

No. 34836-9-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

SAMUEL TEACHER BANKS,
Defendant/Appellant.

APPEAL FROM THE SPOKANE COUNTY SUPERIOR COURT
Honorable James M. Triplet, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

Samuel Teacher Banks was convicted of possession of a controlled substance based on his mere proximity to drugs located in a public place over which he had no dominion and control. After observing Mr. Banks tumble over the handlebars when his bicycle crashed in an unkempt alley, an officer discovered a baggie of methamphetamine in the grasses along the edge. Mr. Banks' conviction was based on insufficient evidence and contravenes the due process clause of the Fourteenth Amendment, warranting reversal.

B. ASSIGNMENT OF ERROR

Mr. Banks' conviction violates due process because the evidence was insufficient to allow any rational trier of fact to find the elements of possession of a controlled substance beyond a reasonable doubt.

Issue Pertaining to Assignment of Error

Did the State fail to present sufficient evidence that Mr. Banks possessed methamphetamine where he was merely observed in proximity to the contraband?

C. STATEMENT OF THE CASE

Shortly after midnight in early May, Samuel Teacher Banks was riding his bicycle in east Spokane, south of the river. RP 36, 47, 80.

While on routine patrol, Sergeant Rankin noticed the bike had no front and rear lights as required by law¹ and activated his flashing lights to initiate a traffic stop. RP 36–37. As Mr. Banks turned off of North Madelia onto East Mallon, the officer rolled down his window and told the bicyclist to stop. RP 38. Mr. Banks continued riding and near 1717 East Mallon Avenue, he veered north through a yard and Sgt. Rankin sprinted after him on foot and yelled at least once more for him to stop. RP 39. The pursuit continued west bound through an alley for several blocks until Mr. Banks crashed and toppled over his handlebars and rolled into the weeds at the south side of the alley. RP 39–41, 55, 63–64. Mr. Banks ended up on his back, with his feet pointed towards the officer and his head up as if looking at the officer. RP 41. There were streetlights and some lighting in the alley itself. RP 40–41, 43, 82.

While he was rolling to the side of the alley Sgt. Rankin could not see Mr. Banks' hands and asked him to show them. RP 42, 64, 68. When Mr. Banks' did not comply, the officer moved against a nearby shed, drew his gun but didn't point it at Mr. Banks, and again asked him to show his hands. RP 42–44, 64–67. Mr. Banks showed his hands and the officer could see he had nothing in them. RP 44, 65. Mr. Banks complied with

¹ RCW 46.61.780(1); *State v. Rowell*, 138 Wn. App. 780, 158 P.3d 1248 (2007).

the officer's further request to roll out of the weeds into the center of the dirt alley and lay on his stomach because he was under arrest for failing to comply with a lawful order. RP 44, 65. Officer Valencia, Sgt. Rankin's partner, had now arrived with the patrol car and they proceeded to handcuff Mr. Banks. RP 45, 80.

Officer Valencia thoroughly searched Mr. Banks' person and backpack incident to arrest, and found no drugs, drug needles, or drug paraphernalia. RP 80, 82–85.

Sgt. Rankin searched the grassy area that he saw the bicyclist lying in, and found a small roll of folded-up dollar-bills and a small sandwich bag containing what was later determined to be methamphetamine. RP 46, 56, 110.

The dirt alley is open to the public, and goes all the way through and is not fenced in in any way. RP 62–63. There's nothing to prevent someone from driving a car or riding a bike down the alley. RP 62. The backs of houses and sheds and garages abut each side of the alley and presumably people drive up and down to park in their respective backyards. RP 62–63. The alley is unkempt and not very well-

maintained, and has debris, weeds, and grasses described variously as ankle height, knee high, or tall. RP 40, 44, 63, 71–73, 85.

The jury was instructed on actual possession and constructive possession. *Instruction No. 9* at CP 45.

The prosecutor argued to the jury in closing that Mr. Banks actually possessed the drug as he rode his bicycle before the crash:

Mr. Banks had meth, actually had meth, and then he rolled away from it. ... We know where the meth came from. It came from Mr. Banks. It came from Mr. Banks, who was running away from the police, running away because he had a reason to run, a reason more serious than getting a traffic infraction for riding a bike without a headlight.

RP 184.

A jury convicted Mr. Banks of possession of a controlled substance—methamphetamine, as charged. CP 4, 49. The court imposed a mid-standard range sentence of eighteen months of confinement and assessed minimum mandatory legal financial obligations of \$800 payable at \$15 per month. CP 62–63, 65–66.

Mr. Banks appeals. RP 73–74.

D. ARGUMENT

1. The State failed to present evidence beyond a reasonable doubt that Mr. Banks possessed methamphetamine.

The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476–77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. 6, 14; Wash. Const. art. 1, §§ 3, 22. The critical inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the 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). Circumstantial evidence may be used to prove an element of a crime, such as specific intent. *State v. Brown*, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that may be drawn from it. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation.” *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013). Such inferences must be logically derived from the facts proved, and

should not be the subject of mere surmise or arbitrary assumption.” *Bailey v. Alabama*, 219 U.S. 219, 232, 31 S.Ct. 145, 55 L.Ed. 191 (1911).

a. There was insufficient evidence to establish possession.

Possession is defined in terms of personal custody or dominion and control. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994) (citing *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969)). Possession may be either actual or constructive. *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008). In closing argument, the prosecuting attorney argued that Mr. Banks actually possessed the controlled substance. However, because the jury was instructed on both actual and constructive possession, both are addressed below.

i. There was no evidence that Mr. Banks actually possessed the substance contained in the baggie.

Actual possession means that the controlled substances are in the personal custody of the person charged. *Callahan*, 77 Wn.2d at 29.

Actual possession requires physical custody. *State v. Cantabrana*, 83 Wn. App. 204, 206, 921 P.2d 572 (1996).

In *State v. Hults*, law enforcement searched a residence that they had observed the defendant frequenting and discovered a large quantity of marijuana. 9 Wn. App. 297, 298, 513 P.2d 89 (1973). The defendant’s

fingerprints were located on the marijuana packaging. *Id.* at 299. The court concluded that “the defendant’s access and proximity to the cache of marijuana and his fingerprints on two or three of the kilos is totally insufficient to establish actual possession.” *Id.* at 300. Because the defendant did not have the marijuana on his person at the time of the arrest, “no serious issue of actual possession” was presented. *Id.*

In *State v. Callahan*, law enforcement entered a houseboat and found the defendant sitting near various drugs and paraphernalia. 77 Wn.2d at 28. The defendant admitted that he had handled the drugs earlier. *Id.* at 29. However, the court determined there was insufficient evidence that the drugs were in the personal custody of the defendant as required:

There was no evidence introduced that the defendant was in physical possession of the drugs other than his close proximity to them at the time of his arrest and the fact that the defendant told one of the officers that he had handled the drugs earlier. Since the drugs were not found on the defendant, the only basis upon which the jury could find that the defendant had actual possession would be the fact that he had handled the drugs earlier and such actions are not sufficient for a charge of possession since possession entails actual control, not a passing control which is only a momentary handling.

Callahan, 77 Wn.2d at 29 (citing *United States v. Landry*, 257 F.2d 425, 431 (7th Cir. 1958)).

In *State v. Spruell*, law enforcement found the defendant's fingerprint on a plate that had held cocaine. 57 Wn. App. 383, 386, 788 P.2d 21 (1990). The court reasoned that the fingerprint on the plate proved only that the defendant had touched the plate. *Id.* Because touching the plate would only establish passing control, the evidence did not establish actual possession. *Id.*

The State argued to the jury that Mr. Bank's failure to stop resulted from guilty knowledge that he actually possessed methamphetamine and wanted to "ditch" it before he was caught. Evidence of flight alone, however, is insufficient to establish actual possession of drugs. Here, Mr. Banks was being signaled to stop by flashing lights on a police car while riding his bicycle at night without the required head light and rear red light. His refusal to stop and continued riding may just as reasonably have been the unthinking reactions of a twenty-eight² year old young man or the instinctive reaction and/or a deliberate effort to avoid citation for a traffic infraction. Alleged flight without some evidence to rationally connect it to the charged crime is insufficient to establish actual possession. *See State v. Bruton*, 66 Wn. 2d 111, 113, 401 P.2d 340, 342 (1965) (If the state believed the actions of appellant, under the circumstances, constituted

flight, it was incumbent upon the state to support that theory with the available evidence bearing thereupon, rather than leave it to the jury to speculate as to whether the appellant simply and freely walked away from a disagreeable scene or actually fled out of a sense of guilt and/or fear of prosecution of the charged crime).

The State further argued to the jury that ending up where methamphetamine was found in the weeds after being catapulted over the bicycle handlebars was either an intentional “ditching” of drugs or made Mr. Banks the unluckiest man on earth. RP 168. The record in this regard is likewise insufficient to establish actual possession.

No one saw Mr. Banks handle the baggie. A mere four minutes elapsed from Sgt. Rankin initiating a call about the observed traffic violation to running Mr. Banks’ name after his arrest and handcuffing. RP 69. One minute or less elapsed from Mr. Banks’ abrupt departure from his bicycle to his arrival in the center of the alley upon Sgt. Rankin’s demand. RP 69–70. During this short time there was sufficient lighting in the alley and from the nearby street to see Mr. Banks crash onto the ground, roll over into the weeds at the side of the alley, and end up on his back with his feet pointed towards the officer and his head up as if looking at the officer.

² This incident occurred on May 11, 2016. Mr. Banks’ date of birth is February 20, 1988.

The record also establishes there was sufficient lighting to see that Mr. Banks had nothing in his hands when ordered by the officer at gunpoint to show his hands. Although Sgt. Rankin stated he could not see Mr. Banks' hands before this and despite the lighting demonstrably available to see other things and despite the officer's testimony he was "absolutely" focused on hands because he was very concerned for his own safety and that Mr. Banks might have a weapon³, the officer did not describe any furtive movements by Mr. Banks or disturbances of the grass and weeds or anything else going on in the alley that even remotely suggested a baggie was being retrieved, handled, and discarded by Mr. Banks.

Unlike the defendants in *Spruell* and *Hults*, there was no evidence of Mr. Banks' fingerprints on any of the items found. RP 115. Unlike the defendant in *Callahan*, Mr. Banks had never been seen with this item before. The item was in a public alleyway, not an area exclusively used by Mr. Banks. Like *Spruell*, the circumstances of alleged flight were speculative and conjectural. *Spruell*, 57 Wn. App. 386–87. At most, the evidence showed mere proximity to the item, which is insufficient to establish actual control as required. The evidence failed to prove that Mr.

CP 1, 59.

³ RP 67–68.

Bank ever had personal custody of the drug and consequently failed to prove actual possession.

ii. There was no evidence that Mr. Banks had dominion and control over the substance contained in the baggie.

“Constructive possession” means that the person charged with possession exercised dominion and control over the contraband. *Staley*, 123 Wn.2d at 798. Dominion and control is determined based on the totality of the circumstances. *State v. Summers*, 107 Wn. App. 373, 384, 28 P.3d 780 (2001). The defendant’s dominion and control need not be exclusive. *State v. Weiss*, 73 Wn.2d 372, 375, 438 P.2d 610 (1968). Generally, dominion and control means the defendant can immediately convert the drugs to his or her actual possession. *State v. Reichert*, 158 Wn.App. 374, 390, 242 P.3d 44 (2010). But the State “ ‘must prove more than a passing control,’ ” or mere momentary handling. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014) (quoting *Staley*, 123 Wn.2d at 801). The State “ ‘must prove actual control.’ ” *Id.* (quoting *Staley*, 123 Wn.2d at 801). Mere proximity to drugs is insufficient to establish constructive possession. *State v. Portrey*, 102 Wn. App. 898, 902–03, 10 P.3d 481 (2000). Additionally, knowledge of the presence of a controlled substance alone is insufficient to establish dominion and control. *State v.*

Davis, 16 Wn. App. 657, 659, 558 P.2d 263 (1977). Construction possession cases are fact sensitive. *George*, 146 Wn. App. at 920.

Viewed in a light most favorable to the State, a jury could reasonably infer that (1) Mr. Banks fled from law enforcement and (2) he was momentarily in close proximity to the baggie in the alley. The circumstances of alleged flight were speculative and conjectural. *Spruell*, 57 Wn. App. 386–87. No evidence suggests Mr. could have immediately converted the drugs to his actual possession before or after he was near the edge of the alley, and his mere proximity was limited in both scope and duration. He had no ability to exclude others from possessing the drugs in the grasses and weeds in a public area. Even viewed in a light most favorable to the State, there is no evidence or inference that Mr. Banks had dominion and control over either the drugs or the public area where the drugs were found.

In *Spruell*, the evidence was also insufficient to establish constructive possession. 57 Wn. App. at 389. The defendant was simply present in the kitchen where drugs were found. *Id.* at 388. “There was no evidence relating to why [the defendant] was in the house, how long he had been there, or whether he had been there on days previous to his arrest.” *Id.* Because the evidence was consistent with the defendant being

a mere visitor to the house, there was no basis for finding that he had dominion and control over the drugs and thus his conviction was reversed and dismissed. *Spruell*, 57 Wn. App. at 388–89.

In *State v. Cote*, the evidence was insufficient to prove constructive possession where the defendant was a passenger in a truck containing components of a methamphetamine lab. 123 Wn. App. 546, 550, 96 P.3d 410 (2004). The defendant’s fingerprint was found on a Mason jar containing chemicals in the back of the truck. *Id.* His conviction was reversed because the fingerprint only proved that the defendant touched the jar. *Id.* Mere proximity and touching is insufficient to establish dominion and control and thus there was no evidence of constructive possession. *Id.*

In *State v. George*, the defendant was a backseat passenger in a vehicle where law enforcement located drug paraphernalia on the floorboard near where he was seated. 146 Wn. App. at 912–13. Again, the court held that there was insufficient evidence to establish constructive possession based on proximity alone. *Id.* at 923. There was no evidence about the defendant’s past use or ownership of drugs or paraphernalia and no such items were found on his person. *Id.* at 922. There was no evidence of dilated pupils, odor on his person, matches, or a lighter to

suggest that the defendant had been smoking marijuana. *Id.* There was no fingerprint evidence linking the defendant to the paraphernalia and he made no admissions. *Id.* Therefore, the State had only shown proximity, which could not on its own prove dominion and control. *Id.*

In *Hults*, the court held that the defendant constructively possessed drugs found in a house. Hults frequented the house for several days before police searched it. His vehicles and musical instruments were found on the premises. His personal correspondence (along with some drugs) and a marijuana handbook were also found in the house. A large amount of cash was found on Hults's person. Hults's fingerprints were found on drug packaging in the house. The court concluded Hults had dominion and control over the premises and thus constructively possessed the drugs. 9 Wn. App. at 302–03.

Unlike *Hults*, Mr. Banks' connection with the drugs found in the weeds was minimal. The officer saw Mr. Banks by the weeds and grasses only once and only momentarily. No evidence suggests Mr. Banks had any other connection with the weeds where the drugs were found. None of Mr. Banks' correspondence or personal items were found near the drugs or in the weeds. The baggie was in a public area, not a house. Further, there was no fingerprint evidence connecting Mr. Banks with the baggie.

In *State v. Portrey*, the court held that the defendant constructively possessed drugs in a field. Portrey was found near marijuana plants growing in a field. He tried to conceal himself from aerial police spotters by lying in bushes near the marijuana plants. He wore a camouflage jacket on a warm day. His residence was 200 yards from the marijuana plants. Trails near the marijuana plants led to Portrey's residence. Police found black tubing in his residence similar to that used around the base of some of the marijuana plants. The court concluded a jury could reasonably infer that the defendant constructively possessed the marijuana. 102 Wn. App. at 901. Unlike *Portrey*, Mr. Banks' momentary proximity to the drugs does not establish dominion and control.

Mr. Banks did not have dominion and control over the items in the public area where they were located. Mr. Banks did not have the ability to exclude others from the drugs in the weeds in a public area. There was no evidence of the condition of the items when found or any other evidence suggesting they had only recently been placed in the grass. There was no fingerprint evidence linking Mr. Banks to the items. There was no evidence that he ever touched the items. No other contraband was found on Mr. Banks' person or in his backpack. At most, the evidence established that Mr. Banks was in mere proximity to the contraband when

he ended up in the weeds after being thrown over the handlebars when his bicycle crashed.

No rational juror could find that the totality of these circumstances establish Mr. Banks' dominion and control over the drugs found in the alley. There was therefore insufficient evidence to establish constructive possession. Because the evidence failed to prove either actual or constructive possession, Mr. Banks' conviction violates due process and requires reversal.

2. Appeal costs should not be awarded.

In determining whether costs should be awarded in the trial court our Supreme Court has held:

The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Under RCW 10.73.160(1), the appellate courts have broad discretion whether to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *State v. Sinclair*, 192

Wn. App. 380, 388, 367 P.3d 612, *rev. denied*, 185 Wn.2d 1034 (2016); *see also State v. Grant*, 196 Wn. App. 644, 649–50, 385 P.3d 184 (2016). The appellate courts should also consider important nonexclusive factors such as an individual’s other debts including restitution and child support (*Blazina*, 182 Wn.2d at 838) and circumstances including the individual’s age, family, education, employment history, criminal history, and the length of the current sentence in determining whether a defendant “cannot contribute anything toward the costs of appellate review.” *Sinclair* 192 Wn. App. at 391. *Sinclair* held, as a general matter, that “the imposition of costs against indigent defendants raises problems that are well documented in *Blazina*—e.g., ‘increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.’ ” *Sinclair*, 192 Wn. App. at 391 (quoting *Blazina*, 182 Wn.2d at 835).

Mr. Banks was twenty-eight years old at the time of this incident. As he discussed with the sentencing court, Mr. Banks attended school through 9th grade and obtained a G.E.D. while in foster care in Canada; he has been homeless at least since age eighteen; and recognizes but doesn’t know how to address the recurring legal problems stemming from being released from custody without a release address to go to. RP 211–220.

Mr. Banks owns no real or personal property, has no income, and has outstanding legal financial obligation debt of approximately \$15,000. CP 76–77. The trial court found Mr. Banks remained indigent for purposes of this appeal. CP 76, 79–80.

In light of Mr. Banks’ indigent status, and the presumption under RAP 15.2(f), that he remains indigent “throughout the review” unless the appellate court finds his financial condition has improved “to the extent [he] is no longer indigent,”⁴ this court should exercise its discretion to waive appellate costs.⁵ RCW 10.73.160(1).

⁴ *Accord*, RAP 14.2, which provides in pertinent part:

When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances **have significantly improved since the last determination of indigency**. (Emphasis added).

⁵ Appellate counsel anticipates filing a report as to Mr. Banks’ continued indigency no later than 60 days following the filing of this brief.

E. CONCLUSION

For the reasons stated, Mr. Banks' conviction for possession of a controlled substance must be reversed. Alternatively, should the State be deemed the substantially prevailing party, this court should exercise its discretion to waive appellate costs.

Respectfully submitted on May 26, 2017.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on May 26, 2017, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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