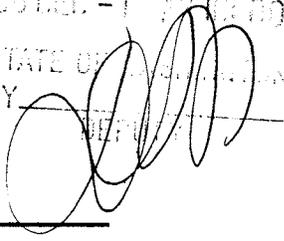


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY: 

No. 37819-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JASON MATTHEW DILLON,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 07-1-05978-6
The Honorable Rosanne Buckner, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

The trial court erred by convicting Dillon of unlawful possession of a stolen vehicle without sufficient evidence that Dillon ever drove or otherwise possessed the vehicle.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Was there sufficient evidence to convict Dillon of unlawful possession of a stolen vehicle where the only evidence was that he was seen near it and no one could testify he was driving or even inside the vehicle?

III. STATEMENT OF THE CASE

On November 27, 2007, at 1:56 a.m., Officer Christopher Martin was on patrol and decided to conduct a routine stolen vehicle check on a passing vehicle. (RP 68, 70) He pulled in behind the car and began to follow without activating lights or siren. (RP 70)

The vehicle began to speed up and failed to stop at a stop sign. (RP 70, 72) Officer Martin continued to follow without activating lights or siren. (RP 100) Officer Martin lost sight of the vehicle, and when he saw it again, it was stopped at the side of the road with the passenger door open. (RP 75)

Officer Martin believed that there were two people inside the vehicle. (RP 88) He never saw either occupant closely enough to identify them. (RP 100)

By the time Officer Martin arrived at the stopped vehicle, there was no one inside it. (RP 88, 93) Martin saw a man running and gave chase. (RP 75, 77)

Martin caught up to Jason Dillon, who he believed was the man he saw running near the vehicle, and ordered him to stop. (RP 77) Dillon immediately cooperated, was handcuffed, and arrested. (RP 77)

At the jail, Martin conducted a search of Dillon's person and found a small quantity of methamphetamine. (RP 85, 105)

Dillon was charged with unlawful possession of a stolen vehicle, unlawful possession of a controlled substance, reckless driving, and driving while in suspended or revoked status in the second degree. (CP 4-6) At the close of evidence, the court dismissed the driving while in suspended or revoked status charge. (RP 140) The jury acquitted Dillon on the reckless driving charge. (CP 44) Dillon did not contest the charge of unlawful possession of methamphetamine and the jury convicted him on that charge. (RP 142-43, CP 43) Dillon was also convicted of unlawful possession of

a stolen vehicle. (CP 42, 48) This appeal timely follows. (CP 67)

IV. ARGUMENT & AUTHORITIES

Due process requires the State to prove all elements of a crime beyond a reasonable doubt. *State v. Aver*, 109 Wn.2d 303, 310, 745 P.2d 479 (1987). Evidence is insufficient to support a conviction when, viewed in the light most favorable to the prosecution, it would not permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

RCW 9A.56.068 provides that: "A person is guilty of possession of a stolen vehicle if he or she possesses a stolen motor vehicle." "Possession" was defined for the jury in this case as:

. . . knowingly to receive, retain, possess, conceal, or dispose of a stolen vehicle knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto.

(CP 21) Moreover, the jury was instructed that to find Dillon guilty, it must find beyond a reasonable doubt that he "acted with knowledge that the vehicle had been stolen" and that he "withheld or appropriated the vehicle to the use of someone other than the true owner or person entitled thereto." (CP 25)

An essential element of the crime of possession of a stolen vehicle is that the defendant possessed the vehicle. RCW 9A.56.068. Mere proximity, even as a passenger of the vehicle is insufficient to prove possession. See *State v. McCaughey*, 14 Wn. App. 326, 329, 541 P.2d 998 (1975) (mere proximity to the stolen merchandise is not enough to establish dominion or control over the merchandise or the vehicle); *State v. Cote*, 123 Wn.App. 546, 548, 96 P.3d 410 (2004) (being a passenger in the truck does not establish dominion and control over it); *State v. Plank*, 46 Wn. App. 728, 733, 731 P.2d 1170 (1987) (mere fact that defendant is a passenger in a stolen vehicle is not sufficient to establish dominion and control).

In this case, Officer Martin saw two people in the stolen vehicle. (RP 88) He did not get close enough to identify the driver and could not testify that Dillon was the driver or even that he was in the car. (RP 100) He never saw Dillon or anyone else get out of the car. (RP 93) Nothing identifying the driver or the passenger was found in the car. (RP 93)

The State's sole evidence against Dillon on this count was that Officer Martin saw Dillon running away from the area where he found the stolen vehicle. However, in view of Officer Martin's

testimony that he believed two people were in the car, even if we assume Dillon was one of the people in the vehicle, this is not sufficient to show possession without evidence that Dillon was the driver or otherwise exercised dominion and control of the vehicle. The fact that Officer Martin did not see anyone else nearby means nothing because the driver could have gone out of the area during the time Officer Martin could not see the car.

The State attempted to argue that Dillon was the sole occupant of the vehicle and that Officer Martin was mistaken in his belief that there was a driver and a passenger. (RP 135) However, there is no evidence to support that argument. The only evidence in this case is that Officer Martin saw two people in the car and he could not testify whether Dillon was one of them, nor whether Dillon was the driver.

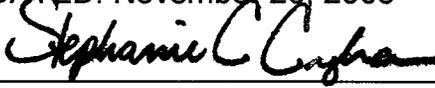
Because there is insufficient evidence to show that Dillon ever possessed the stolen vehicle, there is insufficient evidence to support his conviction for possession of a stolen vehicle and therefore his conviction must be reversed.

V. CONCLUSION

The trial court erred by convicting Dillon of possession of a stolen vehicle where there was no evidence that Dillon possessed

the car. Therefore, Dillon's conviction for possession of a stolen vehicle must be reversed.

DATED: November 26, 2008



STEPHANIE C. CUNNINGHAM

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Attorney for Jason M. Dillon

CERTIFICATE OF MAILING

I certify that on 11/26/2008, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to:

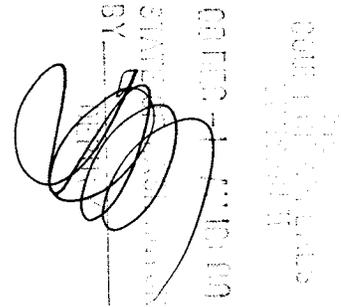
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