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Court of Appeals
Division II
State of Washington
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No. 50813-3

IN THE COURT OF APPEALS DIVISION II

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

DAVID LOISELLE, Appellant

APPEAL FROM THE SUPERIOR COURT

OF COWLITZ COUNTY

THE HONORABLE JUDGE MICHAEL EVANS

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. The evidence was insufficient to sustain a conviction for a violation of the uniform substance control act.

ISSUE RELATED TO ASSIGNMENT OF ERROR

Is the evidence insufficient to sustain a conviction for a violation of the uniform substance control act, requiring reversal and dismissal with prejudice?

II. STATEMENT OF FACT

David Loiselle broke his back in a work injury. RP 139. He had been prescribed opiates to manage the pain but determined he was taking too many and began treatment using Suboxone[1]. RP 139. At the time of his arrest, he had been on the Suboxone program for four months. RP 139.

On March 8, 2017, around 5 p.m., Loiselle was in his outside carport working on his car. RP 134. He heard his dog bark and looked up to see law enforcement cars coming down his driveway. RP 135. He assumed they had come to arrest his daughter who had a history of drug abuse and jail. RP 62,135. He continued to

[1] Suboxone acts as an opioid blocker. RP 140.

work on his vehicle for another 5-15 minutes before he entered his home. RP 68, 74,144.

Mrs. Loiselle, who was inside the home, testified she heard the dog bark, saw the police cars and knew they were there to arrest her daughter. RP 115. She ran to her daughter's area of the home, gathered the drug paraphernalia and carried it to her room. RP 115. She knew her daughter would be arrested, but did not want her to have additional drug charges. RP 116. Her daughter and her daughter's friends were in the home visiting. RP 119.

The officers conducted a knock and announce. RP 66. According to CCO Camacho, they had an arrest warrant for Stephanie Suttles, the Loiselle's daughter. RP 62. Mrs. Loiselle opened the door "all the way" and said her daughter was not at home. RP 62. CCO Camacho testified the officers were invited into the home by Mrs. Loiselle and obtained permission from her to search every room. RP 62. She also testified that Mr. Loiselle was not in the home at that time. RP 69.

By contrast, Mrs. Loiselle testified the officers did not ask her for permission to enter the home. RP 119. She said she never gave consent to search the entire home, but instead, told them they could search her daughter's separate area. RP 120. Mrs. Loiselle

reported the officers searched her bedroom and bathroom without her permission after they had already arrested her daughter. RP 120.

Concerned that the officers were searching her room and would find the drugs, she told Mr. Loiselle, “Don’t let me go to jail.” RP 121. To protect his wife, and thinking possession of drugs was a misdemeanor, Mr. Loiselle loudly stated, ‘Everything you find in there is mine.” RP 87-88,123,139.

CCO Camacho testified she saw needles containing drug residue on the tub, the counters, and toilet area in the master bathroom, all in plain view. RP 63. Items belonging to Ms. Suttles were scattered among them, including her booking information. RP 77, 94. A bible with her name engraved on it was found in the master bedroom, with some syringes and foil on top of it. RP 94. Ms. Suttles had access to and used the master bathroom and bedroom. RP 94.

Mr. and Mrs. Loiselle both denied they told officers that Mr. Loiselle used heroin, and Mrs. Loiselle denied she told officers that the drugs must have belonged to her husband. RP 122-123, 143.

Officers arrested Mr. Loiselle, and prosecutors charged him with one count of Violation of Uniform Controlled Substances Act for possession of heroin. CP 4.

The matter proceeded to a jury trial. The court gave the following instruction on possession:

> Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession.
> Constructive possession occurs when there is no actual physical possession, but there is dominion and control over the substance.
> Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.
> In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

CP 18.

The jury found Mr. Loiselle guilty. CP 22. The court sentenced him to 20 days of electronic home monitoring. CP 27. He makes this timely appeal. CP 34.

III. ARGUMENT

The Evidence Is Insufficient To Sustain a Conviction For Violation Of The Uniform Controlled Substances Act.

1. Standard of Review

Due process requires the State to prove every element of a charged crime beyond a reasonable doubt. *State v. Green,* 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The standard on review 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. *State v. Kintz,* 169 Wn.2d 537, 551, 238 P.3d 470 (2010). A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn from it. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

At issue here is whether the State proved beyond a reasonable doubt that Mr. Loiselle violated RCW 69.50.4013(1). Police found syringes and needles with heroin and heroin residue in the home he shared with his wife and drug-addicted daughter. Even

viewed in a light most favorable to the State, the evidence here fell short of proving beyond a reasonable doubt that he had constructive possession.

2. The State Failed To Prove Mr. Loiselle Was In Constructive Possession Of The Drugs.

It is a crime to have possession of a controlled substance without a valid prescription, or order of a practitioner acting in the course of his professional practice. RCW 69.50.4013. The possession may be actual or constructive. *State v. Portrey,* 102 Wn.App. 898, 904, 10 P.3d 481 (2000). A person has actual possession when he has physical custody of the item. Mr. Loiselle was not in actual possession of the drugs.

Constructive possession occurs when an individual has dominion and control over the item. *State v. Jones,* 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Dominion and control mean the item "may be reduced to actual possession immediately." *Id*. Whether an individual has dominion and control over an item depends on the totality of the circumstances. *State v. Jeffrey,* 11 Wn.App. 222, 227, 889 P.2d 956 (1995).

It is not a crime to have dominion and control over the premises where the substance is later found; rather, it is only one of

the circumstances from which constructive possession may be inferred. *State v. Shumaker,* 142 Wn. App. 330, 334, 174 P.3d 1214 (2007). "Mere proximity to contraband, presence on the property where it is found, and association with a person or persons having control of it are all *insufficient* to establish constructive possession." *United States v. Rodriguez,* 761 F.2d 1339, 1341 (9th Cir.1985); *State v. Echeverria,* 85 Wn.App. 777, 784, 934 P.2d 1214 (1997); *State v. Cote,* 123 Wn.App. 546, 549, 96 P.3d 410 (2004).

The fact that a defendant is a joint occupant of a residence at which contraband is found is insufficient to establish constructive possession by any particular occupant. *U.S. v. Duenas*, 691 F.3d 1070, 1084 (9th Cir. 2012). Mr. Loiselle's daughter lived in the home, had a history of drug use and criminal convictions and had friends over that day. She had access to the entire home, and the drug items were found mixed in with her personal items. The ability to exclude others is a factor relevant to dominion and control. *State v. Edwards,* 9 Wn.App. 688, 690, 514 P.2d 192 (1973). Mr. Loiselle did not exclude his daughter from entering, using, or leaving her things in the master bedroom and bath.

In an attempt to protect his wife, Mr. Loiselle told officers "everything you find in there is mine." However, the evidence presented demonstrated that Mr. Loiselle did not exclude others from the room, did *not* have the ability to take immediate possession of the drugs, and was not in the home when officers began searching it.

According to the testimony, *Mrs*. Loiselle had *actual* possession of the items: she admitted she carried the drugs from her daughter's area into her area of the home to protect her daughter. She denied she told officers the drugs belonged to Mr. Loiselle. Mr. Loiselle denied he told officers that he had used earlier that morning, and the State did not present any evidence of marks on his body indicating he had used the syringes found in the home.

The evidence is insufficient to sustain a conviction for possession of a controlled substance. Accordingly, Mr. Loiselle's convictions must be reversed and the charges dismissed with prejudice. *Smalis v. Pennsylvania,* 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Loiselles respectfully asks the Court to reverse and dismiss the conviction.

Submitted this 26th day of February 2018.

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Attorney for the Appellant

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for David Loiselle, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Appellant's Opening Brief was sent by first class mail, postage prepaid, on February 26 ,2018 to:

David Loiselle
312 Olson Road
Longview, WA 98632

And I electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the Cowlitz County Prosecuting Attorney (at appeals@co.cowlitz.wa.us).

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