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

**STATE OF WASHINGTON,
Respondent,**

v.

**MICHAEL DEAN HAMILTON,
Appellant.**

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES. ii

I. ARGUMENT. 1

 POINT I: Mr. Hamilton Lacked Dominion and Control Over Both
 His Employer's Truck and the Drugs Found in the Truck. . 1

 POINT II: Trial Counsel was Ineffective When, Based on His
 Ignorance of the Elements Required to Prove the Charge,
 He Conceded the Only Element the State Needed to Prove
 and Failed to Attempt to Establish a Viable Affirmative
 Defense. 3

II. CONCLUSION. 10

CERTIFICATE OF SERVICE. 11

TABLE OF AUTHORITIES

Washington State Cases

State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969)... 1

State v. George, 146 Wn. App. 906, 193 P.3d 693 (2008). 1

State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011). 8

State v. Potts, 1 Wn. App. 614, 464 P.2d 742 (1969). 2

State v. Roberts, 80 Wn. App. 342, 908 P.2d 892 (1996)... 2

State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990). 1

Federal Cases

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)
..... 8

Bell v. Cone, 535 U.S. 635, 66-97, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002)... 7

I. ARGUMENT

POINT I: Mr. Hamilton Lacked Dominion and Control Over Both His Employer's Truck and the Drugs Found in the Truck

The State failed to prove Mr. Hamilton's dominion and control over either his employer's truck or the drugs found in the truck. The evidence established Mr. Hamilton was only in temporary possession of the truck, just like the defendant in Callahan was only in temporary possession of the houseboat. State v. Callahan, 77 Wn.2d 27, 31, 459 P.2d 400 (1969). Temporary possession does not create dominion and control over the premises. *Id.* Without dominion and control over the premises, proximity to a controlled substance does not establish constructive possession of that substance: "[T]he rule is that 'where the evidence is insufficient to establish dominion and control of the premises, mere proximity to the drugs and evidence of momentary handling is not enough to support a finding of constructive possession.'" State v. George, 146 Wn. App. 906, 920, 193 P.3d 693 (2008), *quoting*, State v. Spruell, 57 Wn. App. 383, 388, 788 P.2d 21 (1990). Under these circumstances, the State failed to establish Mr. Hamilton's dominion and control over both the truck and the methamphetamine in this case. *See* Appellant's Brief at 15-24.

As explained in Appellant's Brief, the undisputedly temporary nature of Mr. Hamilton's possession of his employer's truck in this case distinguishes it

from cases in which a driver was found to have dominion and control over contraband discovered in the vehicle. Appellant's Brief at 23-24. Although the State relies heavily on State v. Potts, 1 Wn. App. 614, 464 P.2d 742 (1969), that case is similarly distinct. There, marijuana was found in the car the defendant had driven. Potts, 1 Wn. App. 614, 615. The defendant argued he could not be convicted of possession of the drugs because the State neither alleged nor proved he owned the car. *Id.* at 617. However, unlike in this case, there were no facts in the record indicating the defendant did not have sole ongoing use or possession of the vehicle. *See id.* Under those circumstances, the Court found the facts that the defendant was the sole occupant of the car, was driving it, and had the keys was sufficient to establish constructive possession of the drugs.

Accordingly, Potts stands for the unremarkable proposition that ownership of the premises where contraband is found is not required to establish constructive possession. Moreover, its disparate facts mean it does not control the outcome in this case. Here, by contrast, the evidence overwhelmingly established Mr. Hamilton had merely temporary possession of his employer's truck for an overnight shift and many other drivers shared access to that truck. *See* Appellant's Brief at 15-24; *see also* State v. Roberts, 80 Wn. App. 342, 354, 908 P.2d 892 (1996) (holding trial court erred in assuming defendant's ability to evict tenant

from basement of house defendant owned amounted to dominion and control over the premises sufficient to support inference of constructive possession of contraband found there).

For these reasons and the reasons set forth in Appellant's Brief at 15-24, the State failed to prove Mr. Hamilton constructively possessed the methamphetamine and this Court should reverse his conviction.

POINT II: Trial Counsel was Ineffective When, Based on His Ignorance of the Elements Required to Prove the Charge, He Conceded the Only Element the State Needed to Prove and Failed to Attempt to Establish a Viable Affirmative Defense

Because trial counsel mistakenly believed the State was required to prove Mr. Hamilton knowingly possessed a controlled substance, counsel conceded the only contested element – Mr. Hamilton's constructive possession of the substance – and failed to present the affirmative defense of unwitting possession. As argued in Appellant's Brief, these actions constituted ineffective assistance of counsel under either the Strickland or Cronic standards. Appellant's Brief at 25-37. An incorrect understanding of the charged crime, concession of the only contested element, and failure to present a viable defense were both deficient and prejudicial under Strickland and an utter failure of representation under Cronic.

The State's position that counsel was effective is untenable. The State concedes defense counsel misunderstood the charge. Brief of Respondent at 12.

Thus, according to the State's position, trial counsel meets the judicial standards of effectiveness even if he has not read the charge or looked at the law his client is alleged to have violated. That defense counsel in this case had not read the charge or the law is evident from his repeated assertions the State was required to prove knowing possession. *See* Appellant's Brief at 29-30. A 10-second glance at the statute or charge would have revealed knowledge was not an element of the charged crime. RCW 69.50.401(1); CP 3. Under the State's theory, then, an attorney who does not know what elements the State must prove at trial provides effective assistance of counsel. This unprecedented lowering of the standard of effective assistance should not be countenanced by the Court.¹

Next, the State agrees defense counsel conceded the only contested element of the only charged crime. Brief of Respondent at 15-16 (arguing "concession on the elements of the crime" was a tactical decision designed to bolster counsel's credibility). Its suggestion defense counsel made this concession to render his unwitting possession defense more credible is belied by the record. *See* Brief of Respondent at 16.

1. In this regard, the State misapprehends Mr. Hamilton's argument regarding counsel's failure to understand the charge. The resultant harm to Mr. Hamilton was not that the jury might believe counsel and add a knowing element to the to-convict instruction. Brief of Respondent at 12-13. Instead, the harm was that counsel's error caused him to concede the only disputed element and fail to mount an affirmative defense and that these actions directly resulted in Mr. Hamilton's conviction. Appellant's Brief at 9-21.

The record reveals that, to the extent concession of the elements of the charge was a tactical decision, it was a decision based on counsel's erroneous belief the State had to prove knowledge, not on reliance on the affirmative defense. Over and over, counsel hammered on the State's need to prove knowing possession. *See* Appellant's Brief at 29-30. By contrast, he only briefly touched on the affirmative defense. VRP 132-33. Indeed, counsel prefaced his discussion of that defense with the reminder that he had no burden to prove anything, a statement at odds with his supposed tactical decision that the affirmative defense would win the day:

Now, I've been saying that I don't have any duty, I don't have any burden in this case, which I don't. If you are going to convict him of the crime, all the burden lies on the State to convince you beyond a reasonable doubt, but you did hear the judge instruct you on Jury Instruction No. 11, and that's that instruction . . .

VRP 132.

In his perfunctory discussion of the affirmative defense, trial counsel swiftly passed over the defense to remind the jury the State had the burden of proving knowing possession:

So I want to talk just a couple seconds about that instruction, and that the burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. What does "unwittingly" mean? It means we don't know about it, and what is "preponderance of the evidence"? Well,

if you had two scales of justice and they are both lined up equally, a preponderance of the evidence is just about like that, okay, and the law defines it, preponderance of the evidence means that you must be persuaded considering all of the evidence in the case that it is more probably true than not, and if that's the conclusion you come to, and you read the top of that instruction, he is not guilty.

But even if you are not convinced of that, which I support there is evidence to find him not guilty based on that instruction and based on the evidence, **even if you weren't convinced of Jury Instruction No. 11 to find him guilty on that instruction, you still go back to the other instructions in which the State has to prove beyond a reasonable doubt the knowing element that I have already gone over.**

I know it's been a long day, so I won't go back over it, but you still hold them responsible for proving beyond a reasonable doubt that he knew what was in those pants.

VRP 133-34. If counsel were tactically conceding the elements of the offense to make his affirmative defense more credible, he certainly would have had more to say about that defense.

In fact, counsel spelled out his "tactical" reasoning at the time he made the concession. He told the jury he was conceding the constructive possession element not because his affirmative defense was so strong but because the State had to prove knowing possession:

Was he in dominion and control of the vehicle? Of course he was. This is his job. His job is to take the truck from Hannigan Express where he is an employee and he is a commercial truck driver, get in the truck, and drive it to its load. Of course he can tell people to get out of the truck. He has to physically sit in the car and drive it. **So, yes, but that's not the issue, right? That's not in dispute.**

What's in dispute is did he know what's in the pants. We can dance around it. It's the elephant in the room, but, hey, that's what it is, and what evidence has the State used to convince you beyond a reasonable doubt that he knew what was in those pants that were in the truck.

VRP 126-27 (emphasis added). For these reasons, to the extent the decision to concede the only contested element was tactical, tactics cannot shield defense counsel since he based his tactical decision on an erroneous understanding of the charge.

Further, the State defends Mr. Hamilton's trial counsel with a divide and conquer approach. Instead of looking at counsel's performance as a whole, it argues counsel's errors, each taken individually, did not constitute ineffective assistance. Brief of Respondent at 9-21. But counsel's errors were a package deal, not isolated events. It was counsel's misunderstanding of the nature of the charge that led him to concede the only disputed element and fail to mount an affirmative defense. To fairly assess the effect of these errors on Mr. Hamilton's case, the Court must look at counsel's performance throughout the whole trial, not at the discrete snippets the State attempts to break the case into. *See Bell v. Cone*, 535 U.S. 635, 696-97, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (counsel's performance in proceeding as a whole must be evaluated under Cronic). It is the State's piecemeal evaluation of counsel's performance that allows it to argue

Cronic does not apply. When viewed as a whole, counsel's failures of representation permeate the record and require reversal under both Cronic and Strickland.

In addition, the State's contention defense counsel mounted a viable affirmative defense does not withstand scrutiny. While Mr. Hamilton did exercise his right to testify on his own behalf, counsel repeatedly told the jury he had nothing to prove. Appellant's Brief at 30-31. If counsel were presenting an affirmative defense, he would have known he had to prove Mr. Hamilton's unwitting possession. Instead, this was a fact he merely mentioned in his closing argument, at the same time as he urged the jury to hold the State to its burden of proving knowledge. VRP 132-33.

Finally, counsel's errors prejudiced Mr. Hamilton. Prejudice is shown if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) Strickland, 466 U.S. 668, 694; State v. Grier, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011).

Counsel's actions in this case were more than sufficient to undermine confidence in the outcome of the case. Without counsel's misunderstanding of the charge, concession of his client's guilt and failure to establish an affirmative defense, the State would likely not have won at trial. As discussed in Point I above and in Appellant's Brief, the State's evidence of constructive possession was slim. *See* Appellant's Brief at 15-24. The truck in which the jeans were found was driven by many drivers. VRP 70-74. Mr. Hamilton did not own the truck, VRP 72, and testified he did not own the jeans. VRP 78-81. He had only been in the truck for a single overnight shift. VRP 79. The only evidence tying Mr. Hamilton to the jeans was his proximity to the pants, VRP 44, and Trooper Santhuff's unsubstantiated belief that the jeans could have fit Mr. Hamilton. VRP 66-68. Thus, if counsel had not conceded the only contested element, misunderstood the nature of the charged crime, and failed to present an affirmative defense, Mr. Hamilton very likely would have been acquitted.

* * * * *

For the remainder of his arguments, Mr. Hamilton relies on Appellant's Brief.

II. CONCLUSION

For all of these reasons, and the reasons set forth in Appellant's Brief, Michael Dean Hamilton respectfully requests this Court to reverse his conviction.

Dated this 15th day of October 2012.

Respectfully submitted,

/s/ Carol Elewski
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Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 15th day of October 2012, I caused a true and correct copy of Appellant's Brief to be served, by e-filing, on:

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/s/ Carol Elewski
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