

**NO. 44645-6-II**

**COURT OF APPEALS OF THE STATE OF WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**ALEJANDRO BUSTOS-OCHOA,**

**Appellant.**

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**BRIEF OF APPELLANT**

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgement against him for a crime unsupported by substantial evidence.

### ***Issues Pertaining to Assignment of Error***

Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does substantial evidence support a conviction for delivery of a controlled substance when no witness saw a delivery occur and the informant to whom the drugs were allegedly delivered did not testify at trial?

## STATEMENT OF THE CASE

### *Factual History*

On the evening of March 22, 2012, Cowlitz-Wahkiakum County Drug Task Force Agent Brian Streissguth and other Task Force agents served a search upon the person and home of a Longview resident by the name of Larry Lindsey. RP 28-30. Mr. Lindsey was a suspected methamphetamine dealer and during the search the agents placed Mr. Lindsey's under arrest. *Id.* After making the arrest Officer Streissguth suggested to Mr. Lindsey that he might be able to help himself if he worked for the Task Force by arranging to have someone deliver methamphetamine to Mr. Lindsey with the Task Force Agents observing the transaction. *Id.* In order to avoid going to jail Mr. Lindsey readily agreed and made a telephone call during which he appeared to be setting up a drug deal. RP 18-30.

Once the phone call was over Mr. Lindsey told the officers that he had arranged to purchase one ounce of methamphetamine in the parking lot of the Home Depot in Longview. RP 31-32. After searching Mr. Lindsey and finding no drugs or money on his person, Officer Streissguth took him to a parking lot of a local business close to Home Depot in Longview. RP 31-35. Another Task Force Officer drove Mr. Lindsey's vehicle to that location. RP 61-62. Officer Streissguth then searched Mr. Lindsey's car and did not find any drugs or money. RP 31-35. Although the officer had previously found

drugs secreted in air vents in vehicles, he did not search the air vents in Mr. Lindsey's vehicle because they did not readily disassemble. RP 53-54. Neither did Officer Streissguth have a drug dog brought to the scene to perform a search of Mr. Lindsey's vehicle. RP 54-55. At this point Officer Streissguth gave Mr. Lindsey \$1,240.00 and allowed him to get into his own vehicle and drive into the parking lot at Home Depot. RP 38-39. Officer Streissguth did not see where Mr. Lindsey parked, believing that other officers were present to watch him. RP 38. Mr. Lindsey entered the Home Depot parking lot around 8:00 pm. RP 39.

By about 8:45pm nothing had happened. RP 39. As a result Officer Streissguth called Mr. Lindsey and told him to again contact his alleged drug source. *Id.* After speaking to Mr. Lindsey on the phone Officer Streissguth moved to the North end of the parking lot to place himself where he thought the person Mr. Lindsey contacted would enter. RP 41. Finally, at around 10:00 pm Officer Streissguth saw a black Volkswagen Golf drive by him and enter the parking lot. *Id.* A short while later Officer Streissguth saw the same vehicle as it pulled back out onto the public streets. RP 42-44. At that point Officer Streissguth saw the driver, whom he later identified as the defendant Alejandro Bustos-Ochoa. *Id.* Other agents followed Mr. Bustos-Ochoa to a residence in Vancouver. RP 67, 98-100.

The Task Force Agents involved in the operation with Officer

Streissguth were Officers Brown, Hanson, Tate and Hanberry. RP 22, 59, 69, 84, 107. Officer Brown testified that he entered the parking lot ahead of Mr. Lindsey but he did not claim that he saw Mr. Lindsey park or that his part of the operation was to watch Mr. Lindsey. RP 63-66. Rather his job was to follow the target vehicle away from the transaction, which he did after other agents told him that the suspect was leaving the parking lot. RP 66. Similarly Officer Hanson's job was to watch an entrance to the Home Depot lot and follow the suspect's vehicle. RP 71. He did not claim to have seen where Mr. Lindsey parked and he did not claim to have seen a transaction. *Id.*

In contrast to Officer Streissguth, Brown and Hanson, Officer Tate did claim that he saw an interaction between the defendant and the Volkswagen that entered the Home Depot Parking lot. RP 87-93. According to Officer Tate, he stationed his vehicle in the parking lot where he could see Mr. Lindsey sitting in his red passenger vehicle. RP 87-90. At one point he saw Mr. Lindsey get out of his vehicle and stand by it for a few minutes and then reenter. RP 90-93. However, he did not see Mr. Lindsey have any interaction with anyone and he did not see Mr. Lindsey get into the truck or any other compartment of his vehicle. *Id.*

At about 10:00 pm Officer Tate saw the defendant drive up in a black Volkswagen and park near Mr. Lindsey. *Id.* When he did Mr. Lindsey got

out of his vehicle, got into the front passenger seat of the Volkswagen for a couple minutes, then get out and reenter his vehicle. *Id.* At this point the Volkswagen drove away, as did Mr. Lindsey. *Id.* However, Officer Tate did not claim to see the exchange or possession of any items in the hands of either Mr. Lindsey or the defendant. RP 105.

Although Officer Tate did state that he saw the interaction between the defendant in the Volkswagen and Mr. Lindsey at around 10:00 pm, he did not claim that he saw Mr. Lindsey enter the parking lot and park, and he did not claim that he had Mr. Lindsey under surveillance the whole time Mr. Lindsey was in the parking lot. RP 90-93, 103-104. Rather, he claimed that he observed Mr. Lindsey for less than 30 minutes prior to the 10:00 pm interaction. RP 103-104. His later testimony on this point went as follows:

Q. Do you recall about how long you ended up having to wait in surveillance?

A. It seemed like a long time only because it was the end of a long day. We were on overtime by this point, but it was probably less than thirty minutes that I sat in that parking lot waiting for the transaction to come together.

RP 91.

Finally, Officer Hanberry also claimed that he saw the interaction between the defendant and Mr. Lindsey in the parking lot at the Home Depot and he described that transaction in the same manner as did Officer Tate. RP 111-112. However, as with Officer Tate, he did not claim that he saw Mr.



Lindsey enter the parking lot and he did not claim he watched Mr. Lindsey the entire time. *Id.* Rather, he testified that the black Volkswagen appeared “soon after” he started watching Mr. Lindsey. RP 111. His later testimony on this issue went as follows:

A. I set up here. I was advised what the CI would be driving.

Q. Mm-hmm.

A. CI pulled into the lot, parked somewhere in this general area here. I’d say probably thirty yards or so in front of me, not too far. Then soon after, a – a vehicle came in, parked next to the CI vehicle.

Q. When you say “soon after,” was it like, five minutes, fifteen, an hour?

A. It’s hard to tell. I do – I do it so often.

RP 111.

The officers who followed the defendant out of the parking lot and to Vancouver went to that same residence a few days later and arrested the defendant, whom they testified was the same person who drove the Volkswagen to the encounter with Mr. Lindsey. RP 68, 73, 96-100, 115. By contrast, Officer Streissguth followed Mr. Lindsey back to the original parking lot where they had started earlier in the evening and searched Mr. Lindsey and his vehicle. RP 42-44. Officer Streissguth found neither money nor drugs when he searched Mr. Lindsey. RP 44-47. However, his search of the vehicle revealed about an ounce of methamphetamine secreted in the gas

cap. *Id.* This was a location that the officer knew Mr. Lindsey used to transport methamphetamine. *Id.* He claimed that his earlier search of this location had failed to uncover any methamphetamine. RP 44. He did not explain how the methamphetamine got in the gas cap when Neither Officer Tate nor Officer Hanberry claimed that they saw Mr. Lindsey access the gas cap after his contact with the defendant. *Id.*

### ***Procedural History***

By information filed July 30, 2012, and later amended the Cowlitz County Prosecutor charged the defendant Alejandro Bustos-Ochoa with one count of delivery of methamphetamine on February 14, 2013. CP 1-2, 7-8. The case later came on for trial before a jury with the state calling five police officers as witnesses. CP 22, 59, 69, 84, 107. The state did not call the confidential informant to testify as the officers apparently could not find him. RP 18-19. These witnesses testified to the facts set out in the preceding factual history. *See Factual History, supra.*

Following the presentation of the state's case the defense rested without calling any witnesses. RP 118. The court then instructed the jury without objection from either party and both the state and the defense made their closing arguments. CP 31-45; RP 119-130, 130-149. The jury then retired for deliberation after which it returned a verdict of guilty. CP 46; RP 156-159. The court later sentenced the defendant within the standard range.

CP 47-59; RP 166-172. The defendant thereafter filed timely notice of appeal. CP 61-74.

## ARGUMENT

**THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ENTERED JUDGEMENT AGAINST HIM FOR A CRIME UNSUPPORTED BY SUBSTANTIAL EVIDENCE.**

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence.

*State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

For example, in *State v. Mace*, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims’ home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim’s wallet was found in a bag next to the cash machine, (4) that the bag had the defendant’s fingerprints on it, and (5) that

the defendant's fingerprints were also found on a piece of paper located by a second cash machine where the card was used.

Following conviction, the defendant appealed, arguing that the state had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. The defendant then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

Second degree burglary is defined as follows:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.

RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. *There was no direct evidence, only inferences*, that he had committed second degree burglary by entering the premises in Richland.

*State v. Mace*, 97 Wn.2d at 842 (emphasis added).

In the case at bar, the state charged the defendant with delivery of methamphetamine under RCW 69.50.401(1). This statute provides as follows:

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

RCW 69.40.401(a).

The gravamen of this offense, as charged against the defendant, is to deliver methamphetamine to another person. As the following explains the evidence presented at trial, even when seen in the light most favorable to the state, does not constitute substantial evidence that anyone delivered methamphetamine to Mr. Lindsey, much less that the defendant delivered methamphetamine to him. First and foremost two facts about this case should be noted: (1) that no witness saw the defendant possess or deliver methamphetamine or even exchange anything with Mr. Lindsey, and (2) Mr. Lindsey was out of the sight of the task force agents for a significant period of time during the first hour and one-half of the time he was parked in the Home Depot Parking lot.

On this latter point the following facts are critical. At trial Officer Streissguth testified that the informant entered the Home Depot parking lot around 8:00 pm. All of the officers agreed that the interaction between the defendant and Mr. Lindsey occurred at 10:00 pm. However, the only two officers who saw Mr. Lindsey in the parking lot had only been watching him for under 30 minutes before the defendant arrived. This leaves over one and one-half hours with no evidence as to what Mr. Lindsey was doing and who was meeting with him in the parking lot of a store that was open to the public.

Under these two critical facts, there were many sources for the methamphetamine Officer Streissguth found in Mr. Lindsey's gas cap. For

example, the methamphetamine could have come from a person who walked by Mr. Lindsey's vehicle in the relatively dark parking lot; a person Mr. Lindsey called to bring him the methamphetamine. Similarly, it could have come from some person who left it in the parking lot at Mr. Lindsey's request at the location Mr. Lindsey parked. Third, Mr. Lindsey could have had the methamphetamine already secreted in his vehicle in the vents or some other location where Officer Streissguth did not look. He could then have transferred it to the gas cap. Out of all of the possible scenarios this last appears most likely because of the follows facts: (1) Mr. Lindsey was in the parking lot for an extended time with noone watching him, (2) Both Officer Tate and Officer Hanberry watched all interactions between the defendant and Mr. Lindsey, they saw Mr. Lindsey drive off, and they never claim to have seen Mr. Lindsey access his gas cap much less put something in it, and (3) Officer Streissguth did find methamphetamine in the gas cap after Mr. Lindsey drove back to the first parking lot.

The task force agents' failure to keep the informant within their view at all times and the task force agents' failure to do a thorough search of the defendant's vehicle creates a situation in which the police only suspected that the defendant was the source of the methamphetamine. As the decision in *Mace* explains, evidence that only gives rise to suspicion or speculation does not constitute substantial evidence sufficient to meet the requirements of due



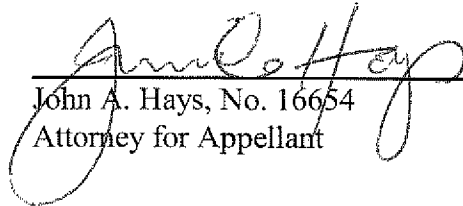
process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result, this court should reverse the defendant's conviction and remand with instructions to dismiss.

**CONCLUSION**

This court should vacate the defendant's conviction and remand the case with instructions to dismiss with prejudice.

DATED this 20th day of September, 2013.

Respectfully submitted,

  
\_\_\_\_\_  
John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

**COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II**

State of Washington,  
Respondent,

No. 44645-6-II

vs.

AFFIRMATION OF  
OF SERVICE

Alejandro Bustos-Ochoa,  
Appellant.

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Diane Hays states the following under penalty of perjury under the laws of Washington State. On September 20, 2013, I personally e-filed and/or placed in the United States Mail the following document with postage paid to the indicated parties:

1. BRIEF OF APPELLANT

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# HAYS LAW OFFICE

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