

67733-1

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No. 67733-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRYAN KEITH MCCORD,

Appellant.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Alan R. Hancock

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to prove the essential elements of possession of methamphetamine with intent to deliver and possession of heroin with intent to deliver, as charged in counts I and II of the information, in violation of McCord's Fourteenth Amendment right to due process.

2. The State presented insufficient evidence to prove that McCord had dominion and control over the controlled substances.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

The State must prove the essential elements of a criminal charge beyond a reasonable doubt. To sustain a conviction for possession of a controlled substance, the State must show the defendant was in actual or constructive possession of the substance. Constructive possession requires the State to prove dominion and control over the premises where the substance was found, under circumstances that show the object may be reduced to actual possession immediately. McCord was not in actual possession of controlled substances, and, viewed in the light most favorable to the State, the evidence does not establish

that McCord was in constructive possession of controlled substances. Must the charges against him be reversed and dismissed?

C. STATEMENT OF THE CASE

On February 6, 2011, Bryan McCord was driving in Oak Harbor with a friend, Carl Kleffel, to look at a car that he was interested in buying. Trial RP 147-48. The car McCord was driving did not belong to him, but rather to another friend, William Goldman. Trial RP 153. McCord was carrying cash in his pants,¹ presumably to buy the car. Trial RP 61.

Oak Harbor police officer Mike Clements saw McCord drive in his direction, then execute a three-point turn and go the other direction. Trial RP 39. The car did not appear to have functioning taillights. Id. Clements activated his emergency lights in an attempt to pull the car over. Id.

McCord did not immediately pull over, although he did not speed up. Trial RP 40, 77. Instead, he used his turn signal to signal left, and then drove into a field that was used for parking by a nearby bowling alley. Trial RP 42, 93. The car

¹ In a search incident to McCord's arrest, a police officer found \$1538 in McCord's pants. Trial RP 61.

drove about 50 or 60 feet and then got stuck in the mud. Trial RP 42. McCord climbed out through the driver's side window, fell, and then ran away. Id.

Clements pursued McCord, who, after running for a hundred feet or so, lay down in some dense brush with his hands folded across his chest. Trial RP 50-53. With the assistance of another officer, Clements was able to take McCord into custody. Trial RP 55.

Oak Harbor police sergeant Jerry Baker arrived at the scene shortly after McCord was arrested. Trial RP 87. Upon learning that McCord was in custody and another person was still in the vehicle, he contacted Kleffer, who still was sitting in the passenger seat. Trial RP 87-88. Baker then searched around the vicinity of the car and, a few feet from the driver's side door, found a black nylon camera case lying halfway in a puddle. Trial RP 89-90. He opened it and inside saw a digital scale, some baggies, and what appeared to be methamphetamine. Trial RP 90.

Baker accordingly gave the camera case to Clements, who took it with him back to the police station. Trial RP 64. At the

police station, Clements conducted a further search of the case and in a zippered compartment found two baggies containing a black tarry substance which later was determined to contain heroin. Trial RP 70, 177.

The Island County prosecuting attorney charged McCord with two counts of possession of a controlled substance with intent to deliver for the methamphetamine and the heroin, respectively, and two misdemeanor counts of driving while license suspended in the first degree and failure to obey a police officer. Trial RP 122-25. A jury convicted McCord of all counts. Trial RP 28-31. McCord appeals. CP 1-15.

D. ARGUMENT

THE STATE PRESENTED INSUFFICIENT EVIDENCE TO PROVE MCCORD HAD DOMINION AND CONTROL OVER THE CAMERA CASE, AS REQUIRED TO SUSTAIN HIS CONVICTIONS FOR POSSESSION WITH INTENT TO DELIVER A CONTROLLED SUBSTANCE AS CHARGED IN COUNTS ONE AND TWO OF THE INFORMATION.

1. The State bears the burden of proving the essential elements of a criminal offense. The State bears the burden of proving the essential elements of a criminal charge beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 796 (1995); U.S. Const. amend. XIV; Const. art. I § 3. A challenge to the sufficiency of the evidence requires the appellate court to view the evidence in the light most favorable to the prosecution and decide whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that can reasonably be drawn

therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. Where a person is not in actual possession of a controlled substance, the State must prove constructive possession by showing dominion and control. Possession may be actual or constructive. State v. Echeverria, 85 Wn. App, 777, 783, 934 P.2d 1214 (1997).

Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods.

State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969).

Constructive possession of contraband may also be proven by showing the defendant had dominion and control over the premises where it was found. Echeverria, 85 Wn. App. at 783. The question whether there is “dominion and control” sufficient to prove constructive possession is subject to a straightforward rule: “Dominion and control means that the object may be reduced to actual possession immediately.” State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Proof of possession further

depends on a showing of “actual control, not a passing control which is only a momentary handling.” Callahan, 77 Wn.2d at 29.

a. The State failed to prove dominion and control over the premises where the drugs were found, which is a necessary predicate for a conviction for possession of controlled substances. It is undisputed that the State did not prove actual possession of the camera case. If the State cannot prove actual possession of controlled substances, then the State must show dominion and control over the premises where the drugs were found. State v. Spruell, 57 Wn. App. 383, 387, 788 P.2d 21 (1990) (“We have found no Washington cases where dominion and control over drugs has been found where there was no actual possession and the evidence was insufficient to support a finding of dominion and control over the premises where the drugs were located”).

In Callahan, the Court found the evidence was insufficient to establish dominion and control where, despite the defendant’s proximity to the drugs and admission that he had handled them earlier, (1) the uncontroverted evidence

established that the defendant was a guest on the houseboat where the drugs were found and (2) there was no showing that he had dominion and control over the houseboat. Callahan, 77 Wn.2d at 31.

In Spruell, the Court likewise found insufficient evidence to sustain the conviction despite (1) the defendant's presence in a home where cocaine found, (2) his fingerprint on a plate near where the cocaine was being weighed and packaged, and (3) a police officer's impression that the defendant had just "fled" from the area. 57 Wn. App. at 387-89.

Where a case involves a vehicle, "ownership . . . is one factor to consider when assessing constructive possession." State v. Enlow, 143 Wn. App. 463, 468, 178 P.3d 366 (2008). In Enlow, the defendant was found hiding under the canopy of a truck in which methamphetamine and numerous items associated with the manufacture of methamphetamine were found. Id. at 466. Enlow was not the registered owner of the truck. Id. The Court concluded that the State had not proven constructive possession because Enlow did not own the truck and, even though some of his possessions were in the truck and

his fingerprints were on several items, the State did not show that Enlow's fingerprints were on any of the contraband. Id. at 469-70.

Likewise, in State v. George, 146 Wn. App. 906, 193 P.3d 693 (2008), the Court found that there was insufficient evidence to sustain convictions for possession of marijuana and drug paraphernalia where items were found on the floorboards near where a vehicle passenger had been sitting. Id. at 922-23.

As an initial matter, this Court should conclude that the State did not even present prima facie evidence to show dominion and control, because the State did not prove that the camera case could be "reduced to actual possession immediately." Jones, 146 Wn.2d at 333. McCord was never seen with or near the camera case. Trial RP 153. He was arrested some hundred feet from the place where the camera case was discovered. Trial RP 50.

Even without reference to the bright-line rule set forth in Jones, the State cannot show dominion and control over the camera case because the State cannot prove dominion and control over the area where it was found. The camera case was

not found in the vehicle, but some distance away from it. Trial RP 89-90. It was uncontroverted that the vehicle did not belong to McCord. Trial RP 153. Assuming, therefore, that the term, “premises” could be stretched to encompass the area surrounding the vehicle, the State fails in its initial burden to prove dominion and control over the vehicle because McCord was not the owner.

b. The State did not otherwise present sufficient evidence of constructive possession to support McCord’s convictions. As noted, the bright-line standard set forth in Jones is dispositive in this case: there is no evidence from which the court can find the camera case can be “reduced to actual possession immediately,” and consequently there is no evidence of constructive possession of the item. The State may nevertheless claim, as it did below, that there is evidence supporting the inference that the item had recently been dropped, because it was only partially wet despite having been found in a puddle. See Trial RP at 252-53 (State’s closing argument). This fact, however, is insufficient to support a

finding that McCord constructively possessed the item,² even coupled with the fact that it allegedly was found in the vicinity of the area where McCord fell.

With respect to this latter fact, “mere proximity to a controlled substance alone is insufficient to show dominion and control.” State v. Ibarra-Raya, 145 Wn.2d 516, 525-26, 187 P.3d 301 (2008). Thus McCord’s momentary proximity to the item does not establish constructive possession unless there is substantial additional evidence establishing possession that also shows more than passing control. Here there is no such evidence. Compare Ibarra Raya, 145 Wn.2d at 525-26 (co-defendant arrested standing near a “fresh looking” bundle of cocaine; constructive possession proven only because he told the police, “If you saw me drop it, then I’ll admit it’s mine...”)

Although McCord ran from the officer who tried to stop him for a moving infraction, he was a habitual traffic offender whose privilege to drive had been revoked. Trial RP 215, 221,

² Evidence was presented that the field was used as a parking lot by a nearby bowling alley. Trial RP 83. The State did not present any evidence about whether other persons had been in this same area prior to the incident leading to McCord’s criminal charges, thus this Court cannot rule out the possibility that someone else may have recently dropped the item.

224. It thus is not possible to claim that McCord's flight was probative of consciousness of guilt regarding the drugs in the camera case. McCord's flight does not support an inference of constructive possession.

In addition, McCord did not admit to possessing the camera case. The vehicle passenger did not see him with the camera case and there was no discussion of drugs or drug-dealing during their drive; the purpose of their trip was to buy a car. Trial RP 153. McCord's fingerprints were not found on any of the items inside the case. Trial RP 103. Even assuming for the sake of argument that the item fell out of the car when McCord jumped through the window, there is no evidence that it had been attached to his person instead of, for example, stashed in a pocket on the driver's side door of the vehicle. If the item was in or near the car door, it is entirely possible that McCord could have dislodged it when he jumped from the car's window. The State has not shown constructive possession, nor has it proven that any hypothetical possession was more than mere passing control.

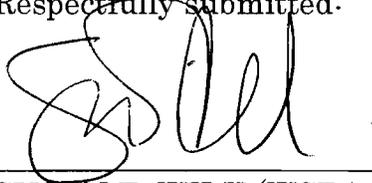
3. The remedy is reversal and dismissal of McCord's convictions for possession with intent to deliver a controlled substance. Where the evidence is insufficient to support a jury verdict, the appellate court must reverse and dismiss the conviction. State v. Stanton, 68 Wn. App. 855, 866-67, 845 P.2d 1365 (1993). "Retrial following reversal for insufficient evidence is 'unequivocally prohibited' and dismissal is the remedy." State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (citing State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)). Because the evidence was insufficient to support a finding of dominion and control, McCord's convictions for possession with intent to deliver a controlled substance should be reversed and dismissed.

E. CONCLUSION

For the foregoing reasons, McCord's convictions should be reversed and dismissed.

DATED this 26th day of January, 2012.

Respectfully submitted:

A handwritten signature in black ink, appearing to read 'SFW', written over a horizontal line.

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 67733-1-I
v.)	
)	
BRYAN MCCORD,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF JANUARY, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] DAVID CARMAN, DPA ISLAND COUNTY PROSECUTOR'S OFFICE P.O. BOX 5000 COUPEVILLE, WA 98239	(X) () ()	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 26TH DAY OF JANUARY, 2012.

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