

No. 43226-9-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

NATHAN R. WRIGHT, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon, Judge

No. 11-1-00195-4

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court jury had ample evidence that Wright unlawfully possessed a controlled substance and that he unlawfully used drug paraphernalia to contain or ingest a controlled substance, and after being presented with Wright's argument regarding the inference of unwitting possession to be drawn from the evidence of possession was unwitting, the jury nevertheless returned a guilty verdict. *Was it within the province of the jury to discount the weight of Wright's proffered defense of unwitting possession?*

2. No citations to the record were located to support a finding that Wright's patronage of bars or taverns contributed to his crime, nor was there any finding by the trial court that Wright suffers from a chemical dependency or that a chemical dependency contributed to his crime. However, because the court sentenced Wright for his conviction of vehicular homicide, the court was required by RCW 9.94A.703(4) to require Wright to obtain a chemical dependency evaluation and complete any recommended follow-up treatment. On these facts, *did the trial court err by imposing as conditions of community custody that Wright not go to bars or taverns and that he obtain a chemical dependency evaluation and complete any recommended follow-up treatment?*

B. FACTS AND STATEMENT OF THE CASE

The State accepts Wright's statement of facts. RAP 10.3(b).

However, the State presents the following additional facts that are relevant to the issues presented on appeal:

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Two syringes were found in the car. RP 120 The syringes were on the driver's side of the car, in the floorboard. RP 170, 203.

A spoon with a filter and liquid heroin in it were found in the car. RP 121, 171. The spoon was in the center console area of the car. RP 171. The spoon contained heroin. RP 173-178, 300. Heroin is usually a solid, but the heroin in the spoon was in liquid form, indicating that it had recently been melted to prepare it for use by injection. RP 300-305.

Wright admitted that there were drugs in the car. RP 314.

C. ARGUMENT

1. The trial court jury had ample evidence that Wright unlawfully possessed a controlled substance and that he unlawfully used drug paraphernalia to contain or ingest a controlled substance, and after being presented with Wright's argument regarding the inference of unwitting possession to be drawn from the evidence of possession was unwitting, the jury nevertheless returned a guilty verdict. *Was it within the province of the jury to discount the weight of Wright's proffered defense of unwitting possession?*

To convict Wright of unlawful possession of a controlled substance, the State had to prove that Wright unlawfully possessed a controlled substance. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502

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(1994). Possession need not be exclusive. *State v. Weiss*, 73 Wn.2d 372, 375, 438 P.2d 610 (1968).

The record shows that Wright was the driver of a car that was involved in a collision and that at the time of the collision there were two occupants of the car, Wright, who was driving, and the occupant, who was killed in the collision. RP 16-20, 59-61, 78-79, 267. There were two syringes in the car. RP 120. In the center console between where Wright and the passenger were seated before the accident, there was a spoon that was loaded with liquid heroin and a filter, making the heroin ready for use by injection. RP 121, 171-178, 300-305. During the investigation that followed the collision, Wright admitted that there were drugs in the car. RP 314.

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992), citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). On review of a jury conviction, the evidence is viewed in the light most favorable to the State and is viewed with deference to the trial court's findings of fact. *State v. Salinas*, 119 Wn.2d 192, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable in

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determining sufficiency of the evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004). The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt; the reviewing court need only find that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000).

In the instant case, the direct and circumstantial evidence -- and the inferences to be drawn from the direct and circumstantial evidence -- show that prior to the collision, while driving down the highway, Wright and his passenger used a spoon to heat up a mixture of heroin, turning it to a liquid form, and prepared the mixture by inserting a filter into the spoon in order to draw the liquid-heroin mixture through the filter into syringes to be used to inject the drug into their bodies. RP 16-20, 59-61, 78-79, 120-121, 171-178, 267, 300-305, 314. There is ample evidence in the record to sustain the jury's finding and verdicts of guilty that that Wright unlawfully possessed a controlled substance, heroin, and that he used drug paraphernalia, the spoon and filter, to store or contain a controlled

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substance or introduce it into the human body. RCW 69.50.412(1); RCW 69.50.4013.

Wright had the burden at trial to prove his unwitting possession defense by a preponderance of the evidence. *State v. Balzer*, 91 Wn. App. 44, 67, 954 P.3d 931 (1998), *review denied*, 136 Wn.2d 1022, 969 P.2d 1063 (1998). No citation to the record was located where Wright proffered any evidence to support his burden; instead, Wright relied upon inferences to be argued from the State's evidence.

Whether Wright had proved the defense of unwitting possession by a preponderance of the evidence was a question of fact for the jury. *State v. Knapp*, 54 Wn. App. 314, 322, 773 P.2d 134 (1989). In this case, it is apparent from the jury's verdict that the jury did not find the defense credible. The reviewing "court must defer 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, 874-75, 83 P.3d 970 (2004), citing *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985).

The jury received substantial evidence, rejected Wright's unwitting possession defense, and found him guilty as charged. Because it was within the province of the jury to determine the weight of the evidence,

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and because the jury had substantial evidence in support of its verdict, the jury's guilty verdicts should be sustained.

2. No citations to the record were located to support a finding that Wright's patronage of bars or taverns contributed to his crime, nor was there any finding by the trial court that Wright suffers from a chemical dependency or that a chemical dependency contributed to his crime. However, because the court sentenced Wright for his conviction of vehicular homicide, the court was required by RCW 9.94A.703(4) to require Wright to obtain a chemical dependency evaluation and complete any recommended follow-up treatment. On these facts, *did the trial court err by imposing as conditions of community custody that Wright not go to bars or taverns and that he obtain a chemical dependency evaluation and complete any recommended follow-up treatment?*

At sentencing, the court imposed community custody conditions that included that Wright "not go into bars, taverns, lounges, or other places whose primary business is the sale of liquor," and the court required Wright to obtain a chemical dependency evaluation and to complete recommended treatment. CP 14. However, no citation to the record was located where there are facts or circumstances that indicate that the use of alcohol contributed to the instant offense.

The legislature has sole province to establish legal punishments; thus, community custody conditions must be authorized by statute. *State v. Kolesnik*, 146 Wn. App. 790, 806, 192 P.3d 937 (2008), *review denied*, 165 Wn.2d 1050 (2009); *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003).

Pursuant to RCW 9.94A.703(3)(e) the sentencing court had statutory authority to require Wright, as a condition of community custody, to "[r]efrain from consuming alcohol." Additionally, the sentencing court had discretionary authority to impose crime related prohibitions. RCW 9.94A.703(3)(f). But there is no citation to the record to support a finding that alcohol or the patronizing of "bars, taverns, lounges, or other places whose primary business is the sale of liquor" contributed to Wright's criminal offense; therefore, the court lacked statutory authority to impose this community custody condition. *State v. Jones*, 118 Wn. App. 199, 76 P.3d 258 (2003).

In the instant case, Wright was convicted of vehicular homicide in addition to his conviction of possession of a controlled substance, and he received community custody conditions in regard to both convictions. CP 4-17. As a community custody condition, the trial court ordered Wright to

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obtain a chemical dependency evaluation and to complete recommended follow-up treatment.

Although there is no citation to the record where the trial court made a formal finding that chemical dependency contributed to Wright's offense, RCW 9.94A.703(3)(c) authorizes the sentencing court to order the defendant to "[p]articipate in crime-related treatment or counseling services." However, court-ordered substance abuse evaluations and treatment must address an issue that contributed to the offense. RCW 9.94A.607; *see also Jones*, 118 Wn. App. at 207–08, 76 P.3d 258.

The nature of Wright's possession of a controlled substance offense supports a finding that the court's order requiring a chemical dependency evaluation is crime related. RCW 9.94A.607 authorizes the court to impose chemical dependency treatment only when the court makes a finding that an offender has a chemical dependency that contributed to the offense. In the instant case, the court made no such finding, but the court did not directly require treatment. CP 14. The community custody condition imposed by the court requires only that Wright obtain an evaluation. Treatment is not required except as recommended following a professional evaluation. CP 14. In regard to conviction for possession of a controlled substance, Wright's community

custody condition that required Wright to obtain a chemical dependency evaluation is crime related. It follows that if the evaluation reveals a chemical dependency, the imposition of a treatment requirement would be appropriate.

Still more, however, RCW 9.94A.703(4) requires the court to require any defendant who is convicted of a drug or alcohol traffic offense, such as vehicular homicide, to submit to a chemical dependency evaluation and to complete any recommended follow-up treatment. RCW 9.94A.703(4). In addition to sentencing Wright on the possession of a controlled substance conviction, the court also sentenced Wright for conviction of vehicular homicide; thus, the court was required to order Wright to submit to an evaluation and to complete treatment. CP 4-17; RCW 9.94A.703(4).

D. CONCLUSION

There was ample evidence in the record for the jury to find beyond a reasonable doubt that Wright unlawfully possessed a controlled substance and that he unlawfully used drug paraphernalia. The jury was under no obligation to give weight to Wright's arguments or proposed inferences to be drawn from the evidence in support of his defense of

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unwitting possession. It is within the jury's sole province to determine the weight of the evidence and to determine the persuasiveness of the evidence. The jury's verdicts of guilty should be sustained.

Because the trial court lacked statutory authority on the facts of this case to impose a community custody condition that Wright not go to bars or taverns, his judgment and sentence should be amended to remove that condition.

Finally, because the court sentenced Wright for his conviction of vehicular homicide, the court was required by RCW 9.94A.703(4) to require Wright to obtain a chemical dependency evaluation and to complete any recommended follow-up treatment. To the extent that this requirement was imposed due to Wright's conviction for possession of a controlled substance, however, there is no evidence in the record or any finding by the court that Wright suffered from a chemical dependency. Thus, in regard to the conviction for possession of a controlled substance, the court-imposed condition that Wright obtain a chemical dependency evaluation and complete recommended follow-up treatment is not *per se* statutorily authorized, except that it is crime-related. Because the condition is related to the crime of conviction, however, the condition should be sustained. In either event, because the condition was required

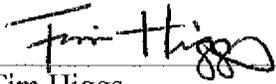
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due to the vehicular homicide conviction, whether it was also permissible in regard to the possession of a controlled substance sentence is moot.

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