

NO. 39036-1-II

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

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STATE OF WASHINGTON, Respondent

v.

KEVIN KENTRELL ROSS, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
THE HONORABLE JOHN F. NICHOLS  
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-01002-3

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BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The State accepts the statement of facts as set forth by the appellant. Where additional information is needed, or needs to be clarified, it will be set forth in the argument section of this brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the State had failed to prove elements of the crime of Possession of Controlled Substance with Intent to Deliver – Marijuana beyond a reasonable doubt.

The defendant was charged in a Second Amended Information with count one – Delivery of a Controlled Substance – Marijuana and count two – Possession of Controlled Substance with Intent to Deliver – Marijuana. (CP 8). The defendant maintains that count two has not been adequately demonstrated in the record.

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 p.2d 628 (1980). When a defendant challenges the sufficiency of evidence in a criminal case, the Appellate Court draws all reasonable inferences from the evidence in favor of the State and

interprets all reasonable inferences from the evidence strongly against the defendant. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). Circumstantial evidence is no less reliable than direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can draw therefrom. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd 95 Wn.2d 385, 622 P.2d 1240 (1980). Finally, the appellate Court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004).

Possession of narcotics may be established by application of the doctrine of constructive possession. State v. Callahan, 77 Wn.2d 27, 29-30, 459 P.2d 400 (1969); State v. Gonzales, 46 Wn. App. 388, 403, 731 P.2d 1101 (1986). To establish constructive possession, courts must "look at the *totality of the situation* to determine if there is substantial evidence tending to establish circumstances from which the jury can reasonably infer that the defendant had dominion and control of the drugs and thus was in constructive possession of them." State v. Partin, 88 Wn.2d 899 at 906. Frequently, this involves establishing dominion and control over the premises where the drugs are found. State v. Callahan, *supra*.

Constructive possession can also be established by showing “dominion and control” over the drugs. State v. Spruell, 57 Wn. App. 383, 387 788 P.2d 21 (1990); State v. Schumaker, 142 Wn. App. 330, 174 P.3d 1214 (2007).

While “bare possession ... absent other facts and circumstances” is not enough for a trier of fact to infer an intent to deliver, there are additional factors present here. State v. Brown, 68 Wn. App. 480, 843 P.2d 1098 (1993) (quoting State v. Harris, 14 Wn. App. 414, 418, 542 P.2d 122 (1975), review denied 86 Wn.2d 1010 (1975)). In addition to the large amount of marijuana and cash contained within the residence, police also found scales, and packaging materials. Having a substantial amount of cash is also an additional factor indicating an intent to deliver. State v. Campos, 100 Wn. App. 218, 224, 998 P.2d 893 (defendant possessed \$1,750 cash), review denied, 142 Wn.2d 1006 (2000); State v. Hagler, 74 Wn. App. 232, 236, 872 P.2d 85 (1994) (defendant possessed \$342 cash). 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. State v. Harris, 14 Wn. App. 414, 542 P.2d 122 (1975) (additional factor of scales); State v. Simpson, 22 Wn. App. 572, 575-76, 590 P.2d 1276 (1979)

(additional factors of balloons and unusual amount of drugs and cutting agent); State v. Lane, 56 Wn. App. 286, 298, 786 P.2d 277 (1989)

(additional factors of scales and large amount of cash). In our case, we have a witness to the possession and sale of the drug.

Among the witnesses called by the State of Washington was Anthony Gallucci, a confidential informant, who conducted a hand-to-hand buy of drugs from the defendant. Mr. Gallucci was able to identify the defendant as being in the courtroom at trial and that he had known him for about seven years. (RP 59). He discussed the fact that he had worked as a confidential informant for law enforcement before and among his duties was a controlled buy from the defendant which was to take place at the defendant's residence. (RP 60-61).

Mr. Gallucci indicated that he had been to the defendant's residence on previous occasions and described in particularity the interior of the residence. (RP 60-62). He indicated that he called the defendant on the phone and asked if he had any marijuana and was told that he did. Mr. Gallucci indicated to the defendant that he wanted an ounce. He then obtained the money from the Vancouver Police Department and went over to the defendant's house to make the purchase. (RP 63). Prior to him going into the house, he discussed with the jury that he was thoroughly searched by the officers. He described going into the residence and that

the defendant was playing a video game at the time that he first came in. After about five minutes, the defendant went into a back room, grabbed the marijuana, grabbed a set of scales and also some packaging material from the kitchen and proceeded to weigh out the marijuana. Mr. Gallucci then indicated that he gave him the money for the marijuana and that that money was in fact exchanged. (RP 65, L.21 – 66, L.7). Further in direct examination, Mr. Gallucci described how the scales and packaging materials were used by the defendant. He also described seeing “bongs” and marijuana smoking pipes in the residence and that he also observed a larger bag of marijuana that his portion was taken from. (RP 67-69).

This is a far cry from simply bare possession of a substance. Clearly you have an eye witness to a delivery of the controlled substance and, given the nature of all the circumstances, you clearly can infer that there was an intent to deliver the marijuana to the gentleman. The State submits that there has been adequate showing to allow the case to go to the jury.

### III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim that the sentencing statute, RCW 9.94A.533(6) is ambiguous and the defendant should not be given consecutive sentencing because of that.

This has previously been discussed in case law and there is no indications from any source given by this defendant that there is an ambiguity here.

The meaning of a statute is a question of law that an appellate court reviews de novo. State v. J.M., 144 Wn.2d 472, 480, 28 P.3d 720 (2001). The court's goal is to determine and give effect to the legislature's intent. Id. If the language is unambiguous, the court will give effect to that language and that language alone because we presume the legislature says what it means. State v. Radan, 143 Wn.2d 323, 330, 21 P.3d 255 (2001). Clear and unambiguous statutory language is not subject to judicial construction. Hines v. Data Lines Sys., Inc., 114 Wn.2d 127, 143, 787 P.2d 8 (1990); Bravo v. Dolsen Cos., 124 Wn.2d 745, 752, 888 P.2d 147 (1995) (quoting Krystad v. Lau, 65 Wn.2d 827, 844, 400 P.2d 72 (1965)). Only if a statute is ambiguous do we examine extrinsic evidence of legislative intent or resort to canons of statutory construction. State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196 (2005); Burton v. Lehman, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). An undefined term in a statute will be given its usual and ordinary meaning, and the court may use a dictionary definition to determine the usual and ordinary meaning of the term. State v. Martin, 55 Wn. App 275, 277, 776 P.2d 1383 (1989); State v. Anderson, 58 Wn. App. 107, 110-11, 791 P.2d 547 (1990). Statutory language is unambiguous when it is not susceptible to

two or more interpretations. State v. Delgado, 148 Wn.2d 723, 726, 63 P.3d 792 (2003).

The Statute in question is the following:

RCW 9.94A.533. Adjustments to standard sentences....  
(6) An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.605. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

This statute was recently addressed in In the Matter of the Postsentencing Review of Gutierrez, 146 Wn. App. 151, 156, 188 P.3d 546 (2008):

The last sentence of RCW 9.94A.533(6), requiring drug zone enhancements to be served consecutively “to all other sentencing provisions,” was added by Laws of 2006, ch. 339, § 301. The acknowledged purpose of the amendment was to overturn the decision in State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2006). See FINAL BILL REPORT on Engrossed Second Substitute S.B. 6239, 59<sup>th</sup> Leg., Reg. Sess., at 4 (Wash. 2006); ENGROSSED SECOND SUBSTITUTE S.B. 6239, at 6-7, 59<sup>th</sup> Leg. Reg. Sess. At 7, 13-14 (Wash. 2006); HOUSE CRIMINAL JUSTICE & CORRRCTIONS COMM., H.B. ANALYSIS on Engrossed Second Substitute S.B. 6239, at 6-7, 59<sup>th</sup> Leg. Reg. Sess. (Wash. 2006). In *Jacobs* the court had reversed a DOSA sentence based on a range that had been expanded by stacking two 24-month drug zone enhancements. The court had concluded that it was unclear if the legislation required multiple drug zone enhancements to be served concurrently or consecutively to each other. Applying the rule of lenity, the court directed the trial court to add only 24 months to the base range on resentencing. Jacobs, 154 Wn.2d at 602-

604. The addition of the stacking provision in the 2006 legislation to change the *Jacobs* result did not change the command of the first sentence of RCW 9.94A.533(6) that enhancements are to be added to the base range. The amendment permitted multiple enhancements and directed that they run consecutively. It did not change the way that enhanced sentence ranges are calculated.

The School Bus Zone enhancement as defined by RCW 9.94A.533(6) is “an additional” twenty-four months “added to the standard sentence range.” The statutory language explicitly provides that the 24-month school Bus Zone enhancement is “added to,” or in other words consecutive to, the standard range sentence imposed. State v. O’Neal, 159 Wn.2d 500, 150 P.3d 1121 (2007). The defendant does not cite any cases which have interpreted the School Bus Zone enhancement as running concurrently with the underlying sentence. During the 17 years that the School Bus Zone enhancement legislation has been in effect, it has been consistently applied in accordance with the plain language of the statute as an additional 24-month period of confinement added to the sentence imposed. See State v. Silva-Baltazar, 125 Wn.2d 472, 478, 886 P.2d 138 (1994) (interpreting former RCW 9.94A.310(5), which is now RCW 9.94A.533(6), the court concluded the School Bus Zone enhancement provision adds 24 months onto the presumptive sentence); State v. Lusby, 105 Wn. App. 257, 265-66, 18 P.3d 625 (2001) (citing legislative history that the School Bus Zone enhancement statute was

intended to impose additional penalties for drug activities conducted within certain localities to increase the maximum penalty imposed and add two years to the presumptive sentence); See also, State v. Johnson, 116 Wn. App. 851, 856, 68 P.3d 290 (2003); State v. Nunez-Martinez, 90 Wn. App. 250, 256, 951 P.2d 823 (1998); State v. Wimbs, 74 Wn. App. 511, 514, 874 P.2d 193 (1994); State v. Dobbins, 67 Wn. App. 15, 18-19, 834 P.2d 646 (1992).

The State submits that the sentencing in this matter was proper under the circumstances.

IV. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 7 day of Oct, 2009.

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