

FILED

MAY 23, 2012
Court of Appeals
Division III
State of Washington

No. 302105

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

JEVON UZIMA BRINKLEY, Appellant

APPEAL FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY
THE HONORABLE JOHN A. LOHRMANN

BRIEF OF APPELLANT

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I. Assignment of Error

1. Mr. Brinkley's Conviction Must Be Dismissed Because
The Evidence Was Insufficient To Support A Conviction
For Possession Of A Controlled Substance.

Issue Related To Assignment of Error

Was the evidence insufficient to support a conviction for possession of a controlled substance where Mr. Brinkley presented evidence that he did not possess the controlled substance or if he did, it was unwitting possession because he is on strictly controlled prescribed pain medication and subject to monthly drug screening tests and use of non-prescribed drugs would be extremely dangerous for him?

II. Statement of Facts

Jevon Brinkley spent two weeks in Walla Walla visiting with family and friends around Thanksgiving 2009. RP 150-51. Because he has *osteogenesis imperfecta* (brittle bone disease), he brought his prescribed medication pills with him. RP 160. He took two unlabeled pill bottles containing close to 100 pills with him to his brother's home for a family get-together on November 28. RP 165.

He left around 7:30 p.m. that evening to return to his cousin's home, where he had been staying for the holiday. RP 150. He drove his car to Wal-Mart, unaware that his license had been suspended for failure to pay court fines on an infraction ticket. RP 118,150-51.

As he drove on the highway, Officer Fortin of College Place police department ran the license plate of Mr. Brinkley's vehicle. RP 30. The report showed the registered owner had a suspended license, so the officer double backed to stop Mr. Brinkley's car. RP 31. Believing he had been stopped because he was a black man driving a Cadillac, Mr. Brinkley got out of the vehicle and yelled that he was being harassed. RP 34, 154,156. The officer handcuffed him, took him to the patrol car, and confirmed Mr. Brinkley's license was suspended. Mr. Brinkley was arrested.

As he was searched, Mr. Brinkley told the officer he had prescriptions for medical marijuana, the hydrocodone, oxycodone, and methadone pills in bottles in his pocket: medications used for his pain management. RP 36,157,160. The officer opened the unlabeled pill bottles and the medications fell on the ground. RP 158. As the officer picked up the pills Mr. Brinkley noticed the officer also picked up a small chalky substance. He said it was not

his and that it had been “planted” by the officer. RP 40, 159.

Officers took photos and bagged the medication and chalky substance as evidence and transported Mr. Brinkley to jail. RP 37, 42. The “evidence” was not sealed until later that evening. RP 58-59.

On January 7, 2010, the confiscated pills were sent to the Washington State Crime lab for testing. CP 2. On March 15, 2010, the report came back that of the pills in the prescription bottles, three were analyzed: of the three, one red pill was found to contain MDMA, a controlled substance. CP 3. The chalky substance was never analyzed. RP 77.

Mr. Brinkley was charged by information on August 27, 2010, with unlawful possession of a controlled substance, MDMA. CP 1-4. On June 9, 2011, Mr. Brinkley was charged by amended information with one count of possession of a controlled substance (the one MDMA pill) and one count of driving with a suspended license. CP 21.

At the jury trial, Mr. Brinkley testified he is required by his doctor to take monthly tests to assure that he is taking his prescribed medications and only those medications in order to receive his monthly supply of pain management pills. RP 168. He

further testified he did not possess an MDMA pill on the night he was arrested, did not see it the night he was arrested, and had no knowledge of where it came from. RP 170. When shown the pictures of the pills taken by officers on the night he was arrested, Mr. Brinkley pointed out he did not see a red pill in the photos. RP 170.

The court gave the following jury instruction on the affirmative defense of unwitting possession:

“A person is not guilty of possession of a controlled substance, if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession, or did not know the nature of the substance. The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded considering all of the evidence in the case that it is more probably true than not true.” RP 188-89.

Mr. Brinkley was found guilty on both counts. CP 29. He appeals. CP 47.

III. Argument

- A. Mr. Brinkley’s Conviction Must Be Dismissed Because The Evidence Was Insufficient To Support A Conviction For Possession Of A Controlled Substance.

The Due Process Clauses of the federal and state constitutions require the State to prove every element of the crime beyond a reasonable doubt. U.S. Const. Amends. VI, XIV; Const. art. I §§ 3, 22. In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). All reasonable inferences are drawn in favor of the verdict and interpreted most strongly against the defendant. *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008).

In a prosecution for unlawful possession of a controlled substance the state is required to prove three elements beyond a reasonable doubt: (1) the nature of the substance; and (2) actual or constructive possession; (3) without a valid prescription or as otherwise authorized by RCW 69.50. RCW 69.50.4013(1).

Although possession of a controlled substance is a strict liability crime, that is, no mental state is required, the defendant may not be convicted if he establishes by a preponderance of the evidence that his possession was unwitting or accidental. *State v.*

Morris, 70 Wn.2d 27, 34-35, 422 P.2d 27 (1966). Unwitting possession is a judicially created affirmative defense that may excuse the defendant's behavior, notwithstanding the defendant's violation of the letter of the law. *State v. Knapp*, 54 Wn. App. 314, 317-18, 773 P.2d 134, *rev. denied*, 113 WN.2d 1022 (1989).

To establish the defense, the defendant must show that it is more true than not that he did not know he was in possession of the controlled substance and/or did not know the nature of the substance. *State v. Cleppe*, 96 Wn.2d 373, 381, 635 P.2d 435 (1981), *cert.denied*, 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d1300 (1982).

At trial, Mr. Brinkley made two arguments in response to the charge that he possessed MDMA. First, he argued that he never actually or constructively possessed the red pill. Second, he reasonably argued that if the pill was mixed in with his medications he did not know it, that is, any possession was unwitting.

Mr. Brinkley described the process he went through in gathering his medications on that day. He was at the home of a close friend and:

“Well, I just emptied my pain pill bottles and grabbed by the handful of my meds to take to my brother's house for

Thanksgiving. I believe I took about, it was like 100, like 99 to 100 of my medicines, like all together...Just in case I was going to stay for a couple of days at my brother's house.”
RP 166.

Mr. Brinkley never looked in the unlabeled pill bottles to make sure they were empty. To his knowledge there was no MDMA pill mixed in with the prescription medications that he placed into the vials when he left for his brother's home. RP 167.

After the stop, when the officer conducted the search incident to arrest, the medications fell to the ground. Further, the officer picked up not only the medications, but also picked up a chalky white substance from the ground. When Mr. Brinkley saw that substance, he panicked and yelled for help to passing motorists that officers were planting evidence on him. RP 159.

Mr. Brinkley reacted very strongly to the inclusion of the white substance in with his medications, but never reacted or denied any of the pills belonged to him. Mr. Brinkley believed the only items in the bottles were his prescription medications: In fact, he clearly stated,

“After he [the officer] opened the bottle some of my medicine fell on the ground; boom, boom, boom. And I go: What, are

you going to pick those up? Because those are my meds, and I need them. He finally picked them up.” RP 158.

On cross-examination, Mr. Brinkley stated that he had seen MDMA pills before that night. RP 170. If he knew what MDMA looked like and had been aware that he was in possession of MDMA, it is reasonable to assume that he would have denied any possession of not only the chalky substance, but also any MDMA that was mixed with his prescription tablets.

In a recent case, a defendant raised the affirmative defense of unwitting possession of marijuana. *City of Kennewick v. Day*, 142 Wn.2d 1, 9, 11 P.3d 304 (2000). The issue in *Day* was whether a defendant who claimed to be unaware of the presence of a controlled substance could introduce his reputation for sobriety from drugs and alcohol. The inference was that a person who does not use drugs (by reputation) is less likely to possess drugs. *Id.* at 12. The Court concluded, “Day’s reputation for sobriety from drugs and alcohol is “pertinent” to the charge of simple possession because he raised the defense of unwitting possession. Day presented evidence tending to establish that the marijuana and marijuana pipe were placed in his truck while it was being repaired. Defendant’s presentation of third party testimony regarding his

reputation for abstention from the use of drugs was important to his defense.” *Id.* at 15.

Although *Day* presented a slightly different question than the one presented here, the inference is the same. Mr. Brinkley testified that as part of his treatment protocol and medication oversight he is required to take monthly urinalysis tests. The tests are necessary to show that he takes only his prescribed drugs, and to allow his physician to prescribe the medications for the next month. RP 168. Further, he testified about the dangerous effects other drugs would have on him, such as alcohol, if used in conjunction with his prescription medications. RP 168-69. Like *Day*, the evidence presented by Mr. Brinkley established that he is not a user of illicit substances and therefore, was less likely to possess any non-prescribed drugs.

The burden to prove unwitting possession by a preponderance of the evidence is so because generally, an affirmative defense is uniquely within the defendant’s knowledge and ability to establish. *Knapp*, 54 Wn. App. at 320-22. Here, Mr. Brinkley presented sufficient evidence to establish it was more likely true than not that he did not knowingly possess the MDMA. He established his need for very strong pain medication because of

his disease, the necessity of monthly urinalysis tests to document his use of only prescribed pain medications, and the likelihood of very serious effects he would suffer if he were to use any other drug. As in *Day*, “if a defendant claims to have been unaware of the presence of the controlled substance at *all*, the defendant’s nonuse of drugs lends support to his claim. *Day*, 142 Wn.2d at 12. Similarly, Mr. Brinkley claimed to be completely unaware of the presence of the MDMA, and the strict oversight of his use of prescription medications lends support to his claim.

“If the defendant affirmatively establishes that his possession was unwitting, then he had no possession for which the law will convict. *Cleppe*, 96 Wn.2d at 381. Mr. Brinkley had no possession for which the law could convict him.

IV. Conclusion

Based on the foregoing facts and authorities, Mr. Brinkley respectfully requests this court to reverse his conviction and dismiss the charge with prejudice.

Submitted this 23rd day of May, 2012.

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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for appellant Jevon U. Brinkley, do hereby certify under penalty of perjury of the laws of the United States and the State of Washington, that on May 23, 2012, I sent a true and correct copy of appellant's brief by first-class mail, postage prepaid, to Jevon U. Brinkley, 1501 W. Rose, Apt. 40, Walla Walla, WA 99362; and by email per agreement between the parties to Teresa J. Chen, Special Prosecutor, at tchen@wapa-sep.wa.gov.

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