

FILED

SEP 30 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

COA No. 28800-5-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent,

v.

CHRISTOPHER LEE MCCABE, Appellant.

---

BRIEF OF APPELLANT

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Kenneth H. Kato, WSBA # 6400  
Attorney for Appellant  
1020 N. Washington St.  
Spokane, WA 99201  
(509) 220-2237

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## I. ASSIGNMENTS OF ERROR

A. The court erred by denying a defense motion to allow a witness to testify telephonically.

B. The State's evidence was insufficient to support the convictions.

### Issues Pertaining to Assignments of Error

1. Did the court abuse its discretion by denying a defense motion to allow a witness to testify telephonically? (Assignment of Error A).

2. Was the State's evidence insufficient to support the convictions? (Assignment of Error B).

## II. STATEMENT OF THE CASE

Christopher Lee McCabe was charged by information on March 31, 2009, with one count of delivery of a controlled substance, heroin, and one count of possession of a controlled substance, heroin, with intent to deliver. (CP 1). The case proceeded to jury trial.

Sheriff's Detective Brad Richmond was aware of an investigation by Spokane Police Detective Jeff Barrington on March 18, 2009, involving suspect Richard Bordwell. (10/26 and 10/27/09 [Trial] RP 8). Controlled buys wee taking place in the 2000 block of

West College, about a mile from the courthouse. (Trial RP 8). Detective Richmond's job was surveillance and videotaping any evidence surrounding the controlled buy. (Trial RP 9). No such buy occurred at that location. (*Id.*). Detective Barrington advised Detective Richmond that Mr. Bordwell was going to get more heroin from his supply source and he should follow him.

Around 5 or 6 p.m., Detective Richmond followed Mr. Bordwell from his home on College to Home Depot on East Sprague. On arriving at the Home Depot parking lot, Detective Richmond parked and set up to videotape Mr. Bordwell. (Trial RP 10). The detective was trying to catch him meeting his source of supply for heroin. (*Id.*).

A man, later identified as Mr. McCabe, pulled up to Mr. Bordwell's car and got out of his vehicle. (Trial RP 11). He got into the passenger side of Mr. Bordwell's car, talked for 3-4 minutes, and got out. (*Id.*). Detective Richmond said it appeared to him that an exchange of items took place inside the car. (*Id.*). Mr. McCabe got into his car and drove off. (Trial RP 15). The detective followed him to where he was stopped by other officers shortly after the meeting with Mr. Bordwell. (*Id.*).

Sheriff's Detective Ronald Miya assisted in the surveillance of Mr. Bordwell. (Trial RP 19-20). Other surveillance units ran Mr. McCabe's license plate and found he had a suspended license and an outstanding felony warrant. (Trial RP 20). Detective Miya assisted in stopping Mr. McCabe around Freya and Thor. (Trial RP 21). The detective saw him fumbling around in the driver's seat, but could not see what he was doing. (Trial RP 22). Detective Miya and another deputy got Mr. McCabe out of his car and handcuffed him. (*Id.*).

Detective Barrington followed Mr. Bordwell from Home Depot and stopped him at Third and Walnut, where he was arrested and cuffed. (Trial RP 34). In a search of his car incident to arrest, the detective found heroin wedged between the front driver seat and the center console area. (Trial RP 35-36).

Deputy Sheriff Andrew Buell followed Mr. McCabe and arrested him. (Trial RP 56-58). The deputy found \$300 in his front left pants pocket, heroin in a plastic baggie in his front left sweatshirt pocket, and a wallet in his rear pocket that contained money and three money orders of \$500 each. (Trial RP 58-59, 64). Deputy Buell said the heroin found on Mr. Bordwell was consistent

with the amount of money to purchase it on the street. (Trial RP 59).

Mr. McCabe admitted using heroin before. (Trial RP 93). He recalled being arrested on March 18, 2009. (Trial RP 95). At the time, he was addicted to and using heroin. (Trial RP 96). Mr. McCabe got a tax refund of \$3068 around the first of March 2009. (Trial RP 99). He had a lot of money when he was arrested because he had just received his tax refund. (*Id.*).

On March 18, 2009, he went to Home Depot to get heroin. (Trial RP 101). Although the police video showed him driving up next to Mr. Bordwell's car, he had actually arrived at Home Depot about 20 minutes earlier. (*Id.*). At that time, Mr. McCabe met his regular dealer at his car and both men went inside. (*Id.*). Mr. McCabe followed him to the bathroom where he bought two pieces, or 50 grams, of heroin. (Trial RP 102). The dealer said a half-piece was reserved for Mr. Bordwell. (Trial RP 103). Mr. McCabe was arrested with 50.2 grams of heroin on him. (*Id.*).

Mr. McCabe knew Mr. Bordwell. (Trial RP 103). Their relationship was that they used heroin together. (*Id.*). He pulled up next to Mr. Bordwell's car to see if he had any syringes. (Trial RP 104). Mr. McCabe got into his car because he did not want to talk

to him about it in public in a busy parking lot. (*Id.*). He said it was a normal thing for two or three buyers at a time to be meeting with the dealer. (Trial RP 110). Mr. McCabe did not provide or deliver any drugs to Mr. Bordwell on March 18, 2009. (Trial RP 115). He did not plan on sharing, delivering, or giving his heroin to anyone else. (Trial RP 116).

As for the three \$500 money orders, Mr. McCabe said he got them from his grandmother, Nancy McCallister. (Trial RP 93, 108). He collected rent for her on occasion and she had him purchase money orders for her to pay bills. (*Id.*). His grandmother was in very poor health and could not get around. (Trial RP 109). Mr. McCabe had to get the money orders since she was not physically able to do so. (*Id.*).

The defense had made a pretrial motion to allow Ms. McCallister to appear telephonically. (10/22/09 RP 3). She would have corroborated Mr. McCabe's testimony that he bought money orders for her with the cash income from rentals. (10/22/09 RP 4). Counsel argued he could then "explain the circumstantial evidence that the State would introduce on the possession with intent to deliver charge, that being a large amount of drugs, a large amount of cash and money orders." (*Id.*). Ms. McCallister did not want to

come and suffer the stress and excitement of testifying in court. (10/22/09 RP 4-5). She was, however, willing to testify on the phone. (10/22/09 RP 5-6).

The State opposed the request on the grounds that it had an equal right to confront the witness; there would be problems, particularly with physical evidence in the courtroom, if she were just on the telephone; and the jury would not be able to determine her credibility without her on the stand. (10/22/09 RP 7). The court denied the motion to have Ms. McAllister testify telephonically. (10/22/09 RP 9).

The defense requested, and the court gave, a jury instruction on possession as a lesser included offense to possession with intent to deliver. (CP 120). The jury returned guilty verdicts on the delivery and possession with intent to deliver charges. (CP 126, 127). Mr. McCabe appeals.

### III. ARGUMENT

A. The court abused its discretion by denying a defense motion to allow a witness to testify telephonically.

There appears to be no authority specifically addressing how a trial court must assess a criminal defendant's request for admission of telephonic testimony. But the issue may be analyzed

in light of ER 611, which in essence provides that taking testimony is within the trial court's control. That being the case, its decision on this evidentiary question is reviewed for abuse of discretion. *In re Det. of Duncan*, 167 Wn.2d 398, 402, 219 P.3d 666 (2009).

The court abuses its discretion if the decision is manifestly unreasonable, or based on untenable grounds or for untenable reasons. *State ex rel. Junker v. Carroll*, 79 Wn.2d 12, 482 P.2d 775 (1971). A court's decision is based on untenable grounds or reasons when it applies the wrong legal standard or relies on facts unsupported in the record. *State v. Rohrich*, 149 Wn.2d 647, 71 P.3d 638 (2003).

There is no prohibition against telephonic testimony. See, e.g., *In re Det. of Stout*, 159 Wn.2d 357, 370-71, 150 P.3d 86 (2007); *In re Sanai*, 167 Wn.2d 740, 750-51, 225 P.3d 203 (2009); *United States v. Filippi*, 918 F.2d 244 (1<sup>st</sup> Cir. 1990). The right of a criminal defendant to secure witnesses in his favor is encompassed within the Sixth Amendment. *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed.2d 1019 (1967); *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). This right to compulsory process was violated by the trial court here.

The court denied the defense motion for the telephonic testimony of Ms. McCallister because (1) the State had a right to have her in court and (2) the jury had a right to observe her demeanor and manner of testifying in order to consider credibility. (10/22/09 RP 9). But the State had no “right” to have Ms. McCallister appear in court. Indeed, the decision to have her testify in court was a decision for the trial court, in its discretion, to make. Furthermore, the jury had no “right” to observe Ms. McCallister’s demeanor and manner to judge credibility. *Sansai*, 167 Wn.2d at 750-51 (fact finder can judge veracity/credibility of telephonic testimony, but not entitled to deference on review); *Stout*, 159 Wn.2d 370-71 (safeguards on telephone deposition of victim such as testimony under oath and jury unanimity). In these circumstances, the trial court abused its discretion by basing its decision on untenable grounds because it applied the wrong legal standard. *Rohrich*, 149 Wn.2d at 654.

Ms. McCallister’s proffered testimony was favorable to Mr. McCabe and exculpatory. The trial court’s erroneous denial of the request for her to testify telephonically requires remand for a new trial.

B. The State's evidence was insufficient to support the convictions.

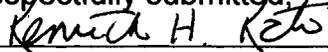
In a challenge to the sufficiency of the evidence, the test is whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could find the essential elements of the crimes beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). At most, the evidence here showed that Mr. McCabe was guilty of possession of a controlled substance. (Trial RP 102). The evidence of delivery was circumstantial; no one observed any delivery of heroin. The evidence of possession with intent to deliver was based on the police officers' testimony speculating that the quantity of heroin showed Mr. McCabe intended to sell it to others. But he was addicted to heroin and a heavy user, who bought it for his personal use. Convictions must rest on evidence, not speculation. This is not a credibility determination. See *State v. Meyers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). The remedy is dismissal.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. McCabe respectfully urges this Court to reverse his convictions and remand the case for new trial or dismiss the charges.

DATED this 30<sup>th</sup> day of September, 2010.

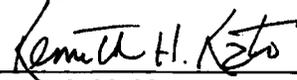
Respectfully submitted,



Kenneth H. Kato, WSBA # 6400  
Attorney for Appellant  
1020 N. Washington St.  
Spokane, WA 99201  
(509) 220-2237

### CERTIFICATE OF SERVICE

I, Kenneth H. Kato, certify that on September 30, 2010, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Mark E. Lindsey, Spokane County Prosecutor's Office, 1100 W. Mallon, Spokane, WA 99260-2043, and Christopher Lee McCabe, Geiger Corrections Center, 3507 S. Spotted Road, Spokane, WA 99224.



Kenneth H. Kato