

34836-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

SAMUEL TEACHER BANKS, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S 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.

II. ISSUE PRESENTED

Whether the State presented sufficient evidence that the defendant committed each of the elements of possession of a controlled substance beyond a reasonable doubt?

III. STATEMENT OF THE CASE

On May 11, 2016, Officer Brandon Rankin and his partner, Officer Andres Valencia, were on routine patrol in the city of Spokane. RP 34-35, 77. Officer Rankin was driving a fully marked patrol car, and Officer Valencia was riding in the passenger seat. RP 35. At approximately 12:30 a.m., while travelling northbound on North Madelia near East Mallon, Officer Rankin observed a bicyclist who was riding his bicycle in the dark without a headlight or working rear red taillight, as required by law. RP 36-37, 77-78. The bicyclist was later identified as the defendant, Samuel Banks. RP 47, 80.

The officer attempted to initiate a traffic stop, but the defendant turned his bicycle eastbound onto East Mallon Avenue, failing to stop or pull over when the officer activated his emergency lights. RP 38.

Officer Rankin rolled down his window and verbally commanded the defendant to stop. RP 38. Refusing to stop, the defendant turned north and rode through a yard, requiring Officer Rankin to pursue him on foot. RP 38-39, 78. Officer Rankin pursued him “at an all-out sprint” through the yard, again commanding him to stop; the two then travelled into an alley, where the defendant lost his balance and fell off the bicycle. RP 39-40. In losing his balance, the defendant went over the handlebars of the bicycle. RP 40.

The defendant then “rolled” into the high weeds at the edge of the alley.¹ RP 40. Due to minimal lighting in the alleyway, the officer was not able to see the defendant’s hands. RP 41, 68. The defendant, while on the ground, faced toward the officer, on his back, with his feet pointed toward the officer; he raised his head off the ground as if he was watching the officer approach. RP 41.

Based on his concern that the defendant was attempting to conceal his actions and his hands, the officer commanded the defendant to show him his hands. RP 41-42. The defendant refused to do so. RP 42. The officer drew his service weapon and held it at a low ready position, and again commanded the defendant to show him his hands. RP 43-44. The defendant finally complied. RP 44. Officer Rankin then commanded the defendant

¹ The grassy/weeded area adjacent to the alley way was unkempt and, in areas, the vegetative growth was shin or knee high. RP 40, 49, 85.

to roll out of the grass and into the dirt alley where he could be seen clearly.

RP 44. The defendant complied. RP 44.

Officer Valencia, who was following in the patrol car, arrived, and handcuffed the defendant. RP 45, 78-79. Although no weapons or drugs were located on the defendant or in his backpack during a search incident to his arrest, Officer Rankin searched the grassy area to which the defendant had rolled after falling off the bicycle, and located a small sandwich bag containing a white crystalline substance and a small roll of folded up dollar bills. RP 46, 72, 80, 82-85. Officer Rankin believed the substance to be methamphetamine. RP 46. Chemical testing later confirmed the substance to be methamphetamine. RP 108-110.

On May 12, 2016, the defendant was charged in the Spokane County Superior Court with one count of possession of a controlled substance. CP 4. His case proceeded to trial, and on October 5, 2016, a jury found the defendant guilty as charged. CP 49. The defendant had an offender score of "9," and the trial court sentenced the defendant to a standard range sentence of 18 months, granting the defendant credit for time served of 136 days. CP 62-63; RP 225. The court also imposed 12 months of community custody, and mandatory legal financial obligations totaling \$800. CP 64-66; RP 222, 224. The defendant timely appealed. CP 73.

IV. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE THAT THE DEFENDANT POSSESSED A CONTROLLED SUBSTANCE.

The defendant challenges the sufficiency of the evidence supporting his conviction for possession of a controlled substance. The purpose for sufficiency of the evidence review is “to guarantee the fundamental protection of due process of law.” *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). “The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). 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. *Id.* (emphasis added). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *Id.* In a sufficiency of the evidence challenge, the court is highly deferential to the decision of the jury. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014).

Credibility determinations are for the trier of fact and are not subject to review on appeal. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). The appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses and the persuasiveness of the evidence. *Id.*

Our Supreme Court has stated:

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe, or disbelieve, any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of an issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial, conflicting evidence properly submitted to it, is final.

State v. Williams, 96 Wn.2d 215, 222, 634 P.2d 868 (1981); *see, also, State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992) (the court defers to the jury's determination regarding conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of evidence).

In a prosecution for unlawful possession of a controlled substance, the State must establish two elements: the nature of the substance and the fact of possession by the defendant. *State v. Cleppe*, 96 Wn.2d 373, 378, 635 P.2d 435 (1981). Possession is defined in terms of personal custody or

dominion and control. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). The State may establish that possession is either “actual” or “constructive.” *State v. Walcott*, 72 Wn.2d 959, 968, 435 P.2d 994 (1967), *cert. denied*, 393 U.S. 890, 89 S.Ct. 211, 21 L.Ed.2d 169 (1968). “Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods.” *Callahan*, 77 Wn.2d at 29.

To meet its burden on the element of possession the State must establish “actual control, not a passing control which is only a momentary handling”. *Id.* The doctrine of “constructive possession” broadens the application of possessory crimes to include situations in which actual physical control cannot be directly proven, but a strong inference exists that the defendant actually possessed the contraband at one time. *State v. Florine*, 226 N.W.2d 609, 610 (Minn. 1975) (defining the purpose of the doctrine of constructive possession). In *Santiago v. U.S.*, the First Circuit noted that “in certain factual contexts, an ability to dispose [of property] is critical to a finding of possession.” 889 F.2d 371, 376 (1989).

Evidence that a defendant has voluntarily abandoned contraband is sufficient to demonstrate that the defendant had actual possession of that contraband at an earlier point in time. *See State v. Hathaway*, 161 Wn. App. 634, 251 P.3d 253 (2011). In *Hathaway*, the defendant was frisked after being arrested for driving with a suspended license. As the officer frisked the defendant, he heard a “tink” sound and notice a vial of methamphetamine on the ground inches away from the defendant’s foot. The officer also testified that, had the vial been at that location when he drove to the scene, he would have driven over it with his patrol car. The court held, “based on this testimony, the jury could reasonably infer that, when [the officer] was not watching Hathaway during the frisk, she removed the vial of methamphetamine from somewhere on her person and dropped it. Sufficient evidence supports Hathaway’s unlawful possession of a controlled substance conviction.” *Id.* at 646.

Other jurisdictions have held the same. For instance, in *U.S. v. Wind*, the Eighth Circuit Court of Appeals determined that where a defendant abandoned a suitcase during a pursuit with police, the government had produced enough evidence to demonstrate actual possession of the suitcase and the firearm contained within. 986 F.2d 1248, 1250 (1993). Courts have historically denied sufficiency of the evidence

challenges under similar facts. *See, e.g., People v. Herbert*, 59 Cal. App. 158, 210 P. 276 (1922) (evidence of possession was sufficient where officers felt defendant's arm make jerking movement during arrest, heard an object drop on pavement, and located packages of narcotics 8 to 15 feet away from the defendant).

Here, the defendant's argument fails primarily because in sufficiency of the evidence review, the court must view all reasonable inferences in the light most favorable to the State. Here, it was reasonable for the jury to infer that, after the defendant's attempt to flee from police failed, he knew he would be apprehended. In an effort to abandon his drugs in the hope that the contraband would not be located on his person, the defendant purposefully rolled into the nearby weeds and dropped the contraband.

The jury was given multiple photographs of the bundle of drugs and cash – the photographs depict the contraband in the grassy area the defendant occupied prior to his arrest. Ex. P1-P4. The photographs depict items which appear to be freshly deposited at that location – the items are not dirty, wet, covered by grass or other debris, and the cash is neatly folded. The jury could infer from the photographs, alone, that the items had not been abandoned at this location for long; had they been there for a considerable time, the cash would likely have blown away or been taken by

another, and the condition of the items would likely be affected by exposure to the elements.

Defendant also proffered evidence of the condition of the alleyway in which he was arrested; it was filled with debris and overgrowth of weeds. Ex. D101-D112. However, as the prosecutor argued in his closing argument, those photographs depict debris that had had been abandoned long ago:

You will see that the garbage in that alley is tattered. It's torn. It's worn. It's been in the sun and the elements, and it's the typical garbage, the plastic that probably won't break down fully for 10,000 years, but it's the tattered and torn garbage.

Look at, in comparison, the cash and the baggy that the meth came from in this case...The cash isn't tattered and torn. It's in a convenient neat little roll. And you can probably imagine that had that been there a long time, it would've been picked up by somebody. And then look at the baggy of meth. That is not the tattered and torn and weathered baggy that would've just been left out in the elements for some poor person to roll over on and for the police to mistakenly think he possessed it.

RP 169.

Additionally, the defendant's failure to stop for police, his purposeful action of rolling from the alley to the grassy area abutting the alley, and his subsequent failure to show Officer Rankin his hands when commanded all lead to the reasonable inference that the defendant was furtively attempting to conceal contraband anticipating arrest and search.

It is wholly within the province of the jury to determine the persuasiveness and significance of the evidence. Here, the jury believed that the drugs were on the defendant's person while he led Officer Rankin in a brief pursuit² and that he deposited the contraband in the weeds so as to avoid being caught with it. As the prosecutor argued in rebuttal closing: "Mr. Banks had meth, actually had meth, and then rolled away from it. Does that give him a no-change-backs rule where now it's not on me; you can't hold that against me? No. We know where the meth came from. It came from Mr. Banks." RP 184.

It is irrelevant that the defendant did not have the drugs on his person at the time he was searched. The jury was able to determine from the facts, and the inferences that may be drawn from those facts, that the defendant actually possessed the drugs shortly before his arrest. Circumstantial

² Defendant argues that his flight from police "may just as reasonably have been the unthinking reactions of a twenty-eight year old young man or the instinctive reaction and/or a deliberate effort to avoid citation for a traffic infraction." Br. at 8. That may be. However, the significance of the evidence is for the jury to determine, and based on the evidence, the jury could determine that the defendant's flight was indicative of guilt.

Here, the State presented "substantial and sufficient" evidence to create the reasonable and substantive inference that the defendant's departure from the "scene of difficulty" was an instinctive reaction to a consciousness of guilt or deliberate effort to evade arrest and prosecution. *See State v. Bruton*, 66 Wn.2d 111, 112-113, 401 P.2d 340 (1965). Based on the defendant's purposeful behavior of rolling from the alleyway into the grass, the defendant's failure to show the officer his hands upon command, and the location where the drugs were ultimately found, the jury could reasonably infer guilt from his earlier flight.

evidence is of no less value than direct evidence. *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202 (1977); *State v. Bencivenga*, 137 Wn.2d 703, 711, 974 P.2d 832 (1999).

Additionally, the cases cited by the defendant are irrelevant to this case. Those cases stand for the proposition that possession cannot be proven by mere proximity, or by a momentary handling of the contraband.³ Mere proximity or momentary handling does not prove that a defendant had dominion and control over an item, i.e., possession; however, the facts of this case reveal more than proximity or momentary handling. Here, the defendant had physical custody of the methamphetamine at the time he fled from law enforcement, and then abandoned the drugs prior to his apprehension. The defendant's argument fails, and his appeal should be denied.

³ In *State v. Callahan*, *supra*; *State v. Hults*, 9 Wn. App. 297, 513 P.2d 89 (1973); and *State v. Spruell*, 57 Wn. App. 383, 788 P.2d 21 (1990), all cited by the defendant in support of his argument, the State was only able to demonstrate that each defendant had passing control of the contraband. Unlike those cases, the inference here is that the defendant actually possessed the methamphetamine on his person prior to, during, and immediately preceding abandoning the contraband in the alley.

B. UNLESS DEFENDANT’S FINANCIAL CIRCUMSTANCES HAVE IMPROVED SINCE THE TRIAL COURT ENTERED THE ORDER OF INDIGENCY, THE PRESUMPTION OF INDIGENCY REMAINS IN EFFECT THROUGHOUT THE APPEAL.

Effective January 31, 2017, RAP 14.2 reads:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review, or unless the commissioner or clerk determines an adult offender does not have the current or likely future ability to pay such costs. *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.* The commissioner or clerk may consider any evidence offered to determine the individual's current or future ability to pay. If there is no substantially prevailing party on review, the commissioner or clerk will not award costs to any party. An award of costs will specify the party who must pay the award. In a criminal case involving an indigent juvenile or adult offender, an award of costs will apportion the money owed between the county and the State. A party who is a nominal party only will not be awarded costs and will not be required to pay costs. A “nominal party” is one who is named but has no real interest in the controversy.

(Emphasis added).

The trial court determined the defendant to be indigent for purposes of his appeal on October 17, 2016, based on a declaration provided by the defendant. CP 79-80. The State is unaware of any change in the defendant’s circumstances. Should the defendant be unsuccessful on appeal, the Court

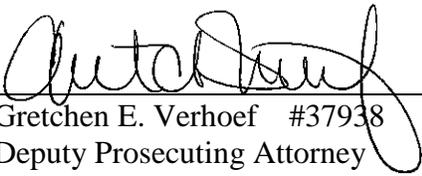
should only impose appellate costs in conformity with RAP 14.2 as amended.

V. CONCLUSION

The State presented sufficient evidence that the defendant unlawfully possessed a controlled substance. The State respectfully requests this court affirm the defendant's conviction.

Dated this 17 day of July, 2017.

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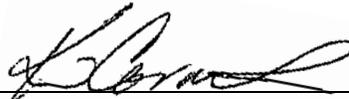
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on July 17, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Susan Gasch
gaschlaw@msn.com

7/17/2017
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

July 17, 2017 - 11:17 AM

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