

NO. 34892-6-II

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

STATE OF WASHINGTON, Respondent

v.

JAMES ELLIOTT CUNNINGHAM, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROBERT L. HARRIS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 06-1-00513-9

BRIEF OF RESPONDENT

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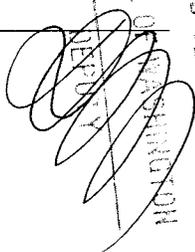
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I. STATEMENT OF THE CASE

The State accepts the statement of the case as set forth by the appellant.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is an argument that the State had failed to meet corpus delicti of the crime of Possession with Intent to Deliver Marijuana.

The corpus delicti rule requires independent evidence to corroborate any extrajudicial statement by a criminal defendant before being admissible at trial. The State's burden is one of production and not of persuasion. The independent evidence need not establish the corpus delicti beyond a reasonable doubt, or even by a preponderance of the proof. Rather, it is sufficient if it prima facie establishes the corpus delicti of the crime. State v. Aten, 130 Wn.2d 640, 656, 927 P.2d 210 (1996). "Prima facie evidence" has been defined as evidence sufficient to support a logical and reasonable inference of the corpus-related elements of the crime. Aten, 130 Wn.2d at 656. Furthermore, the independent evidence need not exclude every reasonable hypothesis consistent with the defense theory of a case. City of Bremerton v. Corbett, 106 Wn.2d 569, 578, 723 P.2d 1135 (1986). When assessing whether the evidence meets this test,

the appellate court views the evidence and all reasonable inferences in the light most favorable to the State of Washington. State v. Pineda, 99 Wn. App. 65, 77, 992 P.2d 525 (2000); State v. Corbelli, 56 Wn. App. 921, 924, 788 P.2d 1081 (1989).

It has been firmly established in the State of Washington that mere possession of a controlled substance is generally insufficient to establish an inference of intent to deliver. State v. Darden, 145 Wn.2d 612, 624, 41 P.3d 1189 (2002); State v. Goodman, 150 Wn.2d 774, 783, 83 P.3d 410 (2004). At least one additional factor must be present. For example, in State v. Zunker, 112 Wn. App. 130, 136, 48 P.3d 344 (2002) the Court of Appeals affirmed the conviction of a man arrested while possessing only 2.0 grams of methamphetamine. While recognizing that the amount of methamphetamine was insufficient by itself to prove the intent to deliver element, the court cited the “scales bearing meth residue, notebooks with names and credit card numbers, a cell phone battery, and meth ingredients” as sufficient evidence to support a conviction. Zunker, 112 Wn. App. at 136. Finally, even though the evidence may be consistent with personal use, it is the duty of the fact finder, not the appellate court, to weigh the evidence. Zunker, 112 Wn. App. at 136-137.

An example of the additional factors the courts have accepted as independent corroboration of intent to deliver include not only the large

quantity of drugs but also cash. State v. Campos, 100 Wn. App. 218, 998 P.2d 893 (2000). In the case of State v. Hagler, 74 Wn. App. 232, 872 P.2d 1098 (1993), the amount of cocaine was 2.8 grams and the amount of cash was \$342.00. Hagler, 74 Wn. App. at 232. Another example is found in State v. Lane, 56 Wn. App. 286, 786 P.2d 277 (1989) where there was one ounce of cocaine found, \$850 in cash and a scale.

In our case, Officer Martin located almost one-half pound of marijuana in the defendant's possession. On the defendant's person, Officer Martin found approximately \$200 in cash. In addition, the defendant's girlfriend retrieved his scales from his apartment and turned them over to the police. The State submits that the combination of the large quantity of marijuana, money and the scales logically leads to the inference that the scales would be used to breakdown and weigh small quantities of marijuana for sale. The cash obviously allows an inference that it was proceeds from previous sales of marijuana. All of this allows a rational trier of fact to infer that the defendant possessed the marijuana with intent to deliver. Viewing all this evidence in the light most favorable to the State, it is clear that the State has sufficient prima facie evidence of intent to deliver.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error deals with the condition of the Judgment and Sentence under community placement which prohibited the defendant from being in a place where alcohol is served by drink or sold as the primary sale item. (Judgment and Sentence, CP 57). The defense counsel is correct that the trial court had struck from the Judgment the provisions about alcohol because there is no information or evidence that alcohol had anything to do with this. The objection to the community custody condition dealing with being in a place where alcohol is sold likewise should have been struck and appears to have been an oversight by the court.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant deals with a DNA sample and payment of the DNA fee. The argument appears to be that because the defendant has a criminal history that therefore another sample for DNA purposes is unnecessary.

The determination of penalties for crimes is a legislative function. State v. Thorne, 129 Wn.2d 736, 767, 921 P.2d 514 (1996). When the plain language of a statute admits of only one meaning, the legislative intent is apparent and the appellate court will not construe the statute otherwise. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

The State submits that there is nothing ambiguous about RCW

43.43.754(1). It provides:

Every adult or juvenile individual convicted of a felony, . . . must have a biological sample collected for purposes of DNA identification analysis.

If any ambiguity can be discerned from that language, it is further clarified elsewhere in RCW 43.43.754(1) when it is indicated:

Every sentence imposed under Chapter 9.94A RCW, for a felony specified in RCW 43.43.754 that is committed on or after July 1, 2002, must include a fee of \$100 for collection of a biological sample as required under RCW 43.43.754, unless the court finds that imposing the fee would result in undue hardship on the offender.

The trial court did not make a finding in this case of undue hardship and the State submits that the language is clear that there is a mandatory collection of a DNA sample and a mandatory fee for collection of that biological sample.

V. CONCLUSION

The State submits that corpus delicti has been established in this case. Further, that the DNA collection and fee is appropriate. The State does agree that certain portions of the community placement should be modified to reflect the intent of the trial court. It appears that that was an

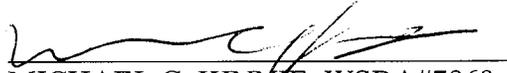
oversight on the part of the court in not striking the provision about being in places where alcohol is sold. The DNA sample and fee are appropriate.

DATED this 2 day of February, 2007.

Respectfully submitted:

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