

64216-2

64216-2

No. 64216-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

DARRELL JONES,

Appellant.

---

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

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APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. Darrell Jones's right to receive a fair trial was violated where the trial court improperly denied the defense request for a continuance, thereby precluding him from calling an exculpatory witness.

2. The State deprived Mr. Jones of due process in entering a conviction in the absence of proof beyond a reasonable doubt of possession of a controlled substance.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The accused has the constitutional right to present a defense. Where the trial court insisted that Mr. Jones proceed to trial in the absence of a crucial exculpatory defense witness, did this refusal to grant a reasonable continuance violate Mr. Jones's right to present a defense?

2. The state and federal constitutions require the prosecution to prove each element of an offense beyond a reasonable doubt. To prove that a person possessed an item, the State must prove beyond a reasonable doubt that the defendant was aware of the item. If the defendant proves by a preponderance of the evidence that the possession was unwitting, the State necessarily fails to satisfy its burden. Here, the State offered no evidence that Mr. Jones was

aware of the item he was convicted of possessing, and the evidence established that he had no knowledge or reason to have knowledge of its presence. Must the conviction be reversed and the case dismissed where the State failed to satisfy its burden of proof?

C. STATEMENT OF THE CASE

Darryll Jones and his girlfriend Ola Milam spent the day together on November 25, 2008. 6/23/08 RP 119.<sup>1</sup> This was the day before Mr. Jones's birthday, so he remembered it well. Id. Mr. Jones had spent the evening before with Ms. Milam and their children. Id. The following day, Mr. Jones and Ms. Milam drove to a friend's house, where they all planned to spend some time socializing together. Id. at 120-21.

Once their babysitter arrived, Mr. Jones and Ms. Milam drove to the Beacon Hill home of their friend Deshawn Mitchell, where they all began drinking tequila at approximately 8 p.m. 6/23/09 RP 121. Later, Mr. Jones asked Ms. Milam to drop him at his mother's home in the Central District near Union Street, in order to pick up some money for his birthday. Id. at 122. Since Mr. Jones had left home without a jacket, he borrowed one from his friend Deshawn Mitchell's

closet. Id. at 124. Mr. Jones described the jacket as a Sean John coat with a hood and a patch on it. 6/23/09 RP 124. He said that the coat had multiple pockets, but that he had no idea what was in any of the pockets, since he had not checked. 6/23/09 RP 127.

Once Mr. Jones was dropped off near Union Street, he was stopped by the police, who said he fit a suspect description broadcast in the area. 6/23/09 RP 126.<sup>2</sup> Although Mr. Jones did not know what was in the pockets of his borrowed coat, officers found an unknown liquid in an old food coloring bottle in one of his pockets. Id. at 88, 127-28. Field tests indicated that the liquid tested positive for apparent phencyclidine (PCP). 6/22/09 RP 32.

The State's expert witness testified that the liquid later tested positive for PCP through laboratory tests at the State crime lab. 6/23/09 RP 110. This same chemist also noted that PCP is known to have hallucinogenic and dissociative properties that tend to remove a person from reality. 6/23/09 RP 113. Officers noted that Mr. Jones

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<sup>1</sup> The verbatim report of proceedings consists of two volumes of transcripts from June 22, 2009, through September 2, 2009. The proceedings will be referred to herein by the date of proceeding followed by the page number, e.g. "6/22/09 RP \_\_\_."

<sup>2</sup> The initial arrest charge -- fourth degree assault -- was dismissed pre-trial, when the State presumably lost its sole witness; the trial court therefore precluded any reference to the reason for the initial stop of Mr. Jones. 6/23/09 RP 49-53. The court ruled that officers would testify to a lawful stop of Mr. Jones, and that he fit a description based on an unrelated charge. 6/23/09 RP 53.

did not struggle during his arrest, attempt to escape, or appear to believe he had superhuman strength. 6/23/09 RP 95.

At trial, following Mr. Jones's direct examination, Mr. Jones personally addressed the trial court and requested a continuance. 6/24/09 RP 142. Mr. Jones indicated that his trial attorney had attempted to communicate with Deshawn Mitchell, the owner of the coat, but that he needed more time to obtain Mr. Mitchell's statement. Id. Mr. Jones's trial attorney then requested a continuance, stating that Mr. Mitchell was an exculpatory witness, and that when he had attempted to interview him in jail the day before, Mr. Mitchell had not responded to his request. Id. 144-45. The trial court denied the motion for a continuance and proceeded with the trial. 6/24/09 RP 146.

Mr. Jones was convicted of possession of a controlled substance. CP 35-43. He timely appeals. CP 44.

D. ARGUMENT

1. THE TRIAL COURT VIOLATED MR. JONES'S CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE BY DENYING HIS REQUEST FOR A CONTINUANCE TO PRESENT AN ESSENTIAL EXCULPATORY WITNESS.

- a. The federal and state constitutions guarantee the accused the right to present a defense. The federal and state constitutions guarantee every person accused of a crime the right to present a defense. This right is derived from (1) the guarantee of due process, which includes the opportunity to defend against the State's accusations; (2) the right to compulsory process, which ensures the right to present a defense; and (3) the right to confront the government's witnesses, which includes the right to meaningful cross-examination. U.S. Const. amends. VI, XIV; Const. art. 1, §§ 3, 22; Holmes v. South Carolina, 547 U.S. 319, 126 S.Ct. 1727, 1731, 164 L.Ed.2d 503 (2006); Davis v. Alaska, 415 U.S. 308, 314-15, 94 S.Ct. 1105, 39 L.Ed.2d 437 (1974); Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); see also RCW 10.52.040; CrR 6.12.

A defendant must be permitted both to introduce relevant, probative evidence and to cross-examine the State's witnesses in a meaningful fashion. State v. Maupin, 128 Wn.2d 918, 924-25, 913

P.2d 808 (1996) (reversing conviction where defendant was precluded from presenting testimony of defense witness). As the Court said in Maupin,

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. . . . This right is a fundamental aspect of due process of law.

Maupin, 128 Wn.2d at 924 (citing Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (reversing conviction where defendant was denied the right to call relevant defense witness, finding denial of right to compulsory process)). In Mr. Jones's case, the denial of his request for a short continuance was an unreasonable burden on his right to present a defense.

b. The proffered testimony was relevant to Mr. Jones's defense and would have been helpful to the jury. The right to present witnesses is limited only to the extent that it does not embrace the right to present irrelevant evidence. Maupin, 128 Wn.2d at 925. The trial court has the discretion to determine whether evidence is relevant. However, a defendant's inability to present relevant evidence implicates the fundamental fairness of

the proceedings and the error must be analyzed as a due process violation. Maupin, 128 Wn.2d at 924.

The trial court's decision denied Mr. Jones's reasonable request to pause the proceedings in order to present a defense witness with relevant testimony – in fact, a witness who might exculpate him completely. 6/24/09 RP 142-46. In denying Mr. Jones the opportunity to call his witness, the court explained:

If there – if -- interpreting that as some motion to stop the trial to go find this witness, I would deny the motion at this time, given the attorney made efforts yesterday to talk to this witness, the witness would not come out and speak with him. Also, there would be a – from the facts that were testified to yesterday, there would be a Fifth Amendment right for Mr. Mitchell – I mean, if the testimony of the defendant is to be believed, and it's Mr. Mitchell's jacket, then Mr. Mitchell, you know, would have a Fifth Amendment right not to testify, so – and I'd have to assign him counsel to discuss that fact, so I am denying the motion at this time.

6/24/09 RP 146. Thus, Mr. Jones was denied the short continuance and forced to proceed with trial, despite his protestations that the jacket belonged to his friend, Mr. Mitchell.

6/24/09 RP 146.

Mr. Jones's defense was critically restricted when the trial court denied the motion for a continuance in order for his defense attorney to speak with Deshawn Mitchell, the owner of the coat.

The testimony of this witness was highly relevant to Mr. Jones's defense of unwitting possession, as his presence would have exculpated Mr. Jones. Mr. Jones had the constitutional right to present this evidence so that the jury had the information needed to determine whether or not the State proved possession, and whether the defense had met its burden on unwitting possession. The trial court's ruling thus violated his due process right to present a defense. Maupin, 128 Wn.2d at 924.

c. The trial court's refusal to grant a continuance and the court's interference with Mr. Jones's right to call witnesses violated his right to present a defense. Due process demands that a defendant be permitted to present evidence that is relevant and of consequence to his or her theory of the case. Maupin, 128 Wn.2d at 924; State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987); see also Am.Jur.2d , §§ 4, 49, 52. A violation of the right to compel witnesses is presumed prejudicial. Maupin, 128 Wn.2d at 924; State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976). It is the prosecution's burden to show that the error was harmless beyond a reasonable doubt. Maupin, 128 Wn.2d at 924; Burri, 87 Wn.2d at 175.

The trial court may not trump a defendant's right to present witnesses in his defense with its own generic concerns about expediency. As the Supreme Court explained in State v. Cadena, "a myopic insistence on expeditiousness in the face of a justifiable request for a delay can render the right to defend with counsel an empty formality." State v. Cadena, 74 Wn.2d 185, 189, 443 P.2d 826 (1968), overruled on other grounds, State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975).

The trial court's analysis focused in part upon its displeasure with needing to assign counsel to Mr. Mitchell, due to a possible Fifth Amendment issue. 6/24/09 RP 146. Yet there was no evidence that unusual delay would result or that the jury would be unduly inconvenienced. The court's concern with waiting for additional witnesses or needing to seek assigned counsel ignores its obligation of ensuring that Mr. Jones's constitutional rights were protected.

d. Since precluding Mr. Jones's opportunity to call a defense witness was an error that cannot be viewed as harmless, reversal must be granted. Without a continuance, no witness could present this critical information about the jacket to the jury in order to corroborate Mr. Jones's testimony. The error went to the heart

of Mr. Jones's defense, and the State cannot demonstrate that the error was harmless beyond a reasonable doubt.

In the alternative, appellate courts normally review evidentiary rulings under the abuse of discretion standard. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Should this Court determine the error is not a constitutional one, it must determine if the trial court abused its discretion in excluding the testimony of Deshawn Mitchell and denying the continuance. An abuse of discretion occurs when the court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. Id.; State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

Mr. Jones's sole defense was unwitting possession. 6/24/09 RP 141, 160; CP 28. Indeed, from the very commencement of the case, the trial court was aware of this, as the parties discussed the proposed jury instructions during motions in limine. 6/23/09 RP 54.

Given the fact that Mr. Jones had been wearing the jacket of a friend on the evening of his arrest, he sought to present that friend as a defense witness in order to corroborate his defense. Due to the difficulty of communicating with prisoners, Mr. Jones's attorney's first attempt to identify himself to Deshawn Mitchell by

filling out the usual paperwork been unsuccessful.<sup>3</sup> Had the court simply granted a continuance so that the witness could have been appointed counsel and properly advised of his rights, the jury would have been free to accept or reject his testimony concerning the vial of PCP in his coat pocket.

Here, the trial court refused to allow the defense to present Deshawn Mitchell's testimony -- without taking even the minimal steps of appointing counsel and hearing from the witness as to the specifics of the proffered testimony. Thus, the court deprived Mr. Jones of his ability to present a defense, to challenge the State's allegations, and to cast doubt on the reliability of the State's claims. This deprivation of Mr. Jones's right to present a critical aspect of his defense in a meaningful fashion was not harmless, and requires reversal. Maupin, 128 Wn.2d at 929-30; Rice, 48 Wn. App. at 12 ("Due process demands that a defendant be entitled to present evidence that is relevant and of consequence to his or her theory of the case").

Due to this violation of Mr. Jones's due process rights, his conviction must be reversed and remanded for a new trial.

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<sup>3</sup> Mr. Jones's defense attorney informed the trial court that although he had filled out the "slip" in order to visit Mr. Mitchell at the county jail, the witness, for some reason, refused the visit. 6/24/09 RP 144-45.

2. THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT MR. JONES'S CONVICTION FOR CRIMINAL POSSESSION OF A CONTROLLED SUBSTANCE.

a. Sufficient evidence must be presented to support each element of the crime charged. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Seattle v. Gellein, 112 Wn.2d 58, 62, 768 P.2d 470 (1989); U.S. Const. amend. XIV; Const. Art. I, §§ 3, 21, 22. On a challenge to the sufficiency of the evidence, this Court must decide whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found all of the essential elements of the crime beyond a reasonable doubt.<sup>4</sup> Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

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<sup>4</sup> When the sufficiency of the evidence is challenged, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the state's evidence and all inferences that reasonably can be drawn therefrom. Id.

b. The State failed to prove that Mr. Jones knowingly possessed a controlled substance. Mr. Jones was charged with possession of PCP, a controlled substance, in violation of the Uniform Controlled Substances Act. CP 1-4. To find him guilty of this offense, the jury had to conclude beyond a reasonable doubt that Mr. Jones had the vial of PCP in his custody or control – the definition of possession – and that his possession was not unwitting; CP 1.<sup>5</sup>

To convict Mr. Jones of possession of a controlled substance, the State was required to prove that Mr. Jones exercised dominion and control over a controlled substance. Possession may be actual or constructive. State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997).

Mr. Jones testified that at the time he was stopped by the police, he was wearing a coat borrowed from his friend Deshawn

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<sup>5</sup> The jury was instructed as follows:

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. Dominion and control need not be exclusive to establish constructive possession.

CP 27 (Jury Instruction No. 8).

Mitchell and that he was not aware of the contents of its pockets.  
6/23/09 RP 127-29. Mr. Jones stated that neither the vial, nor its contents belonged to him, and that the day of trial was the first time he had ever seen the vial that was in evidence. 6/23/09 RP 127-29. The State's witnesses agreed that other than seeming perturbed at being arrested, Mr. Jones did not behave aggressively, try to run or struggle with the officers, nor did he exhibit any characteristics typical of an individual having recently ingested PCP. 6/23/09 RP 95, 113.

c. In light of the trial court's recognition that Mr. Jones was entitled to an unwitting possession instruction, no reasonable juror could find Mr. Jones knowingly possessed a controlled substance. It is an affirmative defense to possession of a controlled substance that the possession was unwitting. State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004); City of Kennewick v. Day, 142 Wn.2d 1, 11, 11 P.3d 304 (2000). Washington courts have upheld this defense to "ameliorate the harshness of the almost strict liability" afforded to possession of a controlled substance prosecutions. Day, 142 Wn.2d at 11 (quoting State v. Cleppe, 96 Wn.2d 373, 379-80, 635 P.2d 435 (1981)).

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A defendant may establish unwitting possession by proving either that he was unaware that he was in possession of a controlled substance, or that he did not know the nature of the substance that he was holding. Day, 142 Wn.2d at 11; State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994).

In order to receive the unwitting possession instruction, a defendant must present sufficient evidence at trial such that a reasonable juror could find by a preponderance of the evidence that he possessed a controlled substance. State v. Buford, 93 Wn. App. 149, 151, 967 P.2d 548 (1998). Mr. Jones met this threshold, and the trial court, in accordance with Buford, scrutinized the evidence before it and decided to instruct the jury on unwitting possession. CP 28 (Jury Instruction No. 9).<sup>6</sup> Because the court instructed the jury on unwitting possession after hearing the testimony presented, the trial court believed there was sufficient evidence for a reasonable juror to

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<sup>6</sup> The jury was instructed on unwitting possession as follows:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

CP 28 (Jury Instruction No. 9).

conclude that Mr. Jones's possession was unwitting. Buford, 93 Wn. App. at 153.

If Mr. Jones met the strict standard required by Buford, it logically follows that a reasonable juror would not conclude that Mr. Jones was guilty of possession of a controlled substance beyond a reasonable doubt. Mr. Jones's testimony of unwitting possession went effectively un rebutted by the State. It was also consistent with the circumstantial evidence surrounding Mr. Jones's behavior upon contact with police.

d. Reversal and dismissal are the appropriate remedy.

The absence of proof beyond a reasonable doubt of an element of an offense requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; Green, 94 Wn.2d at 221. In such a case, the Double Jeopardy Clause would bar retrial. North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), reversed on other grounds, Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Here, the State failed to prove that Mr. Jones was in knowing possession of a controlled substance. Because no rational trier of fact could eliminate all reasonable doubt, Mr. Jones's conviction must be reversed and dismissed.

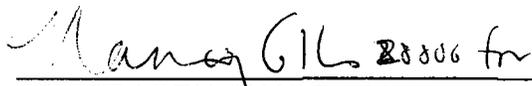
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E. CONCLUSION

Mr. Jones's conviction must be dismissed because his possession of a controlled substance was unwitting. In the alternative, Mr. Jones's conviction must be reversed and remanded for a new trial because the trial court's denial of a continuance violated his constitutional right to present a defense.

DATED this 9<sup>th</sup> day of March, 2010.

Respectfully submitted,

  
\_\_\_\_\_  
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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 64216-2-I
v.	)	
	)	
DARRELL JONES,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

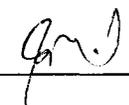
I, MARIA ARRANZA RILEY, STATE THAT ON THE 9<sup>TH</sup> DAY OF MARCH, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 9<sup>TH</sup> DAY OF MARCH, 2010.

X \_\_\_\_\_  


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