

NO. 49757-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

DEMETRIUS HAYES,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Stephanie A. Arend, Judge

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BRIEF OF APPELLANT

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CATHERINE E. GLINSKI  
Attorney for Appellant

Glinski Law Firm PLLC  
P.O. Box 761  
Manchester, WA 98353  
(360) 876-2736

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A. ASSIGNMENT OF ERROR

There was insufficient evidence that appellant possessed a controlled substance with intent to deliver.

Issue pertaining to assignments of error

Mere possession of a controlled substance, even in an amount larger than commonly possessed for personal use, is insufficient to support an inference of intent to deliver. Where the State failed to present sufficient corroborating evidence of intent, must appellant's conviction for possession with intent to deliver be reversed?

B. STATEMENT OF THE CASE

1. Procedural History

The Pierce County Prosecuting Attorney charged appellant Demetrius Hayes with unlawful delivery of a controlled substance, unlawful possession of a controlled substance with intent to deliver, and bail jumping. CP 2-3; RCW 69.50.401(1)(2)(a)-(i); RCW 9A.76.170. The State alleged that the controlled substances charges were committed within 1000 feet of a school bus stop. CP 2-3; RCW 69.50.435. The case proceeded to jury trial before the Honorable Stephanie A. Arend, and the jury returned guilty verdicts and affirmative special verdicts. CP 71-76.

The court imposed standard range sentences, and Hayes filed this timely appeal. CP 101-16.

2. Substantive Facts

On June 8, 2015, Tacoma police used an informant to conduct a controlled buy in the parking lot of El Hutcho's Bar and Grill. 2RP<sup>1</sup> 73. The informant was searched, fitted with recording devices, and provided buy money. 2RP 74. The police handlers observed the informant walk toward the parking lot, and when the informant was out of sight of the handlers, another officer picked up surveillance using a camera. 2RP 75-76, 108. The informant conducted a transaction with someone sitting in a black Jaguar and returned to the handlers without the money and with two rocks of crack cocaine. 2RP 76, 109.

The officer watching the scene with a surveillance camera did not take still photographs during the transaction, but he took stills from the surveillance camera at El Hutcho's that afternoon. 2RP 106, 117. He testified that the person seen in the stills standing outside the Jaguar was Demetrius Hayes. 2RP 107. Police followed the black Jaguar from El Hutcho's approximately an hour and a half after the controlled buy. 2RP 81-82. The car was pulled over, and the driver was identified but not searched or arrested. 2RP 83, 98. Two officers observed the stop from 40

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<sup>1</sup> The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP—9/22/16; 2RP—9/27/16; 3RP—9/28/16; 4RP—9/29/16; 5RP—10/18/16.

to 50 yards away. 2RP 122. They testified at trial that the driver was Hayes. 2RP 83, 123. Neither the informant nor the officer who conducted the stop testified at trial.

Police conducted ongoing surveillance at El Hutcho's until August 25, 2015. 2RP 94. Detective Betts testified that he participated in surveillance of the parking lot at El Hutcho's from the last week of May through the end of August 2015. 2RP 63. During this surveillance he would see people arrive, meet with different people in the parking lot for two to three minutes, and often there was some sort of hand-to-hand exchange. 2RP 64. Betts described these encounters as suspected narcotics transactions, although he did not testify that any of the people involved were stopped, searched, or found to be in possession of narcotics or large amounts of cash. 2RP 64, 100.

Betts said he saw Hayes at El Hutcho's frequently, but he did not give specific dates. 2RP 63-64, 73, 88. Hayes was seen using the same black Jaguar that had been stopped following the controlled buy. 2RP 89. In the encounters Betts observed, Hayes was typically seated in the driver's seat. Sometimes people would get in the passenger seat, other times people would approach the window. Betts said he saw Hayes access the trunk of the car several times, although he could not tell what items Hayes was putting in or taking out of the trunk. 2RP 93-94.

Detective Krause testified that he participated in the surveillance at El Huthco's for more than a month, and he saw Hayes several times a week, although he did not provide specific dates and times. 2RP 110-11. Krause said he saw a lot of short-stay traffic where a car would pull in, and the driver would hop out and make contact with someone in front of El Hutcho's. There would be a short conversation, a quick hand-to-hand exchange, and the driver would return to the car. 1RP 111. He said at times he could actually see the person pour little chunks into someone's hand in exchange for something that looked like currency. 2RP 111. He did not specify that he saw Hayes do this. Id.

Officer Malave testified that he participated in the surveillance at El Hutcho's on multiple days over a period of six months, and he saw Hayes there maybe five or six times. 3RP 167-68. Hayes was using the black Jaguar when Malave saw him. 3RP 168. None of the surveillance officers saw Hayes use drugs while he was at El Hutcho's. 2RP 93, 114; 3RP 169.

On August 25, 2015, Hayes was arrested on a warrant following a traffic stop. 2RP 89, 124. He had been followed from El Hutcho's when he was stopped, but there was no evidence that he had been seen conducting transactions at El Hutcho's that day. 2RP 129. Police found

no controlled substances, no cash, and no cell phone in Hayes's possession. 2RP 127.

One of the officers involved in the stop drove the black Jaguar to a secured garage, and it was searched the next day after a warrant was obtained. 2RP 89; 3RP 178. One small rock of cocaine was found on the floorboard of the driver's seat. 3RP 179. In a small compartment in the trunk of the car, officers found a plastic sandwich bag with 30.1 grams of crack cocaine, about 40 to 60 rocks. 2RP 92, 111; 3RP 179-80. Detectives testified that normal usage is a few of rocks, at most seven, at a time. 2RP 92, 112. The only other item in the trunk was a pool cue case containing some cards in Hayes's name. 3RP 180.

C. ARGUMENT

THE STATE FAILED TO PROVE HAYES POSSESSED  
COCAINE WITH INTENT TO DELIVER.

Hayes was charged with unlawful possession of cocaine with intent to deliver. CP 2-3. To convict him of this offense, the State had to prove he possessed the cocaine found in the car after his arrest with intent to deliver it. Id.; RCW 69.50.401(1)(2). Constitutional due process required the State to prove these elements beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130

Wn.2d 747, 759, 927 P.2d 1129 (1996). To find the elements beyond a reasonable doubt, the trier of fact must “reach a subjective state of near certitude of the guilt of the accused.” Jackson v. Virginia, 443 U.S. 307, 315, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979). As a matter of state and federal constitutional law, a reviewing court must reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

Bare possession of a controlled substance is not sufficient to support a conviction for possession with intent to deliver. “Washington case law forbids the inference of an intent to deliver based on ‘bare possession of a controlled substance, absent other facts and circumstances.’” State v. Brown, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993). Possession of a controlled substance with intent to deliver requires proof of both drug possession and some additional factor supporting an inference of intent to deliver it. State v. Zunker, 112 Wn. App. 130, 135-36, 48 P.3d 344 (2002) (citing State v. Campos, 100 Wn. App. 218, 222, 998 P.2d 893, review denied, 142 Wn.2d 1006 (2000)).

The intent to deliver must logically follow from the evidence at trial. Campos, 100 Wn. App. at 222. “Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession.” Brown, 68 Wn. App. at 485.

Generally cases finding sufficient corroborating evidence of intent to deliver “contain additional factors substantially related to the distribution of drugs, rather than simple possession.” State v. Wade, 98 Wn. App. 328, 341, 989 P.2d 576 (1999). Factors which can give rise to an inference of intent include the possession of large sums of cash, weapons, pagers and cell phones, packaging materials, scales, log or ledgers for recording drug sales, and controlled substance separately packaged for sale. Campos, 100 Wn. App. at 223-24 (large sum of cash, pager, cell phone in addition to large quantity of cocaine); State v. Miller, 91 Wn. App. 181, 955 P.2d 810 (drugs packaged for individual use, empty packaging materials, sales list, knife supported intent to deliver), review denied, 136 Wn.2d 1016 (1998); State v. Hagler, 74 Wn. App. 232, 236, 872 P.2d 85 (1994) (large amount of cash supported inference that juvenile possessed 24 rocks of cocaine with intent to deliver); State v. Lane, 56 Wn. App. 286, 297-98, 786 P.2d 277 (1989) (large sum of cash and a gram scale supported inference of intent to deliver).

Washington cases have long recognized that possession of a larger quantity of drugs than typical for personal use is not sufficient to support an inference of intent to deliver, absent some other factor. State v. Hagler, 74 Wn. App. 232, 236, 872 P.2d 85 (1994); Brown, 68 Wn. App. at 485). In Brown, officers saw Brown, a juvenile, drinking beer in a high narcotics area. As they approached him, he ran. During the pursuit he dropped a baggie containing approximately 20 rocks of crack cocaine. The arresting officer testified that most users carry only one to four rocks of cocaine, and the amount Brown had was in excess of what was commonly seen for personal use. Brown, 68 Wn. App. at 481-82. Brown had no weapon, no large amount of money, no scales, packaging or other paraphernalia indicating sales, and the officers had not observed actions suggesting sales before they approached him. His possession of an amount of cocaine larger than typical for personal use was not the substantial evidence necessary to give rise to an inference of intent to deliver. Id. at 484-85. See also State v. Hutchins, 73 Wn. App. 211, 218, 868 P.2d 196 (1994) (evidence insufficient to support intent to deliver where there was no drug paraphernalia, no packaging materials, no scales, no separate packaging).

Here, as in Brown and Hutchins, the evidence was insufficient to sustain an inference of intent to deliver. The officers' testimony that the

amount of cocaine discovered in the trunk of the car was larger than typical for personal use could not alone establish intent to deliver. The cocaine was contained in a single baggie, not packaged separately for sale, and no cash, weapons, packaging materials, scales, cell phones, or log books were found in the car or in Hayes's possession. See 2RP 127, 3RP 179-80.

The State argued below that the officers' observations during the surveillance operation at El Hutcho's supported the inference that Hayes intended to deliver the cocaine found in the trunk of the car he was driving. 3RP 242. That evidence does not provide the substantial corroboration needed to give rise to an inference of intent, however.

Police observations of drug transactions were found to be logically related to the intent to deliver in State v. Thomas, 68 Wn. App. 268, 843 P.2d 540 (1992), review denied, 123 Wn.2d 1028 (1994). In that case, police officers conducting surveillance of a restaurant for suspected drug activity saw Thomas engaging in activities that resembled drug transactions. They saw people approach Thomas and speak to him briefly, and then saw Thomas reach into his jacket pocket, remove a pill bottle, and shake small items out of the bottle, which he exchanged for currency. Thomas, 68 Wn. App. at 270-71. Thomas was apprehended inside the restaurant after he completed these transactions. Officers found the pill

bottle containing 95 hits of rock cocaine in his coat pocket. In addition, he had more than \$400 and a pager in his possession. Id. at 271.

Here, by contrast, Hayes was not arrested at the scene of the alleged drug transactions. In fact, there was no testimony that Hayes engaged in any behavior indicative of drug transactions on the day of his arrest. There was evidence that an unnamed informant purchased cocaine from Hayes more than two months prior to his arrest. There was also evidence that Hayes was seen several times in the El Hutcho's parking lot over the course of the surveillance operation. No one testified as to any specific dates or number of times he was seen there, or even as to the most recent time such behavior had been observed, however. And while the officers gave their opinion that the actions they observed were consistent with drug transactions, there was no evidence that either Hayes or anyone else observed during the investigation was ever searched and found to have controlled substances or other indicia of drug transactions.

Given the lack of substantial corroborating evidence that Hayes intended to deliver the cocaine found in the car the day after his arrest, his conviction for possession of a controlled substance with intent to deliver must be reversed.

D. CONCLUSION

For the reasons discussed above, Hayes's conviction for possession of a controlled substance with intent to deliver must be reversed.

DATED April 27, 2017.

Respectfully submitted,



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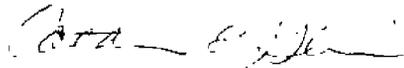
CATHERINE E. GLINSKI  
WSBA No. 20260  
Attorney for Appellant

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I certify under penalty of perjury of the laws of the State of Washington  
that the foregoing is true and correct.



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Catherine E. Glinski  
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