

NO. 44414-3

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JEFFERY ANTONIO WILLIS,

Appellant,

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

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

SIR REGINALD BELL, SR.,
Inmate Advisor for Appellant

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I, Mr. Jeffery Antonio Willis, have received and reviewed the opening brief prepared by my appointed attorney. I have found her argument in support of the error assigned to the insufficiency of the evidence to be without merit. She has argued issue regarding the operability of the firearm when the jury did not enter special weapon findings and nor did the court impose a firearm enhanced sentence.

Therefore, summarized below are the additional grounds for review that are not addressed properly in that brief. Appellants has designated the right facts that supports a claim of insufficient evidence to establish constructive possession as set by the rule in State v. Callahan.

A. ADDITIONAL GROUND ONE

1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM

The State failed to prove Willis was guilty of the crime of first degree possession of a firearm. The evidence is insufficient to show Willis was guilty because the "possession" element of the crime was not proven beyond a reasonable doubt. The conviction must therefore be reversed and the charge dismissed with prejudice.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 90 S.Ct. 1068 (1970); State v. Hundley, 126 Wn.2d 418, 895 P.2d 403 (1995); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient to support a conviction only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier of fact could find each element of the crime proven beyond a reasonable doubt.. State v. Green, 84 Wn.2d 216, 616 P.2d 628

In determining the sufficiency of evidence, existence of a fact cannot rest upon guess, speculation, or conjecture. State v. Colquitt, 133 Wn.App. 789, 137 P.3d 892 (2006).

A person is guilty of first degree unlawful possession of a firearm if the person owns or has in his possession or control a firearm after having previously been convicted of a serious offense as defined by chapter 9.41 RCW. RCW 9.41.040(1)(a).

Possession can be actual or constructive. State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969). Actual possession requires personal, physical custody. State v. George, 146 Wn.App. 906, 193 P.3d 693 (2008). The evidence does not show Willis had actual possession of the gun. The gun was in the possession of Mr. Griffin and discovered by Police after Mr. Griffin dropped it onto the ground as he got out of the car some 7 miles from where Willis was arrested. [4/17/12VRP51-52; 53, 51; 56;]

The State therefore needed to prove Willis had constructive possession. Constructive possession means the defendant has dominion and control over

the firearm. State v. Chouinard, 169 Wn.App. 895, 282 P.3d 117 (2012), review denied, 176 Wn.2d 1003 (2013).

"The totality of the circumstances must provide substantial evidence for a fact finder to reasonably infer that the defendant had dominion and control." State v. Enlow, 143 Wn.App. 463, 178 P.3d 366 (2008).

Willis momentarily handled the gun found in Mr. Griffins possession. [4/16/12VRP34,35; 38-39; 49-50;]. But an earlier momentary handling is not sufficient for a charge of possession since, as noted in Callahan, "possession entails actual control, not a passing control which is only a momentarily handling. State v. Callahan, 77 Wn.2d at 29; "to possess means to have actual control, care, and management of, not a passing control, fleeting and shadowy in nature." United States v. Landry, 257 F.2d at 431; United States v. Wainer, 179 F.2d 603.

Here, the evidence presented was that Willis handled the gun found over seven miles from where it was located in Mr. Griffin's vehicle.

In Chouinard, this Court held the evidence was insufficient to convict for firearm possession because the State demonstrated only the defendants proximity to the weapon and his knowledge of its presence. Chouinard, 169 Wn.App. at 899,903.

Here, the State did not even establish Willis's knowledge of the firearms presence in Griffin vehicle or he was in close proximity to firearm. Mrs. Thomas testified Willis had the gun in his hands for about two minutes then Mr. Griffin grabbed the gun, and drove away in his SUV. [4/16/12VRP49-50; 38-39;]

Nor did the State prove Willis had dominion and control over the premises. Courts have found sufficient evidence of constructive possession, and dominion and control, in cases in which the defendant was either the owner of the premises or the driver/owner of the vehicle where contraband was found." Chouinard, 169 Wn.App. at 899-900.

But here, Willis did not own the SUV Griffin was driving. Griffin was the owner. [4/16/12VRP38-39; And Willis ^{was} driving the car when it was stopped

by police. [4/17/12VRP51-52] Willis neither owned the SUV nor was he driving it. The gun was seized by police from Mr. Griffin over 7 miles from where Mr. Willis was arrested. [4/17/12VRP56]

His status is no/even analogous to a temporary resident in a house or a passenger in a car, in which case he still cannot be deemed to have constructive dominion and control over the premises. State v. Chouinar, 169 Wn.App. 902.

Looking at the evidence in the light most favorable to the State, even if believed, does not establish Willis possessed the firearm. He therefore cannot be guilty of the crime on a theory of actual or constructive possession.

Convictions must be reversed for insufficient evidence where, viewing the evidence in a light most favorable to the State, no rational trier of fact could have found the elements of the crime established beyond a reasonable doubt. Hundley, 126 Wn.2d at 421-22. "[T]he reasonable doubt standard is dispensible, for it 'impresses on the trier of fact the necessity

of reaching a subjective state of certitude on the facts in issue." Id (quoting Winship, 397 U.S. 364).

In the end, whether Willis possessed the gun rests on guess, speculation, or conjecture, which is insufficient to prove the fact of possession under a sufficiency of evidence standard. Colquitt, 133 Wn. App. at 796. "No reasonable trier of fact could reach subjective certitude on the facts at issue here." Hundley, 126 Wn.2d at 422.

Willis's unlawful firearm conviction must therefore be reversed and the charge dismissed with prejudice. State v. Devvries, 149 Wn.2d 842, 72 P.3d 748 (2003) (setting forth remedy where insufficient evidence supports conviction). The prohibition against double jeopardy forbids retrial after conviction is reversed for insufficient evidence. State v. Anderson, 96 Wn.2d 739, 638 P.2d 1205 (1982).

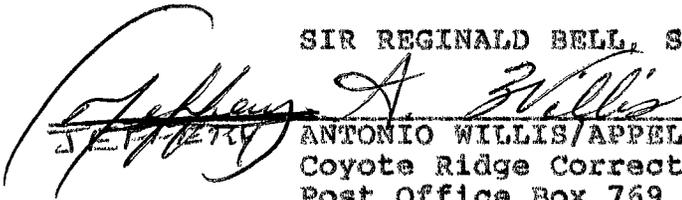
B. CONCLUSION

For the reasons set forth, Willis request reversal of the conviction, i dismissing count I with prejudice. Willis further request remand with an order to strike all court ordered conditions as a result of this conviction.

DATED this 11th day of September 2013

Respectfully Submitted,

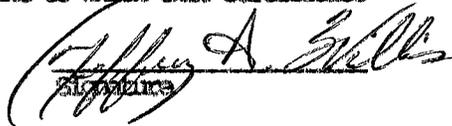
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The undersign certifies that on the date below did cause to be mailed to the respondents attorney of record a true and correct copy of the document to which this certificate is attached.

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