

FILED
Court of Appeals
Division III
State of Washington
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NO. 36437-2-III

THE COURT OF APPEALS OF THE STATE OF
WASHINGTON, DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

CAMREN BUCHE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR STEVENS COUNTY

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

No evidence was introduced at Camren Buche's trial that he knew the small empty bag found in his wallet contained methamphetamine residue. In addition, the jury was not instructed that knowledge was an element of the crime, only that it needed to find Mr. Buche possessed a controlled substance.

The Court should reverse Mr. Buche's conviction because the trial court failed to instruct the jury on the essential element of knowledge. If this Court does not find that the legislature intended for possession of a controlled substance to be a strict liability crime, it should find that the statute is unconstitutional.

B. ASSIGNMENTS OF ERROR

1. In violation of the Sixth and Fourteenth Amendments to the United States Constitution, and article I, sections 3 and 22 of the Washington Constitution, the court erred by failing to instruct the jury the prosecution must

prove Mr. Buche knew he possessed methamphetamine. CP 44 (Instruction number 12).

2. If unlawful possession is a strict liability crime without a knowledge element, the law violates due process under article I, section 3 of the Washington Constitution and the Fourteenth Amendment to the United States Constitution. The court erred by entering the judgment and sentence.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The possession of a controlled substance statute does not expressly require the government to prove the possession was knowing. Statutes must be construed to avoid constitutional deficiencies. If construed as a strict liability crime without a knowledge element, the statute is likely unconstitutional. Consistent with the constitutional-doubt canon, must the possession statute be read to require proof of knowledge? ¹

¹ The Washington Supreme Court is reviewing the issues raised on this appeal. See *State v. A.M.*, 76758-5-I, 2018 WL 3628994 (Wash. Ct. App. July 30, 2018), *review granted*, Supreme Court No. 96354-1. Video of the argument can be found by following this link:

2. The jury must be instructed on all elements of the charged offense. Properly construed, knowledge is an element of the crime of possession of a controlled substance. Did the court err by failing to instruct the jury knowledge is an element of possession of a controlled substance?

3. The presumption of innocence is a principle fundamental to America's history and tradition. Freakish criminal laws that eliminate inherent elements and shift the burden to defendants to prove their innocence are contrary to this fundamental principle. All states except Washington require the prosecution to prove possession of a controlled substance is knowing. In Washington, an innocent person in possession of drugs must prove their possession was "unwitting." Is it unconstitutional to make possession of a controlled substance a strict liability crime and to presume guilt unless the defendant can prove unwitting possession?

<https://www.tvw.org/watch/?clientID=9375922947&eventID=2019051105>.

D. STATEMENT OF THE CASE

In early 2018, the Stevens County police began an investigation into stolen cars, one of which was taken from Coeur d' Alene, Idaho. RP 90-91. Camren Buche was seen driving one of the stolen cars. RP 216, 219. He also admitted to the police he suspected the car he was seen driving might be stolen. RP 234.

As part of their investigation into the stolen cars, the police arrested Mr. Buche. RP 237. A small empty plastic bag with residue was found inside Mr. Buche's wallet during a second search of him. RP 271. The residue tested positive for methamphetamines. RP 245. Mr. Buche made no statements about the controlled substances.

The government charged Mr. Buche with possession of a stolen vehicle, attempted trafficking in stolen property, and possession of a controlled substance. CP 60-61. The court instructed the jury that to convict Mr. Buche of the drug charge, it was required to find:

(1) That on or about February 14, 2018, the defendant possessed Methamphetamine; and

(2) That the acts occurred in the State of Washington.

CP 44 (Instruction 12). The jury was not instructed that knowledge was an essential element of the crime.

Mr. Buche was found guilty of possession of a controlled substance, along with possession of a stolen vehicle. CP41-42.

E. ARGUMENT

When Mr. Buche was arrested, the police discovered a small empty plastic bag with residue that would later test positive for methamphetamines. RP 271. This bag was so small it was not discovered until after the police conducted a second search of Mr. Buche, finding the nearly empty bag in Mr. Buche's wallet. RP 245. No one ever testified Mr. Buche knew what was in the small empty bag.

The court did not instruct the jury that possession of a controlled substance requires knowledge. CP 44 (Instruction 12). Because the jury was not asked to find whether Mr. Buche knew the small empty bag contained a controlled

substance, his conviction should be reserved and a new trial ordered.

1. **Possession of a controlled substance requires proof the defendant *knowingly* possessed the illegal substance. The court's failure to properly instruct the jury on this requirement requires reversal.**

- a. *The jury must be clearly instructed on all the elements of an offense.*

Due process and the right to a jury trial require the prosecution prove every element of an offense to the jury. *Apprendi v. New Jersey*, 530 U.S. 466, 499, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Const. art. I, § 3, § 22; U.S. Const. amend. VI, XIV. Also fundamental is the requirement that the prosecution prove every element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The beyond a reasonable doubt “standard provides concrete substance for the presumption of innocence.” *Id.* at 363. An error in failing to properly instruct the jury on every element of the offense is a manifest constitutional error that may be raised for the time on appeal. RAP 2.5(a)(3); *State v. Mills*, 154 Wn.2d 1, 6, 109 P.3d 415

(2005); *State v. Clark-El*, 196 Wn. App. 614, 619, 384 P.3d 627 (2016).

b. The court erred by failing to instruct the jury the prosecution must prove Mr. Buche knew he possessed the substance.

It is fundamental that “wrongdoing must be conscious to be criminal.” *Morissette v. United States*, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952). A “defendant’s intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense ‘element.’” *Apprendi*, 530 U.S. at 493.

Accordingly, although legislatures have broad authority to define crimes and some kind of strict liability crimes may be permitted, “due process places some limits on its exercise.” *Lambert v. California*, 355 U.S. 225, 228, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957) (strict liability registration scheme violated due process when applied to person who had no knowledge of duty to register). This makes sense because the due process principles of proof beyond a reasonable doubt and the presumption of innocence, as recognized in *Winship*, are

“concerned with substance,” not “formalism.” *Mullaney v. Wilbur*, 421 U.S. 684, 699, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).

Here, the trial court did not instruct the jury the government bore the burden of proving Mr. Buche *knew* he possessed a controlled substance. CP 44 (Instruction 12). Instead, the court only instructed the jury it needed to find Mr. Buche simply possessed methamphetamine. *Id.* This was error.

Washington’s Supreme Court has previously interpreted drug possession to be a strict liability crime with no mental element, but recently heard argument on whether its previous decisions are still good law. *See State v. A.M.*, 192 Wn.2d 1021, 1021, 438 P.3d 112 (2019); *see also State v. Bradshaw*, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); *State v. Cleppe*, 96 Wn.2d 373, 375, 635 P.2d 435 (1981).

Current case law holds that those who innocently possess drugs can avoid a conviction only if they prove “unwitting possession.” *Bradshaw*, 152 Wn.2d at 537-38. In

short, there is a presumption of guilt rather than a presumption of innocence.

This interpretation is wrong. In reaching this conclusion, the Court relied on the legislature's omission of a mental element in the statute. *Bradshaw*, 152 Wn.2d at 534-35; *Cleppe*, 96 Wn.2d at 379-80. The "failure to be explicit regarding a mental element is not, however, dispositive of legislative intent." *State v. Anderson*, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000); accord *United States v. United States Gypsum Co.*, 438 U.S. 422, 438, 98 S. Ct. 2864, 57 L.Ed.2d 854 (1978). Unless it can be absolutely shown a legislature intended to exclude a traditional mental element, the courts will infer one. *See, e.g., Anderson*, 141 Wn.2d at 366-67. This makes sense because without a mental element otherwise innocent conduct may be criminalized.²

In concluding drug possession is a strict liability crime, *Cleppe* and *Bradshaw* overlooked the canon of construction

² Further, that the legislature has not amended the drug possession statute since *Cleppe* and *Bradshaw* is not dispositive. *Fast v. Kennewick Pub.Hosp. Dist.*, 187 Wn.2d 27, 39, 384 P.3d 232 (2016) ("evidence of legislative acquiescence is not conclusive, but is merely one factor to consider").

that statutes are interpreted to avoid constitutional doubts when statutory language reasonably permits. *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015); accord *Gomez v. United States*, 490 U.S. 858, 864, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989) (“settled policy to avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question”); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 247 (2012) (“A statute should be interpreted in a way that avoids placing its constitutionality in doubt.”). Unless interpreted to have a knowledge element, the constitutionality of the statute is dubious in light of fundamental due process principles.

A state has authority to allocate the burdens of proof and persuasion for a criminal offense, but this allocation violates due process if “it offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental.” *Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (internal

quotation omitted). “The presumption of innocence unquestionably fits that bill.” *Nelson v. Colorado*, __ U.S. __, 137 S. Ct. 1249, 1256 n.9, 197 L. Ed. 2d 611 (2017); *accord Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394 (1895). For this reason, in allocating the burden of proof, “there are obviously constitutional limits beyond which the States may not go.” *Patterson*, 432 U.S. at 210.

History and tradition indicate the constitutional line is crossed when “an inherent element” is shifted or when the elements of the crime are “freakish”:

Where a State’s particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant’s burden.

Schad v. Arizona, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality); *see Schad*, 501 U.S. at 650

(Scalia, J. concurring) (“It is precisely the historical practices that *define* what is ‘due.’”).

If interpreted to have no mental element, there are grave doubts about the validity of the possession statute. It creates a felony offense punishable by up to five years in prison and a fine of up to ten thousand dollars. RCW 69.50.4013(2); RCW 9A.20.021(1)(c). It is out of line with the Uniform Controlled Substances Act and every other state, all of which require the prosecution to prove knowledge. *State v. Adkins*, 96 So. 3d 412, 424 n.1 (Fla. 2012) (Pariante, J., concurring); *Bradshaw*, 152 Wn.2d at 534; *State v. Bell*, 649 N.W.2d 243, 252 (2002); *Dawkins v. State*, 313 Md. 638, 547 A.2d 1041, 1045 n.7 (1988); Unif. Controlled Substances Act 1970 § 401(c). And it is out of line with *Anderson’s* reading of unlawful possession of a firearm to include knowledge. 141 Wn.2d at 366-67. Thus, Washington’s drug possession law is “freakish” in that it eliminates the “inherent” mental element of knowledge. *Schad*, 501 U.S. 640 (plurality).

For innocent persons who possess drugs without knowledge, they bear the burden of proving lack of knowledge. This burden-shifting scheme is constitutionally dubious.

Here, unwitting possession requires defendants to disprove knowledge. The defense recognizes there is no wrongful quality about possessing drugs unless there is knowledge. This shows the state seeks to punish knowing possession of drugs, not every possession of drugs. Unless the burden is placed on the prosecution, the statute is unconstitutional.

For these reasons, possession of a controlled substance requires proof of knowledge. This Court should hold the trial court erred by failing to properly instruct the jury the prosecution bore the burden of proving beyond a reasonable doubt Mr. Buche knowingly possessed a controlled substance.

c. The prosecution cannot meet its burden to prove the error harmless beyond a reasonable doubt.

An instructional error that relieves the prosecution of its burden of proof, such as through the omission or

misstatement of an element, is subject to the constitutional harmless error test. *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). The court must be able to conclude beyond a reasonable doubt the error did not contribute to the verdict. *Neder*, 527 U.S. at 15; *Brown*, 147 Wn.2d at 341. In other words, the court must be able to conclude beyond a reasonable doubt the verdict would have been the same without the error. *Neder*, 527 U.S. at 19; *Brown*, 147 Wn.2d at 341. If the missing element is supported by uncontroverted evidence, this standard may be satisfied. *Neder*, 527 U.S. at 18; *Brown*, 147 Wn.2d at 341.

The prosecution cannot meet its burden to prove the error harmless. The evidence did not establish Mr. Buche knew that the empty bag in his wallet contained a controlled substance. At best, the bag contained residue, only that which is left when everything else has been dumped out. RP 270. The bag itself was so small that the police did not see it when they first searched Mr. Buche. The expert never even

indicated the drugs had a quantifiable weight. Mr. Buche never stated he knew the bag contained drugs. In addition, Mr. Buche was not arrested with any other paraphernalia or indications of recent use. The prosecutor also expressly told the jury it was the methamphetamines found in Mr. Buche's wallet when he was arrested, and not at some other time. RP 293-94. Likewise, the to convict instruction told the jury the relevant time period was "on or about February 14, 2018," which was the date of Mr. Buche's arrest.

Because the jury could have found Mr. Buche did not know the small, empty bag still contained a controlled substance, the prosecution cannot prove the error harmless beyond a reasonable doubt. *See State v. Holmes*, 122 Wn. App. 438, 444-45, 93 P.3d 212 (2004) (appellate court not in a position to say jury would have necessarily reached the same result when the issue comes down to credibility). The conviction must be reversed and a new trial granted.

2. If the drug possession statute does not require proof of knowledge, it is unconstitutional. The conviction must be reversed and the prosecution dismissed.

If the drug possession statute does not require proof of knowledge, it violates due process principles and is unconstitutional. U.S. Const. amend. XIV; Const. art. I, § 3. As explained, Washington's drug possession statute crosses the constitutional line and criminalizes innocent behavior. For the innocent to avoid a felony conviction and the grave consequences that flow from it, they must disprove the presumption that they were aware of the substance they possessed. This burden-shifting scheme for possession of a controlled substance is unlike any in the union. *Dawkins*, 547 A.2d at 1045 n.7. The possession statute turns the presumption of innocence, fundamental to our nation's history and traditions, on its head. It creates a presumption of guilt. This Court should hold the statute is unconstitutional.

The constitutional-doubt canon instructs that statutes are interpreted to avoid constitutional doubts when statutory language reasonably permits. *Utter*, 182 Wn.2d at 434;

Gomez, 490 U.S. at 864. Interpreting the drug possession statute to require proof of knowledge avoids the constitutional issue regarding the statute's validity.

Without a knowledge element, the drug possession statute is unconstitutional. If this Court does not find knowledge is a required element of the offense, Mr. Buche's conviction should be reversed and the prosecution dismissed because the statute is void as unconstitutional. *City of Seattle v. Grundy*, 86 Wn.2d 49, 50, 541 P.2d 994 (1975).

F. CONCLUSION

Because the court failed to instruct the jury on the essential element of knowledge, Mr. Buche's conviction should be reversed and a new trial ordered. If the court finds knowledge is not an element of unlawful possession of a controlled substance, this Court should find the statute unconstitutional.

DATED this 5th day of June 2019.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'T. A. O.', written in a cursive style.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 36437-2-III
)	
CAMREN BUCHE,)	
)	
APPELLANT.)	

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