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NO. 62862-2+

02808-2

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LIVIO DELLAGUARDIA,

Appellant.

FILED  
COURT OF APPEALS DIV. I  
STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE GREGORY CANOVA

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Appellant unlawfully possessed a large amount of marijuana, which was valued at approximately \$12,292; the marijuana was packaged in four separate bags; the Appellant ran from the police across I-5 and the Appellant was driving a rental car. Given this, was there sufficient evidence to support Appellant's conviction for Violation of the Uniform Controlled Substances Act: Possession with Intent to Deliver Marijuana?

2. What is the appropriate standard of review?

3. Appellant unlawfully possessed a large amount of marijuana, which was valued at approximately \$12,292; the marijuana was packaged in four separate bags; the Appellant ran from the police across I-5 and the Appellant was driving a rental car. Given the appropriate standard of review, did the State present sufficient evidence from which a reasonable jury could infer and conclude that Appellant possessed marijuana with the intent to deliver it?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

Livio Dellaguardia was charged with one count of Violation of the Uniform Controlled Substances Act: Possession with the Intent to Deliver Marijuana. CP 1-5. The Appellant was found guilty of this charge by a jury on October 24, 2009. CP 29. On January 9, 2009, the Appellant's defense attorney filed notice of appeal. CP 44.

**2. SUBSTANTIVE FACTS.**

On November 17, 2007, Washington State Patrol Trooper Zimmer was on patrol traveling south on I-5 around the Convention Center. RP 143-45. The Trooper observed a fast moving vehicle in front of him, which he paced at a speed of 75 miles per hour in a 60 mile per hour zone. RP 145. The Trooper observed the vehicle cross the skip line from lane four into lane three, and drift back into lane four. RP 146. The vehicle then crossed the skip line from lane four into the HOV lane and drifted back into lane four. RP 146. No turn signal was observed at any time. RP 146. At this point, Trooper Zimmer attempted to conduct a traffic stop, however, the

Appellant drove on the shoulder of the road for approximately half a mile before he stopped. RP 147-48.

The Trooper contacted the Appellant, who was the driver and sole occupant of the vehicle. RP 152. At this time, the Trooper detected an obvious odor of intoxicants coming from the car. RP 153. The Trooper had the Appellant exit the vehicle, and the Appellant provided his driver's license to the Trooper. RP 153. The Trooper was concerned about alcohol use and asked the Appellant how much he had to drink. RP 156. The Appellant replied, "a couple." RP 157. The Trooper then asked the Appellant if he had smoked marijuana, to which the Appellant replied he had "a long time ago." RP 158.

At this point, Field Sobriety Tests and the Portable Breath Test were conducted, and the Trooper did not believe the Appellant was impaired by alcohol. RP 158-61. However, the Trooper noticed the odor of marijuana coming from the Appellant. RP 161. The Trooper informed the Appellant he was under arrest and the Trooper attempted to take the Appellant into custody. RP 161.

The Appellant resisted arrest. RP 161. The Trooper pinned the Appellant up against the vehicle in an attempt to contain him.

RP 190. The Trooper warned the Appellant that he would be tased if he did not stop resisting. RP 190. The Appellant continued to resist arrest and the Trooper decided to use his tazer on the Appellant. RP 191. The Trooper pushed away from the Appellant and pulled his tazer. RP 191. As the Trooper pulled his tazer, the Appellant ran from the Trooper. RP 191. Because the Appellant ran into traffic on I-5, the Trooper did not tase the Appellant out of fear that the Appellant would be hit by a car. RP 191. The Appellant ran across seven lanes of I-5, as well as several off ramps to avoid being arrested. RP 192. The Trooper did not chase the Appellant due to safety reasons, as well as the fact that the Trooper had the Appellant's identification. RP 194. The Trooper notified communications that the Appellant had fled. RP 194.

The Appellant's vehicle was in an impound and no parking zone and was impounded. RP 195. The Trooper searched the vehicle prior to it being impounded and learned that it was a rental vehicle. RP 195. During the search, the Trooper located a large duffel bag in the back of the car, behind the back seat. RP 196. The Trooper noticed an overwhelming odor of marijuana coming from the bag. RP 196. Inside the duffel bag, were four plastic

bags, each of which contained green marijuana. RP 197. The Trooper photographed the duffle bag with the marijuana and then seized it for evidence. RP 196.

The evidence seized by Trooper Zimmer was sent to the Washington State Patrol Crime Laboratory where Mr. Mark Strongman examined it. RP 169-77. According to Mr. Strongman's testimony, the green material was in fact marijuana, and the total weight of the marijuana was 3,073 grams. RP 178-79, 183-84.

**C. ARGUMENT**

- 1. APPELLANT UNLAWFULLY POSSESSED A LARGE AMOUNT OF MARIJUANA THAT WAS VALUED AT APPROXIMATELY \$12,292; THE MARIJUANA WAS PACKAGED IN FOUR SEPARATE BAGS; THE APPELLANT RAN FROM THE POLICE ACROSS I-5 AND THE APPELLANT WAS DRIVING A RENTAL CAR. GIVEN THIS, THERE WAS SUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTION FOR VIOLATION OF THE UNIFORM CONTROLLED SUBSTANCES ACT: POSSESSION WITH INTENT TO DELIVER MARIJUANA.**

The elements of possession of a controlled substance with intent to deliver are: 1) unlawful possession, 2) of a controlled

substance (in this case, marijuana), 3) with intent to deliver. RCW 69.50.401(a); State v. Hagler, 74 Wn. App. 232, 235, 872 P.2d 85 (1994); WPIC 50.13; WPIC 50.14. Appellant contends that insufficient evidence was presented to the jury to support its finding of guilt with regard to his intent. See Brief of Appellant (hereinafter "Appellant's Brief"). Appellant does not challenge that there was sufficient evidence that he, in fact, did unlawfully possess a controlled substance. Nor does he challenge his conviction on any other ground.

Appellant's arguments must fail. The State presented sufficient evidence such that a reasonable jury could find Appellant intended to deliver the marijuana found in the rental vehicle.

a. The Appropriate Standard Of Review.

As Appellant concedes, a challenge to the sufficiency of the evidence requires the appellate court to view the evidence in the light most favorable to the prosecution and to reverse the conviction only if it finds that no reasonable trier of fact could have found the person guilty beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). An appellant's claim of

insufficient evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992). Also, "all reasonable inference from the evidence must be drawn in favor of the State and against the defendant." State v. Gallagher, 112 Wn. App. 601, 613, 51 P.3d 100 (2002) (citing Salinas, 119 Wn.2d at 201). In addition, in conducting a review for sufficiency, appellate courts draw no distinction between circumstantial and direct evidence presented at trial, because both are considered equally reliable. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). Furthermore, in determining whether sufficient evidence was presented, reviewing courts need not be convinced of the Appellant's guilt beyond a reasonable doubt, but only that a reasonable trier of fact *could* so find. Gallagher, 112 Wn. App. at 613. Finally, as in all cases on appeal, the appellate court may affirm for any basis apparent in the record. State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993); State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990); State v. Butler, 53 Wn. App. 214, 766 P.2d 505 (1989).

- b. Appellant Unlawfully Possessed A Large Amount Of Marijuana, Which Was Valued At Approximately \$12,292; The Marijuana Was Packaged In Four Separate Bags; The Appellant Ran From The Police Across I-5 And The Appellant Was Driving A Rental Car. Given The Appropriate Standard Of Review, Did The State Present Sufficient Evidence From Which A Reasonable Jury Could Infer And Conclude That Appellant Possessed Marijuana With The Intent To Deliver It?

A person acts with intent when "he or she acts with the objective or purpose to accomplish a result constituting a crime." RCW 9A.08.010(1)(a). Short of a statement or admission by a person as to what he or she intended, direct evidence of intent is essentially impossible to come by. However, it has long been recognized that intent can legally be inferred from the facts and circumstances of a case. See, e.g., State v. Wilson, 125 Wn.2d 212, 217, 883 P.2d 320 (1994) (citing, *inter alia*, State v. Ferreira, 69 Wn. App. 465, 850 P.2d 541 (1993); State v. Louthier, 22 Wn.2d 497, 156 P.2d 672 (1945)).

In this case, there is no direct evidence as to Appellant's intent. However, there are facts and circumstances from which his intent may be inferred. Appellant's challenge to the sufficiency of the evidence must fail as there is certainly sufficient evidence from

which a reasonable jury could infer and conclude -- as this jury did -  
- that Appellant possessed marijuana with the intent to deliver it.

First, the total weight of the marijuana was 3,073 grams. RP 178-79. This is an extremely large amount of marijuana, in fact, this amount of marijuana is approximately one-thousand times what Trooper Zimmer sees on a regular basis. RP 142. In State v. Wade, the court stated, "It appears that at some point, the quantity of drugs could be large enough to raise an inference that the drugs were possessed with the intent to distribute." State v. Wade, 98 Wn. App. 328, 340; 989 P.2d 576, 582 (1999). In that case, the defendant merely had nine rocks of cocaine, a far cry from the 3,073 grams of marijuana in this case. The approximate value of this amount of marijuana is \$12,292. RP 143. Furthermore, the marijuana was packaged in four separate packages. RP 197. Also noteworthy is that the Appellant was driving a rental car. RP 195. The Appellant lived in Renton, Washington and was driving a rental car at two o'clock in the morning in Seattle, which contained 3,073 grams of marijuana. RP 178-79, 192-95.

Second, once the Trooper attempted to arrest the Appellant, he resisted arrest and then ran from the Trooper. RP 191-92. Not only did he run from the Trooper, but he ran across seven lanes of

I-5 traffic and several off ramps. RP 192. The court in Wade stated flight "may indicate guilt about possession as well as intent." Wade at 341. Therefore, a reasonable jury could infer as a matter of logical probability that Appellant possessed marijuana with the intent to deliver it from his specific conduct of fleeing from the arresting Trooper.

In this case, proof of intent was shown through the sheer amount of marijuana that was found in the Appellant's vehicle (3,073 grams), the fact that this was one-thousand times more than an experienced Trooper sees on a regular basis, the value of the marijuana was approximately \$12,292, the marijuana was packaged in four separate bags, a manner that is consistent with volume sales, no drug paraphernalia for personal use of the marijuana was found in the vehicle, the Appellant was driving a rental car and the Appellant resisted arrest and ran across seven lanes of I-5 traffic. Alone, any one of these factors may not be sufficient, but taken together, the totality of the evidence is sufficient. There was, therefore, sufficient evidence as to Appellant's intent and, thus, his appeal must fail.

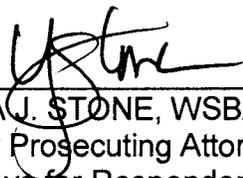
**D. CONCLUSION**

There was sufficient evidence from which a reasonable jury could find that Appellant intended to deliver the marijuana found in the rental vehicle. The State, therefore, respectfully requests that this Court affirm Appellant's conviction.

DATED this 23<sup>rd</sup> day of October, 2009.

Respectfully submitted,

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By:   
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Suzanne Lee Elliott, the attorney for the appellant, at 1300 Hoge Building, 705 Second Avenue, Seattle, WA, 98104, containing a copy of the Brief of Respondent, in STATE V. DELLAGUARDIA, Cause No. 62868-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

Done in Seattle, Washington

Date

10/23/09

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