No. 73027-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

VINCENT WILLIAM BARBEE,

Appellant.

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

APPELLANT'S OPENING BRIEF

MAUREEN M. CYR
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Washington Cases

United States Supreme Court Cases

Statutes

A. ASSIGNMENT OF ERROR

The State did not prove the elements of the crime beyond a reasonable doubt.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

To prove the crime of unlawful possession of a firearm, the State must prove beyond a reasonable doubt that the accused knowingly possessed a firearm. Did the State fail to prove the elements of the crime, where a firearm was found in a locked box in the trunk of a car that Vincent Barbee was driving, but Mr. Barbee did not own the car, and he never handled the firearm and did not know it was in the trunk?

D. STATEMENT OF THE CASE

On July 28, 2014, at around noon, a group of law enforcement officers were searching in the Marysville area for Vincent Barbee in order to arrest him on several outstanding warrants. 10/27/14RP 71. Officers spotted Mr. Barbee driving a green Pontiac Grand Am. His girlfriend, Jennifer Olson, was in the front passenger seat. 10/27/14RP 72. Officers watched Mr. Barbee drive into the parking lot of an AM/PM convenience store, then exit the car and enter the store. 10/27/14RP 72.

Officers waited for Mr. Barbee to exit the store and walk back toward the car. Then they approached him and yelled, "Police." 10/27/14RP 74, 87-88. Mr. Barbee spun around, looked at them, yelled, "Oh, shit," and "took off running." 10/27/14RP 74, 87-88. Mr. Barbee was aware that he was wanted on warrants and would be arrested and go to jail if apprehended by law enforcement. 10/28/14(a.m.)RP 26-27. He ran across the street but was soon detained and handcuffed. Officers drove him back to where the Grand Am was parked. 10/27/14RP 74-75.

The Grand Am was "extremely cluttered," with numerous bags and loose items of clothing and other miscellaneous items strewn throughout the car. 10/27/14RP 108; 10/28/14(a.m.)RP 19, 49. Most of the couple's belongings were in the car because they had no permanent residence. They would stay with friends for a few nights, then move to someone else's house for a few nights. 10/27/14RP 97, 117. They used the car to transport their belongings from one house to the next. 10/27/14RP 97, 117.

The officers told Mr. Barbee they were going to search the car but he said it was not his car and he did not want them to search it. 10/28/14(a.m.)RP 11. The car was not registered to Mr. Barbee but to

"Jacob Conyers." 10/28/14(a.m.)RP 38, 76. Mr. Barbee and Ms. Olson were in the process of purchasing the car from Mr. Conyers, paying him $100 per month. 10/27/14RP 107, 114. The couple had been using the car for about one month at that point. 10/27/14RP 115; 10/28/14(a.m.)RP 17. Both Mr. Barbee and Ms. Olson drove the car, and each had a set of keys. 10/27/14RP 115-16. Mr. Conyers also continued to use the car on occasion, and sometimes Ms. Olson let her sister-in-law drive it. 10/27/14RP 114-16.

Despite Mr. Barbee's refusal to consent to a search, the officers searched the car anyway. 10/28/14(a.m.)RP 28. The trunk was cluttered with clothing, shoes and other miscellaneous items, like the rest of the car. 10/28/14(a.m.)RP 32, 40. Inside the trunk among the clutter, the officers found a small locked box. 10/28/14(a.m.)RP 32. The box was not immediately visible on first glance but was tucked in the corner behind the wheel well and obscured by other items. 10/28/14(a.m.)RP 39-40. Lying next to the lockbox was a green file folder containing various documents with Mr. Barbee's name on them. 10/28/14(a.m.)RP 32-33, 53-54.

The box was locked and the officers could not find a key to open it, although they tried several loose keys that were lying on the

floor of the car. 10/28/14(a.m.)RP 41, 50-51. One of the officers grabbed a knife from the floor and used it to jimmy open the lock. 10/28/14(a.m.)RP 50. Inside the box the officer found a small handgun and one round of .22 caliber ammunition. 10/28/14(a.m.)RP 35, 52.

Mr. Barbee said the gun was not his. 10/28/14(a.m.)RP 11-12. Ms. Olson had never seen the lockbox before and did not know about the gun inside. 10/27/14RP 119-20.

Both the lockbox and the handgun were tested for fingerprints and DNA. One fingerprint was lifted from the top of the lockbox but it was determined not to be Mr. Barbee's. 10/28/14(p.m.)RP 15-16. No fingerprints suitable for comparison were found on the handgun. 10/28/14(p.m.)RP 16. A mixture of DNA from at least three individuals, both male and female, was found on the outside of the lockbox. 10/28/14(p.m.)RP 29, 36. The forensic examiner could not determine whether the mixture contained Mr. Barbee's DNA. 10/28/14(p.m.)RP 31. Likewise, a mixture of DNA from at least three individuals, both male and female, was found on the handgun. 10/28/14(p.m.)RP 31, 36. Again, Mr. Barbee could be neither included nor excluded from the sample. 10/28/14(p.m.)RP 31.

Despite the equivocal evidence, Mr. Barbee was charged with one count of first degree unlawful possession of a firearm. CP 79. At trial, the parties stipulated he had a prior conviction for a "serious offense."[1] CP 55, 70, 72-73. The jury found Mr. Barbee guilty as charged. CP 20, 44.

E. ARGUMENT

The State did not prove beyond a reasonable doubt that Mr. Barbee knowingly possessed the gun in the lockbox

To prove the crime of unlawful possession of a firearm in the first degree, the State was required to prove that Mr. Barbee "knowingly had a firearm in his possession or control." CP 56; RCW 9.41.040(1)(a).

Constitutional due process required the State to prove these elements beyond a reasonable doubt.[2] See Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re

[1] As an element of the crime of unlawful possession of a firearm in the first degree, the State was required to prove that Mr. Barbee had a previous conviction for a "serious offense." RCW 9.41.040(1)(a); CP 56.

[2] In reviewing the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3. To find the elements beyond a reasonable doubt, the trier of fact must "reach a subjective state of near certitude of the guilt of the accused." Jackson, 443 U.S. at 315.

On review, the Court presumes the truth of the State's evidence and draws all reasonable inferences from it. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). But the existence of a fact cannot rest upon guess, speculation, or conjecture. Id.

1. The State did not prove Mr. Barbee had dominion and control over the gun because it was in a locked box for which he did not have a key; he never handled the gun and could not easily reduce it to actual possession; and he did not own or have exclusive control over the car in which the gun was found

Possession can be actual or constructive. State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Actual possession requires the item be in the actual, physical custody of the person charged with the crime. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Here, Mr. Barbee did not have actual physical custody of the gun. Thus, the State was required to prove he had constructive possession of it.

Constructive possession involves "dominion and control" over the item. Callahan, 77 Wn.2d at 29. Constructive possession is established by viewing the totality of the circumstances. State v. Turner, 103 Wn. App. 515, 522-23, 13 P.3d 234 (2000). The fact that a person has dominion and control over the premises where contraband is found is only one of the circumstances from which constructive possession can be inferred; it is not alone sufficient to prove constructive possession. State v. Shumaker, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007); State v. Olivarez, 63 Wn. App. 484, 486, 820 P.2d 66 (1991). "It is not a crime to have dominion and control over the premises where the substance is found." Olivarez, 63 Wn. App. at 486. The State must present additional evidence to prove dominion and control of the contraband.

Although exclusive control of the contraband is not a prerequisite to establishing constructive possession, mere proximity of the contraband to the defendant is insufficient to show dominion and control. State v. Enlow, 143 Wn. App. 463, 469, 178 P.3d 366 (2008). If there is no evidence to show the defendant ever actually handled the contraband, this is a significant factor weighing against a finding of constructive possession. Id. Also relevant is whether the defendant

had *the ability* to reduce the item to actual possession. Turner, 103 Wn. App. at 521. "Dominion and control means that the object may be reduced to actual possession immediately." State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002).

In Enlow, police officers found Enlow under a blanket in the canopy part of a truck. Enlow, 143 Wn. App. at 465. A search of the truck revealed methamphetamine and the materials used to make methamphetamine. Id. During the search, officers found identification cards bearing Mr. Enlow's name and property with his fingerprints on it. Id. But his fingerprints were not found on items containing methamphetamine or items used to manufacture it. Id. Enlow did not own the truck or the house where it was parked. Id. at 469. Under the totality of the circumstances, the evidence was insufficient to prove Enlow had dominion and control over the contraband contained in the truck. Id. at 470.

By contrast, if the defendant owned or was driving the vehicle in which the contraband was found, knew of the presence of the contraband or admitted it was his, and could easily reduce the contraband to actual possession, the circumstances are likely sufficient to prove constructive possession. In Turner, for instance, Turner

admitted the truck he was driving was his, and knew of the rifle's presence in an open case on the back seat. Turner, 103 Wn. App. at 521-22. The rifle was within arm's reach and he could easily reduce it to his actual possession. Id. These circumstances were sufficient to prove Turner possessed or controlled the rifle Id.

Likewise, in Jones, Jones was driving a car in which his girlfriend was a passenger. Jones, 146 Wn.2d at 331. Police found a firearm inside the girlfriend's purse. Id. The evidence was sufficient to prove that Jones had constructive possession of the firearm, but not simply because he exercised control over the car and its contents. Jones also stored items in the purse and admitted the gun in the purse was his. Id. at 333. Under the totality of the circumstances, the evidence was sufficient to show Jones exercised control over the items he stored in the purse. Id.

In this case, ownership of the car that Mr. Barbee was driving is one factor to consider when assessing whether he had constructive possession of the gun found in the trunk. See Enlow, 143 Wn. App. at 469. It is undisputed that Mr. Barbee *did not* own the car. It was registered to someone else. 10/28/14(a.m.)RP 38, 76. Mr. Barbee and his girlfriend were in the process of purchasing the car from the owner,

and had been using it for about one month at the time of Mr. Barbee's arrest. 10/27/14RP 107, 114-15; 10/28/14(a.m.)RP 17. The fact that Mr. Barbee did not own the car weighs against a finding that he had control over the gun found in the trunk. See Enlow, 143 Wn. App. at 469.

But even if the evidence is sufficient to show that Mr. Barbee had dominion and control over the car, despite the fact he did not own it, that is still not sufficient to show he had dominion and control over an item contained in a locked box in the trunk. Shumaker, 142 Wn. App. at 334; Olivarez, 63 Wn. App. at 486. Mr. Barbee did not have exclusive control of the car. His girlfriend also used the car regularly and had a set of keys to it. 10/27/14RP 97-98, 116. The owner of the car, as well as Ms. Olson's sister-in-law, drove the car on occasion. 10/27/14RP 114-17.

Other factors that must be considered to determine whether Mr. Barbee had control over the gun include whether he ever actually handled it, and whether he had the ability to take actual possession of it immediately. Jones, 146 Wn.2d at 333; Enlow, 143 Wn. App. at 469; Turner, 103 Wn. App. at 521. These factors weigh heavily against a finding that Mr. Barbee had control of the gun.

There is no evidence that Mr. Barbee ever handled the gun or the lockbox, although other people did. One fingerprint was lifted from the top of the lockbox but it was not Mr. Barbee's. 10/28/14(p.m.)RP 15-16. Likewise, Mr. Barbee's fingerprints were not found on the gun. 10/28/14(p.m.)RP 16. DNA from at least three individuals—both male and female—was found on both the gun and the lockbox. 10/28/14(p.m.)RP 29, 31, 36. But there is no evidence that Mr. Barbee's DNA was included in the mixture. 10/28/14(p.m.)RP 31, 36. It is pure speculation to say that Mr. Barbee ever handled the gun or the lockbox. The State may not rely upon speculation or conjecture to prove this essential fact. Colquitt, 133 Wn. App. at 796.

Moreover, the evidence shows that Mr. Barbee *could not* easily reduce the gun to his immediate, actual possession. The gun was contained in a locked box in the trunk of the car. 10/28/14(a.m.)RP 32-33, 35-36. Mr. Barbee did not have a key to the box, and no key was found anywhere in the car. 10/27/14RP 76-77, 119; 10/28/14(a.m.)RP 41. Mr. Barbee could not have immediately accessed the gun.

The deputy prosecutor argued in closing argument that Mr. Barbee had control of the gun because a file folder containing documents bearing his name was sitting next to the lockbox in the car,

and because he carried other personal belongings in the car. 10/28/14(p.m.)RP 62-63. But whether Mr. Barbee carried personal belongings in the car does not establish that he had control or possession of an item in the car that he never actually handled. See Enlow, 143 Wn. App. at 465, 469. Again, "mere proximity alone is not enough to infer constructive possession." Id. at 469.

In sum, the State did not prove Mr. Barbee had dominion and control of the gun. He did not own the car in which the gun was found; he did not have exclusive possession of the car; he never actually handled either the gun or the lockbox, although at least two other people did; and he could not easily reduce the gun to his immediate, actual possession. Under the totality of the circumstances, the evidence was insufficient to prove beyond a reasonable doubt that Mr. Barbee had constructive possession of the firearm. Jones, 146 Wn.2d at 333; Enlow, 143 Wn. App. at 469; Shumaker, 142 Wn. App. at 334; Turner, 103 Wn. App. at 521; Olivarez, 63 Wn. App. at 486.

2. The State did not prove Mr. Barbee knew the gun was in the trunk

An essential element of the crime of unlawful possession of a firearm is that the defendant knew he possessed a firearm. State v. Anderson, 141 Wn.2d 357, 366, 5 P.3d 1247 (2000); CP 56. "A person

knows or acts knowingly or with knowledge with respect to a fact or circumstance when he is aware of that fact or circumstance." CP 58; RCW 9A.08.010(1)(b)(i). In addition, "[i]f a person has information that would lead a reasonable person in the same situation to believe that a fact exists, the jury is permitted but not required to find that he acted with knowledge of that fact." CP 58; RCW 9A.08.010(1)(b)(ii).

Knowledge may be inferred when the defendant's conduct indicates the requisite knowledge "as a matter of logical probability." State v. Warfield, 119 Wn. App. 871, 884, 80 P.3d 625 (2003). But although knowledge may be inferred from the surrounding facts and circumstances, it may *not* be inferred from evidence that is "patently equivocal." See State v. Vasquez, 178 Wn.2d 1, 8, 309 P.3d 318 (2013).

Here, the evidence was insufficient to prove beyond a reasonable doubt that Mr. Barbee knew a firearm was present in the trunk of the car. The firearm was contained in a locked box in a cluttered trunk, placed among many other miscellaneous items. 10/28/14(a.m.)RP 32, 40. The box was not immediately visible on first glance but was tucked in the corner behind the wheel well and obscured

by other items. 10/28/14(a.m.)RP 39-40. Even if Mr. Barbee was aware of the box, there is no evidence he knew what was inside of it.

In State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997), the Court concluded the evidence was sufficient to show Echeverria knew the gun was present under his car seat because it was "in plain sight at Mr. Echeverria's feet and the reasonable inference [was] that he therefore knew it was there."

Here, by contrast, the gun was not in "plain sight." It was contained in a locked box inside the trunk of the car. Mr. Barbee did not have a key to the box and there is no evidence he ever opened the box or knew what was inside it. 10/28/14(p.m.)RP 15-16, 29, 31, 36. This evidence is insufficient to show he had actual knowledge of the presence of the gun. It is also insufficient to show that a reasonable person in the same situation would know that a gun was hidden inside the box. See CP 58; RCW 9A.08.010(1)(b)(ii).

In closing argument, the prosecutor argued that Mr. Barbee's decision to run when confronted by police officers in the parking lot demonstrated "consciousness of guilt." 10/28/14(p.m.)RP 61. But that evidence is "patently equivocal." See Vasquez, 178 Wn.2d at 8. Mr. Barbee knew he was wanted on warrants and would be arrested and go

to jail if apprehended by law enforcement. 10/28/14(a.m.)RP 26-27. That is a reasonable, and likely, explanation for his decision to run from the officers when they confronted him. It is purely speculation to conclude that he ran because he knew there was a firearm in the trunk, when there is no other evidence to show he had knowledge of the firearm.

The evidence was insufficient to prove beyond a reasonable doubt that Mr. Barbee knew a firearm was present in the trunk. The State failed to prove an essential element of the crime. See Anderson, 141 Wn.2d at 366.

F. CONCLUSION

Because the State did not prove beyond a reasonable doubt that Mr. Barbee knowingly possessed the firearm, the conviction for unlawful possession of a firearm must be reversed.

Respectfully submitted this 20th day of August, 2015.

/s/ Maureen M. Cyr

_____

MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project - 91052
Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, VINCENT BARBEE, Appellant.	)))))))))	NO. 73027-4-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF AUGUST, 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:

[X]	SETH FINE, DPA [sfine@snoco.org] SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X]	VINCENT BARBEE 842410 OLYMPIC CORRECTIONS CENTER 11235 HOH MAINLINE FORKS, WA 98331	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 20TH DAY OF AUGUST, 2015.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711