

29245-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

AIMEE M. KEMPE, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. THE TRIAL COURT ERRED IN FINDING MS. KEMPE GUILTY OF POSSESSION OF METHAMPHETAMINE.
2. THE TRIAL COURT ERRED IN FINDING THAT MS. KEMPE STATED THAT SHE HAD USED METHAMPHETAMINE BEFORE BUT QUIT USING A YEAR AGO AND CONCLUDED THAT THE METHAMPHETAMINE MAY HAVE BEEN LEFT OVER FROM THE TIMEFRAME. WRITTEN FINDING OF FACT NO. 8; CP 44.

II.

ISSUES PRESENTED

- A. DID THE TRIAL COURT ERR IN NOT EMPLOYING AN "UNWITTING POSSESSION" DEFENSE?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the majority of the defendant's Statement of the Case. However, the State does not accept

the defendant's assertion that the defendant presented an "unwitting possession" defense at pages RP 67-72. Brf. of App. pg. 7. Trial defense counsel stated that with regards to "unwitting possession", "...Obviously that is not the facts here." RP 72.

IV.

ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN DECIDING THAT THE FACTS DID NOT SUPPORT A NON-REQUESTED "UNWITTING POSSESSION" DEFENSE.

The defendant claims on appeal that the trial court failed to even consider the affirmative defense of unwitting possession. Brf. of App. 9. This claim is not supported by the record.

At several points in the transcript, the trial court stated that "She [defendant] has the right to talk about unwitting possession." RP 77. In another portion of its ruling, the trial court noted that "Unwitting possession is a different kind of situation, too. And there are some factual circumstances in which that may come into play." RP 79. Quite to the contrary of the defendant's claim, the trial court discussed unwitting possession openly before both trial attorneys. The concept of unwitting possession appears several times in the trial court's rulings.

The focus of the defendant on unwitting possession is misplaced.

In closing arguments, trial defense counsel gets the facts wrong. Defense counsel argues that the black pouch (containing methamphetamine) was the first thing found by the trooper and it was on top of the "Victoria's Secret" bag as if tossed there by the passenger. RP 70. This is not the testimony. The trooper stated there were two separate pouches, one with marijuana and one with methamphetamine. RP 25. The trooper testified that the methamphetamine containing pouch was found *inside* the "Victoria's Secret" bag. RP 25.

The defendant's primary argument was that the passenger, Mr. Davis, was the one with the methamphetamine and he tossed the pouch into the passenger area of the back seat while the trooper dealt with the defendant outside the car. This is a speculative theory at best. It is not easy to look for something directly behind you in a car without making fairly large body movements. These movements likely would have been seen. Thus, the defendant's theory requires that Mr. Davis knew of the "Victoria's Secret" bag prior to the stop. Further, the defense theory would require Mr. Davis to reach behind the passenger's seat and place the pouch into the defendant's "Victoria's Secret" bag.

This theory requires the passenger to do much twisting, craning of the head, and manipulation of the “Victoria’s Secret” bag. All this while the trooper attempted to keep an eye on the passenger.

“Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. Dominion and control need not be exclusive to establish constructive possession.” WPIC 50.01.

An automobile may be considered a “premises.” *State v. Potts*, 1 Wn. App. 614, 617, 464 P.2d 742 (1969). Possession or control of the premises equals constructive possession of narcotics found in the car. *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971)

A defendant may defeat a possession charge by proving by a preponderance of the evidence that his possession was unwitting. *State v. Cleppe*, 96 Wn.2d 373, 381, 635 P.2d 435 (1981), *cert. denied*, 456 U.S. 1006 (1982). The “unwitting possession” defense is supported by proof that the defendant was unaware either of the presence of the controlled substance or of the nature of the substance. *City of Kennewick v. Day*, 142 Wn.2d 1, 11, 11 P.3d 304 (2000).

In this case, the defendant argued at trial that the passenger possessed the methamphetamine and then hid it inside a bag in the car. While driving, both the defendant and the passenger both had possession

of the methamphetamine. Dual possession is not an impediment to conviction. WPIC 50.01.

By the defendant's theory, the passenger had actual physical possession of the methamphetamine. If, according to the defendant's ideas, the passenger put the drugs in the "Victoria's Secret" bag, the defendant (driver) would come into constructive possession at the time the drugs were placed into the bag. The defendant apparently does not know when the passenger supposedly put the drugs in the bag. The defendant hypothesized that the passenger transferred the drugs after the car was stopped by the trooper. Even following the defendant's speculative theories, it is just as likely the passenger put the drugs in the bag just after the trooper activated his lights and before the car stopped.

By far the simpler resolution of this case is to recognize that this was a bench trial and the trial judge was the finder of fact. The theories promoted on appeal are similar to the ones argued before the trial court. The trial judge simply did not believe the speculative theories presented by the defendant.

Ultimately, the theory of "unwitting possession" is not on all fours here. Without trying to be pedantic, the fact is that the methamphetamine belonged to someone. The defense has no direct testimony or evidence showing when or how the methamphetamine was placed in the bag. The

facts show that the bag was in the defendant's car. The defendant admitted the bag was hers.

The defendant faults the trial court, claiming that the trial court ignored the law pertaining to "unwitting possession." As pointed out previously, the trial court spent quite some time on the record discussing "unwitting possession." In fact, trial defense counsel told the trial court that this case did not involve "unwitting possession." RP 72. Given that the trial defense counsel did not argue for an "unwitting possession" defense, the trial court can hardly be faulted for not using "unwitting possession" as part of its ruling.

As a semi-disconnected issue, the defendant claims that the trial court erred in its findings of fact by including the fact that the defendant told the trooper that she had used methamphetamine before, but quit using a year ago. Written Finding of Fact No. 8; CP 44. The record indicates that Trooper Spencer testified to exactly what the disputed Finding of Fact says. RP 18. The trial court did not err.

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be affirmed.

Dated this 20th day of April, 2011.

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