

COURT OF APPEALS

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NO. 35386-5-II *yn14*

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

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STATE OF WASHINGTON,

Respondent,

v.

CHEKEYMA NICHELL CUBEAN,

Appellant.

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

The Honorable Brian Tollefson, Judge

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REPLY BRIEF OF APPELLANT

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**A. ARGUMENT IN REPLY**

**1. RESPONDENT'S STATEMENT OF FACTS OMITTS IMPORTANT AND RELEVANT DETAILS.**

The state sets out that the police observed *Dorothy Hurd* leave a group standing near an abandoned building, walk to a car stopped at a traffic light, and lean into the car before returning to the group by the building.<sup>1</sup> Brief of Respondent (BOR) at 3. The state further sets out that the officers thought that *Ms. Hurd's* activity looked like a drug exchange. What is missing is a nexus between *Ms. Hurd's* activities and *Ms. Cuban* and evidence that *Ms. Hurd*, who was not charged with a crime arising out of the incident, actually was engaged in selling drugs.

Moreover, the officers were viewing the group from a distance equivalent to a football field where the defense investigator could not "make out anybody that might have been standing there." RP 128. When the officers actually approached the group, they

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<sup>1</sup> The state describes *Ms. Hurd* as a black female and the men in the car as black males. It is unclear if the race of these three people is included to suggest that this makes it more likely that there is a drug transaction taking place. BOR 3.

could not say that *Ms. Cuban* dropped the bag of suspected cocaine. BOR 4.

The state asserts that both *Ms. Hurd* and *Ms. Cuban* had a pipe for smoking crack cocaine on their persons, but omits that *Ms. Cuban's* crack pipe was not visible at the time of her detention and was not found until after the police had pat searched her for weapons and asked her if she had anything on her. BOR 4; RP 128.

The state omits that *Ms. Cuban* was arrested for possession of drug paraphernalia, a crime which the trial court found did not give rise to grounds for an arrest. CP 128, 130. The state omits that the police did not recover from *Ms. Cuban* any scales, packaging, notes, pager, or other indicia of drug selling.

Finally, the state omits that *Ms. Cuban* introduced documentary evidence to support her testimony that she received the money she had from pawning a ring and from deductions from her DSHS account. RP 141-142, 207, 212-213.

**2. THE TRIAL COURT ERRED IN DENYING MS. CUBEAN'S MOTION TO SUPPRESS THE PHYSICAL EVIDENCE SEIZED BY THE POLICE.**

The state concedes that the police discovered the drug pipe in an unconstitutional search. BOR 11. The state then argues that this illegality is of no consequence to the later discovery of drugs at booking because of the trial court's finding that the officers had probable cause to arrest Ms. Cubean for drug loitering. BOR 8-13.

As argued by Ms. Cubean in her Opening Brief of Appellant (AOB), however, the officers arrested Ms. Cubean for possession of drug paraphernalia and not for drug loitering. AOB 12. The officers did not arrest Ms. Cubean for drug loitering and there was nothing in the record to suggest that the officers would ever have arrested Ms. Cubean if they had not found the drug pipe. To the contrary, the record strongly suggests that the police would never have arrested her for drug loitering. They did not immediately arrest her, as they would have if they were going to arrest her for drug loitering. They did not arrest her until they found the drug pipe.

Moreover, to speculate that the officers would have arrested Ms. Cubean based on the court's

perception that they had probable cause to arrest, is contrary to State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2001). O'Neill holds that under article 1, § 7 probable cause for a custodial arrest is not enough to justify a search incident to arrest; there must be an actual arrest to provide "authority of law" to justify a warrantless search incident to arrest. Here admittedly there was no lawful arrest; there was only an unlawful arrest for possession of drug paraphernalia and possibly probable cause to arrest for a different crime. Therefore, the drugs abandoned at booking were not voluntarily abandoned; items abandoned as a result of illegal police behavior are involuntarily abandoned. State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004).

Second, this Court should reject the state's further invitation to speculate that Ms. Cuban would have introduced evidence that she possessed a drug pipe, and thus subject herself to criminal conviction, even if the pipe had been suppressed.  
BOR 11-13.

3. **THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN MS. CUBEAN'S CONVICTIONS FOR POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER.**

The state cites a number of cases in which the sufficiency of the evidence of intent to deliver was affirmed on appeal. BOR 27-28. All of those cases involved factors not present in Ms. Cuban's case: scales, controlled buys, large quantities plus cutting agents, packaging material, large quantity of drugs and money, notebooks with records of sales, pager, and cell phone.

When the state specifically identifies the factors which it argues support a conclusion that the drugs were possessed with intent to deliver rather than intent to use, it is clear that the evidence of intent to deliver was insufficient.

- a. The defendant was standing on a street corner with several other persons in an area known for high drug activity.

Drug buyers go to areas of high drug activity and interact with people selling drugs. Being in an area of high drug activity makes it no more likely a person is selling rather than buying drugs.

- b. Ms. Hurd went to the street to contact the occupants of a car stopped at a traffic light in a manner that was consistent with drug sales.

The evidence showed that *Ms. Hurd* may have been selling drugs. No evidence confirmed this.

- c. Ms. Hurd was standing next to Ms. Cuban, facing the same direction.

Ms. Cuban may have been buying drugs from Ms. Hurd or merely hanging out in a group of people.

- d. Either Ms. Hurd or Ms. Cuban dropped a baggie that had cocaine residue.

The police could not determine that Ms. Cuban dropped the baggie.

- e. Drug sellers frequently work in teams, and the money and drugs may not be on the same person.

Whether or not this is true, the police observed nothing more than that Ms. Hurd approached a car and later Ms. Cuban was next to her. They did not observe any transactions between Ms. Hurd and Ms. Cuban. Ms. Hurd may have been working alone or with any of the four other people who scattered because they, unlike Ms. Cuban, saw the police coming. Ms. Hurd could have simply been talking with friends in the passing car.

The evidence shows that the state speculated about Ms. Hurd, but were unable to confirm that she was engaged in drug activity or that Ms. Cubean was acting as her accomplice in that activity.

- f. Ms. Cubean had two different types of controlled substances in her possession, both of which are sold on the street.

If drugs are sold on the street, they are also purchased on the street. Mere possession of a street drug doesn't distinguish a user from a seller.

- g. Defendant had \$90 in her possession.

Ninety dollars is not a large amount of cash. Moreover, it was undisputed that Ms. Cubean had withdrawn funds from her account in an amount greater than \$90 on January 2, 2007. RP 208. She also had a pawn ticket showing that she had pawned her ring for \$70. RO 141-142.

- h. Ms. Cubean had 14 rocks of cocaine and 8 codeine pills in two separate bags, which in the opinion of the officer was more than you would normally find for personal use.

It was conceded that an officer's opinion that the amount of drugs was more than for personal use is insufficient to establish intent to deliver.

In sum, the factors identified by the state do not differentiate Ms. Cuban's presence as a seller rather than a buyer and do not show her to be an accomplice to Ms. Hurd. The state's evidence shows only that a police officer believed that what she possessed made her a seller rather than a buyer, and this was insufficient to establish her guilt of possession with intent to deliver. Accordingly, her convictions for possession with intent to deliver should be reversed and her case remanded for resentencing for simple possession.

**4. THE TRIAL COURT ERRED IN REFUSING TO GIVE AN INSTRUCTION WHICH CORRECTLY STATED THE LAW AND WHICH ALLOWED THE DEFENSE TO ARGUE ITS THEORY OF THE CASE TO THE JURY.**

**1. Defense counsel properly objected**

Contrary to the assertions of the state, defense counsel made it very clear to the trial court what instructions the defense was requesting and what the defense was objecting to the trial court's failure to give.

Defense counsel proposed the following instruction:

Washington case law forbids the inference of an intent to deliver a controlled substance based upon the bare allegation of that controlled substance, absent other facts and circumstances, such

as weapons, a substantial sum of money, scales, or other drug paraphernalia indicative of sales or delivery. To convict the defendant on possession with intent to deliver, you must find that there is substantial corroborating evidence in addition to the mere fact of possession. Further, the police officer's opinion as to what a person would carry for normal use is insufficient to justify a finding beyond a reasonable doubt that the defendant possessed a controlled substance with intent to deliver.

CP 75-76.

The court gave instruction No. 8, "You may not infer an intent to deliver a controlled substance based upon the bare possession of that controlled substance, absent other facts and circumstances."

CP 94.

Defense counsel agreed that the court's instruction satisfactorily stated the law set forth in the first sentence of his proposed instruction. RP 189-190. Counsel also requested that two additional instructions be given:

Well, then actually, Your Honor, then I think that maybe what I should do is suggest to the Court that this one instruction ought to be broken down into three different instructions so the second instruction would be that to convict the defendant of possession with intent to deliver, you must find that there is substantial corroborating evidence in addition to the mere fact of possession.

And then the third one would be that a police officer's opinion as to what a person would carry for normal use is insufficient to justify a finding beyond a reasonable doubt that the defendant possessed a controlled substance with intent to deliver.

And, specifically, that third sentence would come directly from State vs. Brown, also on page 485.

I understand that the Court might find the first sentence to be verbose.

RP 185.

We would ask that all three of those sentences-- I mean, frankly that we use those three different instructions.

RP 191.

When the trial court indicated that he would instruct the jurors that they could not infer an intent to deliver based on the bare possession of a controlled substance, but declined to give the rest of the instruction, defense counsel stated, "Please note my objection." RP 191-192. Defense counsel reiterated his objection to the failure to give the proposed instruction as requested and renewed his reasons for objecting. RP 215.

The trial court was well and specifically apprised of what the defense wanted by way of instruction and what the defense was objecting to the failure to give.

**2. The defense proposed instructions were proper statements of the law.**

The state implicitly concedes that Division II and III have held that a police officer's opinion that the quantity of drugs possessed was more than for personal use was insufficient to establish an inference of intent to deliver. BOR at 19-20 (citing State v. Hagler, 74 Wn. App. 232, 235, 872 P.2d 85 (1974); State v. Hutchins, 73 Wn. App. 211, 868 P.2d 196 (1994)). This is the statement of law requested by Ms. Cuban--that the officer's opinion about what a person would carry for normal use is insufficient alone to establish proof beyond a reasonable doubt of possession with intent to deliver. Failure to instruct on this law should require reversal of Ms. Cuban's convictions.

Further, the decision in State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002), supports the conclusion that substantial corroborating evidence is required beyond mere possession, in the form of at least one additional factor beyond the fact of possession.

Here, there was no substantial corroboration, and Ms. Cuban's convictions for possession with intent to deliver should be reversed.

5. THE PROSECUTOR'S ARGUMENT IN CLOSING THAT MISSTATED THE BURDEN OF PROOF AND TOLD THE JURY THAT ITS JOB WAS TO DECIDE WHETHER MS. CUBEAN WAS MORE CREDIBLE THAT THE OFFICER DENIED MS. CUBEAN A FAIR TRIAL.

In closing, the prosecutor argued that "so really for her to be guilty of unlawful possession you have to determine that the drugs were for personal use, that she got them so she could use them, not so she could sell them." RP 224. The prosecutor continued that "we know" that the drugs were not for personal use because Ms. Cubean's "story just doesn't add up." RP 224.

The prosecutor argued, "Whose story in this case is credible?" RP 224. The prosecutor compared Ms. Cubean's testimony to Officer Hopkins': "Or ask yourself if Officer Hopkins' testimony is credible. A 27-year veteran in the Tacoma Police Department. No motivation to tell you anything otherwise." RP 224.

This improperly shifted the burden of proof because the issue was not whether Ms. Cubean could prove that she was guilty only of unlawful possession of a controlled substance, but whether the state had proven beyond a reasonable doubt that she was guilty of every element of possession with

intent to deliver. The fact that Ms. Cubean presented a defense that she was guilty of a lesser included offense did not relieve the state of its burden of proving the greater offense.

And while it was not improper for the prosecutor to argue reasons why Ms. Cubean was not credible, as set out in her opening brief, it was improper to argue to the jury that their job was to decide whether Ms. Cubean was more credible than a state's police witness. AOB 23-25.

**E. CONCLUSION**

Ms. Cubean respectfully submits that her convictions should be reversed and her case remanded for retrial with instructions to suppress the physical evidence. Ms. Cubean's convictions for possession of a controlled substance with intent to deliver should be reversed and vacated for

insufficiency of the evidence. If the denial of suppression is upheld, Ms. Cuban should be sentenced for simple possession of a controlled substance.

DATED this 30<sup>th</sup> day of April, 2007.

Respectfully submitted,

  
Rita J. Griffith  
WSBA #14360

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Certification of Service

STATE OF  
BY *jun*

I, Rita Griffith, attorney for Chekeyma Cubean, certify that on April 30, 2007, I mailed to each of the following persons a copy of the document on which this certification appears:

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Dated this 30<sup>th</sup> day of April, 2007.

*Rita J. Griffith*  
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