

COURT OF APPEALS  
DIVISION II  
CELESTINE P. 12:33  
STATE OF WASHINGTON  
BY Y.M.  
Clerk

NO. 36316-0-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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**STATE OF WASHINGTON, Appellant,**

**v.**

**JOHN DION HERRING, Respondent.**

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**APPELLANT'S BRIEF**

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred by convicting Mr. Herring of unlawful possession of a controlled substance without sufficient evidence that he was a principal or accomplice in the crime.
2. The trial court erred by convicting Mr. Herring of unlawful delivery of a controlled substance without sufficient evidence that he was a principal or accomplice in the crime.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court err by convicting Mr. Herring of unlawful possession of a controlled substance where the only evidence of his involvement was his presence in the vehicle?
2. Did the trial court err by convicting Mr. Herring of unlawful delivery of a controlled substance where the only evidence of his involvement was his presence in the vehicle and his possession of \$40 in cash after the fact?

### III. STATEMENT OF THE CASE

On August 17, 2006, a police informant named Robin Schmel bought cocaine from Belinda Banks with two marked \$20 bills. RP4 270, 381, 387. The police surveillance showed that Ms. Schmel only dealt with Ms. Banks. RP4 381, 387. At the time of the drug deal, Ms. Banks was driving a black Hummer H3. RP5 431, 392. The owner's son, Patrick Douglas, was the front seat passenger. RP5 550. In the back seat was the defendant in this case, John Herring. RP5 434.

Following the controlled buy, marked police vehicles stopped the vehicle. RP4 392. Upon a search of the vehicle, cocaine was found in Ms. Banks' purse. RP5 454. Inside the back seat of the car, police found an additional small amount of crack cocaine in two baggies. RP5 477. Police also found two glass pipes. RP5 455. Mr. Herring had two \$20 bills in his hands. RP5 449. These \$20 bills were the same ones given to the CI for the buy. RP5 451.

No fingerprints were found on the cocaine or the glass pipes. RP5 508. Forensics established that the cocaine found inside the purse totaled .45g for the two rocks. RP5 523-24. The two baggies found in the back seat contained 1.2g of cocaine. RP5 526. Altogether, the cocaine found had a street value of around \$100. RP5 462, 487.

Although the CI was under surveillance the entire time she conducted the transaction, both visually and through a body wire, there was no evidence that Mr. Herring was at all involved in the drug transaction. RP7 652, RP4 353, RP4 381.

Following a jury trial, Mr. Herring was convicted of one count of unlawful delivery of a controlled substance, one count of unlawful possession of a controlled substance with intent to deliver, and one count of violation of a no contact order.<sup>1</sup> CP 200. This appeal timely follows.

#### IV. ARGUMENT

**ISSUE 1: THE TRIAL COURT ERRED BY CONVICTING MR. HERRING OF UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WHERE THE ONLY EVIDENCE OF HIS INVOLVEMENT WAS HIS PRESENCE IN THE VEHICLE.**

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

To convict Mr. Herring of possession of a controlled substance, the

jury had to find, beyond a reasonable doubt, that Mr. Herring or a person to whom he acted as an accomplice possessed the cocaine found inside the Hummer. CP 46.

Possession can be either constructive or actual. CP 42, *State v. Partin*, 88 Wn.2d 899, 905, 567 P.2d 1136 (1977). Actual possession occurs when the goods are in the personal custody of the defendant. *State v. Dobyms*, 55 Wn. App. 609, 614, 779 P.2d 746 (1989). Here, there was no evidence to show that Mr. Herring was in actual possession of the cocaine. Half of the cocaine was found in Ms. Banks' purse in the front seat. RP5 454. The other half was found in the back seat. RP5 477. The evidence did not demonstrate Mr. Herring's ownership, possession, or control over the controlled substance or the vehicle in which they were found, nor were his fingerprints found on them.

Constructive possession can be shown when the defendant has dominion or control over either the drugs or the location in which the drugs are found. *Dobyms*, 55 Wn. App. at 614. In determining whether there is sufficient evidence of constructive possession, the court must examine the totality of the circumstances. *Partin*, 88 Wn.2d at 906.

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<sup>1</sup> Mr. Herring was acquitted on the charge of tampering with physical evidence. RP8 736.

Mere proximity to drugs is not enough to establish constructive possession. See *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971); *State v. Spruell*, 57 Wn. App. 383, 389, 788 P.2d 21 (1990). In *Spruell*, officers entered a house and found one defendant seated at the kitchen table on which there was cocaine residue and a small scale; Hill, another defendant, was standing next to the table. *Spruell*, 57 Wn. App. at 384. A fingerprint of Hill's was found on a plate which evidence indicated had contained cocaine moments prior to the officers' entry. *Spruell*, at 384. The court held this evidence insufficient to establish dominion and control over the drugs because "mere proximity to the drugs and evidence of momentary handling is not enough to support a finding of constructive possession." *Spruell*, at 388.

Here, the evidence supporting the State's claim of Mr. Herring's dominion and control over the cocaine is even weaker than in *Spruell*. There is no evidence *beyond* presence and proximity from which one could reasonably infer dominion and control over the drugs themselves. The officers did not testify that Mr. Herring was involved in the transaction, that his fingerprints were found on any of the drugs, or that he was under the influence, circumstances which can constitute evidence of illegal activity. Cf. *State v. Haggarty*, 20 Wash. App. 335, 579 P.2d 1031 (1978) (ample grounds to arrest where officers noticed the odor of fresh

marijuana smoke, marijuana residue was within arm's reach of defendant, and defendant was under the influence of marijuana), *review denied*, 91 Wn.2d 1011 (1979).

In fact, the evidence established that Ms. Banks was involved in the sale of cocaine and that she possessed cocaine. There was no evidence beyond the fact that Mr. Herring sat in the back seat of that vehicle that Mr. Herring was her accomplice. Nor was there evidence that he independently possessed the cocaine. Therefore, the jury's verdict was not supported by substantial evidence and must be reversed.

**ISSUE 2: THE TRIAL COURT ERRED BY CONVICTING MR. HERRING OF UNLAWFUL DELIVERY OF A CONTROLLED SUBSTANCE WHERE THE ONLY EVIDENCE OF HIS INVOLVEMENT WAS HIS PRESENCE IN THE VEHICLE AND HIS POSSESSION OF \$40 IN CASH AFTER THE FACT.**

To find Mr. Herring guilty of the crime of possession of a controlled substance with intent to deliver, the jury had to find that either he or a person to whom he was acting as an accomplice possessed a controlled substance with the intent to deliver. CP 41. The jury instructions further told the jury that:

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

- (1) solicits, commands, encourages, or requests another person to commit the crime; or
- (2) aids or agrees to aid another person in planning or committing the crime.

The word 'aid' means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. *However, mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.*

CP 39 (Emphasis added).

The lack of evidence proving that Mr. Herring possessed cocaine is addressed above.

There is also insufficient evidence in this case that Mr. Herring aided in the delivery of a controlled substance. He was present in the vehicle where the transaction occurred, but his presence and knowledge of the transaction is not enough. *See above.* Moreover, evidence that he was holding two twenties, without more, establishes only that he was given that cash by Ms. Banks. This did not in any way assist in committing the crime, or even in concealing it from the police. Since the transaction was complete by that point, this does not establish Mr. Herring aided in any way in the drug transaction, only that he may have benefited after the fact.

*State v. Robinson*, 73 Wn. App. 851, 872 P.2d 43 (1994), involved a single incident where a passenger suddenly jumped out of the defendant's car without notice and stole the purse of a woman walking along the sidewalk. *Robinson*, 73 Wn. App. at 852-53. After the passenger returned to the car, the defendant panicked and drove away. The Court

held that the crime was complete once the co-defendant had obtained the purse through force. *Robinson*, 73 Wn. App. at 857. The Court determined that the defendant was not an accomplice because he did not associate himself with or participate in the crime. *Robinson*, 73 Wn. App. at 857. "Because Baker had completed the act of robbery by the time he reentered the car and Robinson saw the purse, Robinson could not have aided and abetted Baker's crime." *Robinson*, at 857. "His knowledge that Baker seemed to be struggling with Reynolds and his mere presence at the scene cannot amount to accomplice liability for Baker's crime." *Robinson*, at 857, citing *In re Wilson*, 91 Wn.2d 487, 491-92, 588 P.2d 1161 (1979). The court held that, at most, Robinson's actions "were more in the nature of rendering criminal assistance," rather than accomplice liability. *Robinson*, 73 Wn. App. at 858.

Like Robinson, Mr. Herring was not guilty as an accomplice, but rather, at most, he rendered criminal assistance after the fact. Police monitored the entire drug transaction here and still could provide no direct evidence that Mr. Herring was in any way involved. Mr. Herring never participated in the transaction or aided in it in any way. There is simply no evidence that Mr. Herring was an accomplice to unlawful delivery of a controlled substance. Therefore, Mr. Herring's conviction for unlawful delivery of a controlled substance must be reversed.

V. CONCLUSION

For the reasons stated above, Mr. Herring's convictions for unlawful possession of a controlled substance and unlawful delivery of a controlled substance must be reversed.

DATED: November 29, 2007

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CERTIFICATE OF SERVICE

I certify that on November 29, 2007, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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