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NO. 66237-6-I

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

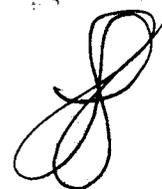
STATE OF WASHINGTON,

Respondent,

v.

NOEL McLANE,

Appellant.



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

The Honorable Anita Farris, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	5
<u>THE EVIDENCE WAS INSUFFICIENT TO CONVICT McLANE OF UNLAWFUL USE OF DRUG PARAPHERNALIA.</u>	5
D. <u>CONCLUSION</u>	11

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Chapin
118 Wn.2d 681, 826 P.2d 194 (1992).....6

State v. Hickman
135 Wn.2d 97, 954 P.2d 900 (1998).....6, 10

State v. LaPlant
157 Wn. App. 685, 239 P.3d 366 (2010).....7

State v. O'Meara
143 Wn. App. 638, 180 P.3d 196 (2008).....9, 10

State v. Smith
155 Wn.2d 496, 120 P. 3d 559 (2005).....6

FEDERAL CASES

In re Winship
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).....6

RULES, STATUTES AND OTHER AUTHORITIES

RCW 46.61.522 1

RCW 69.50.1029

RCW 69.50.4014 1

RCW 69.50.412 1, 6, 7

WPIC 50.31.....7

A. ASSIGNMENT OF ERROR

The evidence was insufficient to convict appellant of the misdemeanor offense of unlawful use of drug paraphernalia.

Issue Pertaining to Assignment of Error

Was the evidence insufficient to convict appellant of using drug paraphernalia to inject, ingest, inhale, or otherwise introduce methamphetamine into a human body when the broken glass pipe relied on by the State to prosecute the charge was never shown to have been used to introduce methamphetamine into a human body?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County Prosecutor charged appellant Noel McLane with two counts of vehicular assault (counts one & two), one count of misdemeanor use of drug paraphernalia (count three), and one count of misdemeanor possession of marijuana (count four). CP 81-82; RCW 46.61.522; RCW 69.50.412; RCW 69.50.4014. Counts one, two and three arose from a traffic accident on September 21, 2009, which injured McLane, McLane's passenger, Debbie Moore, and the driver of another vehicle, Jeff King. CP 81, 91-92. Count four arose from the search of McLane incident to his arrest for counts one, two and three on December 28, 2009. Id.

McLane pleaded guilty to marijuana possession. CP 77-80; 2RP 41-44.¹ A jury trial was held on counts one, two and three September 20-24, 2010, before the Honorable Anita L. Farris. 2RP-4RP. McLane was convicted of all three counts. CP 50-52. The trial court sentenced McLane to 14 months for the assaults, a concurrent 90 days for unlawful use of drug paraphernalia, and a consecutive 30 days for marijuana possession. CP 34-49; 5RP 17.

2. Substantive Facts

At about 6 am on September 21, 2009, Noel McLane was driving Debbie Moore's car on SR 522 near the city of Monroe when he crossed the centerline and struck a car driven by Jeff King. 2RP 61, 125-27; 3RP 120-21. King, McLane and Moore were all injured and taken to Harborview Medical Center for treatment. 2RP 61, 120; 3RP 67.

Monroe Police Deputy Chief Cherie Harris responded to the accident scene. 2RP 171. Harborview had requested identification information for Moore, so Harris conducted a search of the scene and eventually located a cell phone containing a phone number labeled "kids" in a green jacket located near Moore's overturned car. 2RP 173, 190.

¹ There are five volumes of verbatim report of proceedings for seven hearing dates referenced as follows: 1RP - July 1, 20010; 2RP - September 20, 21 & 22 (am), 2010; 3RP - September 22 (pm) & 23 (am), 2010; 4RP - September 23 (pm) & 24, 2010; 5RP - October 12,2010.

Harris relayed the phone number to a nurse at Harborview, who was able to use it to contact Moore's family. 2RP 190.

Also found in the green jacket by Harris were a "man's style watch" and a partially broken "glass pipe"² that had burn marks and white residue on it. 2RP 173, 179. Harris showed the pipe to Monroe Police Detective Spencer Robinson, who seized it as evidence for the subsequent prosecution of McLane. 2RP 179; 3RP 5, 7.

At trial, Harris admitted no one at the Monroe Police Department made any effort to try lift latent fingerprints from the pipe, despite having the capability do so. 2RP 191. She also admitted no effort was made to identify the owner of the cell phone found in the jacket, despite having the resources to do so. 2RP 192.

Like Harris, Robinson admitted that no effort was made to lift latent fingerprints from the pipe. 3RP 11. Robinson also agreed it would have been possible for the Washington State Patrol crime lab to determine what the residue on the pipe was, whether it be "methamphetamine, crack cocaine, [or] some other substance entirely," but that was also not done. 3RP 10. Although Robinson claimed "the pipe was important because I felt the driver may be under the influence of a drug or an impairing

² At trial, Harris initially described the pipe as a "meth pipe" and a "drug

substance[,]" he conceded he had no basis to conclude McLane ever use it. 3RP 11, 39.

Robinson recalled at trial luring McLane into the Monroe Police Department by leaving messages that he could recover his wallet, which had been seized on the day of the accident. 3RP 26-27, 63. When McLane showed up, Robinson arrested him. 3RP 27.

Robinson questioned McLane about the accident, which McLane blamed on the driver of the other car. 3RP 27-28. When asked whether he had been using methamphetamine, McLane "was shocked" and "adamantly denied" it. 3RP 28. When Robinson confronted McLane with toxicology results showing he had a methamphetamine concentration in his blood of .07 milligrams per liter after the accident, McLane continued to deny intentional methamphetamine use and suggested, "somebody must have drugged my pop." 3RP 28-29, 147-50.

Moore testified at trial that the evening before the accident McLane had been helping her organize her storage unit, into which she had moved numerous belongings of her recently deceased friend, Richard Kaz, who she admitted was a methamphetamine user. 3RP 113-17, 126. They ended up spending the night at the storage unit before heading out early on the morning of September 21, 2009 in search of medication to treat a

pipe", but that testimony was subsequently stricken. 2RP 173-79

urinary tract infection she had. 3RP 118-21. Although Moore admitted she using methamphetamine in the past, she denied using any before the accident, denied seeing McLane use any, and denied ever using methamphetamine with McLane. 3RP 119, 126, 130. Moore also denied knowing anything about the green jacket. 3RP 124.

In closing argument, the prosecutor relied on the pipe found in the green jacket as the basis for the jury to convict McLane of the charge of use of drug paraphernalia. 3RP 193; 4RP 23-24. In response, defense counsel noted the lack of evidence linking McLane to the green jacket or the pipe, that both McLane and Moore denied using methamphetamine before the accident, and the evidence suggesting the jacket belonged to someone other than McLane, such as Moore because the phone in the jacket allows other to contact her family, or Kaz because he was a known methamphetamine user. 4RP 6-10.

C. ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO CONVICT McLANE OF UNLAWFUL USE OF DRUG PARAPHERNALIA.

The prosecution failed to introduce any evidence the glass pipe in the green jacket was ever used to ingest or inhale methamphetamine. The prosecution also failed to introduce any evidence McLane ever touched, used or even knew the glass pipe existed. At most, the prosecution proved

only that there was methamphetamine in McLane's blood after the accident, and that a pipe that could be used to smoke methamphetamine was found in the debris from the accident. This is not enough to convict McLane of unlawful use of drug paraphernalia and therefore this Court should reverse and dismiss that conviction.

Due process under the Fourteenth Amendment of the United States Constitution requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Smith, 155 Wn.2d 496, 502, 120 P. 3d 559 (2005). Evidence is insufficient to support a conviction unless viewed in the light most favorable to the State a rational trier of fact could find each essential element of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992). A defendant may challenge the sufficiency of the evidence for the first time on appeal. State v. Hickman, 135 Wn.2d 97, 103 n.3, 954 P.2d 900 (1998).

Here, the State charged McLane use of drug paraphernalia under RCW 69.50.412(1), which provides:

(1) It is unlawful for any person to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance. Any person who violates this subsection is guilty of a misdemeanor.

Thus, in general, to convict someone of the crime of unlawful use of drug paraphernalia, the State must prove three elements: "(1) use (2) of drug paraphernalia (3) to 'plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance.'" State v. LaPlant, 157 Wn. App. 685, 687, 239 P.3d 366 (2010) (quoting RCW 69.50.412(1)). Here, however, the prosecution altered its burden of proof as a result of the to-convict instruction it proposed and was given by the trial court, which provides:

To convict the defendant of the crime of use of drug paraphernalia, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the 21st day of September, 2009, the defendant used drug paraphernalia to inject, ingest, inhale, or otherwise introduce into the human body a controlled substance Methamphetamine; and

(2) That this act occurred in the State of Washington.

CP 70 (Instruction 14); Supp CP __ (sub no. 40, Plaintiff's Proposed Jury Instructions, 9/22/10)(identified by plaintiff as "WPIC 50.31"). Moreover, the only evidence introduced at trial that could possibly be viewed as constituting "drug paraphernalia"³ was the broken glass pipe found in the

³ "Drug paraphernalia" means:

green jacket. Thus, to convict McLane, the prosecution had the burden to prove beyond a reasonable doubt that he used the broken glass pipe found in the green jacket to introduce methamphetamine into a human body. The prosecution failed to satisfy its burden.

In assessing whether a particular object constitutes "drug paraphernalia";

a court or other authority should consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or by anyone in control of the object concerning its use;

(2) Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to any controlled substance;

(3) The proximity of the object, in time and space, to a direct violation of this chapter;

(4) The proximity of the object to controlled substances;

(5) The existence of any residue of controlled

all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance.

RCW 69.50.102(a).

substances on the object;

RCW 69.50.102(b). Here, none of these factors weigh in favor of finding the glass pipe constituted "drug paraphernalia": neither Moore nor McLane said they used it; McLane had no prior convictions of any kind, 5RP 1; there was no evidence at trial the pipe was recently used; there was no evidence at trial the pipe was found near any controlled substances; and there was no evidence of any residue of an actual controlled substance in the pipe.

The State may argue the fact that the pipe had been used to smoke something, combined with the presence of methamphetamine in McLane's blood at the hospital is sufficient to convict. This argument should be rejected.

In State v. O'Meara, 143 Wn. App. 638, 180 P.3d 196 (2008), police arrested O'Meara on outstanding warrants. In a search incident to arrest, police recovered a bag of marijuana, a container allegedly containing marijuana residue, and a pipe allegedly containing marijuana residue. The State charged O'Meara with marijuana possession and unlawful use of drug paraphernalia. 143 Wn. App. at 640. O'Meara plead guilty to marijuana possession, but the trial court dismissed the unlawful use of drug paraphernalia charge on the basis that the evidence failed to show he was under the effects of any drugs at the time he was arrested for

the offense. 143 Wn. App. at 140-41. This Court reversed, holding that the combination of the bag of marijuana and the container and pipe, both of which had suspected marijuana residue, was sufficient circumstantial evidence to conclude O'Meara use the container to store marijuana and used the pipe to smoke it. 143 Wn. App. at 643.

Here, however, there is no bag of methamphetamine akin to the bag of marijuana in O'Meara. And although there was evidence of residue on the glass pipe, there was no evidence of what it was residue of, be it methamphetamine, cocaine, marijuana or tobacco. Thus, it cannot be concluded it was residue of a "controlled substance", much less methamphetamine. If the glass pipe was not used to smoke a controlled substance, then it was not "drug paraphernalia." And even if the pipe was drug paraphernalia, the prosecution's failure to introduce any evidence McLane used the pipe to introduce methamphetamine in to a human body. In either case, the prosecution failed to meets its burden to convict. Therefore reversal and dismissal with prejudice is required. Hickman, 135 Wn.2d at 103.

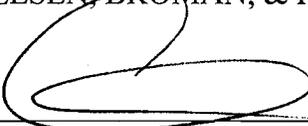
D. CONCLUSION

For the reasons stated herein, this Court should reverse McLane conviction for unlawful use of drug paraphernalia and dismiss the charge with prejudice.

DATED this 31st day of March, 2011.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 66237-6-1
)	
NOEL McLANE,)	
)	
Appellant.)	

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 31ST 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] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
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EVERETT, WA 98201

- [X] NOEL McLANE
DOC NO. 344543
MONROE CORRECTIONS CENTER
P.O. BOX 777
MONROE, WA 98272

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF MARCH 2011.

x *Patrick Mayovsky*