

No. 38107-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN PEDEN,

Appellant.

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STATE OF WASHINGTON
BY MURPHY
COURT OF APPEALS
DIVISION II

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

The Honorable Gary Tabor, Judge
Cause No. 08-1-00741-7

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether there was sufficient evidence presented at trial to support Peden's conviction for unlawful possession of a controlled substance—heroin beyond a reasonable doubt.

2. Whether the court erred by including Peden's Arizona convictions in his offender score without doing a comparability analysis because they had been included in his offender score in prior Washington judgments and sentences.

B. STATEMENT OF THE CASE.

The State accepts Peden's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

1. The State produced sufficient evidence at trial to permit a rational trier of fact to find that Peden unlawfully possessed a controlled substance--heroin.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

"[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial

established guilt beyond a reasonable doubt. "Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, *supra*, at 201. Circumstantial evidence and direct evidence are equally reliable, and criminal intent may be inferred from conduct where "plainly indicated as a matter of logical probability." State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Possession of a controlled substance is a strict liability offense. State v. George, 146 Wn. App. 906, 919, 193 P.3d 693 (2008). Possession of drugs may be either actual or constructive. Actual possession occurs when the drugs are in a person's physical custody. Constructive possession occurs when a person has dominion and control over either the drugs or the premises upon which the drugs are found. State v. Mathews, 4 Wn. App. 653, 656, 484 P.2d 942 (1971). Mere proximity to drugs is not enough by itself to prove constructive possession. George, *supra*, at 920. However, proximity plus other circumstances can be enough. Id., at 921-22, citing to Mathews, *supra*, and State v. Ibarra-Raya, 145 Wn. App. 516, 521, 187 P.3d 301 (2008). "Constructive possession cases are fact-sensitive." Id., at 920. Courts must look to the totality of the circumstances to determine whether there is substantial evidence establishing circumstances from which a jury can reasonably infer that the defendant had constructive possession of the premises, the drugs, or both. State v. Porter, 58 Wn. App. 57, 60, 791 P.2d 905 (1990).

Here the jury heard that three city police officers arrived at an address on 12th Avenue in Olympia, finding a heavily wooded, apparently abandoned lot where a house used to stand. The

complainant had reported smashing sounds coming from the property. [Trial RP 15-16] The officers could hear someone mumbling and muttering; in response to repeated calls to come out, a voice responded something like "I'm coming, I'm coming", but after two or three minutes no one appeared. [Trial RP 17, 19] The property was overgrown with vegetation such that there was a cutout like the mouth of a cave to enter the lot. [Trial RP 18] The only way in (or out) was up a set of steps and through the opening. [Trial RP 21, 69]

When the officers entered the property they found Peden alone. He was sitting on a concrete step. In the cinder blocks of the remaining foundation of the house, there were niches, which the officers referred to as alcoves, where items had been placed. One niche was directly under the step on which Peden was seated, just to the right of his knees, within immediate reach. [Trial RP 29] The other was at a ninety-degree angle to the first, within twenty-four inches, and also within arm's reach of Peden. [Trial RP 35, 37] In the niches were syringes, water ampoules, cotton balls, alcohol swabs, and heroin in a metal bottle cap. [Trial RP 22, 29] The heroin was wet when discovered, but had dried out by the time it was photographed. [Trial RP 39] The items were clean, not

weathered from exposure, and were lying on top of pine needles and debris. [Trial RP 31-32, 66] Beside Peden on the concrete, within twelve inches, was a dog collar; Peden denied having a dog, and the officer saw none. [Trial RP 28-29] The collar appeared new and Peden admitted owning it. [Trial RP 38] Also in a niche was a lighter and Peden had a matching lighter on his person. [Trial RP 31]

Although the officers detected no odor of alcohol, [Trial RP 24, 67], Peden was severely intoxicated. His speech was slurred and repetitive, he had difficulty standing up, and he was shaky, lethargic and emotional. When he was taken into custody the officers had to assist him to the car because he could not walk by himself. Once seated in the car he had to be held upright or he would have fallen over. [Trial RP 24, 65] During the trip to the jail, Peden was on the verge of falling asleep or passing out. [Trial RP 49] Officers Schumacher and Brian Wyllie both testified that these symptoms were consistent with heroin use. [Trial RP 49, 86]

Officer Cori Schumacher, a nine-year veteran of the police department, [Trial RP 11] testified that all of the items located near Peden were consistent with the use of heroin. The dog collar could be used as a tie-off to raise a vein for injection, the bottle cap,

water, and lighter were used to cook the heroin, which needs to be diluted, and cotton balls are commonly used as a filter when filling a syringe with the heroin. [Trial RP 30]

In short, in addition to proximity to the heroin, the State presented evidence that Peden had within arm's reach all of the materials he needed to cook and inject heroin. He was manifestly under the influence of something that did not produce an odor of alcohol, and in fact took a breath test that showed he had not consumed alcohol. [Trial RP 45] He was alone at the scene. Contrary to his argument that he was nearly catatonic and incapable of noisy movement or speech, he did speak to the officers, and given his poor balance and coordination, he would have been incapable of moving quietly. Nowhere does the record even suggest that anyone else was present and fled before the officers arrived. Even if one was to consider the evidence most favorably to the defendant, rather than the State, there was ample evidence that Peden possessed the heroin.

2. The court did err by failing to require proof of the out-of-state convictions other than their inclusion in prior Washington judgments and sentences, and by failing to perform a comparability analysis. However, under the circumstances of this case, the error can be deemed harmless.

At Peden's sentencing hearing, the State produced certified copies of the judgments and sentences in four different Washington cause numbers, totaling six convictions. [CP 38-74] All four of these judgments and sentences include two Arizona convictions, one for felony theft and one for second degree burglary, both committed and sentenced in 1995. Each of these judgment and sentences is signed by Peden. The State did not produce certified copies of the Arizona judgments and sentences, nor did the court conduct a comparability analysis. At the sentencing hearing, Peden's counsel remarked that he was unaware whether the Arizona convictions were comparable to Washington felonies, but admitted that even if those two points were excluded from Peden's offender score, the standard range would be the same. [Sentencing RP 3-4] Possession of a controlled substance—heroin carries a standard range sentence of 12-plus to 24 months when the offender score is between six and nine. [CP 37]

The sentencing court incorrectly concluded that the inclusion of the Arizona convictions in prior Washington judgment and sentences was adequate proof of those convictions, noting that even if that were not the case, and Peden's offender score were

seven instead of nine, the standard range would be the same.

[Sentencing RP 5]

A sentencing court's calculation of an offender score is reviewed de novo. State v. Wilson, 113 Wn. App. 122, 136, 52 P.3d 545 (2002). The Sentencing Reform Act requires that sentencing judges classify out-of-state convictions according to comparable Washington crimes, and if they are comparable, those convictions may be used to calculate the defendant's offender score. The State has the burden of proving prior convictions by a preponderance of the evidence. Id. That burden of proving out-of-state convictions is satisfied by the inclusion of the convictions in a prior Washington judgment and sentence unless the defendant objects. Id., at 137. When the defendant does object, the State is required to produce additional evidence of the classification, as well as existence, of those convictions. State v. Cabrera, 73 Wn. App. 165, 169, 868 P.2d 179 (1994); Wilson, *supra*, at 137. Peden's signature on the Washington judgments and sentences is insufficient to constitute collateral estoppel. Cabrera, *supra*, at 169-70.

While Peden's objection at sentencing was rather tentative, the State concedes it was an objection, and therefore the State had the obligation to provide additional proof of the Arizona convictions

and their comparability. However, the Cabrera opinion implies that this situation can be subject to a harmless error analysis. In Cabrera, the court calculated an offender score of 11, using two prior Florida convictions, and a standard range of 108 to 144 months. Without the Florida convictions, the offender score would have been 8, with a standard range of 87 to 116 months. Cabrera was sentenced to 114 months, which was near the low end of the first range but would have been at the high end of the second. The Court of Appeals reasoned that since the court imposed a sentence at the bottom end of what it believed to be the correct range, it could not conclude that the court would have chosen a sentence at the top end of the correct range. The appellate court reversed the sentence, concluding that the error could not be considered harmless.

This implies, then, that under different circumstances harmless error may apply. In Peden's case, the standard range is the same whether his offender score is seven or nine, and thus the situation faced by the Cabrera court does not exist. Peden received a sentence of 18 months, midpoint in the standard range. [CP 6] The court found that the current crime was not particularly egregious and the sentence would run consecutively to a prior

DOSA sentence. [Sentencing RP 12] It noted that even if the offender score was seven, the range was the same. [Sentencing RP 5] Under these circumstances, it is virtually certain that the court would have imposed the same sentence even without the inclusion of the Arizona convictions.

A harmless error is one that is “trivial, formal, or merely academic and which in no way affects the outcome.” State v. Gonzales, 90 Wn. App. 852, 855, 954 P.2d 360 (1998). That describes the situation in Peden’s case, and the State asks this court to find that the improper inclusion of the Arizona convictions is harmless error. Although Peden’s offender score here is incorrect, the standard range remains the same and the sentence would certainly be the same. Should he be convicted of crimes in the future, that sentencing court could not rely on the criminal history from this judgment, but would have to calculate the offender score as of that date, and if he objected to the inclusion of any convictions, the State would have to re-prove them. In re Pers. Restraint of Harris, 148 Wn. App. 22, 27-8, 197 P.3d 1206 (2008). Thus, the error here does not prejudice him now and will not prejudice him in the future.

Should this court disagree that the error is harmless and remand for resentencing, the State should be allowed to produce additional evidence of the Arizona convictions and not be restricted to the existing record. The rule, as set forth in State v. Bergstrom, 162 Wn.2d 87, 169 P.3d 816 (2007), is that “if the defense does specifically object during the sentencing hearing but the State fails to produce *any* evidence of the defendant’s prior convictions, then the state may not present new evidence at resentencing.” Id., at 93, (emphasis in original), citing to In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 877-78, 123 P.3d 456 (2005). Here, the State did produce some evidence that the Arizona convictions existed, in the form of certified copies of Washington judgment and sentences including those convictions in the offender score, but not enough to carry its burden of proving them by a preponderance of the evidence. Therefore, if this matter is remanded, the State should have the opportunity to produce sufficient proof to satisfy the Cabrera test.

D. CONCLUSION.

There was ample evidence to support Peden’s conviction for unlawful possession of heroin. While the inclusion of two Arizona convictions in his offender score was error, under these

circumstances it can be considered harmless. If this court does vacate the sentence and remand for resentencing, the State should be permitted to submit proof of the Arizona convictions. The State respectfully asks this court to affirm both the conviction and the sentence.

Respectfully submitted this 5th day of March, 2009.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Brief of Respondent, on all parties or their counsel of record on the date below as follows:

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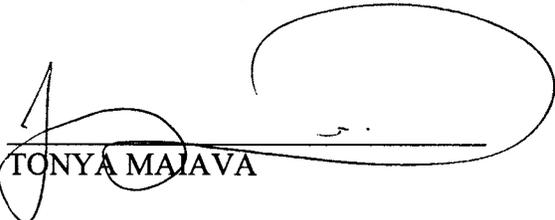
TO:

MANEK R. MISTRY
JODI R. BACKLUND
BACKLUND & MISTRY
203 EAST FOURTH AVENUE, SUITE 404
OLYMPIA, WA 98501

09 MAR -9 PM 12:10
STATE OF WASHINGTON
BY MA DEPUTY
COURT OF APPEALS
DISTRICT II

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 5th day of March, 2009, at Olympia, Washington.


TONYA MALAVA