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No. 62868-2-I

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

STATE OF WASHINGTON,

Respondent,

v.

LIVIO DELLAGUARDIA,

Appellant.

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

The Honorable Gregory Canova Judge

BRIEF OF APPELLANT

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I.
ASSIGNMENT OF ERROR

Dellaguardia's right to due process under the Fourteenth Amendment to the U.S. Constitution was violated because the evidence was insufficient to support a conviction for possession of marijuana with intent to deliver.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Was the evidence sufficient to support a conviction for possession of marijuana with intent to deliver?

II.
STATEMENT OF THE CASE

Livio Dellaguardia was charged with one count of possession with intent to deliver marijuana. CP1-5. He was convicted as charged and this timely appeal followed. CP 36-43, 35.

On November 17, 2008, Trooper Joseph Zimmer was patrolling I-5 in Seattle. RP 144-145. He stopped Dellaguardia for speeding. RP 146. Dellaguardia provided a valid driver's licence. At first, Trooper Zimmer suspected that Dellaguardia was driving while intoxicated. RP 156. But, according to the Trooper Zimmer, Dellaguardia performed "adequately" on the field sobriety tests. RP 160.

During this encounter, however, Dellaguardia admitted to the trooper that he had smoked marijuana much earlier in the day. *Id.* Trooper Zimmer stated that he could smell the odor marijuana on Dellaguardia.

Well, obviously since I did have a crime at that point, the odor of marijuana, granted he had said to me that he smoked it earlier, I didn't smell it on my initial contact, but at this time I did smell it and I was confident that he had it on his person, and I attempted to make an arrest for the possession of marijuana.

RP 161.

Dellaguardia resisted the arrest and fled across I-5. RP 189-91.

Trooper Zimmer then inventoried the contents of Dellaguardia's vehicle and found a cell phone and a duffel bag containing 3,000 grams of marijuana. RP 178. The marijuana was in 4 bags inside the duffel bag; two of those bags were heat-sealed. RP 197.

When Dellaguardia fled, he left his driver's license in the trooper's possession. The trooper later drove by the residence listed on the driver's license. RP 221. Trooper Zimmer testified that his total encounter with Dellaguardia lasted seven minutes. RP 194.

III.

ARGUMENT

A. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR POSSESSION WITH INTENT TO DELIVER

1. Legal Standards

The due process clause of the Fourteenth Amendment to the U.S. Constitution requires a minimum level of proof to support a criminal conviction. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). The evidence is sufficient if, when considered in the light most favorable to the prosecution, any rational trier of fact could have

found the defendant guilty of the essential elements of the crime beyond a reasonable doubt. Id. at 319. Because Jackson focuses on the need for proof beyond a reasonable doubt, it overturned the more lenient “substantial evidence” test previously followed in the State of Washington. See State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980).

To convict Dellaguardia, the State needed to prove that he knowingly possessed marijuana with intent to deliver. See RCW 69.50.401(a). The State failed to prove the element of 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), quoting State v. Harris, 14 Wn. App. 414, 418, 542 P.2d 122 (1975), review denied, 86 Wn.2d 1010 (1976). See also, e.g., State v. Hutchins, 73 Wn. App. 211, 216, 868 P.2d 196 (1994); State v. Hagler, 74 Wn. App. 232, 235, 872 P.2d 85 (1994). Accord, Turner v. United States, 396 U.S. 398, 422-23, 24 L. Ed. 2d 610, 90 S. Ct. 642 (1970) (“bare possession of cocaine is an insufficient predicate for concluding that Turner was dispensing or distributing”). The State must produce “substantial corroborating evidence” of the possessor’s intent. State v. Brown, 68 Wn. App. at 485. The inference of intent must be “plainly indicated as a matter of logical probability.” State v. Kovac, 50 Wn. App. 117, 120, 747 P.2d 484 (1987), quoting State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Put another way, evidence of intent to deliver must be “sufficiently compelling.” State v. Davis, 79 Wn. App. 591, 594,

904 P.2d 306 (1995). “[T]he cases finding sufficient corroborating evidence contain additional factors [besides the fact of possession] that are substantially related to distribution of drugs, rather than simple possession.” State v. Wade, 98 Wn. App. 328, 989 P.2d 576 (1999).

Even when properly admitted, an officer’s expert opinion that the quantity of drugs possessed is inconsistent with personal use is not sufficient to support conviction. See, e.g., State v. Lopez, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995); State v. Hagler, 74 Wn. App. at 235; State v. Hutchins, 73 Wn. App. at 217. Otherwise, “any person possessing a controlled substance in an amount greater than some experienced law enforcement officer believes is ‘usual’ or ‘customary’ for personal use is subject to conviction for possession with intent to deliver.” State v. Brown, 68 Wn. App. at 485. Because of the substantial difference in punishment between simple possession and possession with intent to deliver, “courts must be careful to preserve the distinction.” Id.

Evidence suggesting consciousness of guilt – such as nervousness, flight, or giving a false name – does not create an inference of intent to deliver. State v. Wade, 98 Wn. App. at 342. Such facts, “beg the question of *which* of the two possible crimes [the defendant] felt guilty about – do his actions show that he knew he possessed cocaine or that he knew he intended to deliver it?” State v. Hagler, 74 Wn. App. at 236. See also State v. Hutchins, 73 Wn. App. at 217 (insufficient evidence of intent although defendant gave false name); State v. Brown, 68 Wn. App. at 481

(insufficient evidence of intent although defendant ran when approached by police).

Courts have sometimes found the presence of cash to support an inference of intent to deliver, but only when the quantity is abnormally large. See State v. Campos, 100 Wn. App. 218, 219- 20, 998 P.2d 893 (2000) (defendant had \$1750 in pocket; officer testified that denominations were consistent with typical drug sales); State v. Lane, 56 Wn. App. 286, 290, 786 P.2d 277 (1989) (\$850 found near drugs in diaper); State v. Hagler, 74 Wn. App. at 233-36 (juvenile had \$342 in cash “bulging” from pocket, “consistent in amount and denominations with proceeds of prior sales of narcotics”); Brown at 484 (suggesting that a “substantial sum” of money, along with other factors, could indicate dealing). The mere fact that the defendant has some cash with him, however, proves nothing. See State v. Cobelli, 56 Wn. App. 921, 925, 788 P.2d 1081 (1989) (that defendant had money in his pocket along with drugs not incriminating, where record does not reflect amount of money).

2. Application of Standards to This Case

In closing the prosecutor argued that the jury could find intent to deliver based upon 5 items of circumstantial evidence. First she argued that because in 100 previous arrests Trooper Zimmer had generally seized only two to seven grams, and the amount seized here was 1,000 times more than the Trooper sees on a regular basis. RP 260. In rebuttal she stated:

[O]ne person isn't going to smoke 3,000 grams of marijuana.” RP 277.¹ She went so far as to say that amount of the drug was the “strongest” piece of evidence. *Id.* Second, she argued that the marijuana was worth about \$12,292. RP 260.² Third, she argued the marijuana was in four large bags. *Id.* Fourth, she argued that the jury could speculate that the reason Dellaguardia ran was because he had other evidence of delivery on his person. And, asked the jury to consider whether Dellaguardia would “risk his life” running across the freeway “if you just like to smoke a little dope. RP 262.³ Fifth, she argued that he was driving a rental car even though he lived in Renton. RP 262.⁴

The prosecutor's first two arguments are nothing more than an invitation to the jury to find that amount alone is sufficient proof of intent to deliver. This is precisely the argument rejected in Hutchins. In Hutchins, the Court rejected the State's argument that the quantity of drugs

¹ Defense counsel objected to this argument because it relied on facts not in evidence. RP 277. The judge overruled the objection. *Id.*

² Defense counsel objected to this argument on the grounds that there had been testimony only of the price of small amounts of marijuana and that the prosecutor was arguing a price based upon an extrapolation of the price of these smaller amounts. But, this was clearly a bulk amount of marijuana that might be purchased for much less. RP 251. The trial judge overruled that objection. RP 255.

³ Defense counsel objected to this argument because it allowed the jury to speculate and tended to shift the burden to Dellaguardia to prove that he did not run because he had evidence of intent on his person. RP 250-51. The judge overruled that objection. RP 251.

⁴ Defense counsel also objected to this argument. RP 261. The judge overruled the objection. *Id.*

seized plus regarding the profit margin the defendant would receive for selling the drugs was enough to establish intent to deliver.

The prosecutor's third argument is equally unavailing. It is true that the marijuana was divided up into four large bags. But the trooper found no baggies, bindles, balloons or other packaging material. There was no other dealer paraphernalia such as scales, cutting powder, or customer lists. There were no weapons in the vehicle. The investigating officer knew where Dellaguardia lived yet did not set surveillance to determine if there was drug dealing going on at his residence.

The prosecutor's fourth argument violated the holding in Brown and Wade. Both of these cases hold that flight, while it might be evidence of a crime is not probative evidence of the distinction between the intent to possess and the intent to deliver. In either case, the defendant may simply wish to avoid arrest.

The use of a rental car also proves nothing. This argument is similar to the one that courts have rejected regarding cell phones. "It does not follow . . . that because police officers know that drug dealers frequently own . . . cellular telephones, . . . [the defendant], who owned a . . . cellular telephone, was a drug dealer." Burchette v. Virginia, 14 Va. App. 432, 437, 425 S.E. 2d 81 (1992). By the same token, drug dealers may, on occasion use rental cars. But that does not mean that anyone driving a rental car is a drug dealer. It may simply mean that the driver does not have a working vehicle of his own.

In many cases, evidence equal to or stronger than that presented here was found to be insufficient. In State v. Brown, the defendant was found in a “high narcotics area ” with 20 rocks of cocaine weighing 5.1 grams. He ran when first approached by the police. An officer testified that the amount was “definitely in excess of the amount commonly possessed for personal use only,” and “this is definitely possessed with the intent to deliver.” Brown, 68 Wn. App. at 481-82. In State v. Davis,

[t]he evidence against [the defendant] included possession of a bread sack with six individually wrapped baggies of marijuana, two baggies of marijuana seeds, a film canister containing marijuana, a baggie with marijuana residue in it, a box of sandwich baggies, a pipe used for smoking marijuana, a number of knives, and police testimony that it was not customary for people who simply use marijuana to have that “quantity with that packaging.”

Davis, 79 Wn. App. at 592. See also State v. Kovac, 50 Wn. App. at 118 (defendant seen exchanging baggies and money with another person in park; found with seven baggies of marijuana each containing about one gram).

Cases finding evidence of intent sufficient have involved far more incriminating facts than those present here. See, e.g., State v. Taylor, 74 Wn. App. 111, 872 P.2d 53 1994) (police found 15 grams of cocaine, 1 gram of heroin, 1 bottle of diazepam pills, baggies, scales, a cocaine grinder, over \$5,000 in cash and a handgun); State v. Llamas-Villa, 67 Wn. App. 48, 836 P.2d 239 (1992) (possession of cocaine, heroin, \$3,200, combined with officer’s observation of deals); State v. Lane, 56 Wn. App. 286, 786 P.2d 277 (1989) (possession of one ounce of cocaine, scales, and

\$850 hidden in a diaper); State v. Simpson, 22 Wn. App. 572, 590 P.2d 1276 (1979)

**IV.
CONCLUSION**

Because the evidence was insufficient, Dellaguardia's conviction violated his right to due process under the federal constitution. The Court should therefore reverse and remand for resentencing on the lesser-included offense of possession. See State v. Wade, 98 Wn. App. at 342.

DATED this 27 day of August 2009.

Respectfully submitted,


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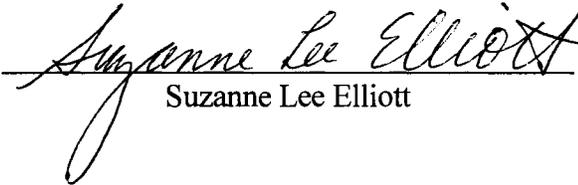
CERTIFICATE OF SERVICE

I certify that on August 27, 2009, I deposited this brief in the mail, postage prepaid, to the following:

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