

NO. 34117-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

GORDON K. GRASSER

Appellant.

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

The Honorable James J. Stonier, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to support appellant's convictions for possession of a controlled substance and use of drug paraphernalia.

2. The court exceeded its statutory authority in imposing a 365-day sentence on appellant's misdemeanor conviction.

Issues pertaining to assignments of error

1. Appellant was charged with possession of a controlled substance (methamphetamine) and use of drug paraphernalia to store the methamphetamine. Where the jury was instructed it had to find appellant knowingly possessed a controlled substance in order to convict, and where the evidence did not establish either possession or knowledge, must the convictions be reversed?

2. Use of drug paraphernalia is a misdemeanor, subject to a maximum sentence of 90 days. Where the court exceeded its statutory sentencing authority by imposing a 365-day sentence, is remand required for imposition of an appropriate sentence?

B. STATEMENT OF THE CASE

1. Procedural History

On June 9, 2005, the Cowlitz County Prosecuting Attorney charged appellant Gordon Grasser with possession of methamphetamine, use of drug paraphernalia, and criminal trespass. CP 3-4; RCW 69.50.4013; RCW 69.50.412(1); RCW 9A.52.070(1). The case proceeded to jury trial before the Honorable James J. Stonier, and the jury entered guilty verdicts on all counts. CP 27-29. The court imposed a Drug Offender Sentencing Alternative for the possession conviction and 365-day sentences, with 335 days suspended, on each of the remaining charges. CP 37, 39. Grasser filed this timely appeal. CP 45.

2. Substantive Facts

On June 1, 2005, Gordon Grasser was evicted from the house he had been renting in Lexington, Washington. RP¹ 35. He moved in with his father and hired a friend, Carrie Weber, to take care of moving his belongings out of the rental house. RP 83, 94, 97. Weber had several people helping her with the move, including Sandy McKenna. RP 83. McKenna drinks a lot, and when Weber left the house for the last time on June 5, she noticed there were several beer cans and other odds and ends left behind. RP 84-85.

¹ The Verbatim Report of Proceedings (RP) is contained in three consecutively paginated volumes, two from the jury trial (11/2/05 and 11/3/05) and one from the sentencing hearing (11/9/05 and 11/23/05).

On June 3 the property manager, Christian Larson, had stopped by the house to retrieve the keys. Grasser was not present, but two other people were there in the process of moving. Larson spoke to a woman who gave him some keys and said they would be finished moving that evening. RP 9-10. When Larson drove by the house the following two days, however, he saw that there were still vehicles in the front yard. RP 30.

On June 6 the property owner asked the Cowlitz County Sheriff's Department to remove Grasser from property. RP 35. Deputies Handy and Schallert responded to the residence, accompanied by Larson. RP 36. The deputies knocked on the door several times but received no response. RP 37. Larson then provided keys so that the deputies could enter the house. RP 12.

Once inside, Larson and the two deputies saw Grasser by the door to the garage, heading toward the front door. RP 30, 55. Grasser was very cooperative as the deputies arrested him for criminal trespass. RP 16, 40. Schallert searched Grasser for weapons and contraband and found none, nor did she find any keys on his person. RP 71-72. Grasser told the deputies that the car in the garage belonged to him. The car was filled with personal possessions, but the deputies did not search the car. RP 42, 49, 69.

Schallert took Grasser out to the patrol car, while Handy searched the house for other people. RP 41. No one else was in the residence, and there was nothing in the house to indicate anyone was living there. RP 41-42. In one of the upstairs bedrooms, however, Handy found beer cans and other garbage strewn about, as well as a sleeping bag, some men's clothing, a vial of liquid, and a fanny pack. RP 43.

Handy started to search the fanny pack for identification and saw some cash inside. He stopped searching, however, when he remembered that the fanny pack was outside the scope of the authorized search. RP 44. He then went downstairs, had a brief conversation with Larson, and headed out to his car. RP 44. Before Handy pulled away, Larson came out of the house and said he had found what he believed were drugs in the fanny pack. RP 26, 45.

Handy went back inside the residence and took possession of the fanny pack. RP 26. He photographed the contents, collected them, and brought them to the station. RP 45. Inside the fanny pack were \$120.15 in cash, pliers, keys, a padlock, a lock pick, jack knives, cigarette lighters, a scoop, a small tin containing two baggies of methamphetamine, scales, and some additional baggies. RP 61-62, 64, 66. There was no identification or anything with Grasser's name in the fanny pack. RP 49,

67. There was, however, a Quest card in the name of Sandra McKenna. RP 50, 68.

As Schallert was transporting Grasser to the jail, Handy radioed that Larson had located a fanny pack with what appeared to be drugs inside. At the jail, Schallert told Grasser about the drugs and he responded, "yeah," and nodded his head. RP 59. When Handy again mentioned the drugs to Grasser, he did not seem surprised or angry. RP 46. In a conversation the next day, Grasser said that the drugs were not his and he did not know how they got in the house. RP 47.

Grasser was charged with criminal trespass, possession of methamphetamine, and use of drug paraphernalia. CP 3-4. The trespass charge was not disputed at trial. RP 125. The state's theory as to the drug offenses was that Grasser was in constructive possession of the fanny pack and that he knew of its contents. RP 119-20. It relied on the fact that Grasser was the only person in the house when the deputies arrived, there was no sign of forced entry, the only key inside the house was located in the fanny pack, Handy's testimony that Grasser said he had been sleeping upstairs, and Grasser's response when Schallert told him about the drugs. RP 120-21. The state was unable to link Grasser to the fanny pack or its contents through fingerprints or any other identifying evidence, however. RP 49, 67.

Even though the only identifying information found in the fanny pack belonged to Sandra McKenna, the state never spoke with her. Deputy Schallert testified that she had attempted to contact McKenna at the address associated with the Quest card found in the fanny pack. McKenna was not home when Schallert was there, however, so she left her business card. RP 68. Grasser testified that he knew who McKenna was, although he did not know her personally. RP 100. But Weber confirmed that McKenna was at the rental house helping with the move on June 5, the day before the fanny pack was found, and that she has known McKenna to use methamphetamine. RP 83-84, 92.

Grasser testified that he went to the rental house late in the evening on June 5 to make sure that Weber had left everything as it was supposed to be. RP 98. He used a key Weber had left under the door mat and pulled his car into the garage. While he was there, he decided to install a stereo in his car, and he fell asleep in the car when he was finished. RP 98-99, 101. Grasser woke up the next morning when he heard a pounding on the front door. He went into the house from the garage and saw the deputies standing inside the front door. RP 99. Although Handy remembered Grasser saying he had been asleep upstairs, RP 41, Grasser testified that he told the deputies he had stopped off to make sure everything was in order, he put a stereo in the car, and he fell asleep. RP

101. Schallert also testified that Grasser was coming from the garage area when they entered the house. He apologized for not opening the door and said he had been sleeping. RP 55-56.

Grasser testified that he does not own a fanny pack, that the fanny pack found in the house was not his, and that he did not know there were drugs in the house. RP 100. He believed he had left the house key in his car along with the rest of his keys, and neither the keys nor anything else in the fanny pack were his. RP 101, 104.

C. ARGUMENT

1. THE STATE FAILED TO PROVE POSSESSION OF METHAMPHETAMINE AND USE OF DRUG PARAPHERNALIA.

In every criminal prosecution, the state must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). On appeal, a reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996);

State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

Grasser was charged with possession of methamphetamine under RCW 69.50.4013, which provides:

(1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

Guilty knowledge is not an element of the offense, and ordinarily the state bears the burden of proving only the nature of the substance and the fact of possession. State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). The burden then shifts to the defendant to show that the possession was unwitting. Id.

In this case, however, the court instructed the jury that “It is a crime for any person to *knowingly* possess a controlled substance except as authorized by law.” CP 14 (Instruction No. 6, emphasis added). Moreover, the jury was instructed,

To convict the defendant of the crime of possession of a controlled substance as charged in Count I of the information, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about June 6, 2005, the defendant *knowingly* possessed a controlled substance; and
- (2) That the acts occurred in the State of Washington.

CP 15 (Instruction No. 7, emphasis added). The state did not object to inclusion of the knowledge element and in fact proposed the instructions given by the court. RP 107; Supp. CP 12, 15.

Elements included in to convict instructions which are not objected to become the law of the case which the state must prove beyond a reasonable doubt. Hickman, 135 Wn.2d at 99. By acquiescing to jury instructions which included knowledge as an element necessary to convict, even though it is not an element of the offense, the state assumed the burden of proving knowledge beyond a reasonable doubt. See Id. Thus, the state was required to prove not only that Grasser was in constructive possession² of the methamphetamine, but that he was knowingly in possession. The state did not carry that burden.

First, the evidence was insufficient to show constructive possession. Whether a person has dominion and control over a controlled substance, and thus constructive possession, is determined by examining the totality of the situation. State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). Mere proximity is insufficient to show dominion and control. Temporary residence, personal possessions on the premises, or

² Because there was no evidence that Grasser was in actual physical possession of the methamphetamine, the state had to prove the substance was under his dominion and control, i.e. constructive possession. See State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

knowledge of the presence of the drug, without more, are also insufficient. State v. Davis, 16 Wn. App. 657, 659, 558 P.2d 263 (1977).

In Davis, police officers entered a house with a search warrant. A party was in progress at the time, and about 20 people were present, including the owner and a permanent resident of the house. The defendant's vehicle was parked outside, and he was found asleep in a bedroom normally occupied by the homeowner. Although the police found marijuana in the house, none was found in the room where the defendant was sleeping, on his person, or in any of his belongings. The defendant had stayed at that house on occasion and kept a sleeping bag there. He also had a pile of clothes in the room where he was found during the search. 16 Wn. App. at 658-59.

The defendant was convicted of possession of marijuana, but the Court of Appeals reversed, holding the evidence was insufficient to establish the defendant had dominion and control over the premises. Id. at 659. The Court held that, as a matter of law, constructive possession of marijuana found in the house could not be based merely on the defendant's presence in the house. While dominion and control of the premises could be inferred from circumstances such as payment of rent or possession of keys, the fact that he was spending the night and had some personal possessions with him was not enough to show dominion and

control over the premises and thus constructive possession of the drugs found therein. Id.

Here, as in Davis, the evidence failed to show that Grasser had dominion and control over the premises. Like the defendant in Davis, Grasser has spent the night on the property, and his car, which held several of his possessions, was in the garage. RP 56, 69. But this evidence was insufficient to establish constructive possession of drugs found in the house. It was undisputed that Grasser had been evicted several days before his arrest and he had hired a friend to remove his belongings from the property. RP 35, 97. The state's witnesses testified that there was no indication that anyone was living in the house. RP 17, 20, 42, 57. Like Davis, Grasser was merely present on the premises at the same time as the drugs. But mere presence is not enough. See Davis, 16 Wn. App. at 659. The state failed to show that, by trespassing, Grasser gained dominion and control of the premises, and the evidence was insufficient to establish constructive possession of the drugs found therein.

In denying Grasser's motion to dismiss for insufficient evidence, the court below relied on State v. Partin, supra. RP 81-82. In that case, the Supreme Court upheld a conviction for possession of marijuana, finding that the cumulative effect of a number of factors established the defendant's constructive possession of the drugs. Partin, 88 Wn.2d at 906-

907. There, drugs were found in the clubhouse of a motorcycle club of which Partin was the vice president. Partin had more than a casual connection to the house, however. He had been seen there by police several times, he gave that address as his contact residence when he reported his motorcycle stolen, he told a number of other people he could be found at that address, several people came to the door or called the residence looking for Partin as the police were searching, his motorcycle was on the back porch, there was a picture of him on the wall in the living room, and the police found letters, paycheck stubs and unemployment warrants in his name. Further, when police had investigated noise at a party being held at that address, Partin stepped forward and took responsibility for the premises. 88 Wn.2d at 907-08. The Supreme Court held that the cumulative effect of this evidence sufficiently established a total situation from which a jury could infer Partin had dominion and control over the drugs. Id. at 908.

Here, on the other hand, the only evidence connecting Grasser with the house was that he had lived there before he was evicted and he had been asleep at the house the night before his arrest. The undisputed evidence was that there was no indication that anyone was living in the house at the time of Grasser's arrest. The only items found in the house other than the fanny pack were trash, a few items of discarded clothing,

and a sleeping bag which Weber and her friends left behind when they finished moving Grasser's belongings. RP 17, 21, 87. The evidence did not establish a set of circumstances from which the jury could infer Grasser was still in control of the premises or anything inside.

The state relied on keys found in the fanny pack to establish constructive possession of the drugs. The prosecutor argued that since there were no keys on Grasser's person and no signs of forced entry, Grasser must have used the key in the fanny pack to enter the house. Since the drugs were in the same location, Grasser must have had dominion and control over the drugs. RP 120-21. This is not a reasonable inference from the evidence but rather sheer speculation and conjecture. The state never showed that the keys in the fanny pack opened the door to the house or were connected to Grasser in any way. "When substantial evidence is present, the drawing of reasonable inferences therefrom and the doing of some conjecturing on the basis of such evidence is permissible and acceptable. . . . If, however, the necessity for conjecture results from the fact that the evidence is merely scintilla evidence, then the necessity for conjecture is fatal." State v. Liles, 11 Wn. App. 166, 171, 521 P.2d 973, review denied, 84 Wn.2d 1005 (1974). The presence of the unidentified keys in the fanny pack provides no more than a scintilla of evidence from which no permissible inference of dominion and control

can be drawn. See State v. Harris, 14 Wn. App. 414, 418, 542 P.2d 122 (1975), review denied, 86 Wn.2d 1010 (1976).

The state also relied on Handy's testimony that Grasser said he had been sleeping upstairs. The prosecutor argued that since the fanny pack was upstairs, Grasser was in constructive possession of the drugs. RP 117, 120-21. But Schallert's testimony did not corroborate Handy's recall. She was the first deputy in the house, and she testified that, when she entered, Grasser was coming in from the garage. He apologized for not answering the door and said he had been sleeping. RP 39, 54-56. Schallert's testimony corroborates Grasser's testimony that he had been asleep in the garage when the deputies arrived. RP 99. In light of Schallert's testimony, Handy's conflicting recollection is insufficient to establish beyond a reasonable doubt that Grasser was upstairs with the drugs. See State v. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995) (where lab tests achieved conflicting results and only one lab test indicated presence of controlled substance, Court held, "This welter of conflicting evidence does not amount to proof beyond a reasonable doubt.").

In any event, even if the jury could reasonably infer that Grasser had been upstairs in the same room where the fanny pack was found, that alone is not enough to establish constructive possession. As a matter of law, constructive possession cannot be predicated on mere proximity to

the drugs. Davis, 16 Wn. App. at 659; Callahan, 77 Wn.2d at 28-29 (Even though defendant was sitting at desk next to drugs and admitted handling the drugs earlier in the day, the evidence was insufficient to establish constructive possession.).

Next, even if this case is distinguishable from the above-cited precedent and the evidence is sufficient to establish constructive possession, the state's burden does not end there. As noted above, the state was required to prove beyond a reasonable doubt that Grasser knowingly possessed the drugs. There is simply no evidence to establish that element. Grasser's fingerprints were not found on the fanny pack or anything in it. There was no identification or anything with Grasser's name in the fanny pack. RP 49, 67. There was no indication he had used or opened the fanny pack at any time. There were no drugs or paraphernalia in plain sight. RP 22-23, 43-44. And there was no evidence that Grasser was in the residence when Sandra McKenna, whose Quest card was found in the fanny pack, was present. RP 68, 83. Thus, there is no evidence from which the jury could infer Grasser was knowingly in possession of methamphetamine.

The state's failure to prove Grasser was knowingly in possession of methamphetamine is also a failure to prove Grasser used drug paraphernalia to store the methamphetamine. As charged in this case, the

statute requires proof that Grasser used baggies to store a controlled substance. CP 3; RCW 69.50.412(1)³. While the evidence showed that drug paraphernalia was being used to store the methamphetamine, the evidence did not show that it was Grasser who so used the paraphernalia, because the state failed to prove that Grasser even knew of the methamphetamine's existence. Both convictions must be reversed and the charges dismissed. See Hickman, 135 Wn.2d at 103.

2. THE COURT EXCEEDED ITS AUTHORITY IN IMPOSING A 365-DAY SENTENCE ON GRASSER'S MISDEMEANOR CONVICTION.

At Grasser's request, the court imposed a Drug Offender Sentencing Alternative on his possession conviction. RP 158, 162; CP 37. In addition, the court imposed 365 days incarceration, with 335 days suspended, on both the paraphernalia conviction and the trespassing conviction. RP 163; CP 39. The sentence for use of drug paraphernalia exceeded the court's authority and must be corrected.

Grasser was convicted of using drug paraphernalia under RCW 69.50.412(1). That statute provides, "Any person who violates this subsection is guilty of a misdemeanor." RCW 69.50.412(1). Where no

³ RCW 69.50.412(1) provides as follows:

It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor.

other punishment is prescribed by statute, the maximum term a court may impose on a misdemeanor is 90 days. RCW 9.92.030. Although the Judgment and Sentence indicates that Grasser's misdemeanor conviction carries a maximum term of 90 days, CP 34, the court nonetheless imposed a 365-day sentence. CP 39.

The fixing of punishments for criminal offenses is a legislative function, and a court's sentencing authority is derived solely from statute. State v. Hughes, 154 Wn.2d 118, 149, 110 P.3d 192 (2005). The court below exceeded its statutorily-conferred authority by imposing a 365-day sentence on Grasser's misdemeanor conviction, and the unauthorized sentence must be vacated.

D. CONCLUSION

The state failed to prove beyond a reasonable doubt that Grasser was guilty of possession of a controlled substance or use of drug paraphernalia. His convictions on those counts must be reversed and the charges dismissed. In addition, the unauthorized 365-day sentence must be vacated and the case remanded for resentencing.

DATED this 25th day of April, 2006.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in *State v. Gordon Keith Grasser*, Cause No. 34117-4-II, directed to:

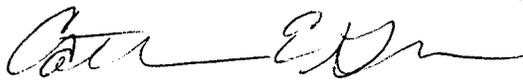
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
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Today I deposited in the mails of the United States of America, postage prepaid, a properly stamped and addressed envelope containing a copy of the Brief of Appellant in *State v. Gordon Keith Grasser*, Cause No. 34117-4-II, directed to:

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



Catherine E. Glinski
Done in Port Orchard, WA
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