

NO. 38859-6-II

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

STATE OF WASHINGTON, Respondent

v.

VAUGHN A. MILLER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE ROGER A. BENNETT
CLARK COUNTY SUPERIOR COURT CAUSE NO. 08-1-01812-1

BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

Because of the nature of the issue raised, the statement of facts will be set forth in the argument section of the brief.

II. RESPONSE TO ASSIGNMENTS OF ERROR

The assignments of error raised by the defendant deal with sufficiency of evidence relating to the two counts brought against the defendant in the Information (CP 1). In count one, he was charged with Possession of Controlled Substance With Intent to Deliver – Methamphetamine and in count two, he was charged with a gross misdemeanor of Tampering With Physical Evidence.

The nature of the allegations are intertwined and because of that they will be treated as one response. The court instructed the jury on the elements that needed to be proven beyond a reasonable doubt (Court's Instructions to the Jury, CP 7).

In the Court's Instructions to the Jury, No. 9 is the elements instruction dealing with possession with intent to deliver a controlled substance. It is set forth as follows:

To convict the defendant VAUGHN ALLEN MILLER of the crime of possession with intent to deliver a controlled substance, as charged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt;

(1) That on or about the 24th day of October, 2008, the defendant VAUGHN ALLEN MILLER possessed a controlled substance;

(2) That the defendant VAUGHN ALLEN MILLER possessed the substance with the intent to deliver the controlled substance; and

(3) That the acts occurred in the State of Washington, County of Clark.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

The jury was also instructed on the elements of tampering with physical evidence as charged in count two under instruction number 17.

That instruction reads as follows:

To convict the defendant VAUGHN ALLEN MILLER of the crime of tempering with physical evidence as charged in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) that on or about the 24th day of October, 2008, the defendant VAUGHN ALLEN MILLER, having reason to believe that an official proceeding was about to be instituted acted without legal right or authority;

(2) That the defendant VAUGHN ALLEN MILLER destroyed or altered physical evidence with intent to impair its appearance, character, or availability in such prospective official proceedings;

(3) That any of these acts occurred in the State of Washington, County of Clark.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

To establish the elements of the crimes beyond a reasonable doubt, the State called a number of witnesses in its case in chief. Deputy Pete Muller, from the Clark County Sheriff's Office, testified that he was the lead scout for the shop entry team of the Clark County/Skamania County Task Force executing the search warrant. (RP 88). He told the jury that he knocked and announced and that there was a long wait. After waiting for an extended period of time, it was decided to use the ram on the door. That was done and a flash grenade was then used prior to entering. (RP 89). Once inside the residence, the team came upon another door with two locks. The Deputy indicated that again they lost time getting in through that particular door. (RP 90).

The Deputy further testified then that they found the defendant inside another room which had a third door closed which had to be opened to gain access to the defendant. He was found in this interior room with a female. (RP 91).

Deputy Muller told the jury what the defendant was doing as he made entry into the room.

Q. (By Mr. Ikata) (Deputy Prosecutor): Without utilizing that adverb, if you can describe what you observed regarding Mr. Miller when - - you were at the entryway.

A. (Deputy Muller): At the top of the dresser, he was wiping things down and pouring liquids on top of objects on top of the dresser, and quickly moving - - and what - - wiping things down on top of the dresser.

Q. When you entered and you observed this conduct by Mr. Miller, what did you do or say, if anything?

A. As soon as I observed the two people inside the room, I ordered them to the ground. The female quickly compli- - - really - - or, complied really fast. She got right on the ground.

Q. What was Mr. Miller's response?

A. He looked at me and continued doing - - wiping down the dress. I had to repeat myself several times before he actually complied.

Q. When you say "several times," how many times? Two time, three - -

A. An additional two times. So a total of three times, I ordered him to get on the ground. I actually had to - - I transferred - - I transitioned from my handgun to my Taser and I was just about to Tase him when he just stopped, looked at me, and then knelt down on the ground. So - -

Q. Prior to going for your Taser, and Mr. Miller going down to the ground, was Mr. Miller continuing to pour and wipe down the table, or - - or not? What was he's doing up until he went to the ground?

A. That's what he was doing the entire time until he stopped and turned around and got on the ground.

Q. When Mr. Miller went to the ground, what did you do next?

A. Myself and my teammate approached both of them and - - and secured them in restraints.

Q. Once you secured Mr. Miller in restraints, what did you do next?

A. After they were secured, I looked around the immediate area for any other threats that I might have missed. You know, it was a small room. I happened to observe the area that Mr. Miller was standing at when I contacted him, which was the dresser. I noticed that on top of the dresser, there as a can of Pepsi; a scale - - a weight scale, measuring scale, electronic one - - and a lighted work station on top of the dresser.

The top dresser drawer was open, slightly open. And what I could - - saw was, the - - the contents of the Pepsi dumped all over the lighted work station, the scale, the dresser top; and inside the dresser was a plastic baggie of - - through my training, knowledge, and experience, led me to believe was suspected methamphetamines. And Pepsi was on top of - - on that baggie also.

Through those observations, we took the two - - Mr. Miller and the female, turned them over, consulted him - - consolidated them in the rec room portion of the - - the shop, and turned them over to TDU detectives, once the building was secured.

Q. Did you subsequently describe what you had observed Mr. Miller doing to other law enforcement officers - - for instance, to Deputy Sofianos?

A. Detective Conroy, TDU, teammate of his, came in. I explained my observations to him, just so that they knew what we came across, in the - - inside the shop.

- (RP 93, L.20 – 96, L.8)

The State next called Bill Sofianos, from the Clark County Sheriff's Office. He described the interior of the bedroom and what he observed when he made entry into the room.

Q. (Deputy Prosecutor): Did you assist - - was in Craig Marler and Jeff Brockus, with - - with searching the shop?

A. (Deputy Sofianos): Yes.

Q. Did you have opportunity to personally observe the dresser in the shop bedroom?

A. Yes, I did.

Q. And what did you personally observe, if anything?

A. On the - - the - - the table; it was a tabletop on top of a dresser - - was a large - - I guess the best way to describe it is what you might see when you walk into a bar or something. It's a large box with a light; and so that there's light that shines up so that you can put something on it. That was sitting on the - - on the table. There was a - - a digital scale on the table, a small black digital scale.

Q. Okay.

A. There was a - -

Q. And if I could have you hold on for one - -

A. Yes, sir.

Q. - - moment, please.

MR. IKATA: May I approach the witness. Your Honor?

THE COURT: Yes.

MR. IKATA: Thank you.

Q. (By Mr. Ikata): Showing you what's been marked as State's Exhibit No. 9. Do you recognize that item?

A. Yes, sir.

Q. Is that the item you were just describing?

A. Yes. This is the - - the black digital scale that was on top of the dresser in that main bedroom.

Q. What else did you personally observe on the dresser, if anything?

A. There was a dark liquid covering everything; and that scale is still sticky inside the bag. There was what - - presumed to be soda, all over; everything on top of the table, on top of that lighted work station, there was soda; on top of that scale there was the - - the dark liquid; and it's still sticky. Like I said, there was a - - a white cap, which looked like it might have went to the top of a - - some type of bottle. In that was also a dark liquid, and then a crystal substance that appeared to be suspected methamphetamine.

Q. Based on your training and experience?

A. Yes, sir.

Q. Were those crystal substances, the suspected methamphetamine, on the - - the dresser?

A. There was. Inside this white cap, I could see some suspected methamphetamine kind of mixed in with this - - this liquid substance. Spread across the - - the table, the top of the dresser, were numerous other pieces of - - of crystal substance, suspected methamphetamine, that had not been - - it had - - it was actually up underneath a little overhang on the dresser, and it was back in a corner; so there was nno soda or s- - liquid on that suspected meth as well.

Q. The suspected methamphetamine that you personally observed on the dresser - - was that ultimately collected by - - by an officer?

A. Yes, it was.

- (RP 110, L.16 – 112, L.25)

Deputy Sofianos also discussed with the jury that he found a metal box on the floor next to the dresser that he had just described in his testimony. Inside that box he found the following:

Q. (Deputy Prosecutor): And what did you observe, if anything, regarding that metal box?

A. (Deputy Sofianos): Inside the box, I located two more digital scales, aside from the one that was on the table. There was two of them inside this box. There was a - - a plastic container, estimated about an inch, an inch wide by half an inch thick, that had, again, some suspected crystal substance, suspected methamphetamine, inside. On the scales inside this box there was also suspected methamphetamine, a crystal sub- - - substance on the scales themselves. And there was a - - some type of medical I.D. card with Vaughn Miller's name on the card in the box with the - - those items.

Q. Showing you State's Exhibit No. 4. Do you recognize these items?

A. Yes. These are the - - the two scales, the two other digital scales that I located in this metal box.

Q. Showing you State's Exhibit No. 3.

A. This was the - - the plastic container, or - - for, too, that was also found in the box - - in that metal box there that contained the suspected methamphetamine.

Q. Showing you State's Exhibit No. 6.

A. And this is a - - it's labeled "Grest West Health Care," a medical card with "Vaughn Miller" - - Vaughn

Miller's name, a group plan number on it. This card was, again, located in that box by me with the scales and the - - the plastic container with the suspected meth inside.

- (RP 116, L.2 - 117, L.4)

The contents of this room and the area around the dresser and the box was also further described by Deputy Craig Marler, Clark County Sheriff's Office, when he testified for the State. He described observing the scales and also a small tin box which contained a number of small baggies. His testimony was as follows:

Q. (By Mr. Ikata) (Deputy Prosecutor): The suspected meth was gathered from the dresser?

A. (Deputy Marler): Yes.

Q. Do you recall finding anything regarding a tin?

A. Yes. There was a small tin that was in that - - in the room as well.

Q. Was there anything within the small tin?

A. There were small plastic baggies within that tin.

Q. Showing you State's - - thank you - - State's Exhibit No. 8. Do you recognize that item?

A. Yes.

Q. And - -

A. They're small, prob - - approximately inch-and-a-half or so, by inch-and-a-half, baggies, within - - and then some larger ones, within that.

Q. Thank you. And did you find anything regarding a scale?

A. Yes. There was a digital scale atop the same dresser where the suspected methamphetamine was.

Q. Showing you State's Exhibit No. 9. Do you recognize that item?

A. Yes, I do.

Q. Do you recall where you found that item of evidence?

A. It was on top of the dresser. It was wet, with a brown liquid. It's still sticky on the back, I see. And - - and it was on the same dresser where the suspected methamphetamine was, the crystalline.

- (RP 185, L.5 – 186, L.8)

The State used Deputy Jeff Brockus, Clark County Sheriff's Office, as an expert in the sale, packaging, and distribution of illicit drugs, particularly methamphetamine. He described from his experience, knowledge and training the use of multiple scales and the use of the baggies in the drug industry.

Q. (Deputy Prosecutor): Describe some of your - - describe your experience related to street-level dealing investigations with the Drug Task Force.

A. (Deputy Brockus): Depending on quantity, there's different levels of dealers: All the way from someone that'll sell "ten cents" - - which is basically a name for, like, a tenth of a gram - - all the way up to pounds. So it varies in packaging and how it's distributed and how it's measured. Obviously, these - - referring to these items here - - are small digital scales; wouldn't be used for pound quantities, because it wouldn't - - it wouldn't register on these. But they might

have bigger scales for bigger-quantity sales; where lesser-quantity sales, be it "ten cents"; a half-T, which is a 16th of an ounce; an eighth, 8-ball, eighth of an ounce - - these quantities will be used with these small digital scales, for smaller distribution.

Q. And is that, those three scales - - discuss the significance of those three scales, if any, based on your training and experience with the Drug Task Force.

A. Well, in my experience, when someone either purchases or sells something, it's normally done in front of the person. Some people package prior to; but not all the time. Some people like to have their amount of their purchase weighed out in front of them, to make sure it's accurate - - they're getting the accurate amount of what they're paying for. So dealers will carry these type of scales to actually weigh out in front of a person to show that they're getting the accurate amount of drug that they're purchasing; as well as the purchaser, so - -

Q. Are those scales used by dealers in order to - - to package their product?

A. Directly to package?

Q. And to separate out and package their product?

A. If - - if they were going to package, to - - to - - to - - to weigh the product before packaging, they - - they would - - they may use this to make sure they're getting the adequate amount in a bag, if they're pre-packaging; not directly used for packaging, obviously. But they may use this just to - - if they were selling in, you know, teener quantities, where they measure out a teener and then they put each individual amount in - - in baggies prior to sale. So - - usually, normally, a certain type of dealer only deals in a certain quantity. If they're using a low-level amount or selling a low-level amount, they'll package in all those quantities; versus, you know, purchasing large amounts - - be it ounces and pounds. Because it takes a lot more money, actually, to do the purchase, let alone to sell it. So - -

Q. And showing you what's been marked as State's Exhibit No. 8. Showing you what's been marked as State's Exhibit No. 8 - - taking a look at the items in No. 8, could you describe for the jury what you're looking at, and based on your training and experience with the Drug Task Force, the significance of those items, if anything.

A. Well, just on the tin in general, any container can hold any type of drug or anything; so - - but we typically see any kind of Altoid container, tins - - anything that might hold either packaging and/or drugs.

Referring to the plastic baggies inside, low-level quantities and sales - - these bags are usually representative in almost every case that I've done. Sometimes they will use, like, a sandwich-baggie type; but usually when a - - it get up a little bit more toward, you know, 8-balls and ounces, they go into the - - that type of packaging, traditionally, from what I've seen.

And these, is - - and these small baggies is normally where we're seeing the - - the small amounts of drug, be it methamphetamine or heroin or any other drug. If it's ten cents; if it's a gram; if it's a - - it's - - if it's a teener; because they hold a small quantity, and it's easy to see through. People know what they're getting. So - -

- (RP 239, L.10 – 242, L.8)

Catherine Dunn is a Forensic Scientist with the Washington State Patrol Crime Laboratory. (RP 305). She described how she tested seven different objects taken from that room and determined that all of them contained methamphetamine. (RP 312, 343). She also discussed with the jury the solubility of methamphetamine when it comes in contact with liquid. That testimony was as follows:

Q. (By Mr. Ikata) (Deputy Prosecutor): Ms. Dunn, crystal - - the crystal form of methamphetamine - - is that dissolvable in soda pop such as Pepsi?

A. (Catherine Dunn): The crystal form of methamphetamine, the solid form that we commonly see, is called methamphetamine hydrochloride. That particular form is, indeed, soluble in water; so it should be soluble, also, in a can of soda.

- (RP 343, L.22 – 344, L.4)

The State's claim in this matter was that this was a situation of constructive possession by the defendant. Not only was identification found in items related to the drug distribution industry, but he was also found attempting to destroy and eliminate the physical evidence. His conduct, the multiple scales and the baggies would lead a reasonable trier of fact to conclude that this man was involved in the sale and/or distribution of drugs, specifically methamphetamine.

Constructive possession is "established by showing the person charged has dominion and control over" the drug. The fact that a person has dominion and control over the premises where a drug is found is only one of the circumstances from which constructive possession can be inferred by the jury. State v. Shumaker, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007). Various factors determining dominion and control, and the cumulative effect of several factors is a strong indication of constructive

possession. State v. Ibarra-Raya, 145 Wn. App. 516, 525, 187 P.3d 301 (2008) (citing State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977)). The court must look to all the evidence to determine whether the trier of fact could reasonably infer, under the totality of the circumstances, that the defendant had dominion and control over the controlled substance. Partin, 88 Wn.2d at 906.

In reviewing a challenge to the sufficiency of the evidence, the Appellate Court views the evidence in a light most favorable to the State to determine whether a rational trier of fact could find the elements of the offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A large amount of a controlled substance is not required to convict a person of intent to deliver. Goodman, 150 Wn.2d at 782-83 (citing State v. Zunker, 112 Wn. App. 130, 136, 48 P.3d 344 (2002), review denied, 148 Wn.2d 1012, 62 P.3d 890 (2003)). But 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). At least one additional factor must be present. Zunker, 112 Wn. App. at 136. The State must show more than bare possession to support a conviction for possession with intent to deliver. State v. Brown, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993). At least one other factor must be present. Here, the officers found three digital scales, numerous

small plastic baggies, methamphetamine, and attempts to destroy the evidence. The presence of the scale and packaging could lead a rational trier of fact to find intent to deliver. See State v. Lane, 56 Wn. App. 286, 786 P.2d 277 (1989) (possession of cocaine with large amounts of cash and scales supported an intent to deliver); State v. Simpson, 22 Wn. App. 572, 590 P.2d 1276 (1979) (possession of uncut heroin, cutting agent, and packaging sufficient for intent to deliver); State v. Harris, 14 Wn. App. 414, 542 P.2d 122 (1975) (additional factor of scales).

The defense in its brief argues that State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990) defeats the State's argument that the fact of the defendant trying to destroy physical evidence would be enough to show that he is involved with the methamphetamine. However, in Spruell, a plate had been dropped on the floor, a fingerprint was found but there was nothing else. Here, at least one deputy actually sees the defendant attempting to destroy and eliminate physical evidence. The State submits that this evidence is far stronger than anything that Spruell contemplated when that decision was rendered.

The other factor in our case which was amply demonstrated by the deputies was that there was an inordinate delay in being able to make access into the house once the knock and announce was done. Clearly, there was no attempt by anyone in the residence to come to the door. The

deputy testified that there was a lengthy period of time when they had to wait at the knock and announce, then had to break in to gain entry and discovered a second door which had to be breached and then finally a third door before they came in contact with the defendant. The deputy indicated all of this took additional time. This would explain why the deputy, on first gaining access to where the defendant was, was delayed for a period that allowed the defendant to dissolve much of the drugs. It is also of interest to note that the defendant did not immediately stop his activities when ordered to do so, but continued to attempt to destroy more of the narcotics.

The State submits that all of this ties back to the general propositions relating to the State being able to prove substantial evidence of the elements of the crime. In reviewing the sufficiency of the evidence to support a guilty verdict in a criminal case, the Appellate Court views the evidence in the light most favorable to the prosecution to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Smith, 106 Wn.2d 772, 725 P.2d 951 (1986); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979)). A jury verdict will be overturned on review only when it is clear that there is no substantial evidence to support it.

Lamborn v. Phillips Pac. Chem. Co., 89 Wn.2d 701, 709, 575 P.2d 215 (1978). To determine whether the necessary quantum of proof exists, the court need not be convinced of the defendant's guilty beyond a reasonable doubt; it needs only be satisfied that there was substantial evidence to support the State's case. State v. McKeown, 23 Wn. App. 582, 588, 596 P.2d 1100 (1979).

The State submits that the elements of the crimes have been proven beyond a reasonable doubt and certainly to the satisfaction of the trier of fact.

III. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 24 day of July, 2009.

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