

NO. 50237-2-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RICHARD D. PETERO,

Appellant.

AMENDED BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court erred when it accepted the jury's guilty verdict to the charge of possession of methamphetamine because substantial evidence does not support the conclusion that the defendant possessed the methamphetamine the police found.

Issues Pertaining to Assignment of Error

Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does a trial court err if it accepts a jury's guilty verdict to the charge of possession of methamphetamine when substantial evidence does not support the conclusion that the defendant possessed the methamphetamine the state offered into evidence?

STATEMENT OF THE CASE

Factual History

Sometime during the afternoon of October 29, 2016, Port Orchard Police Officer Donna Main was on routine patrol in Port Orchard when she stopped by some apartments in the 1800 block of Sidney Avenue to speak with a resident. RP 30-31¹. While in her patrol car conversing with that person she believed she saw the defendant Richard Petero and his girlfriend Jessica Schnabel walking about a block away. *Id.* At the time the officer was aware of an unconfirmed warrant for the defendant's arrest. RP 31-32. After finishing her business with the local resident, she drove down to the area where she believed the defendant had been walking but didn't find anyone. RP 32.

About an hour later while still on patrol Officer Main was driving southbound the 1800 block of Sidney Avenue when she again passed the defendant and Jessica walking in the opposite direction. RP 31-32. However, by the time she was able to turn around and return they were

¹The record on appeal includes five volumes of verbatim reports. The first has the transcripts of the two hearings held on 1/23/17. It is referred to herein as RP 1/23/17 [page #]." The second, third and fourth volumes include the transcripts of the jury trial held on 2/13/17, 2/14/17 and 2/15/17. They are continuously numbered and are referred to herein as "RP [page #]." The fifth volume has the verbatim report of the sentencing hearing held on 2/24/17 and is referred to herein as "RP 2/24/17 [page #]."

gone. RP 43-45. Officer Main then pulled into the apartment complex at 1790 Sidney, found Ms. Schnabel, spoke with her, and then returned to again drive southbound on Sidney. *Id.* As she passed the house at 1833 Sidney she saw the defendant standing on the porch or in the yard speaking with the homeowner, who was on the porch. RP 31-32, 43-44. In fact, earlier that day the homeowner had seen the defendant walking down the road with a gas can and had given him a ride to a gas station. RP 58-62. He had later helped the defendant look for the lost keys to the defendant's car. *Id.*

Upon seeing the defendant, Officer Main stopped her patrol vehicle, pulled out her sidearm, pointed it at the ground in front of her, yelled at the defendant that he was under arrest, and ordered him to the ground. RP 35. The defendant, who had been speaking with the homeowner, turned to look at her. *Id.* At that point he looked confused, started flailing his arms around and repeatedly asked what was going on. RP 35-36. As he did he fell over a planter on the edge of the porch. RP 35-36, 49-50, 65-66, 96-97. By this time Officer Main was able to get to the defendant, place him in handcuffs, and take him to her patrol vehicle, where another officer who had just arrived took custody of him. RP 37. According to Officer Main, from the time she first yelled at the defendant that he was under arrest she

continuously had the defendant in her sight, she did not see anything in his hands, and she did not see the defendant throw anything down. RP 49-50.

Once the Officer Main confirmed the warrant for the defendant, she returned to the front porch of the house to ask the homeowner if he had seen the defendant throw anything down. RP 51-42, 79. The homeowner stated that at one point he saw the defendant throw a white tissue from his left hand into the homeowner's side yard. RP 79, 81. Officer Main then walked into that area and found a clear plastic baggie on the grass with 6.4 grams of a crystalline substance in it that later tested positive for methamphetamine. RP 84-91. It had a retail value between 325 to 350 dollars. RP 41-42.

Procedural History

By information filed November 3, 2016, the Kitsap County Prosecutor charged the defendant with possession of methamphetamine. CP 1-5. Following a continuance at the defendant's request this case came on for trial on February 13, 2017. RP 1/22/17 1-25; RP 1. At the beginning of trial the defendant appeared with new counsel he had been just been able to retain the preceding day. RP 1-5. His retained counsel then moved to continue the trial date to have adequate time to prepare. *Id.* The trial court denied the motion and asked retained counsel whether nor not he

was prepared to go to trial. *Id.* When he said he was not the court denied his implicit request for substitution and the case proceeded to trial with appointed counsel continuing to represent the defendant. *Id.*

During trial the state called three witnesses: Officer Main, the homeowner at 1833 Sydney Ave., and a forensic scientist. RP 29, 58, 84. The defense called two witnesses: the defendant and Jessica Schnabel. RP 92, 104. These witnesses testified to the facts contained in the preceding factual history. *See Factual History, supra.* In addition, the defendant denied that he had either possessed methamphetamine on October 29th or that he had thrown anything from his hand just before Officer Main arrested him. RP 104-110.

Following the reception of evidence the court instructed the jury without objection from either party. RP 113-115, 116-126. The parties then presented closing arguments, after which the jury retired for deliberation. RP 126-136. At that point the court released the alternate juror with an admonition to refrain from discussing the case until instructed by the court. RP 136-137, 138-139. Later that afternoon the jury sent out a note asking the following: "Were there any fingerprints found on the Exhibit No. 9 plastic bag of Methamphetamine?" CP 69. With the consent of both parties the court responded by referring the jury back to the written

jury instructions. CP 69; RP 140-141. By about 4:00 pm that day the court released the jury for the night at the jury's request. RP 141-145.

Prior to the second day of deliberations the court informed the parties that one of the jurors had contacted the court to state that both she and her son were ill and that she could not come to court that day. RP 147-148. Over the defendant's objection that the missing juror should be questioned, the court called back the alternate juror and instructed the jury to begin deliberations anew. RP 149-150. Eventually the jury returned a verdict of guilty. RP 151-154; CP 70. The court later sentenced the defendant within the standard range and did not impose any non-discretionary costs. RP 2/24/17 1-10; CP 84-94. The defendant thereafter filed timely notice of appeal. RP 76.

ARGUMENT

THE TRIAL COURT ERRED WHEN IT ACCEPTED THE JURY'S GUILTY VERDICT TO THE CHARGE OF POSSESSION OF METHAMPHETAMINE BECAUSE SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE CONCLUSION THAT THE DEFENDANT POSSESSED THE METHAMPHETAMINE THE POLICE FOUND.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not

substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the 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 essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the state charged the defendant with possession of the methamphetamine Officer Main found in the baggie in the side yard at 1833 Sidney Avenue, Port Orchard. As the following explains, under the facts as presented in this case, substantial evidence does not support the conclusion that the defendant possessed that methamphetamine.

Under the law of Washington, possession of a physical item such as drugs or firearms may be either actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). In examining whether or not the record contains substantial evidence of dominion and control, the reviewing court must examine the “totality of the situation.” *State v. Morgan*, 78

Wn.App. 208, 212, 896 P.2d 731 (1995) (quoting *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977)).

For example, in *State v. Cote*, 123 Wn.App. 526, 96 P.3d 410 (2004), the defendant appealed his conviction for possession of pseudoephedrine with intent to manufacture methamphetamine arguing that the state had failed to present substantial evidence that he possessed the pseudoephedrine. At trial the state had adduced the following evidence: (1) that the day before his arrest the defendant arrived at a residence as a passenger in a stolen truck, (2) that the defendant was arrested in that residence the next day, (3) that the stolen truck was still parked by the residence at the time of the defendant's arrest, and (4) in the back of the truck police officers found pseudoephedrine in a liquid in mason jars with the defendant's fingerprints on them.

In making his argument on appeal the defendant principally relied upon two cases: *State v. Callahan, supra*, and *State v. Spruell*, 57 Wn.App. 383, 788 P.2d 21 (1990). In *Callahan*, drugs were found in a houseboat near the defendant, who admitted handling the drugs earlier that day. The court held that the defendant's mere momentary handling of the drugs was insufficient to establish actual possession. In *Spruell* the defendant was arrested in close proximity to drugs found in a house, but the State failed

to present evidence that the defendant had dominion and control over the premises. Under these facts the court held that the State had failed to prove the defendant actually or constructively possessed the drugs. After reviewing these two cases the court of appeals held as follows in *Cote*:

Mr. Cote was not in or near the truck at the time of his arrest. He was seen as a passenger in the truck, but this alone does not establish he had dominion and control over it. *See State v. Plank*, 46 Wn.App. 728, 733, 731 P.2d 1170 (1987) (mere fact that defendant is a passenger in a stolen vehicle is not sufficient to establish dominion and control). There is also no evidence indicating that the Mason jar containing Mr. Cote's fingerprint was found in the passenger area of the truck. The officer indicated it was in the "back of the stolen pickup." Report of Proceedings (Oct. 22, 2002) at 101. Moreover, the fingerprint on the jar proves only that Mr. Cote touched it. *See Spruell*, 57 Wn.App. at 386, 788 P.2d 21.

The evidence establishes that Mr. Cote was at one point in proximity to the contraband and touched it. But under *Callahan* and *Spruell* this is insufficient to establish dominion and control. Accordingly, there was no evidence of constructive possession. Because this issue is dispositive, we will not address the other issues raised in this appeal.

State v. Cote, 123 Wn.App. at 950.

In the case at bar the following facts are relevant to the defendant's argument that substantial evidence does not support the conclusion that he possessed the methamphetamine the officer in the baggie in the side yard: (1) a trained and experienced police had the defendant and his hands in sight from the moment she got his attention by yelling that he was under

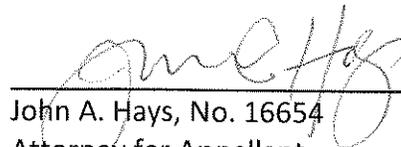
arrest to point at which she put cuffs on him and she did not see anything in the defendant's hands and did not see him throw anything from his hands; (2) although the homeowner believed he saw the defendant throw something from his hand, he was certain that it was white and that it was a Kleenex; (3) the state did not present any evidence of the defendant's fingerprints or DNA being on the baggie and the state did not explain its failure to seek such evidence; and (4) no witness gave any testimony indicating that the defendant appeared to have ingested methamphetamine that day. Based upon this evidence, any conclusion that the defendant possessed the methamphetamine in the baggie the officer found is mere possibility, suspicion, speculation, conjecture, or at best a scintilla of evidence. As the court noted in *State v. Moore, supra*, this is not substantial evidence, and does not meet the minimum requirements of due process. As a result this court should vacate the defendant's conviction and remand with instructions to dismiss with prejudice.

CONCLUSION

Substantial evidence does not support the defendant's conviction for possession of methamphetamine. As a result this court should vacate the defendant's conviction and remand with instructions to dismiss with prejudice.

DATED this 22nd day of September, 2017.

Respectfully submitted,



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APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

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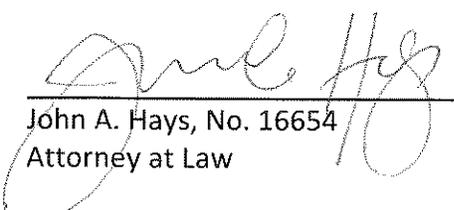
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AFFIRMATION
OF SERVICE

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 22nd day of September, 2017, at Longview, WA.



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