

NO. 66194-9-I

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

REC'D  
MAR 30 2011  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

OSCAR SANCHEZ,

Appellant.

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

The Honorable Theresa Doyle, Judge

BRIEF OF APPELLANT

ERIC J. NIELSEN  
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC  
1908 E Madison Street  
Seattle, WA 98122  
(206) 623-2373

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A. ASSIGNMENT OF ERROR

The evidence was insufficient to support appellant's convictions.

Issue Pertaining to Assignment of Error

Was there insufficient evidence to support appellant's convictions for delivery of a controlled substance and possession with the intent to deliver a controlled substance?

B. STATEMENT OF THE CASE<sup>1</sup>

1. Procedural Facts

Oscar Sanchez was charged by amended information with delivery of cocaine (Count I) and possession with the intent to deliver cocaine (Count II). CP 8-9. A jury found Sanchez guilty as charged. CP 40-41.

Sanchez was sentenced under the prison based special drug offender sentencing alternative. CP 73-83. Based on an offender score of 7, Sanchez was given concurrent sentences of 45 months in prison and 45 months community custody. Id.

2. Substantive Facts

On January 22, 2010, Seattle police conducted a "buy/bust" operation near 1<sup>st</sup> and Virginia in downtown Seattle. 2RP 13, 45. Officer Raul Vaca was working as the under cover buyer. 2RP 13.

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<sup>1</sup> 1RP refers to the verbatim report of proceeding for September 13, 2010; 2RP September 14, 2010; 3RP September 15, 2010; 4RP September 16, 2010; 5RP October 15, 2010.

At about 8:30 p.m. Vaca saw some kind of exchange between a person he identified as Sanchez and another person so he approached Sanchez and asked if he had any “piedra”, which is a Spanish language term for rock cocaine. 2RP 16-17. The man Vaca identified as Sanchez responded affirmatively and he and Vaca walked a short way then stepped into a doorway. 2RP 17. Vaca said Sanchez opened a brown napkin and inside was a plastic bag with a number of pieces of what looked like crack cocaine. 2RP 17-18. Vaca purchased \$50.00 worth of what was determined to be cocaine using pre-recorded buy money. 2RP 18-19, 22-23, 97-99. After Vaca made the purchase, he gave a good buy signal and left. 2RP 18.

Vaca testified he did not see police arrest Sanchez. 2RP 28. It was dark and he was only with Sanchez for about a minute so he did not see Sanchez’s face clearly. 2RP 39-41. Vaca identified Sanchez at trial based on an article of clothing and his location in the courtroom. 2RP 15. In his report, Vaca described the man he purchased the cocaine from as Hispanic wearing blue jeans and a blue top. 2RP 37.

Officer Jason Diamond was acting as a surveillance officer. 2RP 76-78. He said he watched Vaca exchange something with a Hispanic man and when Vaca gave the good buy signal he called the arrest team. 2RP 79-81. Diamond likewise never saw the man’s face but he saw what

he was wearing. However, he could not remember what he saw. Id. He described to the arrest team the man he saw with Vaca as only a Hispanic male. 2RP 86.

Sergeant Brian Kaus was part of the arrest team. The arrest team consisted of a number of officers on bicycles who kept themselves hidden. 2RP 45. After Vaca's good buy signal, Kaus said surveillance officers provided him and his team with a description of the clothing worn by the man who sold Vaca the drugs, which was contrary to Diamond's testimony that the only description he gave to the arrest team was that the suspect was a Hispanic male. 2RP 30.

Kaus and other arrest officers then approached Sanchez from their hiding places. Two officers approached Sanchez from the front while Kaus approached from the rear. According to Kaus, when Sanchez saw the two officers in front of him he dropped a brown napkin near the base of a tree. 2RP 49-52. Inside the napkin was a plastic baggie containing approximately 4.6 grams of cocaine. 2RP 72-74, 107.

Sanchez was arrested and searched. Police found a wad of brown napkins and \$731.00. 2RP 30, 58-59.

Sanchez testified he is a 58 year old day laborer. 2RP 126. Earlier in the day he was paid \$800.00 for some work he had done. 2RP 127. He

had also been to a taco restaurant where he grabbed a bunch of napkins. 2RP 130.

That evening the person he worked for dropped him off in downtown Seattle. 2RP 128. Sanchez was walking to catch the trolley when he saw two police officers on bicycles riding towards him from a parking lot. Id. As police approached, two people sitting on some nearby steps got up and walked away. Id. There was also a person walking behind Sanchez. 2RP 127-128. Police came up to both Sanchez and the person behind him and threw them both to the ground. 2RP 128-129. Sanchez was arrested.

Sanchez denied selling any cocaine to Vaca or dropping any cocaine on the ground. 2RP 129-131. Contrary to Vaca's testimony, Sanchez testified he was wearing blue jeans and a black sweater and jacket---not a blue top. 2RP 131. Jail records also showed that when Sanchez was booked he was wearing a black sweater and a black jacket. 3RP 6-9.

C. ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT  
SANCHEZ'S CONVICTIONS

The due process clauses of the state and federal constitutions require the state to prove all elements of the charged offense beyond a

reasonable doubt. U.S. Const. amend. 5, 14; Const. art. 1, § 3; Jackson v. Virginia, 443 U.S. 307, 316, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the state, a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992). It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense. State v. Huber, 129 Wn.App. 499, 501, 119 P.3d 388 (2005). The conviction must be reversed and the charge dismissed with prejudice if there is insufficient evidence to prove each element of the crime. State v. DeVries, 149 Wn.2d 842, 853, 72 P.3d 748 (2003); State v. Hickman, 135 Wn.2d 97, 99, 103, 954 P.2d 900 (1998).

To support the conviction in Count I, delivery of a controlled substance, in this case cocaine, the State had to prove Sanchez (1) delivered a controlled substance, and (2) knew the delivered substance was controlled. CP 8-9; State v. Evans, 80 Wn.App. 806, 814 n. 17, 911 P.2d 1344, review denied, 129 Wn.2d 1032, 922 P.2d 97 (1996); RCW 69.50.401. Delivery means the actual or constructive transfer of a controlled substance from one person to another. RCW 69.50.101(f).

Sanchez testified he was walking down the street when he was arrested and that he did not sell any drugs to Vaca. Vaca admitted he was with the seller for about one minute (2RP 41) and he did not see the seller's face clearly. Vaca's description of the clothes the seller wore was different than the clothes Sanchez was actually wearing. And, while Vaca testified the arresting officer handed him back the money Vaca used to purchase the cocaine, there was no evidence the money was taken from Sanchez or that it matched the pre-recorded buy money. 2RP 30. Moreover, the only description of the seller relayed to the arrest team by the surveillance officer was that the seller was a Hispanic man. On these facts the State failed to prove Sanchez was the person who sold the cocaine to Vaca. His conviction for delivery of a controlled substance should be reversed.

To support the conviction in Count II, possession with the intent to deliver a controlled substance, the State had to prove Sanchez (1) possessed cocaine (2) with intent to deliver. CP 8-9, 26, 29; RCW 69.50.401; State v. Hagler, 74 Wn. App. 232, 235, 872 P.2d 85 (1994). Mere possession of a controlled substance is not enough to support an inference of intent to deliver. State v. Huynh, 107 Wn. App. 68, 71, 77, 26 P.3d 290 (2001); State v. Campos, 100 Wn. App. 218, 220, 222, 998 P.2d 893, review denied, 142 Wn.2d 1006 (2000); State v. Hutchins, 73

Wn. App. 211, 217, 868 P.2d 196 (1994). Rather, possession must be coupled with substantial corroborating evidence to show intent. State v. Brown, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993).

For example, individual packaging, other packaging and processing materials, scales, sales "ledgers" with names and numbers, weapons, and large amounts of cash have been found sufficient to support an inference of intent to deliver. State v. McPherson, 111 Wn. App. 747, 760, 46 P.3d 284 (2002); State v. Miller, 91 Wn. App. 181, 186, 955 P.2d 810, 961 P.2d 973, review denied, 136 Wn.2d 1016 (1998); State v. Taylor, 74 Wn. App. 111, 123, 872 P.2d 53, review denied, 124 Wn.2d 1029 (1994). So too are other "tools of the trade," such as a pager, cell phone and phone charger. Campos, 100 Wn. App. at 224. Conduct consistent with drug sales, such as trading small packages for money and drug sales shortly before a defendant is arrested have also been considered sufficient corroborating evidence. State v. Thomas, 68 Wn. App. 268, 270- 71, 843 P.2d 540 (1992), review denied, 123 Wn.2d 1028 (1994).

Even if Sanchez was the person who dropped the napkin containing cocaine, there was no evidence consistent with future drug sales. Sanchez did not have a large amount of unexplained cash and police did not find any other items to support an inference Sanchez intended to sell drugs in the future. While Vaca testified he purchased

cocaine shortly before Sanchez was arrested, as shown above, the evidence was insufficient to prove Sanchez was the man who sold the cocaine to Vaca. The State failed to prove possession with the intent to deliver and his conviction on that count should be reversed as well.

D. CONCLUSION

For the above reasons, Sanchez's convictions should be reversed.

DATED this 30 day of March, 2011.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ERIC J. NIELSEN,

WSBA 12773

Office ID No. 91051

Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 66194-9-1
	)	
OSCAR SANCHEZ,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF MARCH, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] OSCAR SANCHEZ  
DOC NO. 853180  
COYOTE RIDGE CORRECTIONS CENTER  
P.O. BOX 769  
CONNELL, WA 99326

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF MARCH, 2011.

x- Patrick Mayovsky

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