

65331-8

65331-8

NO. 65331-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

VICTOR VICTOROVICH TOKARENKO,

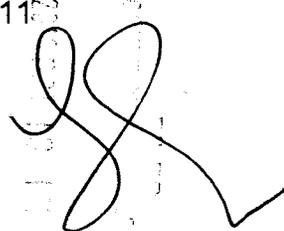
Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Victor Tokarenko's conviction for possession with intent to deliver a controlled substance must be reversed because the State failed to prove every element of the crime beyond a reasonable doubt. In addition, the trial court violated Mr. Tokarenko's right to privacy as guaranteed under Article 1, Section 7 of the Washington constitution.

B. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to convict Victor Tokarenko of possession with intent to deliver a controlled substance, in that the prosecutor failed to prove that Mr. Tokarenko knew the cocaine was in his vehicle.

2. The police disturbed Mr. Tokarenko's private affairs and his right to be free from warrantless searches and seizures.

3. Mr. Tokarenko's lawyer provided ineffective assistance of counsel when he failed to object to the admission of the evidence located during the warrantless K-9 search of the vehicle.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove constructive possession of an item, the State must prove beyond a reasonable doubt that the defendant exercised dominion and control over the item. Must Victor Tokarenko's

conviction for possession with intent to deliver a controlled substance be reversed and dismissed where the State failed to prove beyond a reasonable doubt that Mr. Tokarenko exercised dominion and control over the drugs seized in this case?

2. Where both occupants have already been removed from their vehicle, handcuffed, and placed in a patrol car, did the trial court err by upholding the search of the vehicle under Article I, Section 7?

3. Was defense counsel ineffective for failing to raise an obvious challenge to the warrantless search of the vehicle, when Mr. Tokarenko and the driver both had been removed, handcuffed, arrested, and placed into patrol cars at the time of the search?

D. STATEMENT OF THE CASE

On September 23, 2009, Victor Tokarenko and his girlfriend, Kalley McNae, were outside their condominium complex in Kirkland. 2/24/10 RP 29-35.¹ They were both loading Mr. Tokarenko's car, with Mr. Tokarenko carrying the heavier items and Ms. McNae placing the lighter ones into the vehicle. Id. at 34-35. They were not aware that they were being watched by Kirkland Police Officers, who were seeking to arrest each of them on open warrants. Id. at 30.

Officer David Quiggle observed Mr. Tokarenko load a large black duffel bag into the back hatch area of his Mercedes SUV, as well as a red vacuum cleaner. 2/24/10 RP 29-35. He also observed Ms. McNae load several shopping bags into the back seat area of the vehicle. Id. Once the car was loaded and the couple began to pull out of their condominium complex, the officer radioed for back-up, and a second officer, Officer Reali, made a traffic stop before Mr. Tokarenko's vehicle could leave the parking lot. Id. at 37.

Officer Reali approached Mr. Tokarenko's car and ordered him and his girlfriend to put their hands up. 2/25/09 RP 9. Officer Reali stated that although Ms. McNae immediately complied, Mr. Tokarenko refused to comply with his order, and instead began hurriedly emptying his pockets onto the car seat. Id. at 9-10. Once Officer Reali placed his hand on his holster and then pulled his weapon to a "low ready" position, Mr. Tokarenko complied and put his hands up. Id. at 10. Officer Reali stated that once he approached the car he was able to see money and credit cards on the car seat and the floor. Id. He also noticed that Mr. Tokarenko seemed to be nervous and was sweating profusely. Id.

¹ The verbatim report of proceedings consists of four volumes of transcripts from February 24, 2010, through April 28, 2010. The proceedings will be referred to herein as follows: "2/24/10 RP ___."

Officer Reali ordered Mr. Tokarenko out of the car, handcuffed him, and patted him down. 2/25/09 RP 12-13. At this time, both Mr. Tokarenko and his girlfriend were placed under arrest for their outstanding warrants and placed in separate patrol cars. 2/24/09 RP 45. Officer Reali searched Mr. Tokarenko and recovered a college identification card from his front pants pocket that contained the right photograph but a different name, as well as a glass pipe that had narcotics residue on it. 2/25/09 RP at 12-13.

Mr. Tokarenko was administered his Miranda warnings, and Mr. Tokarenko agreed to answer several questions. 2/25/09 RP 39. Officer Quiggle asked him why he had an identification card from Bellevue Community College with his own photograph and a different name, and he responded, "I'd like to know that myself." Id. at 40-41. Mr. Tokarenko was also asked if he had a job, and he responded that it had been awhile, perhaps a year, since he had worked. Id. at 41-42.

Officer Quiggle stated that prior to searching the vehicle or calling the K-9 unit, he had noticed cash strewn about the car, as well as balls of tin foil that he associated with heroin or oxycontin use. Id. 42-44.

Officer Quiggle radioed to a local K-9 unit, which quickly responded. 2/24/09 RP 45. Without a search warrant, and although both occupants of the SUV were arrested and secured in patrol cars, a dog sniff was conducted. Id. at 48. The dog alerted particularly to the trunk area of Mr. Tokarenko's vehicle, and the car was then sealed by Officer Quiggle and towed to the police property room to await a search warrant. Id.

The following day, the vehicle was searched pursuant to search warrant. 2/24/09 RP 52. Officers recovered a brick of cocaine wrapped within a woman's sweater, concealed within both men's and women's clothing, which had been found inside the black duffel bag from the SUV's rear hatch. Id. at 62-63. The cocaine weighed approximately 127 grams. Id. at 142. Officers also recovered a digital scale, two disposable Nokia cell phones, and a prescription bottle with several different pills inside. Id. at 62-64. When officers disassembled the vacuum cleaner from the car, they recovered a .380 semi-automatic handgun concealed within the vacuum cleaner bag. Id. at 58-60.

Mr. Tokarenko was charged with possession with intent to deliver a controlled substance with a firearm enhancement; Ms.

McNae was later arrested for the same crime. CP 1-5; 2/24/09 RP 108.

Following a jury trial before the Honorable Steven Gonzalez, Mr. Tokarenko was convicted of possession with intent to deliver a controlled substance. 2/26/09 RP 3; CP 41. The jury did not return a special verdict as to the firearm. 2/26/09 RP 3; CP 42.

This appeal follows. CP 54-62.

E. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. TOKARENKO OF POSSESSION WITH INTENT TO DELIVER A CONTROLLED SUBSTANCE.

- a. The State bears the burden of proving all essential elements of an offense beyond a reasonable doubt. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in article I, section 3 of the Washington Constitution² and the 14th Amendment of the federal constitution. Sandstrom v.

Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. 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).

When an innocent explanation is as equally valid as one upon which the inference of guilt may be made, the interpretation consistent with innocence must prevail. United States v. Bautista-Avila, 6 F.3d 1360, 1363 (9th Cir. 1993). “[U]nder these circumstances, a reasonable jury must necessarily entertain a reasonable doubt.” United States v. Lopez, 74 F.3d 575, 577 (5th Cir. 1996). Speculation and conjecture are not a valid basis for upholding a jury’s guilty verdict. State v. Prestegard, 108 Wn. App. 14, 42-43, 28 P.3d 817 (2001).

² Art. I, section 3 provides, “No person shall be deprived of life, liberty, or property, without due process of law.”

b. The State did not prove Mr. Tokarenko possessed

a controlled substance. The jury was instructed:

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 ... Proximity alone without proof of dominion and control is insufficient to establish constructive possession.

CP 33 (Jury Instruction 8).

Constructive possession is defined as the exercise of dominion and control over an item. State v. Callahan, 77 Wn.2d 27, 29-30, 459 P.2d 400 (1969). Constructive possession is established by viewing the totality of the circumstances, including proximity to the property and ownership of the premises in which the contraband is found. State v. Turner, 103 Wn. App. 515, 523, 13 P.3d 234 (2000); State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996). The circumstances must provide substantial evidence for the fact finder to reasonably infer the defendant had dominion and control. State v. Cote, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). Close proximity alone is never enough to infer constructive possession. Id. Ownership of a vehicle, or of a

residence, where contraband is discovered, is only one factor to consider when assessing constructive possession. Turner, 103 Wn. App. at 521-24; see Cantabrana, 83 Wn. App. at 208. For example, in Turner, the police found a gun in plain view in the car Turner owned. 103 Wn. App. at 518. Since Turner owned the car, drove it that day, and the gun was in plain view, his dominion and control of the gun was reasonably inferred. Id. at 524.

On the other hand, in Callahan, the defendant was not the owner of the houseboat where drugs were found, but was seen in close proximity to drugs discovered in a cigar box and admitted handling the drugs that day. 77 Wn.2d at 28-31. Callahan was an overnight guest and owned two books, two guns, and broken scales for measuring drugs found at the houseboat. Id. at 31. Yet the Supreme Court found his close proximity, knowledge of the drugs, and his ownership of other incriminating items insufficient to consider him a constructive possessor of the drugs. Id. The Callahan Court stressed that the defendant was merely using the property, not paying rent or maintaining the houseboat as his residence. Id.

In State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990), the police observed the defendant standing up from a table as they

entered the room; drugs and paraphernalia were found on the table. The court found the State failed to prove possession where the only evidence was defendant's proximity to the drugs and his fingerprints on a plate containing cocaine residue. Id. at 387-89. The Spruell Court found that the fingerprints proved only fleeting possession at best, which was insufficient to prove actual possession or dominion and control. Id. at 387. Because the defendant in Spruell lacked dominion and control over the premises, mere proximity and momentary handling were insufficient to prove constructive possession. Id. at 389.

Likewise, in Cote, the defendant was a passenger in a vehicle where contraband was found, and his fingerprints were found on a jar containing some of the contraband. 123 Wn. App. at 548. As in the instant case, the State in Cote proved that the defendant "was at one point in proximity to the contraband and touched it," but this was "insufficient to establish dominion and control. Accordingly, there was no evidence of constructive possession." Id. at 550.

Testimony was clear that the duffel bag recovered from Mr. Tokarenko's car was full of both men's and women's clothing. 2/24/09 RP 61-63. More importantly, the cocaine was tightly

wrapped within a woman's sweater, surrounded by women's clothing, according to Officer Quiggle. Id. Even though the SUV belonged to Mr. Tokarenko, Ms. McNae was driving at the time of the traffic stop, and she is the one who immediately threw the vehicle into reverse at the sight of a police car. 2/25/09 RP 16. The circumstances surrounding the packaging of the cocaine, in addition to Ms. McNae's behavior, support her consciousness of guilt. 2/25/09 RP 16. These circumstances also explain the reason that Ms. McNae was later arrested for possession of the cocaine. 2/24/09 RP 108. These circumstances support the assertion that Mr. Tokarenko lacked knowledge of the contents of the duffel bag that he loaded into his vehicle.

In sum, the prosecution did not offer evidence based on anything other than speculation that Mr. Tokarenko's presence in the same vehicle as the duffel bag containing the seized cocaine demonstrated that he exercised dominion and control over it.

c. The prosecution's failure to prove all essential elements requires reversal. The absence of proof beyond a reasonable doubt of an element requires dismissal of the conviction and charge. Jackson, 443 U.S. at 319; Green, 94 Wn.2d at 221. The Fifth Amendment's Double Jeopardy Clause bars retrial of a

case, such as this, where the State fails to prove an added element. 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).

The State failed to sufficiently connect Mr. Tokarenko to the cocaine, by failing to prove that he had dominion or control over it, an essential element of the charged offense. Absent proof of every essential element, the conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

2. THE K-9 SEARCH OF MR. TOKARENKO'S CAR VIOLATED ARTICLE I, SECTION 7.

a. Article I, Section 7 prohibits the search of an automobile incident to the driver's arrest unless the driver has access to the passenger compartment at the time of the search.

Article I, Section 7 provides: "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

Granting more protection than the Fourth Amendment, which precludes only "unreasonable" searches and seizures without a warrant, Washington's constitution prohibits any disturbance of an individual's private affairs "without authority of law," whether

reasonable or unreasonable in the Fourth Amendment context.

State v. Valdez, 167 Wn.2d 761, 771-72, 224 P.3d 751 (2009).

A warrantless search is unconstitutional, per se, under Article I, Section 7, unless it falls within an exception to the warrant requirement. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). “Exceptions to the warrant requirement are limited and narrowly drawn.” State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). The State always carries the “heavy burden” of proving a warrantless search is justified. State v. Jones, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002); State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999).

A search incident to arrest is an exception to the warrant requirement. Jones, 146 Wn.2d at 335. The justifications for the search incident to arrest exception are the need to protect officer safety and the need to prevent the destruction of evidence. Valdez, 167 Wn.2d at 776-77; State v. Ringer, 100 Wn.2d 686, 699, 674 P.2d 1240 (1983). In recognition of these justifications for the exception, the Supreme Court held that once an arrestee is secured and removed from an automobile, that person’s presence can no longer support a warrantless search under the search incident to arrest exception. Valdez, 167 Wn.2d at 777.

b. The K-9 search of Mr. Tokarenko's vehicle was a warrantless intrusion into his private affairs. As in Valdez, the K-9 sniff of Mr. Tokarenko's vehicle took place after he had already been removed from the car, cuffed, and locked into a patrol car. 2/24/09 RP 45. Under Valdez, the K-9 sniff violated the Fourth Amendment because Mr. Tokarenko could no longer reach the passenger compartment at the time of the search, and also because the State did not show it was reasonable to believe evidence relevant to the crime underlying the arrest (the open warrant) might be found in the vehicle. Valdez, 167 Wn.2d at 778; Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 1723-24, 173 L.Ed.2d. 485 (2009) ("Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.").

Importantly, however, under Article I, Section 7, the crime of arrest is irrelevant and the search is unconstitutional under the Washington Constitution if it occurs after the arrestee is restrained. Valdez, 167 Wn.2d at 778.

The K-9 search of Mr. Tokarenko's vehicle constituted an impermissible warrantless search, intruding upon appellant's private affairs in violation of Article I, Section 7. Valdez, 167 Wn.2d at 778. Accordingly, the evidence gathered during this search – the “alert” on the trunk, which led to the discovery of the cocaine in the duffel bag – must be suppressed. Valdez, 167 Wn.2d at 778 (citing State v. Duncan, 146 Wn.2d 166, 176, 43 P.3d 513 (2002)). Without the cocaine recovered from the duffel bag, insufficient evidence remains to sustain a finding of guilt for possession with intent to deliver a controlled substance.

This Court should therefore reverse the conviction and remand for dismissal with prejudice. State v. Armenta, 134 Wn.2d 1, 17-18, 948 P.2d 1280 (1997).

c. This Court may review the warrantless search under RAP 2.5(a)(3). Mr. Tokarenko may raise this argument regarding the violation of his Article I, Section 7 rights under RAP 2.5(a)(3), if his assignment of error stakes out a claim of “manifest error affecting his constitutional rights.” State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); see RAP 2.5(a)(3).

To meet the criteria of RAP 2.5(a)(3), an appellant must first show that the asserted error was one of constitutional magnitude.

McFarland, 127 Wn.2d at 333. Mr. Tokarenko then must show the “actual prejudice” necessary to establish the error as manifest. State v. Lynn, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). Here, constitutional error is apparent in the form of the trial court’s erroneous admission of evidence seized following a search warrant that appellant submits would not have been authorized without this impermissible K-9 search. This error resulted in “identifiable prejudice,” as the State could not have secured the conviction otherwise. State v. Contreras, 92 Wn. App. 307, 312, 966 P.2d 915 (1998) (citing State v. McFarland, 127 Wn.2d at 334).

The second requirement of RAP 2.5(a)(3), actual prejudice, is a demand that the constitutional error had identifiable consequences to the defendant that are evident from the record. Where the alleged constitutional error involves the denial of a motion seeking exclusion of evidence under CrR 3.6, the appellant first “must show the trial court likely would have granted the motion if made.” State v. M.R.C., 98 Wn. App. 52, 58-59, 989 P.2d 93 (1999). Here, the absence of legal authority to perform a K-9 search was shown, supra., under Washington law.

d. Alternatively, trial counsel provided ineffective assistance by failing to object to the warrantless search. Mr. Tokarenko also raises an additional argument of ineffective assistance of counsel, alleging that his trial attorney failed to challenge the admission of the controlled substance evidence as the product of a warrantless search. In order to show that he received ineffective assistance of counsel, Mr. Tokarenko must show: 1) that his defense counsel's conduct was deficient; ie: that it fell below an objective standard of reasonableness; and 2) that it resulted in prejudice; ie: that there is a reasonable possibility that, but for the deficient conduct, the result of the proceeding would have been different. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test from Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

F. CONCLUSION

For the foregoing reasons, Mr. Tokarenko respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 13th day of October, 2010.

Respectfully submitted,



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Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Appellant)	COURT OF APPEALS No. 65331-8
)	
v.)	
)	
VICTOR TOKARENKO)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, ANN JOYCE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

1. THAT ON THE 13th DAY OF OCTOBER, 2010, A COPY OF THE **APPELLANT'S OPENING BRIEF** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

[X] Prosecuting Atty King County
King Co Pros/App Unit Supervisor
W554 King County Courthouse
516 Third Avenue
Seattle WA 98104

[X] Victor Victorovich Tokarenko
1035 156th Avenue N.E., #18
Bellevue, WA 98007

SIGNED IN SEATTLE, WASHINGTON THIS 13th DAY OF OCTOBER, 2010

X *Ann Joyce*