

FILED
Court of Appeals
Division III
State of Washington
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No. 37191-3-III

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

STATE OF WASHINGTON, Respondent

v.

THOMAS BARTON, Appellant

APPEAL FROM THE SUPERIOR COURT
OF OKANOGAN COUNTY
THE HONORABLE JUDGE CHRISTOPHER E. CULP

BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
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I. ASSIGNMENTS OF ERROR

A. The Evidence Was Insufficient To Sustain A Conviction For Use Of Drug Paraphernalia.

LEGAL ISSUE: Possession of drug paraphernalia alone is insufficient to convict a person of the use of drug paraphernalia. Where the State presents nothing more than mere possession of a pipe, is the evidence insufficient to sustain the conviction?

II. STATEMENT OF FACTS

Okanogan County prosecutors charged Thomas Barton with one count of possession of a controlled substance- methamphetamine (RCW 69.50.4013(1)) and one count of use of drug paraphernalia. (RCW 69.50.412(1)). CP 39-40.

On July 3, 2019, security from the Coulee Dam Casino alerted the Colville Tribal Police that Thomas Barton was at the casino, and he had a confirmed warrant. RP 62. Officer Shaffer took Mr. Barton into custody. RP 63. Shaffer transported Mr. Barton to the jail and left him with jail staff to inventory Barton's property. RP 64. Jail staff alerted Shaffer that inside of Barton's fleece jacket they found a blue glass pipe, a piece of foil, and inside the foil a piece of notebook paper. RP 66,69.

Shaffer suspected the white substance inside of the notebook paper was methamphetamine. RP 69,70. He said the pipe appeared to have been

used “at some point.” RP 70. Shaffer sealed the pipe, foil, and paper in evidence bags. RP 71. Dr. Stenzel from the WSPCL received the evidence bags. RP 100. Stenzel testified the notebook paper substance was methamphetamine hydrochloride. RP 109. He did not test the pipe. RP 111-112.

After the State rested its case defense counsel moved to dismiss Count 2, the drug paraphernalia charge. RP 117. The court remarked “the charge is unlawful use. And –(inaudible) saying (inaudible) evidence to create a prima facia showing – charge is not – It’s not against the law to possess it, it’s against the law to use it.” RP 117. The court acknowledged there was no evidence the inside of the pipe bowl contained any drug residue, only that it looked like it had been used at some point by someone. RP 118. The court denied the motion. RP 118.

The court gave jury instruction number 11:

A person commits the crime of use of drug paraphernalia when he or she uses paraphernalia to store, contain, conceal, ingest inhale, or otherwise introduce into the human body a controlled substance.
CP 22

The court gave jury instruction number 12:

To convict the defendant of the crime of use of drug paraphernalia, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about July 3, 2019, *the defendant used drug paraphernalia* to store, contain, conceal, ingest or otherwise introduce into the human body a controlled substance; and

(2) That this act occurred in the State of Washington, County of Okanogan.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 23. (emphasis added).

The jury found Mr. Barton guilty on both charges. CP 73-74. The court imposed a sentence of 12 months plus a day on Count 1 and 90 days on Count 2. CP 55. Mr. Barton makes this timely appeal. CP 51-62.

III. ARGUMENT

A. The Evidence Is Insufficient To Sustain A Conviction For Use Of Drug Paraphernalia.

A claim of insufficiency of the evidence is a question of constitutional law which this Court reviews de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Evidence will only support a conviction if, viewed in the light most favorable to the prosecution, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In determining whether the necessary quantum of proof exists, this Court must be convinced that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn.App. 714, 718, 995 P.2d 107 (2000). Evidence is substantial if it would convince an unprejudiced mind of the

truth of the fact to which the evidence is directed. The existence of a fact cannot rest on mere guess, speculation or conjecture. *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972).

RCW 69.50.412(1) proscribes the *use of drug paraphernalia* to inject, inhale or otherwise ingest a controlled substance. RCW 69.50.412(1)¹. Under Washington law, bare possession of drug paraphernalia is not unlawful, more is needed. *State v. Lowrimore*, 67 Wn.App. 949, 959, 841 P.2d 779 (1992). Moreover, the statute does not prohibit possession of drug paraphernalia even with an intent to use it for illegal substances. RCW 69.50.412(1). *State v. Fisher*, 132 Wn.App. 26, 31, 130 P.3d 382 (2006).

To prove possession of drug paraphernalia, the State must prove not only possession of the item, but that the item was used in drug related activity. *State v. George*, 146 Wn.App. 906, 919, 193 P.3d 693 (2008). A used pipe, in and of itself, does not establish a “common sense inference” that a pipe untested for drugs is the equivalent of drug paraphernalia. RCW 69.50.102(5); *State v. Williams*, 62 Wn.App. 748, 815 P.2d 285

¹ 1) It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance other than marijuana. Any person who violates this subsection is guilty of a misdemeanor.

(1991)². Officers must either see the use of the paraphernalia, or there must be some confirmation of an illegal substance in the pipe itself.

In *O'Meara*, the defendant was found with a baggie of marijuana, a tin, and a pipe which both contained marijuana residue. *State v. o'Meara*, 143 Wn.App. 638, 643, 180 P.3d 196 (2008). The Court reversed dismissal because a rational trier of fact could conclude the *existence of residue of controlled substances on an object* supported a reasonable inference that the object was drug paraphernalia. *Id.* at 643.

Here, the only fact presented by the State was that the pipe was burned, not that there was any drug residue. RP 70,118. It is speculation and guess that it was drug paraphernalia, and the State's evidence cannot support a conviction for possession of drug paraphernalia. Where an appellate court reverses a conviction based on insufficiency of the evidence, it must be dismissed with prejudice. *Hudson v. Louisiana*, 450 U.S. 40, 101 S.Ct. 970, 67 L.Ed.2d 30 (1981).

² The issue there was whether possession of cocaine and use of drug paraphernalia were concurrent statutes. *Id.* at 754.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Barton respectfully asks this Court to reverse and dismiss with prejudice the conviction for possession of drug paraphernalia.

Respectfully submitted this 18th day of May 2020.

A handwritten signature in black ink that reads "Marie Trombley". The signature is written in a cursive style and is enclosed within a thin black rectangular border.

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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on May 18, 2020, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Okanogan County Prosecuting Attorney at anoma@co.okanogan.wa.us and to Thomas Barton c/o attorney Marie Trombley at marietrombley@comcast.net.



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