

FILED
July 24, 2015
Court of Appeals
Division I
State of Washington

No. 72944-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DENNIS JACKSON,

Appellant.

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

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

The State charged Mr. Jackson with one count of possession of heroin based on two acts, which allegedly occurred at two different times in two different places. As to one incident, the State alleged Mr. Jackson was guilty of constructive possession of heroin. As to the other, the State alleged he was guilty of actual possession. Because these acts did not constitute a continuing course of conduct, the trial court erred when it denied Mr. Jackson's request for a unanimity instruction. This Court should reverse.

B. ASSIGNMENT OF ERROR

The trial court erred when it denied Mr. Jackson's request for a unanimity instruction.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Criminal defendants have a constitutional right to a unanimous jury verdict. When the State alleges the defendant committed two distinct acts but charges only one count of criminal conduct, the trial court must instruct the jury that it is required to agree on a specific act in order to find the defendant guilty. Where the State relied on two separate acts of heroin possession to prove one charge, and the trial

court denied Mr. Jackson's request for a unanimity instruction, is reversal required?

D. STATEMENT OF THE CASE

Dennis Jackson was riding in the front passenger seat of a car when it was stopped by police. 1 RP 135-36. During the arrest of the driver for a suspended license, an officer ordered Mr. Jackson out of the car because the officer did not like the way Mr. Jackson was moving his hands. 1 RP 162; 2 RP 201-02. When Mr. Jackson stepped out of the car, the officer saw white crystals, later found to contain methamphetamine, on the passenger seat and floorboard. 2 RP 203.

The officer detained Mr. Jackson and, after discovering he had an outstanding warrant, placed Mr. Jackson under arrest and performed a search of his person. 2 RP 204, 229. The driver was placed in Officer Stephen Ross's car, and Mr. Jackson was placed in Officer Timothy O'Hara's car. 1 RP 164; 2 RP 206. The driver, who appeared to Officer O'Hara to be a drug addict, remained in Officer Ross's car for 30 minutes to one hour. 1 RP 138; 2 RP 230. He was then released and Mr.

Jackson was moved to Officer Ross's vehicle for transport to the jail. 2 RP 206.

Upon arriving at the jail, Officer Ross discovered a small plastic bag, later found to contain heroin, on the floor of one of the back passenger seats. 1 RP 144. No heroin had been found on Mr. Jackson when he was searched at the time of arrest, and no heroin was found in the patrol car he was initially placed in. 1 RP 139; 2 RP 206, 229.

Mr. Jackson was booked into the jail, strip searched, and placed in restraints. 2 RP 320-21. After his hands were released from restraints to allow him to eat, a deputy testified he noticed another small plastic bag, also later found to contain heroin, in Mr. Jackson's hand. 2 RP 307. Mr. Jackson's resulting scuffle with the correctional officers, which included a sergeant tasing Mr. Jackson three times, was recorded on the jail's surveillance video. 2 RP 305-06.

The State charged Mr. Jackson with one count of possession of methamphetamine and one count of possession of heroin. CP 69. At trial, Mr. Jackson requested a unanimity instruction directing the jurors they must unanimously agree on

one act to find him guilty of heroin possession. 3 RP 363. The trial court summarily denied his request “based on [its] reading of the comments from the WPIC book.” 3 RP 365.

In closing argument, the State relied on both heroin-related incidents, failing to elect one or the other. 3 RP 367. During deliberations, the jury asked to watch the jail video a second time, and asked questions including whether a strip search included a rectal exam. CP 32-33. The trial court referred the jurors back to their instructions and allowed them to watch the video again. CP 32-33; 3 RP 420.

The jury acquitted Mr. Jackson of possession of methamphetamine and found him guilty of possession of heroin. He was sentenced to 13 months of incarceration. CP 17.

E. ARGUMENT

The trial court’s failure to give a unanimity instruction requires reversal.

- a. Mr. Jackson had a constitutional right to a unanimous jury.

Criminal defendants in Washington are guaranteed the right to a unanimous jury. *State v. Coleman*, 159 Wn.2d at 509, 511, 150 P.3d 1126 (2007). When a defendant is charged with

only one count of criminal conduct, but the evidence at trial indicates multiple distinct criminal acts may have been committed, additional measures must be taken to ensure this right is protected. *State v. Petrich*, 101 Wn.2d 566, 572, 693 P.2d 173 (1984). The State must elect which of the acts it relies upon for a conviction or the court must instruct the jury to agree on a specific criminal act. *Coleman*, 159 Wn.2d at 511.

In *Coleman*, the court explained why this is so important, stating:

The unanimity instruction requirement avoids the risk that jurors will aggregate evidence improperly. Without the election or instruction, each juror may arrive at a guilty verdict by responding to testimony about discrete incidents – incidents which, if an election were made, the jury may not all agree occurred.

Id. at 512. When the State chooses not to elect a specific act, a trial court's failure to give the jury a unanimity instruction violates the defendant's state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); Const. art. I, §22; U.S. Const. amend. VI.

- b. The court violated Mr. Jackson’s constitutional right to a unanimous jury when it denied his request for a unanimity instruction.
 - i. *The Instruction was Required Because the State Relied on Two Distinct Acts of Heroin Possession*

Mr. Jackson was charged with one count of possession of heroin, but the State alleged he had possessed heroin in two different locations at two different times. CP 69; 1 RP 144; 2 RP 307. Mr. Jackson requested a *Petrich* instruction, asking the jurors be directed they must unanimously agree the State proved one particular act of possession in order to find him guilty. 3 RP 3. The State argued both acts were encompassed within a continuing course of conduct and declined to elect one. 3 RP 365. The trial court denied Mr. Jackson’s request “based on [its] reading of the comments from the WPIC book.” 3 RP 365.

In closing argument, the State argued both incidents to the jury, stating:

[Y]ou heard about the heroin that was left in Officer Ross’s patrol car when Mr. Jackson got out of the patrol car at the jail. And finally, you heard about the heroin that was recovered from Mr. Jackson that came out of his rectum at the jail...

3 RP 367. The prosecuting attorney even used the two incidents to explain the difference between actual and constructive possession, telling the jury:

Actual possession occurs when it's in their physical possession. In the jail during the booking process he had it in his hand. You saw that on video. He had it in his hand, he was trying to put it in his mouth, they struggled to get it out of his hand. That's actual possession.

Constructive possession occurs when there's no actual physical possession but there's dominion and control over the substance. When he's in the back of the patrol car and it ends up on the floor, nobody else, and you heard testimony, nobody else was in the back of that patrol car when that heroin was there.

3 RP 375.

Where the State's evidence tends to show two distinct instances of possession occurring at different times, in different places, and involving two different types of possession (one actual and one constructive), a *Petrich* instruction is required. *State v. King*, 75 Wn. App. 899, 903, 878 P.2d 466 (1994). In *King*, this Court considered facts very similar to those alleged here. The police arrested the defendant after cocaine was found in a vehicle in which he was a passenger. *Id.* at 901. During the inventory search at the jail, an officer found more cocaine in the fanny pack he was wearing. *Id.*

The State charged the defendant in *King* with only one count of possession of cocaine. *Id.* The trial court denied the defendant's request for a unanimity instruction after the State indicated it would make an election during its closing argument. *Id.* at 903. However, when the State failed to make this election, and instead relied on each incident to support a conviction, the trial court neglected to remedy the State's failure by issuing the unanimity instruction. *Id.* The Court reversed, finding a *Petrich* instruction was required because the case involved multiple acts rather than a continuing course of conduct. *Id.* at 903.

This Court noted that “[n]o Washington cases have applied the ‘continuing course of conduct’ exception to *Petrich* in the context of a drug possession offense.” *Id.* It declined to do so in *King*, where “[t]he State’s evidence tended to show two distinct instances of cocaine possession occurring at different times, in different places, and involving two different containers – the Tylenol bottle and the fanny pack. One alleged possession was constructive; the other, actual.” *Id.*

Similar to the facts in *King*, the State alleged Mr. Jackson should be convicted for possession because he had constructive possession of the heroin found in the car and because he had actual possession of the heroin found in his hand at the jail. 3 RP 374. The evidence presented by the State alleged two acts in different places, at different times, in different bags, and involving two different types of possession. Thus, this Court’s holding in *King* controls. A *Petrich* instruction was required to ensure Mr. Jackson was only convicted following a unanimous verdict. *See Kitchen*, 110 Wn.2d at 409; Const. art. I, §22; U.S. Const. amend. VI. When the trial court denied Mr. Jackson’s request for this instruction, it erred.

ii. *The Trial Court’s Error was Not Harmless*

When a trial court errs by failing to provide a unanimity instruction, “[a] conviction beset by this error will not be upheld unless the error is harmless beyond a reasonable doubt.” *Coleman*, 159 Wn.2d at 512. “The presumption of error is overcome only if no rational juror could have a reasonable doubt as to *any* of the incidents alleged.” *Id.* (Emphasis added).

In *King*, the Court found the State failed to meet this

high burden because:

Sufficient conflicting evidence exists as to which one of the car's occupants constructively possessed the Tylenol bottle for us to conclude that a rational trier of fact could entertain reasonable doubt as to whether King was responsible for the Tylenol bottle. The evidence is also conflicting as to King's alleged possession of the cocaine in the fanny pack. King testified that he was unaware of the cocaine in his fanny pack and asserted that the officers must have planted it. We cannot say that no rational trier of fact would entertain a reasonable doubt about King's responsibility for the cocaine in his fanny pack.

75 Wn. App. at 904.

The Court's analysis in *King* applies with equal force here. The State alleged Mr. Jackson was guilty of possession of heroin because the police found heroin on the floor of the patrol car near Mr. Jackson's feet when they arrived at the jail. 1 RP 144. However, Mr. Jackson was not the only individual in the back of Officer Ross's car that afternoon. The driver of the car stopped by police was initially placed under arrest and held in Officer Ross's vehicle between 30 minutes to one hour before he was removed and Mr. Jackson took his place. 1 RP 138.

Although Officer Ross testified he had checked the car before placing Mr. Jackson inside, no drugs were found on Mr.

Jackson when he was searched during his arrest nor were any drugs found in Officer O'Hara's vehicle, where Mr. Jackson was initially seated. 1 RP 139; 2 RP 206, 229. In addition, Officer O'Hara testified the driver of the stopped vehicle, who was in Officer Ross's car first, appeared to be a drug addict, whereas Mr. Jackson did not appear to be under the influence. 2 RP 229-30. Given this evidence, a rational juror could have a reasonable doubt that Mr. Jackson constructively possessed the heroin found on the floor of Officer Ross's vehicle. *See* 1 RP 139.

In fact, the jury found Mr. Jackson not guilty of possession of methamphetamine based on the State's allegations that methamphetamine was on the seat where Mr. Jackson was sitting in the car that was stopped, as well as on the floor near his feet. CP 30; 1 RP 142. The jury's acquittal on this charge further demonstrates that a rational juror could have a reasonable doubt Mr. Jackson was guilty of possessing drugs found near him when another individual, who appeared to be a drug addict, had access to the same space. Thus, a finding of harmlessness is precluded because a rational juror could have

entertained reasonable doubt about whether Mr. Jackson committed this act. *Coleman*, 159 Wn.2d at 513.

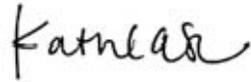
In addition, the jury requested to view a video from the jail a second time during its deliberations, which the trial court granted. CP 31; 3 RP 420. This suggests that at least some of the jurors questioned whether the State could prove its case based on the heroin discovered while Mr. Jackson was in the jail. Because a rational juror could have had a reasonable doubt as to at least one of the incidents alleged, the State cannot overcome the presumption of harm. Reversal is required. *Coleman*, 159 Wn.2d at 512.

F. CONCLUSION

This Court should reverse Mr. Jackson's conviction because the trial court erred in denying his request for a unanimity instruction and the State cannot show the error is harmless beyond a reasonable doubt.

DATED this 28th of July, 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kathleen A. Shea". The signature is written in a cursive, flowing style.

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