

FILED
Court of Appeals
Division II
State of Washington
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NO. 49926-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANNY RAY POTTS,

Appellant.

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

The Honorable Michael Evans, Judge, and
The Honorable Marilyn Haan, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THERE WAS INSUFFICIENT EVIDENCE THAT MR. POTTS POSSESSED DRUGS WITH THE INTENT TO DELIVER

Appellant Danny Potts argues to this Court, *inter alia*, that the convictions of possession with intent to deliver in Counts 1 and 2 should be dismissed because the State presented insufficient evidence to demonstrate that he intended to deliver the drugs that police found during the search of the house. Brief of Appellant at 30-36. The State argues in its Response that although Washington case law forbids the inference of an intent to deliver based on “bare possession of a controlled substance, absent other facts and circumstances[.]” Washington cases have found an intent to deliver from the possession of a quantity of substance “and at least one additional factor.” Brief of Respondent at 13, (quoting *State v. Harris*, 14 Wash.App. 414, 418, 542 P.2d 122 (1975), review denied, 86 Wash.2d 1010 (1976)).

The State argues that the facts of this case show an intent to deliver, including not only the weight of the drugs found in the house (13.5 grams, or one ounce according to Ms. Rickards), but also “drug trafficking paraphernalia, a confession and a large sum of money.” Brief of Respondent at 14.

These factors, however, are still not sufficient to support an inference of intent to deliver. Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Salinas*, 119 Wn.2d at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Under RCW 69.50.401(1), the statutory elements of possession of a controlled substance with intent to deliver are: (1) unlawful possession (2) with intent to deliver (3) a controlled substance.

As noted previously, Washington courts require evidence beyond possession to infer an intent to deliver. *State v. Brown*, 68 Wn.App. 480, 484, 843 P.2d 1098 (1993); *State v. Campos*, 100 Wn.App. 218, 998 P.2d 893 (2000) (undiluted cocaine, \$1,750 in small denominations, pager, cell phone, and a list with a column of numbers and the Spanish word for “snow” demonstrated intent to deliver); *State v. Hagler*, 74 Wn.App. 232, 236, 872 P.2d 85 (1994) (possession of 24 rocks of cocaine as well as \$342 in small denominations sufficient to infer intent to deliver); *State v. Lane*, 56 Wn.App. 286, 297–98, 786 P.2d 277 (1989) (large amount of

narcotics and cash as well as scales indicative of intent to deliver).

Here, the facts make this close to being a “naked possession” case. Mr. Potts had no weapon, no substantial sum of money, or drug paraphernalia indicative of sales or delivery other than the scale, to which the State assigns great significance. The methamphetamine was not separately packaged nor were there separate packages of drugs in Mr. Potts’ possession. Moreover, no informant testified about delivery of drugs from the house. Detective Libby stated that Mr. Potts said that anything found in the house belonged to him, and that the police must be there because they had “deliveries.” 2RP at 429-30. Mr. Potts denied making a statement that he was responsible for drug trafficking out of the house. RP at 592, 607. Baggies were found in the house, but the State failed to show that the baggies were specifically for use in packaging drugs for sale, rather than for innocuous household use, or for personal drug use. Moreover, even when baggies contain drugs, Courts have found that packaged drugs may not be sufficient to support a conviction for intent to deliver. In *State v. Cobelli*, 56 Wash.App. 921, 788 P.2d 1081 (1989), the court found possession of several baggies containing a total of 1.4 grams of marijuana was insufficient to establish even a *prima facie* case of intent to deliver. In *State v. Kovac*, 50 Wash.App. 117, 747 P.2d 484 (1987), the court found mere possession of seven baggies containing a

total of 8 grams of marijuana insufficient to establish possession with intent to deliver. In *State v. Liles*, 11 Wash.App. 166, 521 P.2d 973, review denied, 84 Wash.2d 1005 (1974), the court reversed the conviction for possession of heroin with intent to deliver where the evidence showed mere possession of a baggie containing 6.88 grams of 5 percent heroin. In *State v. Johnson*, 61 Wash.App. 539, 811 P.2d 687 (1991), a conviction for possession of cocaine with intent to deliver was reversed and remanded for resentencing on a lesser charge of simple possession where untainted evidence showed at most constructive possession of seven bindles of cocaine.

Here, despite the State's argument that police seized a "large sum of money," police seized only a total of \$600.00 from Mr. Potts. Moreover, Mr. Potts had a reasonable explanation for having this cash: he testified that the money was to be used to buy a pickup truck and he had \$450.00 in his pocket and \$150.00 in his wallet. RP at 593. He stated that he had the money separated because he wanted to try to buy the truck for \$450.00. RP at 593. This explanation makes sense; a reasonable person versed in the art of buying vehicles for cash would know not show all his or her available money to a potential seller and keep some money separate.

Mr. Potts stated that he used the digital scale when he bought drugs

from a dealer, and he would weigh the drugs “because some of those drug dealer guys are not real honest and they’ll try to not give you what you’re paying for.” RP at 595. He explained that he tried to buy the drugs he used once a month after he got a monthly check and “buy enough to try and get through the month without having to go out and see anybody else to get—to buy any more drugs. They were for me”. RP at 595.

There was no evidence the digital scale was for any other purpose other than his personal drug purchases. No informant testified regarding the use of the scale in weighing drugs to be sold, in fact no informant testified to the use of the scale at all.

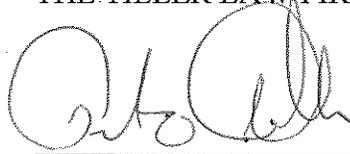
Because the evidence is insufficient as a matter of law to prove the required element of intent to deliver, the evidence is insufficient to support the jury's verdict. This Court must reverse Mr. Potts’ convictions and remand with directions that the trial court dismiss the charges with prejudice. *State v. Hickman*, 135 Wash.2d 97, 103, 954 P.2d 900 (1998) (“Retrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.” (citing *State v. Hardesty*, 129 Wash.2d 303, 309, 915 P.2d 1080 (1996))).

B. CONCLUSION

For the reasons stated herein, and in appellant’s opening brief, the appellant respectfully requests this Court to reverse the convictions.

DATED: March 14, 2018.

Respectfully submitted,
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", written over a horizontal line.

PETER B. TILLER-WSBA 20835
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CERTIFICATE OF SERVICE

The undersigned certifies that on March 14, 2018, that this Reply Brief of Appellant was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Ryan Paul Jurvakainen, Cowlitz County Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

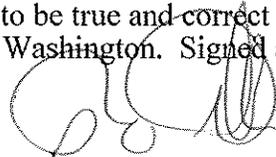
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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 14, 2018.



PETER B. TILLER

THE TILLER LAW FIRM

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