cash when arrested. D.T. had nothing of evidentiary value. 1RP 194-195.

In Officer Vaca's presence, D.T. did say, "hurry up, man." But Vaca conceded he did not know to whom this statement was directed. It may have been directed at Skinner. CP 43 (finding 24). A short time later, D.T. also told Vaca to leave. But these statements, which were intended to terminate the transactions, are too ambiguous to establish that D.T. was acting as a lookout.

Findings of fact not supported by substantial evidence are erroneous. Bering v. Share, 106 Wn.2d 212, 220, 721 P.2d 918

(1986). Judge Trickey found that D.T. was not merely present and knowingly assisted in the sale to Vaca. CP 44 (findings 28-29). But in light of D.T.'s extremely limited conduct and the ambiguous circumstances under which he spoke in Occidental Park, these findings are not supported by substantial evidence. These findings – and the court's ultimate conclusions on accomplice liability based on them – are erroneous.

At best, the State proved presence and knowledge that Skinner was selling cocaine. This does not establish accomplice liability. Wilson, 91 Wn.2d at 491; Luna, 71 Wn. App. at 759. Because the evidence is insufficient to sustain D.T.'s conviction, it must be reversed and the charge dismissed with prejudice. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

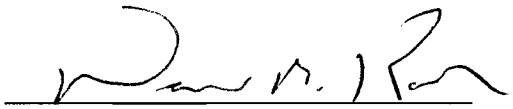
D. CONCLUSION

D.T. respectfully asks this Court to vacate his conviction.

DATED this 17th day of December, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



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APPENDIX

FILED
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CASE NUMBER: 10-8-00807-3 SEA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
JUVENILE DIVISION

STATE OF WASHINGTON, Plaintiff, vs. DAYLAE THOMAS DOB 7/7/92 Respondent.	No. 10-8-00807-3 **FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO JuCR 7.11(d)**

THE ABOVE-ENTITLED CAUSE having come on for trial on August 30 and September 2-3, 2010, before the undersigned judge in the above-entitled court; the State of Washington having been represented by Benjamin Carr; the respondent Daylae Thomas appearing in person and having been represented by his attorney, Maureen McKee; the court having heard sworn testimony and arguments of counsel, and having received exhibits, now makes and enters the following findings of fact and conclusions of law.

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FINDINGS OF FACT

1. On March 22, 2010, Seattle Police Officers Raul Vaca, Terry Bailey, and Matthew Pasquan were working in an undercover capacity in and near Occidental Park, Seattle, Washington. The goal of the operation was to buy illegal drugs from drug dealers, then arrest those connected with the drug deal.
2. At approximately 6 p.m., Officer Bailey set up surveillance on the southwest corner of 2nd Avenue Extension South and South Washington Street, approximately one block east of Occidental Square.
3. Officer Bailey soon observed two young males approach his location walking south along the east side of 2nd Ave Ext. S. The males were later identified as respondent DAYLAE THOMAS and co-respondent MARK SKINNER.
4. Officer Bailey observed the males stop at the northeast corner of 2nd Ave Ext. S. and S. Washington St., diagonally across the intersection from Officer Bailey and in Officer Bailey's direct line of sight.
5. From the corner, Skinner walked a few paces east on S. Washington St., away from 2nd Ave. Ext. S., and took up a position near an alleyway. Thomas posted himself directly on the corner of 2nd Ave. Ext. S. and S. Washington St. approximately 20-25 feet away from Skinner.
6. It was still light out and Officer Bailey had no problem seeing Thomas and Skinner. The officer's observation occurred during a time of day when buses and cars were traveling southbound on 2nd Ave. Ext. S. A bus stop was a few feet away from Officer Bailey on 2nd Ave. Ext. S. Pedestrians were walking in the area. There were also stores,

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1 restaurants, bars, food banks, homeless shelters and business offices in that area where
2 people were entering and exiting.
3 7. Thomas' position allowed Thomas to see north and south on 2nd Ave. Ext. S. and east and
4 west on S. Washington St.
5 8. While Thomas stood on the corner, Skinner conducted five suspected hand-to-hand drug
6 deals. When individuals approached Skinner, Skinner would pull a small object out of
7 his front pocket, he would hold it in his palm and show it to the individuals, he and the
8 individual would each hand something to the other, and then the individuals would walk
9 away. At least 1 individual tucked the item given to him by Skinner into his own mouth.
10 9. Given the totality of the circumstances, Thomas knew or should have known that Skinner
11 was selling crack cocaine.
12 10. Officer Bailey observed Thomas and Skinner for about two minutes. During this time
13 that these suspected drug deals took to complete, Thomas remained on the corner.
14 11. While standing on the corner, Thomas was actively looking up and down the street.
15 12. Once the five suspected deals were complete, Thomas and Skinner crossed together to the
16 southwest corner of 2nd Ave. Ext. S. and S. Washington, toward the spot where Officer
17 Bailey was positioned.
18 13. Officer Bailey and Thomas made eye contact when Thomas and Skinner walked towards
19 him. Though Officer Bailey was undercover, Thomas was watching him.
20 14. Thomas and Skinner walked west on S. Washington, then turned south onto 2nd Ave.
21 Plain. This section of 2nd Ave Plain forms an acute angle with 2nd Ave. Ext. S, so that the
22 building at that corner has a distinctive "wedge" shape. Because of the shape of the
23

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building and the positioning of the windows, Officer Bailey was able to maintain visual contact through the windows with Thomas and Skinner.

15. Once Thomas and Skinner had begun walking down 2nd Ave. Plain, Thomas looked back through the windows and saw Officer Bailey watching him.
16. As Thomas noticed Officer Bailey watching him, Thomas grabbed Skinner and changed directions, guiding Skinner back onto S. Washington St. and walking west with him into Occidental Park.
17. Officer Bailey radioed what he had just witnessed to his fellow officers.
18. Officer Vaca entered Occidental Park from 1st Avenue, with Officer Pasquan stationed nearby providing surveillance. Both officers were undercover, and Officer Vaca's role in the operation was to act as a "buyer" of drugs.
19. Officer Pasquan took up a position in an alleyway north of Occidental Park.
20. Officer Vaca approached the location radioed to him by Officer Bailey, and saw the described males. Officer Pasquan saw Officer Vaca immediately after he entered Occidental Park and also observed Skinner immediately after he entered Occidental Park.
21. Skinner had in his hand, and was selling, what appeared to be "crack" cocaine.
22. Thomas was standing next to Skinner, actively looking around the area.
23. Thomas was close enough to Skinner that he could hear Skinner's conversations.
24. As one person was purchasing suspected cocaine from Skinner, Thomas said "hurry up." Officer Vaca did not know whether Thomas was talking to Skinner or another potential customer when he said "hurry up."
25. Officer Vaca purchased crack cocaine from Skinner using $60 of pre-recorded "buy money."

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26. Skinner sold cocaine to Officer Vaca, knowing it was cocaine.

27. Officer Vaca lingered near Skinner following the drug deal. Thomas then looked at Officer Vaca and told Officer Vaca, "Leave, man."

28. Thomas was not merely present during the drug deal. Thomas assisted and was ready to assist Skinner during the drug deal.

29. Thomas knew his assistance and readiness would aid in the commission of the drug deal.

30. Officer Vaca turned and walked away from Thomas and Skinner, giving the predetermined "good buy" signal to surveilling officers.

31. Officer Vaca began walking north after the drug deal, which was observed by Officer Pasquan. Officer Vaca walked southwest through Occidental Park immediately after buying crack from Skinner. When he was near the southwest corner of the park, he looked east and saw Thomas and Skinner being stopped by the arrest team.

32. Officer Pasquan called for arrest team officers to respond to the area. Officer Pasquan testified that he saw Officer Vaca walk northwest through the park immediately after making the hand to hand exchange with Skinner.

33. Thomas and Skinner began walking away, then jogging, southeast across Occidental Park into an adjoining parking lot.

34. Officer Pasquan followed Thomas and Skinner southeast across the park. Officer Pasquan lost sight of Officer Vaca when he did this.

35. Officer Pasquan observed Thomas and Skinner arrested in the southern portion of the parking lot by arrest team officers. Officers searched Thomas and found no money or drugs.

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36. When Skinner was arrested, he was in possession of crack cocaine, the $60 in prerecorded buy money, and $39 dollars likely attributable to the earlier hand-to-hand exchanges witnessed by Officer Bailey. Officer Johnson testified that the going rate for one rock was $10.00 - $30.00.
37. Officer Vaca packaged the purchased crack cocaine for submittal to the State Crime Laboratory for testing.
38. State Crime Lab forensic scientist Ray Kusumi tested and confirmed that the purchased substance was crack cocaine, a controlled substance.
39. All observations and events described above occurred in Seattle, King County, Washington state.

And having made those Findings of Fact, the Court also now enters the following:

CONCLUSIONS OF LAW

I.

The State has proven the following elements of Violation of the Uniform Controlled Substances Act (Delivery of Cocaine), contrary to RCW 69.50.401(1), (2)(a) beyond a reasonable doubt: That on or about March 22, 2010, in King County, Washington, the respondent Daylae Thomas, together with Mark Skinner, unlawfully and feloniously did deliver cocaine, a controlled substance and a narcotic drug, to another person, and did know it was a controlled substance.

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II.

The State has proved that Daylae Thomas was an accomplice to the drug deal performed between Officer Vaca and Mark Skinner.

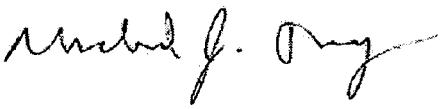
III.

The respondent Daylae Thomas is guilty, as an accomplice, of the crime of Violation of the Uniform Controlled Substances Act (Delivery of Cocaine).

IV.

Judgment should be entered in accordance with Conclusion of Law III. In addition to these written findings, the Court incorporates all of its oral findings and conclusions as reflected in the record.

SIGNED this 26th day of October, 2010.



Honorable Michael Trickey

Presented by:

Benjamin Carr, #40778
Deputy Prosecuting Attorney

Maureen McKee #32727
Attorney for Respondent Daylae Thomas

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66121-3-I
	)	
DAYLEE THOMAS,	)	
	)	
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 16TH DAY OF DECEMBER, 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] DAYLEE THOMAS
NASELLE YOUTH CAMP
11 YOUTH CAMP DRIVE
NASELLE, WA 98638

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF DECEMBER, 2010.

x Patrick Mayovsky