

FILED
October 28, 2015
Court of Appeals
Division I
State of Washington

NO. 73364-8-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRIAN SCOTT,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

Insufficient evidence exists to establish possession with intent to deliver when the State is only able to demonstrate that an accused person may have delivered controlled substances other than those he was alleged to have possessed. Mr. Scott's conviction should be overturned because the State failed to establish that Mr. Scott had the intent to deliver.

At trial, the State presented inconsistent testimony with regard to whether Mr. Scott was in fact the person who an officer observed making exchanges. While this officer testified he never lost sight of Mr. Scott until he was arrested, other officers testified he was first seen coming out of a building, making it impossible for the observing officer to have witnessed what he testified to. The officer's ability to recall was impacted by the significant number of arrests he had made and was apparent in his lack of recall during the trial.

In analyzing whether a rational fact finder could have found sufficient evidence of an intent to deliver, this Court must reconcile the State's inconsistent testimony. Because there was no evidence of an intent deliver other than through the observing officer and his testimony conflicts with the testimony of the other officers, this Court

should find the State failed to present sufficient evidence of intent to deliver.

B. ASSIGNMENTS OF ERROR

1. There was insufficient evidence of intent to deliver the controlled substances Mr. Scott was alleged to have possessed.

2. The court abused its discretion in failing to grant Mr. Scott's motion to a new trial to right a substantial injustice.

C. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

1. An essential element of the crime of possession of a controlled substance with the intent to deliver is that the accused intend to deliver the drugs they are alleged to possess. It is insufficient to show the accused intended to deliver or did in fact deliver other controlled substances. In the absence of evidence of an intent to deliver the controlled substances Mr. Scott was alleged to have possessed, did the court err in finding sufficient evidence of an intent to deliver?

2. The court shall grant a new trial when it affirmatively appears that a substantial right of the defendant was materially affected in that substantial justice has not been done. Where the State provides inconsistent testimony regarding the critical issue of identity must the court grant a new trial to correct the substantial injustice?

D. STATEMENT OF THE CASE

Brian Scott was convicted on February 26, 2015 of possession of a controlled substance with the intent to deliver. 2/26/15 RP 100.¹ He was sentenced on April 10, 2015 to sixty months. 4/10 RP15.

Three officers who were part of a drug observation unit testified at his trial. Det. Collier testified he was within “an arm’s length” of a person he later came to believe to be Mr. Scott when he claimed he saw that person hand “small white rocks” to two other people. 2/26/15 RP 18, 21. He also claimed he saw a “transfer of money.” *Id.* at 22. The detective testified that “I never [took] my eyes off of him.” *Id.* at 20. Finally, he testified he saw Mr. Scott put a “baggie on the rim of a metal container” immediately before he was arrested. *Id.* at 23. A bag containing several small rocks of cocaine was recovered from the garbage can. 2/24/15 RP 99.

Det. Collier also testified with regard to his ability to recall. 2/26/15 RP 47 (“Sometimes it’s just hard to keep track of one arrest from another”). While recalled observing two exchanges being made prior to calling in the arrest team, he admitted he had not been able to

¹ When referring to the record, counsel will refer to each volume by their date and then the page number within that volume. E.g., 2/26/15 RP 100. References to the clerk’s papers will be by the designated page number. E.g., CP 10.

recall the details of where he or Mr. Scott were standing while he made these observations when he was interviewed by defense counsel ten days prior to trial. 2/26/15 RP 44. He also had trouble remembering many of the details of the day, from whom he was working with to whether he observed other transactions take place. *Id.* 40-45.

Det. Collier testified regarding the description he provided to the arrest team. He said he notified them that the person he observed making exchanges had the following characteristics: “Light-skinned black male. Short curly hair. Dark jacket with the hood down. Blue jeans and light sneakers.” 2/26/15 RP 17. While Det. Collier testified he had seen the Seahawks tattoo on the neck of the person who conducted the transactions, he admitted he did not relay this information to the arresting team. *Id.* at 25. There was no dispute Mr. Scott had this distinguishing tattoo on his neck. *Id.* at 13.

Officer Berry arrested Mr. Scott. He was not called to the scene until after Det. Collier claimed to see the transaction occur. 2/24/15 RP 40. Unlike the testimony of Det. Collier, Officer Berry testified he first saw Mr. Scott “coming out of Déjà Vu, which is in the 1500 block of First Avenue.” *Id.* at 46. He testified that shortly before Mr. Scott was arrested, Mr. Scott “put something in between the bucket carrier,”

describing a garbage can Det. Collier later testified about. *Id.* at 47.

Det. Sharp was also part of the arresting team. *Id.* at 89. He testified he was told to go to a certain location, but did not remember the exact address. *Id.* at 90.

Unlike the description of Mr. Scott or whether Mr. Scott was seen leaving Déjà Vu, there were no inconsistencies between the officers with regard to where Mr. Scott was arrested or where the controlled substances were found. Each officer agreed that they saw Mr. Scott dispose of a bag into a garbage can immediately prior to his arrest. *Id.* at 47, 92; 2/26/15 RP 23. A small bag of cocaine rocks were recovered from the garbage can. 2/24/15 RP 99.

Mr. Scott's attorney focused much of his closing argument on the credibility of Det. Collier. 2/26/15 RP 84, 87-88. Defense counsel's final remarks regarding the evidence focused on whether the State had proven intent to deliver. Counsel argued:

Finally, is there an intent to deliver. They have to prove beyond a reasonable doubt that there was an intent to deliver. Items that you would typically think you would find on a drug dealer were not located.

There was no multiple bindles of drugs. It was just one tiny bindle. The amount of cash -- I don't know if seventy-eight dollars is a lot of money or a little bit of money, but it's not thousands of dollars that you would expect.

Id. at 91.

Mr. Scott moved post-verdict for an arrest of judgment for insufficient evidence, a motion to dismiss under CrR 8.3(b) and for a new trial under CrR 7.5 (a)(8). CP 31-40. The Court denied Mr. Scott's motions. 4/10/15 RP 14.

E. ARGUMENT

The State failed to present sufficient evidence Mr. Scott intended to deliver the controlled substances the State alleged he possessed.

1. *Intent to deliver the controlled substance an accused is alleged to have possessed is an essential element of possession of a controlled substance with the intent to deliver.*

The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); *State v. O'Hara*, 167 Wn.2d 91, 105, 217 P.3d 756 (2009) (*citing* U.S. Const. amend. 14; Const. art. I, § 22; *Jackson v. Virginia*, 443 U.S. 307, 311, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). When viewing evidence in the light most favorable to the State, evidence is only sufficient where a rational trier of fact could find the essential elements of the crime charged beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 192, 414, 4

P.3d 115 (2000). There must be substantial evidence to support the court's findings of fact in order for them to be sufficient. *State v. Mewes*, 84 Wn. App. 620, 622, 929 P.2d 505 (1997) (citing *Rae v. Konopaski*, 2 Wn. App. 92, 95, 467 P.2d 375 (1970)).

A motion for a new trial may be granted when it affirmatively appears that a substantial right of the defendant was materially affected in that a substantial justice has not been done. CrR 7.5 (a)(8). In a criminal proceeding, a new trial is necessary when the “defendant has been so prejudiced that nothing short of a new trial can [e]nsure that the defendant will be treated fairly.” *State v. Chanthabouly*, 164 Wn. App. 104, 140, 262 P.3d 144 (2011), *review denied*, 173 Wn.2d 1018, 272 P.3d 247 (2012) ((quoting *State v. Roberts*, 142 Wn.2d 471, 533, 14 P.3d 713 (2000) (quoting *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996))). The basic question with respect to whether a substantial justice has not be done is whether the losing party received a fair trial. *Baxter v. Greyhound Corp.*, 65 Wn.2d 421, 440, 397 P.2d 857 (1964).

Bare possession of a controlled substance is not sufficient to support a conviction for possession with intent to deliver. “Washington case law forbids the inference of an intent to deliver based on ‘bare possession of a controlled substance, absent other facts and

circumstances.”” *State v. Brown*, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993) (relying on *State v. Johnson*, 61 Wn. App. 539, 811 P.2d 687 (1991) (conviction for possession of cocaine with intent to deliver reversed and remanded for resentencing on lesser charge of possession when evidence showed at most constructive possession of seven bindles of cocaine). Possession of a controlled substance with intent to deliver requires proof of both drug possession and some additional factor supporting an inference of intent to deliver it. *State v. Zunker*, 112 Wn. App. 130, 135–36, 48 P.3d 344 (2002) (citing *State v. Campos*, 100 Wn. App. 218, 222, 998 P.2d 893 (2000)).

While a large quantity of drugs is not essential, some additional factor suggestive of sale is required for corroboration. *State v. Hagler*, 74 Wn. App. 232, 236, 872 P.2d 85 (1994); *State v. Brown*, 68 Wn. App. at 485). Examples of additional factors that have been held sufficient to support an inference of intent to deliver include large amounts of cash, scales, cell phones, address lists, and the like, which have been acknowledged as delivery paraphernalia. *See Campos*, 100 Wn. App. at 223–24, 998 P.2d 893 (citing *State v. Brown*, 68 Wn. App. at 485).

The plain meaning of RCW 69.50.401(a)² is that possession and intent to deliver refer to the same quantity of controlled substance. *State v. Robbins*, 68 Wn. App. 873, 876, 846 P.2d 585 (1993). It is not sufficient to show the accused intended to deliver drugs other than those he was alleged to have possessed. *Id.* In *Robbins*, the court found insufficient evidence of Robbins' intent to deliver the controlled substance he was found to have possessed because the quantity he possessed was not sufficient for a sale. The court found the evidence to be insufficient despite the additional evidence of "sales ledgers, cutting agents and paraphernalia tending to show that Robbins was a dealer in cocaine." *Id.* at 875.

There must be sufficient evidence of an intent to deliver the controlled substance a person is alleged to have possessed and not merely that a person may have delivered other controlled substances. *Id.* at 876. The intent must be specific to the charged substances. *Id.*

2. *The State failed to establish an intent to deliver.*

The State did not prove beyond a reasonable doubt that Mr. Scott intended to deliver the controlled substances alleged to have been

² RCW 69.50.401(a) states "it is unlawful for any person to ... possess with intent to ... deliver, a controlled substance."

in his possession. Mr. Scott was not arrested with any of the hallmarks which would indicate he had intended to deliver the controlled substances he was accused of possessing. He was arrested “coming out of the Déjà Vu, which is in the 1500 block of First Avenue on the east side.” 2/24/15 RP 46. He had a twenty dollar bill in his pocket and an additional fifty eight dollars in his wallet. 2/24/15 RP 76. The cocaine found by the State was only a “baggie” which would fit into his pocket. *Id.* at 62. There were also no scales that would help weigh drugs. 2/24/15 RP 70.

Mr. Scott was arrested with twenty dollars in his pocket and other money in his wallet. Det. Collier testified he did not recall whether Mr. Scott put money in his wallet. 2/26/15 RP 53. He also testified the small rocks he believed Mr. Scott sold were likely to be worth ten dollars each. *Id.* at 23. Det. Collier did not testify the transactions involved anyone making change but were rather exchanges that took less than five seconds. *Id.* at 18. This is important because the money seized from Mr. Scott was not consistent with the testimony given by Det. Collier. Had the transactions occurred as he testified to, Mr. Scott would have possessed two ten dollar bills, rather than a twenty. Because these transactions took place so quickly, there is no

rational view of the evidence which would suggest change was given on the street. This inconsistency between the physical evidence and Det. Collier's testimony demonstrates why Mr. Scott was not the person Det. Collier observed making exchanges on the street.

There was also conflict in the testimony of the State's witnesses. Det. Collier testified he never lost sight of Mr. Scott before the arrest team made contact with him. 2/26/15 RP 20. Officer Bailey testified to the contrary, stating he first observed Mr. Scott coming out from Déjà Vu. 2/24/15 RP 46. When asked what significance Déjà Vu had to this case, Det. Collier stated clearly, "None for me." 2/26/15 RP 57.

Importantly, Det. Collier never described the Seattle Seahawks tattoo which features prominently on Mr. Scott's neck. 2/26/15 RP 25. Instead, what stuck out in Det. Collier's mind was Mr. Scott's "jacket, his curly hair, his jeans and his sneakers." 2/26/15 RP 25. He did not note in his report this unusual characteristic or relay it to the arresting team. *Id.* at 62-63. He never told the arresting team about this tattoo. *Id.* at 25.

While the physical characteristics of Mr. Scott may be reconciled by a lack of ability to recall, it is far more difficult to reconcile the inconsistent testimony with regard to whether Mr. Scott

was seen coming out of Déjà Vu. To believe Mr. Scott was the same person Det. Collier testified had delivered other controlled substances prior to his arrest, the jury would have had to reject that he was observed coming out of Déjà Vu by the arresting team. It is not possible for Det. Collier to have never lost sight of Mr. Scott and yet for the arresting team to have seen him leave Déjà Vu. Instead, this Court must examine whether a rational juror would have rejected the testimony of the arresting team and found that, despite the fact that they arrested Mr. Scott, they did not actually see what Mr. Scott was doing prior to his arrest.

This inconsistent testimony is compounded by Det. Collier's limited ability to recall facts from the arrest. At trial, Det. Collier admitted that "sometimes it's just hard to keep track of one arrest from another." 2/26/15 RP 47. When he was interviewed by defense counsel prior to Mr. Scott's trial, Det. Collier had difficulty recalling many of the facts about the case. During the interview ten days prior, he did not recall how far away he was from Mr. Scott when he claimed he saw him make a delivery. 2/26/15 RP 44. He also did not recall where he was standing when he observed the deliveries. *Id.* at 26. At trial, he

stated he did recall his location, but could not explain how his memory had changed, other than by reviewing a general police report. *Id.* at 28.³

Det. Collier had trouble remembering much of the rest of the operation. He did not recall whether he was working alone during the operation. 2/26/15 RP 10. He did not recall where he first saw Mr. Scott. *Id.* at 15. He did not recall what side of the street he was on when he claimed Mr. Scott made a delivery. *Id.* at 40. He did not recall the officer in charge of the operation. *Id.* at 42. He did not recall the number of arrest teams in the area. *Id.* at 42. He did not recall the number of people involved in the operation. *Id.* at 43. He did not recall whether a briefing took place prior to the operation. *Id.* at 43. He did not recall whether he made other observations of drug sales that day. *Id.* at 43. He did not recall how long he had been following Mr. Scott. *Id.* at 45. He did not recall how long it was he watched Mr. Scott before he saw what he believed to be a delivery. *Id.* at 45.

The greatest difficulty in determining whether the evidence in this case is sufficient to establish an intent to deliver is in reconciling

³ Memories do not improve over time. To the contrary, reactivation of a memory and subsequent recalls can be easily distorted. *See*, Donna J. Bridge and Ken Paller, *Neural Correlates of Reactivation and Retrieval-Induced Distortion*, *The Journal of Neuroscience* 32 (August 29, 2012).

the testimony of the officers. While there was no dispute Mr. Scott was arrested on First Avenue, considerable conflict arose as to whether he remained on the street from the time Det. Collier stated he believed he saw Mr. Scott made a delivery or whether he emerged from Déjà Vu as the arresting team believed.

This is exacerbated by the fact that Det. Collier recalled very little of the operation he was engaged in that day, only remembering some of the facts between his interview by defense counsel and the trial itself. Unlike Det. Collier, the testimony of Officer Bailey was unequivocal, especially with respect to first seeing Mr. Scott as he emerged from Déjà Vu. For sufficiency purposes, this court should find the only rational way to reconcile this testimony is to determine that Officer Bailey was credible when he claimed he first saw Mr. Scott coming out of Déjà Vu and that Det. Collier's ability to recall was challenged by the 114 arrests he had been involved in during the twelve months prior to the trial. 2/26/15 RP 47.

Under a rational view of the evidence analysed in the light most favorable to the State, this Court must reject the claim that Mr. Scott was involved in the drug transactions Det. Collier claimed he observed. His testimony is inconsistent with the remainder of the State's evidence

and his ability to recall is impacted by the extraordinary number of arrests he was involved in. Instead, an analysis of the sufficiency of the evidence must be based upon the evidence the State introduced which is not in conflict with itself. In examining this evidence, it is clear Mr. Scott did not have the intent to commit a delivery. He was arrested with a minimal amount of drugs, very little money and no hallmarks which would indicate he was involved in the drug trade. Under this analysis, this Court should find the State presented insufficient evidence of Mr. Scott's intent to deliver.

3. This Court should dismiss because the State failed to establish sufficient evidence of an intent to deliver or grant a new trial under CrR 7.5 (a)(8).

Because the State failed to establish an essential element of the possession of a controlled substance with the intent to deliver, the Court should dismiss this charge. In the alternative, this Court should order a new trial under CrR 7.5 (a)(8).

F. CONCLUSION

The State failed to present sufficient evidence that Mr. Scott intended to deliver the drugs he was alleged to have possessed. Because the State failed to establish an essential element of the crime charge, this court should dismiss. In the alternative, because the court abused

its discretion in failing to order a new trial under CrR 7.5 (a)(8), this court should remand this matter for a new trial.

DATED this 28th day of October 2015.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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


STATE OF WASHINGTON,)	
)	
Respondent,)	
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v.)	NO. 73364-8-I
)	
BRIAN SCOTT,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 28TH DAY OF OCTOBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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