

**FILED**

APR 21 2017

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION III

NO. 34579-3-III

STATE OF WASHINGTON,  
Respondent,

vs.

RAFAELITO AGUSTIN,  
Appellant.

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APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR ADAMS COUNTY  
CAUSE NO. 16-8-00027-0

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**BRIEF OF RESPONDENT**



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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
RESPONSE TO ASSIGNMENT OF ERROR.....	1
STATEMENT OF THE CASE.....	1
ARGUMENT.....	3
CONCLUSION.....	13



## TABLE OF AUTHORITIES

### **CASES**

1.	<u>In re Marriage of Littlefield</u> , 133 Wn.2d 39, 940 P.2d 1362 (1997).	12
2.	<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).	4
3.	<u>State v. Colquitt</u> , 133 Wn.App. 789, 137 P.2d 892 (2006).	6, 7
4.	<u>State v. Cord</u> , 103 Wn.2d 361, 693 P.2d 81 (1985).	5
5.	<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).	4
6.	<u>State v. Hathaway</u> , 161 Wn.App. 634, 251 P.3d 253 (2011).	6
7.	<u>State v. Hernandez</u> , 85 Wn.App. 672, 935 P.2d 623 (1997).	6
8.	<u>State v. Hutton</u> , 7 Wn.App. 726, 502 P.2d 1037 (1972).	5
9.	<u>State v. K.N.</u> , 124 Wn.App. 875, 103 P.3d 844 (2004).	9
10.	<u>State v. Lamb</u> , 175 Wn.2d 121, 285 P.3d 27 (2012).	11, 12
11.	<u>State v. Michielli</u> , 132 Wn.2d 229, 937 P.2d 587 (1997).	6
12.	<u>State v. Norman</u> , 145 Wn.2d 578, 40 P.3d 1161 (2002).	11
13.	<u>State v. Partin</u> , 88 Wn.2d 899, 567 P.2d 1136 (1977).	4
14.	<u>State v. Rice</u> , 174 Wn.2d 884, 279 P.3d 849 (2012).	12
15.	<u>State v. Roth</u> , 131 Wn.App. 556, 128 P.3d 114 (2006).	9

16.	<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).	4
17.	<u>State v. Squally</u> , 132 Wn.2d 333, 937 P.2d 1069 (1997).	11
18.	<u>State v. Theroff</u> , 25 Wn.App. 590, 608 P.2d 1254, <i>aff'd</i> , 95 Wn.2d 385, 622 P.2d 1240 (1980).	5

### OTHER AUTHORITIES

CrR 8.3(a).	11
RCW 9A.04.030(1).	10
RCW 9A.04.100.	4
RCW 69.50.101(v).	6
RCW 69.50.4013(4).	5, 10

## **I. RESPONSE TO ASSIGNMENTS OF ERROR**

1. There was sufficient evidence presented to find the respondent possessed marijuana and was under the age of twenty-one; however, the State concedes that there was insufficient evidence of jurisdiction presented.
2. The trial court exercised its' discretion to deny the motion to dismiss because the trial court has unequivocal discretion to approve or deny a motion to dismiss.

## **II. STATEMENT OF THE CASE**

On June 7, 2016, in the 300 block of East Juniper Street, Sergeant David Veloz of the Othello Police Department responded to a report of a group of juveniles possibly smoking marijuana in the alley. 1 RP 77. Appellant began to walk away and dropped a soda can on the ground. 1 RP 78. Sergeant Veloz collected the soda can and found it was bent on one side, had holes in it, had a brownish, black residue, and smelled like burnt marijuana. 1 RP 78, 83. Based on Sergeant Veloz's training and experience he believed the soda can to be fashioned into a smoking device. 1 RP 79, 83. Burnt ashes were also observed by the respondent's feet. 1 RP 83. The ashes smelled of marijuana. 1 RP 89.

On July 7, 2016, at a Fact Finding hearing, Sergeant Veloz testified he recognized Appellant as one of the juveniles from previous encounters with him. 1 RP 78. School Resource Officer Sean Anderson of the Othello Police Department also recognized Appellant from previous encounters at the high school. 1 RP 82. Officer Anderson knew Appellant to be a freshman at the high school, and could guess his approximate age. 1 RP 82.

Also, at the hearing, Sergeant Veloz, Officer Anderson, and Assistant Chief Dave Rehaume testified about their training and experience as officers. Sergeant Veloz testified he had worked for the Othello Police Department for just over four years, and has received training including the basic law enforcement academy for Washington State. 1 RP 75-76. He received training on how to identify smoking devices with burnt smell of marijuana and what different drugs look like. 1 RP 76. Officer Anderson has been an officer for approximately eight and a half years and received training from the basic law enforcement academy which included training in marijuana. 1 RP 80. He has also encountered numerous cases involving marijuana, easily fifty or more in his career. 1 RP 80. Assistant Chief Rehaume has been with the Othello Police Department for twenty-seven years and received training from the

basic law enforcement academy on the identification of marijuana.  
1 RP 87. He also had numerous marijuana cases in his career,  
upwards of 100 cases. 1 RP 87.

Before the hearing, the State moved, ex parte, for the Court  
to dismiss the charges based on insufficient evidence. 1 RP 67.

The Trial Court denied the motion stating:

The reason I did not sign is that I did not suppress the – the  
soda can which was fashioned into a smoking device with  
the burnt residue which smelled like marijuana. I figured  
there is enough information still in this case to prosecute the  
defendant. 1 RT 67-68.

Appellant was found not guilty of minor in possession and/or  
consumption of alcohol, but found him guilty of possession of  
marijuana. 1 RP 97-98. The Court made the following findings of  
fact: Appellant dropped to the ground what appeared to be a  
marijuana pipe; the officers testimony included they were very  
familiar with the looks of marijuana pipes and the smell of  
marijuana; and the testimony was beyond mere conjecture. 1 RP  
98.

### III. ARGUMENT

- A. **The evidence submitted by the State was sufficient to find Appellant possessed marijuana and was under the age of twenty-one; however, the evidence was insufficient in regards to jurisdiction.**

Each element of a crime must be proven beyond a reasonable doubt. RCW 9A.04.100. “[T]he Due Process Clause [U.S. Const. amend. XIV] protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).

On appeal, to determine the sufficiency of evidence, the test is whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt, after viewing the evidence in light most favorable to the State. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” State v. Salinas, 119 Wn. 2d 192, 201, 829 P.2d 1068 (1992) (*citing State v. Partin*, 88 Wn. 2d 899, 906–07, 567 P.2d 1136 (1977)). Claiming insufficiency of the evidence admits the truth of the State’s

evidence at trial as well as all inferences that can reasonably be drawn from that evidence. State v. Theroff, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

“Nevertheless, the existence of a fact cannot rest upon guess, speculation, or conjecture.” State v. Hutton, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972).

Great deference must be given to factual findings made by the trial court. State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). “It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.” Id.

Here, there was sufficient evidence to find beyond a reasonable doubt that marijuana was possessed by Appellant and he was under the age of twenty-one; however, the State concedes that the element of jurisdiction was not proven beyond a reasonable doubt.

- i. There was sufficient evidence to find beyond a reasonable doubt that Appellant possessed marijuana.

RCW 69.50.4013(4) states, “No person under twenty-one years of age may possess, manufacture, sell, or distribute marijuana, marijuana-infused products, or marijuana concentrates,

regardless of THC concentration.” RCW 69.50.101(v) defines marijuana, in pertinent part, as follows:

all parts of the plant *Cannabis*, whether growing or not, with a THC concentration greater than 0.3 percent on a dry weight basis; the seeds thereof; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant, its seeds or resin.

“When the words in a statute are clear and unequivocal, this court must apply the statute as written.” State v. Michielli, 132 Wn.2d 229, 237, 937 P.2d 587 (1997).

The State must prove possession, either constructive or actual, and the nature of the substance. State v. Hathaway, 161 Wn.App. 634, 645, 251 P.3d 253 (2011). “Actual possession occurs when a defendant has physical custody of the item, and constructive possession occurs if the defendant has dominion and control over the item.” Id. at 646.

In general, circumstantial evidence and lay witness testimony may be sufficient to uphold a conviction for possession of marijuana, and chemical analysis is not necessarily required. State v. Colquitt, 133 Wn.App. 789, 796, 137 p.2d 892 (2006) (*citing State v. Hernandez*, 85 Wn.App. 672, 935 P.2d 623 (1997)). A non-

exhaustive list of factors helps to determine if the State has met its burden identifying the controlled substance, using circumstantial evidence:

(1) testimony by witnesses who have a significant amount of experience with the drug in question, so that their identification of the drug as the same as the drug in their past experience is highly credible; (2) corroborating testimony by officers or other experts as to the identification of the substance; (3) references made to the drug by the defendant and others, either by the drug's name or a slang term commonly used to connote the drug; (4) prior involvement by the defendant in drug trafficking; (5) behavior characteristic of use or possession of the particular controlled substance; and (6) sensory identification of the substance if the substance is sufficiently unique.

Colquitt, 133 Wn.App. at 800-801(2006).

In Colquitt, the Court held the circumstantial evidence presented at trial was conjecture at best. There wasn't any evidence presented regarding the officer's training and experience which would allow him to properly identify the white, rock-like items as cocaine. Id.

Here, the statute is clear and unambiguous; possession of marijuana by a person under twenty-one years old is illegal regardless of the THC concentration. This is not ambiguous language, and does not conflict with the definition of marijuana. Rather, contrary to Appellant contention, the legislature specifically

drafted the statute to make THC concentration not required to be proven.

The Trial Court made the factual finding that this case differs from Colquitt, specifically holding that this case went beyond mere conjecture. 1 RP 98. In Colquitt, the court held that the statement alone without any reference to the officer's training and experience made the statement regarding the white, rock like substance to be mere conjecture. Here, the officers all testified about their respective training and experience. All three officers stated that they had substantial training and experience in their careers identifying marijuana and smoking devices with anywhere from 50-100 cases specifically dealing with marijuana. 1 RP 80, 87. The trial court made a specific finding of fact that the officers provided testimony which showed that they were very familiar with the looks of marijuana pipes and the smell of marijuana. 1 RP 98.

The Trial Court also made a finding that Appellant dropped to the ground what appeared to be a marijuana pipe. 1 RP 98. The officers all testified as to the appearance of the soda can and determined it to be a marijuana pipe describing it as bent on one side, with holes it and a brownish, black residue. 1 RP 78-79, 83.

The residue smelled like marijuana based upon their training and experience. Also, there were burnt ashes at Appellant's feet that also smelled like marijuana. 1 RP 79, 83, 89. When Appellant had the soda can in his hand he was in actual possession of the marijuana. After he dropped the soda can to the ground he was in constructive possession of marijuana. While no lab testing was done, there was enough circumstantial evidence to find him guilty beyond a reasonable doubt.

Therefore, sufficient evidence exists to find that Appellant was in possession of marijuana.

- ii. There was sufficient evidence to find beyond a reasonable doubt that Appellant was under twenty-one years of age.

"[I]n cases where the defendant is charged with minor in possession..., the State is required to prove the age of the defendant as part of the defendant's due process rights." State v. Roth, 131 Wn.App. 556, 562, 128 P.3d 114 (2006). Even when the juvenile stipulates to his date of birth for the purpose of juvenile court jurisdiction, the State is not relieved of the duty to prove all elements of the offense, including the age of the defendant. State v. K.N., 124 Wn.App. 875, 884, 103 P.3d 844 (2004). Circumstantial evidence is sufficient to prove the age requirement. Roth, 131

Wn.App. at 562 (2006). Possession of marijuana when the defendant is under twenty-one years of age is a crime. RCW 69.50.4013(4).

Here, Officer Anderson testified he knew Appellant from previous contacts, specifically from the high school. 1 RP 82. Based on these previous encounters at the high school, Officer Anderson testified that Appellant was a freshman in high school. 1 RP 82. He did also testify that he could guess his approximate age, but did not give an estimate. 1 RP 82. Knowing he was a freshman in high school created the inference that he was under the age of twenty-one, being as majority of freshman are under the age of eighteen. These are all facts that provide circumstantial evidence of Appellant being under twenty-one years old.

Therefore, sufficient evidence exists to make a finding beyond a reasonable doubt Appellant was under twenty-one.

- iii. There was insufficient evidence to find beyond a reasonable doubt the jurisdiction element of the offense.

Under RCW 9A.04.030(1), a person is liable if “[the] person commits in the state any crime, in whole or in part.” The State has the burden to prove jurisdiction beyond a reasonable doubt in all

criminal matters. State v. Squally, 132 Wn.2d 333, 340, 937 P.2d 1069 (1997). “Generally, proof that the crime was committed in the state satisfies the jurisdictional element.” State v. Norman, 145 Wn.2d 578, 589, 40 P.3d 1161 (2002).

Here, no evidence was provided by the State to confirm that this crime was committed in the State of Washington. The only jurisdiction evidence that was presented was the street name that created the alley where Appellant was found. There was insufficient evidence of jurisdiction presented by the State.

Therefore, the State concedes that the element of jurisdiction was not proven beyond a reasonable doubt at Fact Finding.

**B. The Trial Court did not abuse it’s discretion in denying the motion to dismiss the case upon the State’s motion.**

CrR 8.3(a) states, “the court **may, in its discretion**, upon written motion of the prosecuting attorney setting forth the reasons therefor, dismiss an indictment, information, or complaint.” (*Emphasis added*). The standard used for abuse of discretion of a trial court’s decision is if “it [is] manifestly unreasonable or based upon untenable grounds or reasons.” State v. Lamb, 175 Wn.2d

121, 127, 285 P.3d 27 (2012). “A court's decision is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” Id. (citing In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997)). “A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard.” Lamb, 175 Wn.2d at 127 (2012).

Here, the Trial Court properly used its' discretion to deny the motion to dismiss. Appellant contends that the Trial Court abused its discretion by removing the discretion of the Prosecution. While prosecutors are provided with broad discretion in charging, this “prosecutorial discretion” to charge or not occurs exactly then: the filing of criminal charges phase. State v. Rice, 174 Wn.2d 884, 901, 279 P.3d 849 (2012). Once charges are filed, only the Court can decide whether a case should be dismissed. The language in the statute unequivocally provides that the trial court has complete discretion to approve or deny a motion to dismiss.

The question here is not whether the Court had the power to deny the motion to dismiss, but rather if that decision was unreasonable or untenable. The decision by the Trial Court was not

unreasonable or untenable given the facts presented to the Court after the suppression motion.

The Trial Court denied the motion to dismiss and made a factual finding stating the reason for the denial. Specifically, the Trial Court stated that “the soda can which was fashioned into a smoking device with the burnt residue which smelled like marijuana” was not suppressed. 1 RP 67. Given these facts and the evidence still being admissible the Court ruled to deny the motion to suppress.<sup>1</sup> By denying the motion, the Trial Court disagreed with the State that there was insufficient evidence to proceed, and reasonably concluded there was still information available to proceed forward. 1 RP 67-68.

Therefore, the Trial Court properly used its discretion to deny the States motion to dismiss the case.

#### **IV. CONCLUSION**

The State respectfully requests the Court find that sufficient evidence was presented to prove beyond a reasonable doubt that the Appellant did possess marijuana while under the age of twenty-

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<sup>1</sup> It is important to note that the Trial Court was correct in finding sufficient evidence still existed. As set forth in the sections above, the State presented sufficient circumstantial evidence to prove possession of marijuana. The Trial Court could not have abused its discretion by ruling sufficient evidence existed, when it in fact did exist.

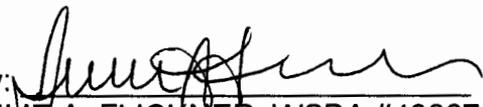
one. The Trial Court did not abuse its discretion in denying the State's Motion to Dismiss.

The State does concede that insufficient evidence was presented that the Appellant committed the crime in the State of Washington.

The State respectfully requests that the Court only reverse the Appellant's conviction on the ground of insufficient evidence of Jurisdiction.

DATED this 20<sup>th</sup> day of APRIL, 2017.

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