

65865-4

65865-4

No. 65865-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

DEREK HARLIN,

Appellant.

2011 APR 28 10:05 AM
COURT OF APPEALS
CLERK'S OFFICE

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

The Honorable Judge Fair

APPELLANT'S REPLY BRIEF

MARK D. MESTEL
Attorney for Appellant
Derek Harlin

MARK D. MESTEL, INC., P.S.
3221 Oakes Avenue
Everett, Washington 98201
(425) 339-2383

ORIGINAL

TABLE OF CONTENTS

I. ARGUMENT.....1

1. The State failed to introduce sufficient evidence from which reasonable inferences could be drawn that the Appellant constructively possessed the marijuana.

II. CONCLUSION.....15

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>State v. Bergeron</u> , 105 Wash.2d 1, 711 P.2d 1000 (1985).....	1
<u>State v. Davis</u> , 16 Wash.App. 657, 659, 558 P.2d 263, 264 - 265 (1977).....	11
<u>State v. George</u> , 146 Wash.App. 906, 921, 193 P.3d 693, 699 (2008).....	13
<u>State v. Gutierrez</u> , 50 Wash.App. 583, 593, 749 P.2d 213 (1988).....	10
<u>State v. Hanna</u> , 123 Wash.2d 704, 710, 871 P.2d 135, cert. denied, 513 U.S. 919, 115 S.Ct. 299, 130 L.Ed.2d 212 (1994).....	2
<u>State v. Johnson</u> , 100 Wash.2d 607, 674 P.2d 145 (1983).....	1
<u>State v. Spruell</u> , 57 Wash.App. 383, 388-89, 788 P.2d 21 (1990).....	12

FEDERAL CASES

<u>Ulster Cy. v. Allen</u> , 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979).....	1, 2
<u>United States v. Spinney</u> , 65 F.3d 231 (1st Cir.1995).....	2

OTHER JURISDICTIONS

<u>Dukes v. State</u> , 178 Md.App. 38, 47-48, 940 A.2d 211, cert. denied, 405 Md. 64, 949 A.2d 652 (2008).....	3
<u>Hooper v. State</u> , 214 S.W.3d 9, 15 -16 (Tex.Crim.App., 2007).....	5
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).....	4

I. ARGUMENT

The State failed to introduce sufficient evidence from which reasonable inferences could be drawn that the Appellant constructively possessed the marijuana.

As noted in his Opening Brief to state the test for the sufficiency of evidence is straightforward; it is its implementation which is difficult. Appellant went to some length to discuss the difference between reasonable inferences and speculation so that this Court might properly analyze the evidence introduced by the State. The State chose not to address the issue. Appellant would like to bring additional authority to this Court's attention.

Appellate courts that have analyzed the issue, rather than simply stated the standard, have commented on the difference between a reasonable inference and speculation. The inference must be rationally related to the proven facts. State v. Johnson, 100 Wash.2d 607, 674 P.2d 145 (1983), overruled on other grounds in State v. Bergeron, 105 Wash.2d 1, 711 P.2d 1000 (1985); Ulster Cy. v. Allen, 442 U.S. 140, 99 S.Ct. 2213,

60 L.Ed.2d 777 (1979). Although the State claims that an inference must not exhaust all other reasonable explanations, an inference is only rationally related to the proven facts if that inference is more likely than not to flow from those facts. See Ulster Cy. v. Allen, 442 U.S. at 166, 99 S.Ct. at 2229 (quoting Leary v. United States, 395 U.S. 6, 34, 36, 89 S.Ct. 1532, 1547, 1548, 23 L.Ed.2d 57 (1969)); accord State v. Hanna, 123 Wash.2d 704, 710, 871 P.2d 135, cert. denied, 513 U.S. 919, 115 S.Ct. 299, 130 L.Ed.2d 212 (1994), writ of habeas corpus granted sub nom. Hanna v. Holden, No. C94-1565R (W.D.Wash. May 17, 1995)

The First Circuit discussed the standard for appellate review of the sufficiency of the evidence in United States v. Spinney, 65 F.3d 231 (1st Cir.1995). It wrote:

[A] reviewing court should refrain from second-guessing the ensuing conclusions as long as (1) the inferences derive support from a plausible rendition of the record, and (2) the conclusions flow rationally from those inferences.... [However,] juries do not have carte blanche. **The appellate function, properly**

understood, requires the reviewing court to take a hard look at the record and to reject those evidentiary interpretations and illations that are unreasonable, insupportable, or overly speculative.... This function is especially important in criminal cases, given the prosecution's obligation to prove every element of an offense beyond a reasonable doubt.

Id. at 234 (citations omitted, emphasis added).

The Maryland appellate courts are in agreement, noting the difference between reasonable inferences and speculation.

As the Court observed in Dukes v. State, 178 Md.App. 38, 47-48, 940 A.2d 211, cert. denied, 405 Md. 64, 949 A.2d 652 (2008):

The Maryland courts have long drawn a distinction between rational inference from evidence, which is legitimate, and mere speculation, which is not. See, e.g., Benedick v. Potts, 88 Md. 52, 55, 40 A. 1067 (1898) (“[A]ny ... fact ... may be established by the proof of circumstances from which its existence may be inferred. But this inference must, after all, be a legitimate inference, and not a mere speculation or conjecture. There must be a logical relation and connection between the circumstances proved and the conclusion sought to be adduced from them.”). In Bell v. Heitkamp, 126 Md.App. 211, 728 A.2d

743 (1999), we endorsed the following test to distinguish between inference and speculation: “ ‘where from the facts most favorable to the [party with the burden of proof] the nonexistence of the fact to be inferred is just as probable as its existence (or more probable than its existence), the conclusion that it exists is a matter of speculation, surmise, and conjecture, and a jury will not be permitted to draw it.’ ” Id. at 224, 728 A.2d 743 (quoting Chesapeake & Potomac Tel. Co. v. Hicks, 25 Md.App. 503, 524, 337 A.2d 744, cert. denied, 275 Md. 750 (1975)).

After the United States Supreme Court decision in Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) the Texas Appellate Court, in an attempt to address the proper implementation of the Supreme Court holding, addressed the difference between a reasonable inference supported by the evidence at trial, speculation, and a presumption. It stated:

A presumption is a legal inference that a fact exists if the facts giving rise to the presumption are proven beyond a reasonable doubt. See TEX. PENAL CODE § 2.05. For example, the Penal Code states that a person who purchases or receives a used or secondhand motor vehicle is presumed to know on receipt that the vehicle has been previously stolen, if certain basic

facts are established regarding his conduct after receiving the vehicle. TEX. PENAL CODE § 31.03(c)(7). A jury may find that the element of the offense sought to be presumed exists, but it is not bound to find so. TEX. PENAL CODE § 2.05. In contrast, an inference is a conclusion reached by considering other facts and deducing a logical consequence from them. Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt.

Hooper v. State, 214 S.W.3d 9, 15 -16 (Tex.Crim.App., 2007)

The first step in the analysis of the sufficiency of the State's evidence should be, what has the State proved, either through direct or circumstantial evidence. Those terms are defined in WPIC 5.01 as: The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case. Circumstantial evidence

is evidence that is based on a reasonable inference. Can one find that the State has introduced circumstantial evidence, but then draw reasonable inferences from that evidence, thereby stacking inferences?

In the case at bar the State's proof established the following:

1. Derek Harlin was at a house, having arrived sometime before the police.

2. Merlinda Harlin was at a house, having arrived sometime before the police.

3. Cody Harlin's identification was located in a downstairs bedroom.

4. There was a photograph of Derek and Merlinda Harlin located in the master bedroom.

5. Cody Harlin was arrested by the police while he was in the locked shop.

6. At the time of his arrest he was wearing blue gloves.

7. The police entered into the shop using a key.

8. This was a large two story shop located 50 feet from the residence. (RP 44).

9. Derek Harlin made certain statements to the police after learning that the police were there to search for marijuana. Although the State references these statements as if they were quotes, that is not the case. The Prosecutor asked Det. Vargas to give “a general description of the topics of conversation that you and he had had during the course of those telephone calls.” (RP 232). In describing one conversation Det. Vargas said that Mr. Harlin asked for “some paperwork that we had taken from the house.” In another conversation he said that Mr. Harlin wanted returned some of the guns taken from his house. (RP 233).

Based on these facts it is reasonable to infer that:

1. Cody Harlin had a connection to the house and to the shop.

2. Cody Harlin is the adult child of the Harlins (charges were filed against him in Superior Court rather than Juvenile Court).

3. Cody Harlin was in possession of marijuana.

4. Cody Harlin locked himself into the shop.

5. Cody Harlin had been caring for or manicuring the marijuana plants discovered on the second floor of the shop.

Based on these facts it is **not reasonable to infer** that:

1. Derek Harlin lived at the house. His presence, without more, does not logically lead to the conclusion that he resided at that house. While it is possible that he lived at the house, it is speculative at best. Did Merlinda live at the house? Was it her master bedroom? Were they estranged? Did neither live at the house, but were there to visit their son?

2. Derek Harlin gave the police a key to the shop. There is no fact on which the Court could infer that Derek Harlin gave the key to the police. The record is silent on where the key originated. Did the police discover keys when they

entered the residence? Did they locate them on a counter or in the bedroom associated with Cody? Did Merlinda give them the keys?

3. Derek Harlin had the ability to exclude others from the marijuana. There was no proof that Derek Harlin had the ability to access the locked shop much less that he had the ability to exclude others.

There was insufficient evidence to put Derek Harlin in constructive possession of the marijuana. Contrast the evidence introduced by the State in this case to other cases in which the Court found the State's evidence insufficient to sustain the conviction.

State v. Callahan, supra, is the leading case regarding constructive possession of narcotics. There, the evidence linking the defendant to the drugs and the premises searched, found insufficient to prove constructive possession, included: (1) two books and two guns belonging to the defendant found on the searched houseboat; (2) defendant had stayed 2 to 3 days

on the houseboat but paid no rent; (3) most of the drugs were found near the defendant; and (4) he admitted having handled the drugs.

In State v. Gutierrez , 50 Wash.App. 583, 593, 749 P.2d 213 (1988) the Court rejected the State's argument that it had presented sufficient evidence to establish constructive possession of drugs. Although the defendant possessed money used to buy drugs during a controlled buy and had accompanied the renter of the storage unit and owner of the travel trailer (found within the storage unit and in which the police discovered the drugs which formed the basis of the criminal charge) to the unit, the Court still found the evidence insufficient to establish dominion and control over the drugs stating:

There was no evidence Mr. Gutierrez had any rental interest in the storage unit or travel trailer, kept any property within the unit, or had ever previously been seen at the unit. There was no direct evidence Mr. Gutierrez entered the travel trailer while in the storage unit. This evidence is tested under the State v. Green, 94 Wash.2d 216,

616 P.2d 628 (1980) sufficiency of the evidence test, i.e., whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, viewing the evidence in the light most favorable to the prosecution.

The Court also rejected Mr. Gutierrez's possession of the money exchanged during the controlled buy as sufficient to support the conviction stating:

The State is correct that there is a circumstantial link between the earlier drug sales on the 18th and 19th, and money found on Mr. Gutierrez. Nevertheless, while minimally relevant to showing Mr. Gutierrez was in some way connected with those drug purchases, this evidence does not show possession of the drugs found in the trailer. In addition, unlike Mr. Warren, there is no evidence linking Mr. Gutierrez to the storage unit or trailer other than a 40-minute visit. We conclude there was insufficient evidence presented by the State, and it was error to deny Mr. Gutierrez' motion to dismiss.

Id at 593-94.

In State v. Davis, 16 Wash.App. 657, 659, 558 P.2d 263, 264 - 265 (1977) the Court stated that dominion and control (necessary to establish constructive possession) "need not be exclusive, but may be inferred from such circumstances as

payment of rent, or possession of keys. Absent evidence of actual possession of the controlled substance or of participation in its processing, even additional facts of temporary residence, personal possessions in the premises, or knowledge of the presence of controlled substances are insufficient to show dominion and control of the premises, State v. Callahan, 77 Wash.2d 27, 459 P.2d 400 (1969). Since the State failed to show, even circumstantially, dominion and control over the premises it reversed the conviction for felony possession.

In State v. Spruell, 57 Wash.App. 383, 388-89, 788 P.2d 21 (1990) the Court found the evidence insufficient to convict the defendant based on the State's theory of constructive possession of cocaine located near a table on which there was also a scale, vials and a razor blade. In reversing the conviction the Court stated:

There is no evidence in this case involving Hill other than the testimony of his presence in the kitchen when the officers entered and the testimony of the conditions there described by Detective Greenbaum and Detective Sergeant

McClure. There is no evidence relating to why Hill was in the house, how long he had been there, or whether he had ever been there on days previous to his arrest. There is no evidence of any activity by Hill in the house. So far as the record shows, he had no connection with the house or the cocaine, other than being present and having a fingerprint on a dish which appeared to have contained cocaine immediately prior to the forced entry of the police. Neither of the police officers testified to anything that was inconsistent with Hill being a mere visitor in the house. There is no basis for finding that Hill had dominion and control over the drugs. Our case law makes it clear that presence and proximity to the drugs is not enough. There must be some evidence from which a trier of fact can infer dominion and control over the drugs themselves. That evidence being absent, Hill's conviction must be reversed and dismissed on double jeopardy grounds.

See also State v. George, 146 Wash.App. 906, 921, 193 P.3d 693, 699 (2008).

In light of the foregoing, the State's summary of evidence and inferences set out on page 12 of its Brief does no more than establish proximity to the shop and knowledge that marijuana might be within the shop. Contrary to the State's assertion, the statement that he lost his source of income cannot

be interpreted, nor reasonably inferred, as an affirmation that he possessed the drugs. The police arrested him and Cody Harlin on the day of the execution of the search warrant. Did the State offer any evidence concerning Derek's source of income? Was he employed? Did he lose his job because he was arrested? Was Cody the renter of the property? Did he rent from his father? Did Derek lose the rent on the property? Were there seizure notices issued that jeopardized whatever equity there may have been in the property?

This Court reviews convictions in drug cases perhaps more than any other type of felony. On how many occasions has the Court reviewed a possession of drug prosecution in which the police have executed a search warrant at a residence and a large outbuilding and the State has not one "letter of occupancy," not one record relating to the real estate, not one fingerprint, not one means of entry to a locked building associated with the defendant on which to establish possession?

II. CONCLUSION

For the reasons set out above and in Appellant's Opening Brief the Judgment entered herein should be vacated and the prosecution dismissed with prejudice.

DATED this 17 day of MAY, 2011.

Respectfully Submitted,



Mark D. Mestel, WSBA #8350
Attorney for Appellant

VI. CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Appellant's Reply Brief was served upon the following by North Sound Legal Messengers, addressed to:

- | | | | |
|----|--|----|--|
| 1. | Court of Appeals
Division One
600 University Street
One Union Square
Seattle, WA 98101 | 2. | Snohomish County <i>Prosecutor's</i>
3000 Rockefeller Ave
M/S 504
Everett, WA 98201 |
|----|--|----|--|

I hereby certify that a copy of the foregoing Appellant's Reply Brief was served upon the following by United States Postal Service, addressed to:

1. Derek Harlin
11319 – 156th Street NE
Arlington, WA 98223

DATED this 17th day of May, 2011.



Brandy L. Ellis, Secretary

2011 MAY 19 11:23 AM
