

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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No. 38107-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

John Peden,

Appellant.

Thurston County Superior Court Cause No. 08-1-00741-7

The Honorable Judges Gary Tabor, Richard Strophy, Anne Hirsch

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Peden's conviction for Possession of Heroin infringed his Fourteenth Amendment right to due process because the evidence was insufficient to prove the elements of the offense.
2. The trial court erred by failing to properly determine Mr. Peden's criminal history and offender score.
3. The trial court erred by adopting Finding of Fact No. 2.2 of the Judgment and Sentence.
4. The trial court erred by adopting Finding of Fact No. 2.3 of the Judgment and Sentence.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Possession of a Controlled Substance requires proof of actual or constructive possession. The state failed to prove that Mr. Peden did more than handle the heroin he was charged with possessing. Did Mr. Peden's conviction for Possession of Heroin violate his Fourteenth Amendment right to due process because it was based on insufficient evidence?
2. Out-of-state convictions may not be included in the offender score unless the prosecution proves they are comparable to Washington felonies. Here, Mr. Peden objected to inclusion of his out-of-state felonies, but the state failed to prove their comparability. Did the trial court err by including Mr. Peden's out-of-state convictions in his offender score in the absence of proof they were comparable to Washington felonies?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Late at night, three uniformed officers driving separate patrol cars went to an abandoned wooded area in Olympia, responding to a complaint of “smashing sounds” coming from within. RP (7/14/08) 15-16, 62. The lot measures 30 x 60 feet, is “super overgrown with laurel,” and looks “like a little cave as you would walk into it.” RP (7/14/08) 18. A staircase leads upward to the foundation where a house once stood. RP (7/14/08) 18.

The officers yelled for three to four minutes for whoever was inside to come out. RP (7/14/08) 17, 62. The officers heard “mumbling [and] muttering, and it was obvious that someone or people were up there.” RP (7/14/08) 17. The officers heard movement from within the overgrown area, and someone said “I’m coming, I’m coming.” RP (7/14/08) 19, 51. In addition to being “heavily wooded,” the area was dark, and the officers could not see who was within. RP (7/14/08) 19-20. Despite concerns about a possible “ambush” by multiple assailants, the officers entered the property and climbed the stairs. RP (7/14/08) 18-20.

They found Mr. Peden sitting on the steps of the old foundation with his back to them. RP (7/14/08) 21-24, 63. When they spoke to him, he had “very slurred speech, hard time standing, just very shaky, and

difficult to understand, very repetitive, a lot of the things that we encounter with drunk drivers.” RP (7/14/08) 24. He was lethargic, and had difficulty standing, but did not smell of alcohol. RP (7/14/08) 24, 65, 67. In an “alcove” within arms’ reach, the officers found heroin and paraphernalia. RP (7/14/08) 29-30, 66. The items appeared “fresh” and “clean.” RP (7/14/08) 31-32, 66. The area was very dark, and the items were not visible without the aid of a flashlight. RP (7/14/08) 70.

The officers asked Mr. Peden if he had been drinking alcohol or using drugs; he told them he had not. RP (7/14/08) 45-46. He did not have any fresh needle marks on his arms, feet, neck, back, or legs; however, he appeared to be under the influence of “something.” RP (7/14/08) 45-48. He continued to have problems standing and talking, and he seemed on the verge of falling asleep. RP (7/14/08) 48-49. A drug recognition expert examined Mr. Peden, but did not perform all twelve of the tests required under the drug recognition protocol. RP (7/14/08) 73, 86, 88-91.

Mr. Peden was charged with Possession of a Controlled Substance (Heroin) and Use of Drug Paraphernalia. CP 2. He was convicted following a jury trial. CP 3. At sentencing, the prosecutor alleged that Mr. Peden had eight prior felonies (including two Arizona convictions),

and that he was on community custody at the time of the offense.

Prosecutor's Statement of Criminal History, Supp. CP; RP (7/17/08) 3.

Defense counsel objected to the use of the prior Arizona convictions and argued for an offender score of seven (rather than nine), but conceded that the standard sentencing range was the same whether the offender score was seven or nine. RP (7/17/08) 3-4. The state did not submit any evidence proving comparability of the Arizona offenses. RP (7/17/08) 1-15. Instead, the prosecutor supplied prior Washington Judgments including the Arizona offenses in the offender score, and argued that "[the] issue really has been determined in previous court hearings." RP (7/17/08) 4.

The court accepted this argument, and sentenced Mr. Peden with an offender score of nine. RP (7/17/08) 5; CP 4. Mr. Peden appealed. CP 12.

ARGUMENT

I. MR. PEDEN'S CONVICTION FOR POSSESSION OF HEROIN VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE POSSESSION BEYOND A REASONABLE DOUBT.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt.

U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The sufficiency of the evidence may be challenged for the first time on appeal. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Evidence is insufficient to support a conviction unless, when viewed in the light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *Colquitt*, at 796. The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986); *Colquitt, supra*.

Here, the evidence was insufficient to show that Mr. Peden possessed the heroin. First, it was not found on his person, and thus he did not have actual possession. Second, there was no evidence that he had dominion and control over the heroin; thus the state failed to prove constructive possession. See Instruction No. 10, Supp. CP. Mere proximity is insufficient to prove constructive possession. *State v. George*, 146 Wn. App. 906, ___ P.3d ___ 920 (2008). This is so even where the accused person handles contraband, because evidence of momentary handling is insufficient to establish constructive possession. *George*, at 920 (citing *State v. Spruell*, 57 Wn. App. 383, 388, 788 P.2d 21 (1990)).

The complaining party heard “smashing sounds,” and the officers reported sounds of movement and audible speech. RP (7/14/08) 17-19, 51. But Mr. Peden was nearly catatonic when discovered, and incapable of noisy movement or audible speech. RP (7/14/08) 21-24, 63, 65. Taking this evidence in a light most favorable to the state, the record shows that someone else was present and fled just before the officers discovered Mr. Peden. Under these circumstances, even if Mr. Peden exercised passing control by momentarily handling the heroin (i.e. while ingesting it), the evidence was insufficient to prove that he had dominion and control over the heroin. Accordingly, the conviction for Possession of Heroin must be reversed and the charge dismissed with prejudice. *Smalis, supra*.

II. THE TRIAL COURT FAILED TO PROPERLY DETERMINE MR. PEDEN’S CRIMINAL HISTORY AND OFFENDER SCORE.

RCW 9.94A.500(1) requires that the court conduct a sentencing hearing “before imposing a sentence upon a defendant.” Furthermore, “[i]f the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist. All of this information shall be part of the record...” RCW 9.94A.500(1). Criminal history is defined to include all prior convictions and juvenile adjudications, and “shall include, where known,

for each conviction (i) whether the defendant has been placed on probation and the length and terms thereof; and (ii) whether the defendant has been incarcerated and the length of incarceration.” RCW 9.94A.030(13). To establish criminal history, “the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530(2).

Under RCW 9.94A.525(3): “Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law.” Where the state alleges a defendant’s criminal history contains out-of-state felony convictions, the state bears the burden of proving the existence and comparability of those convictions. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). An out-of-state conviction may not be used to increase an offender score unless the state proves the conviction would be a felony under Washington law. *State v. Cabrera*, 73 Wn. App. 165, 168, 868 P.2d 179 (1994).

To determine whether a foreign conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state offense to the elements of potentially comparable Washington statutes in effect when the foreign crime was committed. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). “If the elements are not identical, or if the Washington statute defines the offense more narrowly

than does the foreign statute, it may be necessary to look into the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington offense.” *Ford*, at 479 (citing *Morley*, at 606). The goal under the SRA is to match the out-of-state crime to the comparable Washington crime and “to treat a person convicted outside the state as if he or she had been convicted in Washington.” *State v. Berry*, 141 Wn.2d 121, 130-31, 5 P.3d 658 (2000) (citing *State v. Cameron*, 80 Wn.App. 374, 378, 909 P.2d 309 (1996)).

Illegal or erroneous sentences may be challenged for the first time on appeal. *Ford*, at 477. The appellate court reviews the calculation of an offender score de novo. *State v. Ortega*, 120 Wn. App. 165, 171, 84 P.3d 935 (2004). Where a defendant objects to a prior conviction, the prosecution is held to the existing record upon remand. *Ford, supra*.

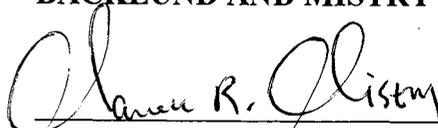
In this case, Mr. Peden objected to the inclusion of his prior Arizona convictions in the calculation of his offender score. RP (7/17/08) 3-4. Despite this, the state failed to prove the existence or comparability of Arizona offenses. RP (7/17/08) 1-15. Accordingly, Mr. Peden’s sentence must be vacated and the case remanded for resentencing with an offender score of seven.

CONCLUSION

For the foregoing reasons, Mr. Peden's conviction for possession must be reversed and the charge dismissed. In the alternative, his sentence must be vacated and the case remanded for a new sentencing hearing with an offender score of seven.

Respectfully submitted on December 31, 2008.

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DIVISION II

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 31, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 31, 2008.

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Jodi R. Backlund, WSBA No. 22922
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