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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEFFREY J. PALMER, Appellant.	No. 53376-6-II UNPUBLISHED OPINION

LEE, C.J. — Jeffrey J. Palmer appeals his convictions for possession of a controlled substance by a jail inmate and possession of a controlled substance—methamphetamine. The State concedes that Palmer's convictions should be reversed. We accept the State's concessions. Accordingly, we reverse Palmer's convictions for possession of a controlled substance by a jail inmate and possession of a controlled substance—methamphetamine, and we remand for the trial court to dismiss with prejudice the possession of a controlled substance by a jail inmate charge and vacate Palmer's possession of a controlled substance—methamphetamine conviction.

FACTS

After Palmer was arrested after allegedly trespassing on a hospital's property, the State charged Palmer with possession of a controlled substance by prisoner or jail inmate, possession of a controlled substance—methamphetamine, criminal trespass in the second degree, and obstructing a law enforcement officer.

At Palmer's jury trial, Deputy Alan Earhart of the Clark County Sheriff's Office, testified that he was dispatched to the hospital on April 5. When Deputy Earhart arrived at the hospital, he placed Palmer under arrest.

When Deputy Earhart searched Palmer incident to the arrest, Deputy Earhart found a glass pipe, a black plastic container from a marijuana dispensary, and some aluminum foil that had burn marks on it. Deputy Earhart then transported Palmer to the Clark County jail parking lot. In the parking lot, Deputy Earhart filled out a form called a "Prebook," which is needed to book someone into the Clark County jail, and a probable cause statement. 2 Verbatim Report of Proceedings (VRP) (May 20, 2019) at 182. To complete the booking process, Deputy Earhart needed to walk Palmer into a "sally port" and wait in line for booking. 2 VRP (May 20, 2019) at 182. While Deputy Earhart was trying to fill out the forms, Palmer stated that he urgently needed to use the restroom. Deputy Earhart asked him if he could wait for 15 minutes, and Palmer stated that he could not. In order to accommodate Palmer's need to urinate, Deputy Earhart did not finish his forms but walked Palmer inside the jail.

Deputy Earhart and corrections Deputy Hatcher took Palmer to the bathroom. They had a visual of Palmer the entire time. Deputy Earhart observed that "[Palmer] stood in front of the toilet; he moved around a lot. He appeared to be positioning things at his—I'll just say his groin or crotch area, moved around a lot. His pants were unzipped at one point, and he urinated very, very little." 2 VRP (May 20, 2019) at 184. The officers stopped Palmer because he appeared to be intent on doing something other than urinating. Deputy Earhart told Palmer that it was a felony crime for an inmate to smuggle contraband into the jail. The corrections deputy decided that based on the finding of the drug paraphernalia and Palmer's actions in the bathroom, a strip search was

necessary. The corrections deputy conducted the strip search and handed Deputy Earhart a small black canister containing marijuana, and a blue glove containing two "baggies" of marijuana. 2 VRP (May 20, 2019) at 185. After these items were discovered, Deputy Earhart looked at the items he had found on Palmer at the hospital. The canister that Deputy Earhart had found during the initial search contained crystal meth.[1]

After the strip search, Deputy Earhart could not book Palmer into the jail until Palmer got a medical clearance because Palmer told him that he had eaten a razor blade. Despite not seeing Palmer with a razor blade during the two hours that Deputy Earhart had been with Palmer, Deputy Earhart took Palmer back to the hospital. A hospital x-ray showed no razor blade present.

When they got back into the patrol car, Palmer showed Deputy Earhart some white wire. The end of the wire was missing, and Palmer stated that he swallowed it. Deputy Earhart found the end of the wire tucked between Palmer's body and the waistband of his pants. Then Palmer claimed that there were two wires and that he had swallowed the other one. Deputy Earhart called the hospital staff and asked them that if there were other pieces of wire missing, and the hospital staff answered in the negative. Deputy Earhart took Palmer back to the Clark County jail for booking.

The jury found Palmer guilty of possession of a controlled substance by prisoner or jail inmate, possession of a controlled substance—methamphetamine, and obstructing a law enforcement officer. The jury found Palmer not guilty of criminal trespass in the second degree.

[1] The Washington State Patrol Crime Lab tested the substance and confirmed that it was methamphetamine.

The trial court imposed a standard range sentence of 21 months confinement. Palmer appeals.

ANALYSIS

A. POSSESSION OF A CONTROLLED SUBSTANCE BY AN INMATE

Palmer argues that "[t]he government failed to establish Mr. Palmer was confined in a county or local correctional institution when marijuana was found on him, as required by RCW 9.94.041(2)." Br. of Appellant at 30 (boldface omitted). Palmer contends that "[a]t no time prior to the discovery of marijuana on his body was Mr. Palmer booked into the county jail or otherwise transferred into the custody of the institution." Br. of Appellant at 35-36. The State concedes that there is insufficient evidence to sustain Palmer's conviction for being a prisoner or jail inmate in possession of marijuana. We accept the State's concession.

1. Legal Principles

We review questions of statutory interpretation de novo. *State v. Bao Dinh Dang*, 178 Wn.2d 868, 874, 312 P.3d 30 (2013). "The purpose of statutory interpretation is to determine and carry out the intent of the legislature." *State v. Sweat*, 180 Wn.2d 156, 159, 322 P.3d 1213 (2014) (citing *State v. Alvarado*, 164 Wn.2d 556, 561-62, 192 P.3d 345 (2008)). "'Statutory interpretation begins with the statute's plain meaning.'" *State v. Derenoff*, 182 Wn. App. 458, 463, 332 P.3d 1001 (2014) (quoting *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). We evaluate the plain meaning of the statute "from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009) (citing *State v. Jacobs*, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005).

RCW 9.94.041 (Narcotic drugs, controlled substances, alcohol, marijuana, other intoxicant, cell phone, or other form of electronic telecommunications device—Possession, etc., by prisoners—Penalty) states:

> (2) Every person confined in a county or local correctional institution who, without legal authorization, while in the institution or while being conveyed to or from the institution, or while under the custody or supervision of institution officials, officers, or employees, or while on any premises subject to the control of the institution, knowingly possesses or has under his or her control any narcotic drug or controlled substance, as defined in chapter 69.50 RCW, alcohol, marijuana, or other intoxicant, or a cell phone or other form of an electronic telecommunications device, is guilty of a class C felony.

The plain language of the statute shows that RCW 9.94.041(2) pertains to those who are "confined" in a county or local correctional institution. RCW 9.94.041(2). The term is not defined in the statute. The dictionary defines "confined" as "kept in confines." WEBSTER'S THIRD INTERNATIONAL DICTIONARY 476 (1993). Therefore, the RCW 9.94.041(2) applies to those who are *kept* in the confines of a county or local correctional institution.

A challenge to the sufficiency of the evidence to convict is a constitutional question this court reviews de novo. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). Our Supreme Court in *Rich* explained this court's review on a sufficiency of the evidence challenge as follows:

> The State bears the burden of proving all the elements of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. CONST. amend. XIV; WASH. CONST. art. I, § 3. To determine if sufficient evidence supports a conviction, we consider " '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.' " *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (plurality opinion) (some emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). "[I]nferences based on circumstantial evidence must be reasonable and cannot be based on speculation." *State v. Vasquez*, 178 Wn.2d 1, 16, 309 P.3d 318 (2013). A " 'modicum' " of evidence does not meet this standard. *Jackson*, 443 U.S. at 320.

Id. Where there is insufficient evidence to support a necessary element of the crime, we will reverse and remand to vacate the conviction and dismiss the charge with prejudice. *See State v. Smith*, 155 Wn.2d 496, 498, 120 P.3d 559 (2005).

2. Insufficient Evidence To Convict

Here, under both the statute and the jury instructions, Palmer was not confined to a county or local correctional institution. *See* RCW 9.94.041(2). Based on the record, there is no evidence that Palmer was confined or kept in the confines of a county or local correctional institution at the time that the marijuana was found on him. Deputy Earhart testified that he transported Palmer to the Clark County jail parking lot. In the parking lot, Deputy Earhart needed to fill out a form called a "Prebook" and a probable cause statement in order for Palmer to be booked in the Clark County jail. 2 VRP (May 20, 2019) at 182. Also, in order to get booked, Deputy Earhart needed to walk Palmer into a "sally port" and wait in line to be booked. 2 VRP (May 20, 2019) at 182. Deputy Earhart completed neither requirement.

While Deputy Earhart was trying to fill out the forms, Palmer stated that he urgently needed to use the restroom. In order to accommodate Palmer's need to urinate, Deputy Earhart did not finish his forms but walked him inside. Deputy Earhart and a corrections deputy took him to the bathroom. While keeping watch over Palmer, Deputy Earhart and Deputy Hatcher noted that Palmer was doing something other than urinating, so Deputy Hatcher conducted a strip search of Palmer. Deputy Hatcher found marijuana on Palmer. After the strip search, Deputy Earhart could not book Palmer into the jail but had to take Palmer back to the hospital because Palmer told

Deputy Earhart that he had swallowed a foreign object. It was not until after the hospital visit that Deputy Earhart took Palmer back to the Clark County jail for booking.

Even when the evidence is viewed in the light most favorable to the State, no rational trier of fact could have found that Palmer was confined or kept in the Clark County jail at the time that the marijuana was found. Palmer had not yet been booked at the jail and was taken by Deputy Earhart, not the correctional deputy, to the hospital. Thus, we hold that there is insufficient evidence to support Palmer's conviction for possession of a controlled substance by prisoners or jail inmate. Therefore, we reverse the conviction and remand to the trial court to dismiss the charge with prejudice.

B. POSSESSION OF A CONTROLLED SUBSTANCE—METHAMPHETAMINE

Palmer also argues that his conviction for possession of a controlled substance—methamphetamine is unconstitutional under *State v. Blake*, 197 Wn.2d 170, 481 P.3d 521 (2021). The State concedes that Palmer's conviction is unconstitutional under *Blake*. We agree and reverse Palmer's conviction for possession of a controlled substance—methamphetamine.

In *Blake*, our Supreme Court held that RCW 69.50.4013(1), the statute criminalizing simple possession, was unconstitutional. 197 Wn.2d at 186. Therefore, we accept the State's concession. Accordingly, we reverse Palmer's conviction for possession of a controlled substance—methamphetamine and remand to the trial court to vacate this conviction.[2]

We reverse Palmer's convictions for possession of a controlled substance by a jail inmate and possession of a controlled substance—methamphetamine, and we remand for the trial court to

[2] Palmer also raised additional issues in his statement of additional grounds (SAG) under RAP 10.10. Because we reverse both of Palmer's convictions, we do not address Palmer's SAG claims.

dismiss with prejudice the possession of a controlled substance by a jail inmate charge and vacate Palmer's possession of a controlled substance—methamphetamine conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Lee, C.J.

We concur:

Worswick, J.

Glasgow, J.