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Court of Appeals
Division II
State of Washington
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NO. 50160-1-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

WILLIAM CANNING,

Appellant.

RESPONDENT'S BRIEF

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**HALL OF JUSTICE
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I. ISSUE

1. Did the State present sufficient evidence that the Appellant possessed a controlled substance with intent to deliver?
2. Did the trial court err when imposing the \$250 jury demand fee as part of the Appellant's legal financial obligations?
3. Should the Appellant's case be remanded to correct the scrivener's error in the judgment and sentence?

II. SHORT ANSWER

1. Yes. The State presented sufficient evidence to support the Appellant's conviction for possession of a controlled substance with intent to deliver.
2. Yes. The trial court failed to inquire into the Appellant's ability to pay prior to imposing a discretionary LFO.
3. Yes. The Appellant's judgment and sentence mistakenly lists his offender score as 5 instead of 3.

III. FACTS

The State agrees, for the most part, with the factual and procedural history as set forth by the Appellant. Where appropriate, the State's brief will point to specific facts in the record regarding the issues before the Court.

IV. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT THE APPELLANT'S CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER.

The standard of review for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221 (1980). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638 (1980). For purposes of a challenge to the sufficiency of the evidence, the appellant admits the truth of the State's evidence. *State v. Jones*, 63 Wn. App. 703, 707-08, *review denied*, 118 Wn.2d 1028 (1992). All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 338-39 (1993). A reviewing court need not itself be convinced beyond a reasonable doubt, *Jones*, 63 Wn. App. at 708, and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, *review denied*, 119 Wn.2d 1011 (1992).

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. Harris*, 14, Wn. App. 414, 418 (1975), *review*

denied, 86 Wn.2d 1010 (1976). However, Washington cases have found an intent to deliver from the possession of a quantity of narcotics and at least one additional factor. For example, the *Harris* court found that possession of five one-pound bags of marijuana and scales evidenced intent to deliver. In *State v. Llamas-Villa*, 67 Wn. App. 448 (1992), possession of cocaine, heroin, and \$3,200, combined with an officer's observations of deals supported the inference of intent. In *State v. Mejia*, 111 Wn.2d 892 (1989), held that 1 1/2 pounds of cocaine combined with an informant's tip and a controlled buy supported an inference of intent to deliver. In *State v. Lane*, 56 Wn. App. 286 (1989), an ounce of cocaine, together with large amounts of cash and scales supported an intent to deliver, where the court specifically noted that cocaine is commonly sold by the 1/8 ounce. *State v. Simpson*, 22 Wn. App. 572 (1979), held possession of cocaine, uncut heroin, lactose for cutting, and balloons for packaging supported an inference of intent to deliver. Finally, in *State v. Hagler*, 74 Wn. App. 232 (1994), the court held that an inference of intent to deliver could properly be drawn from the defendant's possession of 24 rocks of cocaine and his possession of \$342 cash.

The State presented sufficient evidence to sustain the Appellant's conviction for possession of a controlled substance with intent to deliver. The Appellant mischaracterizes this case as one simply involving weight.

This case involved weight, the manner in which the controlled substances were packaged, the lack of drug paraphernalia, and possession of money.

The weight of the methamphetamine as presented to the jury was 13 grams, which is one gram short of one-half ounce. 1RP at 156. The State presented to the jury that a typical user amount of methamphetamine was approximately one gram or less. 1RP at 107; 128. So, the starting point of this analysis is that the Appellant was in possession of up to thirteen times the typical user amount of methamphetamine.

The manner in which the methamphetamine is also significant. The methamphetamine was packaged in three separate baggies, each one containing more than the others – 1 gram, 5.2 grams, and 6.8 grams. 1RP 116, 156. A typical user amount is 1 gram. One-fifth of an ounce is approximately 5.2 grams. A quarter ounce is approximately 6.8 grams. This half-ounce of methamphetamine was not contained in a single large bag, which would be the typical case if it was purchased in bulk. 1RP at 109, 122-23, 131. Rather, it was found in three separate bags, each containing a separate amount. One bag, ready to be delivered to a single user. The other two bags in quantities consistent with a weekend binge by more than a single user. The methamphetamine was not pre-portioned out into quantities for personal use, whether it be for that hour, day or ever week; rather it was portioned out in a manner consistent with an intent to deliver. As Det.

Mortensen stated, “[m]aybe it’s packaged, pre-packaged individually already, so it’s a quick sale, somebody can meet somebody, just do a quick hand-to-hand and off they go.” 1RP at 130.

The fact that this half-ounce of methamphetamine was split up in three separate bags in three separate weights without the presence of items to actually use the methamphetamine is significant. The Appellant was not found in actual possession of a smoking device. Although a methamphetamine pipe was located in his vehicle, he denied possession of it. 1RP at 185. It is illogical that a person would be in possession of one-half ounce of methamphetamine, packaged in three separate bags, that was solely for personal use, and not be in possession of an item to actually use the methamphetamine.

Finally, the presence of the \$125 cash supports the State’s evidence that the methamphetamine was not intended for person use. As described by Sgt. Langlois, the presence of a large quantity of controlled substances and a small quantity of money (or no money) is indicative of drug trafficking – namely that the Appellant had just restocked his supply to later sell. 1RP at 122. Again, the methamphetamine was not packaged in a single large bag; rather it was in three separate bags in three separate quantities. The presence of the \$125 supports the State’s evidence that the Appellant

has just “re-upped” his supply and intended on delivering the methamphetamine.

The Appellant argues that the weight of the methamphetamine is not significant, stating that the Appellant “was merely in possession of the 14 grams of methamphetamine he needed to support his addiction for 7-10 days.” *Appellant’s Brief* at 9; 1RP at 184. Again, 14 grams is not a “mere amount” or an insignificant amount. It is approximately one-half of an ounce. It is up to 14 times the typical user amount. Det. Mortensen’s testimony also contradicts this argument. It is not typical that a person would buy methamphetamine in bulk in this quantity.

You know, it’s not Costco, they don’t buy that large bulk to last them for a long time. Because you have several things to think about. You could get robbed for that. It costs more money than to just buy a gram here and there...you just don’t want to pack that around with you all the time.

1RP at 133.

Based upon this evidence – weight, the manner in which the methamphetamine was packaged, the lack of drug paraphernalia, and money – the State presented sufficient evidence to sustain the Appellant’s conviction for possession of a controlled substance with intent to deliver.

B. THE TRIAL COURT FAILED TO INQUIRE INTO THE APPELLANT'S ABILITY TO PAY PRIOR TO IMPOSING A DISCRETIONARY LFO.

The State agrees that the jury demand fee imposed by the trial court is a discretionary LFO. The trial court did not inquire into the Appellant's ability to pay his LFOs. The inclusion of the jury demand fee was done in error and should be stricken.

C. THE APPELLANT'S CASE SHOULD BE REMANDED TO CORRECT THE SCRIVENER'S ERROR IN HIS JUDGMENT AND SENTENCE.

The State, the Appellant, and the trial court all agreed that the Appellant's offender score for his convictions were 3. The judgment and sentence mistakenly lists his offender score as 5. A simple order to modify the Appellant's judgment and sentence can be entered to correct this scrivener's error.

V. CONCLUSION

The State requests this Court affirm the Appellant's conviction for possession with intent to deliver. The matter should be remanded to the trial

court to address the LFOs and scrivener's error in the judgment and sentence.

Respectfully submitted this 1st day of May, 2018.



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CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on May 7th, 2018.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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