

65865-4

65865-4

No. 65865-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DEREK HARLIN,

Appellant.

FILED
COURT OF APPEALS OF THE STATE OF WASHINGTON
2012 FEB -3 PM 2:15

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

The Honorable Judge Fair

APPELLANT'S CORRECTED OPENING BRIEF

MARK D. MESTEL
Attorney for Appellant
Derek Harlin

MARK D. MESTEL, INC., P.S.
3221 Oakes Avenue
Everett, Washington 98201
(425) 339-2383

TABLE OF CONTENTS

I. PROCEEDINGS BELOW.....1

II. ASSIGNMENTS OF ERROR.....2

 Assignments of Error

 a. Judge Fair erred when she held that there was sufficient evidence introduced by the State on which to find Derek Harlin guilty of felony possession of marijuana.....2

 Issues Pertaining to Assignments of Error

 a. When the State fails to establish who owns or has dominion and control over the property in which marijuana is found, is there sufficient evidence to justify a Court’s guilty verdict.....2

III. STATEMENT OF THE CASE.....2

IV. ARGUMENT.....4

 1. Appellant contends that Judge Fair erred when she found that the State had introduced sufficient evidence to prove beyond a reasonable doubt that Derek Harlin possessed more than 40 grams of marijuana.

V. CONCLUSION.....16

VI. CERTIFICATE OF SERVICE.....17

TABLE OF AUTHORITIES

Cases

Washington Cases

<u>Arnold v. Sanstol</u> , 43 Wn.2d 94, 99, 260 P.2d 327 (1953).....	9
<u>In re Welfare of Wilson</u> , 91 Wn.2d 487, 588 P.2d 1161 (1979).....	7
<u>State v. George</u> , 146 Wn. App. 906, 920, 193 P.3d 693 (2008).....	5
<u>State v. Hutton</u> , 7 Wash.App. 726, 728, 502 P.2d 1037 (1972).....	9
<u>State v. Nyegaard</u> , 154 Wn. App. 641, 647, 226 P.3d 783 (2010).....	5
<u>State v. Roberts</u> , 80 Wn.App. 342, 908 P.2d 892 (1996).....	7
<u>State v. Thomas</u> , 150 Wash.2d 821, 874, 83 P.3d 970 (2004).....	7

Other Jurisdictions

<u>Goldhirsh Group, Inc. v. Alpert</u> , 107 F.3d 105, 108 (2 nd Cir.1997).....	10
<u>Sunward Corp. v. Dun & Bradstreet, Inc.</u> , 811 F.2d 511, 521 (10th Cir.1987).....	12
<u>United States v. Jones</u> , 49 F.3d 628 (10 th Cir.1995).....	11, 14
<u>United States v. Lovern</u> , 590 F.3d 1095, 1109 (C.A.10 (2009)).....	10
<u>United States v. Truong</u> , 425 F.3d 1282, 1288 (10th Cir.2005)	9

Other Authorities

WPIC 50.03.....	5-6
-----------------	-----

I. PROCEEDINGS BELOW

The State on December 22, 2009 filed an Information in which it alleged that Derek Harlin, his wife, Merlinda Harlin, and Cody Harlin¹, conspired to grow marijuana. Prior to the trial the State dismissed the case against Merlinda Harlin, and amended the charge against Derek Harlin to allege Felony Possession of Marijuana with a firearm enhancement. (CP 13 -14) Cody remained charged with Conspiracy.

The case proceeded to jury trial. At the end of the State's case both defendants moved to dismiss based on insufficient evidence. The Court granted the motion and dismissed Cody Harlin's case. The Court granted the motion in part for Derek Harlin, dismissing the firearm allegation, but allowed the charge of felony possession of marijuana to go to the jury stating:

THE COURT: Well, the question at this point is whether or not there is evidence, taking all inferences in the light most favorable to the State, to establish the elements. Honestly, it's pretty thin. I think there is enough to withstand Green, just. So I'll deny the motion.

After announcing that the State had introduced just enough evidence to get past a Green motion, the defendant waived jury (CP 12) and submitted the case to Judge Fair without offering any evidence. Judge Fair found the defendant. If the residence was his then, according to

Judge Fair, he had constructive possession of the marijuana found in the outbuilding. The Court did not enter Findings of Fact and Conclusions of Law.

On August 3, 2010 the Court sentenced him to 45 days in custody (CP 1 - 11), but stayed the execution of the sentence pending this appeal. Derek Harlin filed a timely motion to appeal.

II. ASSIGNMENTS OF ERROR

1. Judge Fair erred when she held that there was sufficient evidence introduced by the State on which to find Derek Harlin guilty of felony possession of marijuana.

Issues Pertaining to Assignments of Error

1. When the State fails to establish who owns or has dominion and control over the property in which marijuana is found, is there sufficient evidence to justify a Court's guilty verdict.

III. STATEMENT OF THE CASE

Following up on an anonymous tip, Det. Vargas of the Snohomish County Sheriff's Office obtained a warrant to search property located in rural Arlington. At an unknown time on May 5, 2009 a number of officers from the Sheriff's Office entered that property to execute the search

¹ The State offered no evidence of the relationship, if any, between Derek and Cody

warrant. While approaching the main building the officers noticed a male standing by a window. That male, subsequently indentified as Derek Harlin, opened the door for the officers, exited the building, and was taken into custody. (RP 25, 43) The officers then entered into the house, found Merlinda Harlin, who they also took into custody. They observed a handgun on the counter not far from the door they entered which they seized. (RP 26-7) The officers secured the house and found no other persons in that building, nor any contraband.

The officers next went to a large outbuilding. The State offered no testimony as to how the outbuilding was associated with the residence or whether it was under the control of whoever owned or rented the residence. They entered the locked building using a key. (RP 144, 184) There was a second floor accessible by a ladder. Upstairs in a closed room the police found Cody Harlin and a number of marijuana plants. The police ordered Cody to come down from the second floor. He did and the police arrested him. At the time he was wearing rubber gloves and had apparently been manicuring the marijuana plants. (RP 188) Harvested marijuana also was found in various places on the first floor of the building.

Harlin.

At trial Det. Vargas testified to a number of conversations that he had with Derek Harlin. The first occurred after the police secured the premises and placed Derek in custody. According to Det. Vargas he advised Mr. Harlin that he was at the property to search for marijuana. To which Derek Harlin responded that he didn't see what the big deal was, because Obama was going to legalize what we might or might not have found up in the garage anyway.

(RP 189-90)

Vargas testified that Derek Harlin also contacted him by telephone on a couple of occasions though he offered no time frame as to when these conversations occurred. In discussing these telephone conversations he testified that Derek asked to have some paperwork a gun returned to him. In another conversation Derek reiterated that he didn't think this was a big deal at all because Obama was going to legalize what was found in the shop. There also was a phone conversation in which Detective Vargas said that Derek said that he would have to contact his ex-wife about child support because he took away his source of income. (RP 233)

IV. ARGUMENT

Appellant contends that Judge Fair erred when she found that the State had introduced sufficient evidence to prove beyond a reasonable doubt that Derek Harlin possessed more than 40 grams of marijuana.

The elements of felony possession of marijuana required the State to prove beyond a reasonable doubt:

(1) That on or about May 5, 2009, the defendant possessed marijuana in excess of 40 grams; and

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

The State did not contend, nor did the evidence establish, that Derek Harlin physically possessed marijuana. Instead the State's theory was that Derek Harlin constructively possessed the marijuana. To establish constructive possession, the State had to show that Derek Harlin had dominion and control over the marijuana. State v. Nyegaard, 154 Wn. App. 641, 647, 226 P.3d 783 (2010). This control need not be exclusive, but the State must show more than mere proximity. State v. George, 146 Wn. App. 906, 920, 193 P.3d 693 (2008).

The WPIC is instructive. 50.03 defines possession and reads:

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.]

Dominion and control need not be exclusive to support a finding of constructive possession.]

[In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include [whether the defendant had the [immediate] ability to take actual possession of the substance,] [whether the defendant had the capacity to exclude others from possession of the substance,][and][whether the defendant had dominion and control over the premises where the substance was located]. No single one of these factors necessarily controls your decision.]

Examining those relevant factors establishes the following:

1. There was no testimony that Derek had the ability to take actual possession of the substance. In fact the testimony was that all of the marijuana was located in the outbuilding, which was locked. No testimony was offered that would allow the finder of fact to conclude that Derek Harlin had access to that key or the ability to enter that building.

2. If he couldn't enter the building, and absent some showing that he had a proprietary interest in the outbuilding, one cannot say that he had the right or ability to exclude others from possession of the marijuana.

3. The State did not offer any testimony that Derek Harlin had dominion and control over either the main residence or the outbuilding. Unlike many possession cases, here the State did not offer any letters of occupancy or records which showed who was authorized to be on the property.

Although the standard for review in this case can be stated in a straightforward manner, its application may be more problematic. The standard is that sufficient evidence supports a conviction when any rational fact finder could find the essential elements of the crime beyond a reasonable doubt when viewing the evidence in the light most favorable to the State. State v. Thomas, 150 Wash.2d 821, 874, 83 P.3d 970 (2004), aff'd, 166 Wash.2d 380, 208 P.3d 1107 (2009). An insufficiency of the evidence claim admits the truth of the State's evidence and all reasonable inferences drawn from it. Thomas, 150 Wash.2d at 874, 83 P.3d 970. The problem arises when one must determine whether the facts introduced at trial allow certain inferences as opposed to speculation.

In this case the statement testified to by Vargas, that Derek told him that Obama was going to legalize whatever they might find in the outbuilding probably is sufficient circumstantial evidence to establish that Derek knew there was marijuana in the outbuilding. Knowledge isn't the issue. Knowing that Cody Harlin was involved in growing marijuana does not lead to the inference that Derek Harlin possessed more than 40 grams of marijuana. In re Welfare of Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979) (bystander's mere presence plus knowledge of ongoing criminal activity insufficient to show intent required for complicity); State v. Roberts, 80 Wn.App. 342, 908 P.2d 892 (1996) (defendant's mere knowledge and

assent to subtenant's marijuana grow operation insufficient for accomplice liability). The issue is whether Derek exercised dominion and control over the outbuilding. A review of the evidence introduced by the State requires this Court to answer that question with a “No.”

The evidence established the following:

1. Derek and Merlinda Harlin arrived at the property some time before the police. The record is silent as to what time the police arrived or for how long Derek had been in the residence prior to their arrival. There was no evidence that he lived at the residence.

2. The police recovered possessions belonging to Cody Harlin in a downstairs bedroom.

3. The police observed a picture of Derek and Merlinda in the Master bedroom.

4. Subsequent to his arrest Derek Harlin phoned Detective Vargas and asked that a gun and some papers taken during the execution of the search warrant be returned to him. While one may infer that his was the gun found on the kitchen counter close to where he had been standing before exiting the house, the State offered no testimony as to where the papers had been or what they contained.

5. Derek Harlin told Det. Vargas that he would suffer financially because of what happened at the property.

Since the existence of a fact cannot rest upon guess, speculation, or conjecture, State v. Hutton, 7 Wash.App. 726, 728, 502 P.2d 1037 (1972), it is important to distinguish between “inferences” and “speculation.”

Evidence may be direct or circumstantial. When reliance is placed on circumstantial evidence, there must be reasonable inferences to establish the fact to be proved. Arnold v. Sanstol, 43 Wn.2d 94, 99, 260 P.2d 327 (1953). “The facts relied on to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them.” Arnold, 43 Wn.2d at 99. It is a bedrock promise of our criminal justice system that the evidence supporting a conviction “must raise more than the mere suspicion of guilt, and the jury's inferences must be more than speculation and conjecture in order to be reasonable.” United States v. Truong, 425 F.3d 1282, 1288 (10th Cir.2005) (internal quotation marks omitted).

As noted by the Courts the line between permissible inference and impermissible speculation is not always easy to discern. When we “infer,” we derive a conclusion from proven facts because such considerations as experience, or history, or science have demonstrated that there is a likely correlation between those facts and the conclusion. If that correlation is sufficiently compelling, the inference is “reasonable.”

But if the correlation between the facts and the conclusion is slight, or if a different conclusion is more closely correlated with the facts than the chosen conclusion, the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it “speculation.” When that point is reached is, frankly, a matter of judgment. Goldhirsh Group, Inc. v. Alpert, 107 F.3d 105, 108 (2nd Cir.1997)

Two cases are illustrative of convictions by juries reversed by the Appellate Court. In each case the Court found that the proof introduced by the prosecution failed to provide a basis for the inference that the accused had committed the crime. The language in each, set out below in some detail, helps to illustrate the difference between an “inference” and “speculation”.

In United States v. Lovern, 590 F.3d 1095, 1109 (C.A.10 (2009)) the Court reviewed the conviction of Mr. Barron, a computer technician for an online pharmacy. The issue was whether the Government introduced sufficient evidence to establish that Mr. Barron knew that the pharmacists filled prescriptions issued without a legitimate medical purpose or in defiance of professional standards. The Government’s proof concerning what Mr. Barron knew (his mens rea) was inferential. Its contention was that circumstantial evidence satisfied this element of the

offense. Its strongest evidence against Barron, said the Government, was an instant message sent by Barron soliciting fake clients for the pharmacy. The Court acknowledged that from this message one could infer that Barron knew something “was fishy” at the pharmacy. But the Court went on to state that knowing something to be “fishy” is not sufficient to sustain a conviction stating:

Even viewing the message in the light most favorable to the jury's verdict, it gives us no way to distinguish among several plausible and competing inferences about its meaning. And where, as here, “the evidence ... gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence, we must reverse the conviction, as under these circumstances a reasonable jury must necessarily entertain a reasonable doubt.” United States v. Caseer, 399 F.3d 828, 840 (6th Cir.2005) (emphasis in original); see also Ingram v. United States, 360 U.S. 672, 680, 79 S.Ct. 1314, 3 L.Ed.2d 1503 (1959); United States v. Dunmire, 403 F.3d 722, 724 (10th Cir.2005) (“While the jury may draw reasonable inferences from direct or circumstantial evidence, an inference must be more than speculation and conjecture to be reasonable.”). Put differently, the jury simply had no non-speculative reason to favor any one of these explanations over the others.

United States v. Jones, 49 F.3d 628 (10thCir.1995) concerned a challenge to the sufficiency of the evidence on charges of unlawful possession of a firearm and possession of a controlled substance with intent to distribute. In this case the police discovered crack cocaine and a loaded gun in the trunk of a car in which Mr. Jones was seated in the rear

seat. In reversing the conviction the Court first noted that having built its entire case on circumstantial evidence the Government depended upon inferences to carry its burden. However, the Court observed that a principle overlooked by the Government is probative inferences “must be more than speculation and conjecture.” Sunward Corp. v. Dun & Bradstreet, Inc., 811 F.2d 511, 521 (10th Cir.1987) (citing Galloway v. United States, 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 1458 (1943)). “A jury will not be allowed to engage in a degree of speculation and conjecture that renders its finding a guess or mere possibility. Such a finding is infirm because it is not based on the evidence.” Sunward, 811 F.2d at 521 (quoting Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1326 (11th Cir.1982))

The Court adopted the approach of the Third Circuit, which is set out below in some detail as it offers a well-reasoned analysis of the difference between inferences and speculation.

The line between a reasonable inference that may permissibly be drawn by a jury from basic facts in evidence and an impermissible speculation is not drawn by judicial idiosyncrasies. The line is drawn by the laws of logic. If there is an experience of logical probability that an ultimate fact will follow from a stated narrative or historical fact, then the jury is given the opportunity to draw a conclusion because there is a reasonable probability that the conclusion flows from the proven facts. Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 895 (3d Cir.) cert. denied, 454 U.S. 893, 102 S.Ct. 390, 70 L.Ed.2d 208 (1981).

Additionally, “the essential requirement is that mere speculation be not allowed to do duty for probative facts after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.” Galloway, 319 U.S. at 395, 63 S.Ct. at 1089.

We cannot permit speculation to substitute for proof beyond a reasonable doubt. Even though rational jurors may believe in the likelihood of the defendants' guilt, as they probably did in this case, they may not convict on that belief alone. It cannot be equivocated that a conviction without supporting evidence must fall.

What the government contends constitutes reasonable inferences simply does not sustain a logical probability. For example, the prosecution's suggestion that Mr. Brown's explorations under the dash and hood are inferential of his attempt to hide the drugs and gun is illogical because it piles one inference upon another. To justify the inference Mr. Brown was trying to hide these items, there must have been some proof he possessed items to hide. Without such proof, the suggestion he was trying to hide something is conjecture. The only reasonable inference which is logically probable on the state of the evidence is that Mr. Brown was looking for something under the dash and hood. What he was seeking, again, is pure speculation. Thus, the inference he was attempting to hide something, let alone that he was trying to hide a gun and drugs, simply does not logically flow from the established facts.

The Government placed a great deal of weight on the defendant's statement that “he should have “smoked him,” inferring that it was a reference to shooting someone thereby establishing that he possessed a gun. Again the Court rejected this “inference” stating: From the record, we have no idea what that statement meant because there was no effort made to explain it. We assume the jury was left to speculate what “smoke” means and that the object of the smoking was Trooper Kelley. The government made no attempt to aid the jury so it could have drawn a logical, if

not weighty, inference from that statement. Ascribing a criminal motive to that statement now is simply surmise.”

United States v. Jones, 49 F.3d 628, 629 -634 (10th Cir.1995)

Although Cody Harlin clearly was manufacturing marijuana the State elected not to charge him with that crime. Instead it accused him of being part of a conspiracy to manufacture marijuana. The Court acquitted him finding that the State failed to introduce sufficient evidence to establish that he was part of a conspiracy.

In Derek Harlin’s case the State offered no evidence on the following:

1. The address of the property.
2. Whether the outbuilding and the residence were on the same parcel of property.
3. Who had a proprietary interest in the properties (owner/renter).
4. Whether Derek Harlin lived in the residence.
5. When Derek Harlin arrived at the residence.
6. For how long he had been at the residence.
7. Whether any item found in the outbuilding could be linked to him.
8. The relationship, if any, between Derek and Cody Harlin.

9. Whether Derek Harlin lived with Merlinda Harlin or whether they were separated.
10. Whether Merlinda Harlin lived at the residence.
11. Who paid for the power being used to grow the marijuana.
12. The dates, or approximate times, that Detective Vargas had phone conversations with Derek Harlin (were they before the State charged him with the crimes or after charges were filed?)

The only evidence that links the appellant to the marijuana came from Detective Vargas and concerned the statement attributed to Derek that he “had to contact his ex-wife and start paying child support, and he didn’t want to do that but he had to because I (Detective Vargas) took away his source of income.” The State offered no other testimony concerning this statement. Can one say that the statement meant that Derek had a financial interest in the marijuana grow? Is it not equally plausible that Derek had a financial interest in the outbuilding, that he had rented it to his son? Or, might it be that the seizing agency had initiated forfeiture proceedings against the real property, which represented Derek’s only asset. Or, might the fact that the police arrested Derek have caused him to lose his source of income? This isolated statement at an unknown time, taken out of context, really is no different than the

statement attributed to the defendant in Jones who said he was going to “smoke him.” It provides an insufficient basis on which to draw an inference that Derek exercised dominion and control over the outbuilding, and for that reason, the marijuana.

V. CONCLUSION

The State introduced insufficient evidence on which to convict Derek Harlin of felony possession of marijuana. Accordingly, this Court should vacate the conviction and dismiss the prosecution with prejudice.

DATED this 2 day of FEBRUARY, 2011.

Respectfully Submitted,


Mark D. Mestel, WSBA #8350
Attorney for Appellant

VI. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Corrected Opening Brief was served upon the following by North Sound Legal Messengers, addressed to:

- | | |
|---|---|
| 1. Court of Appeals
Division One
600 University Street
One Union Square
Seattle, WA 98101 | 2. Snohomish County Prosecutor
3000 Rockefeller Avenue
M/S 504
Everett, WA 98201 |
|---|---|

I hereby certify that a copy of the foregoing Appellant's Opening Brief was served upon the following by United States Postal Service, addressed to:

1. Derek Harlin
11319 – 156th Street NE
Arlington, WA 98223

DATED this 2nd day of February, 2011.



Brandy L. Ellis, Secretary