

NO. 38859-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

VAUGHN A. MILLER,

Appellant.

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

The Honorable Roger A. Bennett, Judge

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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BRIEF OF APPELLANT

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P.M. 6-12-2009

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A. ASSIGNMENTS OF ERROR

1. The State failed to prove that appellant possessed methamphetamine with intent to deliver

2. The State failed to prove appellant tampered with physical evidence.

Issues pertaining to assignments of error

1. Appellant was convicted of possession of methamphetamine with intent to deliver. Where the evidence failed to establish he had dominion and control over the premises or the drugs, and where there was insufficient corroborating evidence of intent to deliver, must appellant's conviction be reversed and the charge dismissed?

2. Appellant was convicted of tampering with physical evidence based on allegations that he poured soda on a table where methamphetamine was found. Where the State failed to prove there was ever any more methamphetamine on the table, which appellant had altered or destroyed, must appellant's conviction be reversed and the charge dismissed?

B. STATEMENT OF THE CASE

1. Procedural History

On October 28, 2008, the Clark County Prosecuting Attorney charged appellant Vaughn Miller with one count of possession of methamphetamine with intent to deliver, committed within 1000 feet of a school bus route stop, and one count of tampering with physical evidence. CP 1-4; RCW 69.50.401(1), (2)(b); RCW 69.50.435; RCW 9A.72.150. A count of bail jumping was included in the information but later dismissed. CP 2, 42, 52; RCW 9A.76.170. The information also contained charges against several co-defendants, although the co-defendants were not charged as accomplices or co-conspirators. CP 1-4.

The case against Miller and co-defendant Darrell Burns proceeded to jury trial before the Honorable Roger A. Bennett. The jury found Miller guilty on both counts and found the drug offense was committed within 1000 feet of a school bus route stop. CP 37, 39-40. The court denied Miller's request for a DOSA and imposed standard range sentences. CP 42, 55. Miller filed this timely appeal. CP 67.

2. Substantive Facts

On October 24, 2008, Clark County Sheriff's deputies executed a search warrant at house and detached shop in Vancouver, Washington.

2RP¹ 87, 98, 103.² The deputies knocked on the shop door and announced their presence, then forced the door open and used a flash-bang diversionary device to gain entry. 2RP 89-90. They proceeded through the outer room to the door of an inner bedroom. They again knocked and announced and then threw open the unlocked door. 2RP 91. The deputies saw Shannon Riggins and Vaughn Miller inside the room. 2RP 91. Miller appeared to be pouring Pepsi onto a table and quickly wiping the table. 2RP 93. Miller was ordered to the ground, but he continued what he was doing for a moment before complying. 2RP 94. Both Miller and Riggins were taken into custody. 2RP 95.

During the search of the bedroom, deputies noticed that the table next to which Miller had been standing was covered with what appeared to be soda. A digital scale, a white bottle cap, and numerous piles of crystal substance suspected to be methamphetamine were found on top of the table as well. 2RP 112. On the floor next to the table was a metal box in which deputies found two more scales, a plastic container, and a damaged medical identification card from 2006 in Miller's name. 2RP 116, 135. There was suspected methamphetamine on the scales and in the plastic

¹ The Verbatim Report of Proceedings is contained in six volumes, designated herein as follows: 1RP—12/29/08 a.m.; 2RP 12/29/08 p.m.; 3RP—12/30/08 a.m.; 4RP—12/30/08 p.m.; 5RP—12/31/08; 6RP—1/30/09.

² Darrell Burns was tried with Miller on charges arising out of the search of the main residence.

container. 2RP 116. The deputies also located a tin containing a large number of empty Ziploc baggies. 2RP 131. One piece of mail addressed to Miller at the search address was found in a shoebox under a nightstand next to the bed. 3RP 256-57.

Miller was read his Miranda warnings and agreed to talk to the deputies. When asked about a safe in the bedroom, Miller said it contained money and jewelry, and he gave the deputies the combination. 2RP 118. A total of \$71 cash was found in the safe, and an additional \$190 was found in Miller's wallet. 2RP 119, 183.

Although the deputies observed surveillance cameras facing down the driveway leading to the shop and monitors inside the bedroom, none of the surveillance equipment was seized. 2RP 144-45. Moreover, all the digital photographs taken during the search were lost after they were downloaded into the police report. 2RP 145-46, 187-88.

At trial, the forensic scientist who tested the seized items testified that unweighable amounts of methamphetamine residue were found on the bottle cap, the plastic container, the one scale that was tested, and the plastic bag. 3RP 316; 4RP 334-38, 344-49. The crystal substance collected from the table top consisted of .1 gram of methamphetamine. 4RP 338, 348. The expert testified that since the crystal form of methamphetamine is soluble in water, it should be soluble in Pepsi. 4RP

344. She did testify that she had analyzed any samples of soda to determine if they contained dissolved methamphetamine, however.

A detective with the drug task force testified that in his experience, drug dealers use scales to weigh the amount being sold. 3RP 240. He said there are different levels of dealers, ranging from those who will sell as little as .1 gram all the way up to those who sell pounds of methamphetamine. 3RP 239. Baggies are typically used for packaging in low level sales. 3RP 241.

The State also presented evidence that the search address was within 1000 feet of a school bus route stop. 4RP 386.

Shannon Riggins testified that she and Miller had leased the shop together in April or May 2008, but Miller moved out some time in August. 4RP 444-45. Although Riggins had told the police that she and Miller lived in the shop, Riggins explained at trial that she was just nervous and scared when the police questioned her. 4RP 454. Miller took most of his belongings when he moved, but not everything, and he still visited Riggins occasionally for sex. 4RP 445, 466. Miller was on the bed with her when the police arrived. 4RP 446.

After she was arrested and read her rights, Riggins told the deputies that everything in the room belonged to her. 4RP 447. She testified consistently with that statement, explaining that the scales, the

metal box, the tin, the money in the safe, and the methamphetamine were all hers. 4RP 448-53. Riggins had told deputies that she did not know where three laptops found on the bed had come from but said she believed they had been traded for methamphetamine. 5RP 540. Although a deputy testified that Riggins had said she and Miller were selling methamphetamine, Riggins testified that the methamphetamine was for her personal use and denied dealing drugs or telling police she and Miller were dealing. 4RP 453-54; 5RP 540.

Annette Sullivan confirmed that Miller had rented a room from her in August 2008. 5RP 515. She testified that he moved in the first week of August, and he lived in her house and paid rent until he was arrested. 5RP 517, 520.

In addition, the defense presented evidence that the search warrant had authorized seizure of items relating to drug dealing, including telephone books, address books, lists of names, and notes regarding drug transactions, but no such documents were found in the shop. 5RP 522-24. The warrant also authorized seizure of financial documents used to track proceeds from drug sales, but again, no such documents were found. 5RP 525. In addition, the warrant authorized seizure of methamphetamine on Miller's person or in the safe located in the room, but no controlled substances were found either in the safe or on Miller. 2RP 127-28.

C. ARGUMENT

1. THE STATE FAILED TO PROVE MILLER POSSESSED METHAMPHETAMINE WITH INTENT TO DELIVER.

In every criminal prosecution, the state must prove all elements of a charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). On appeal, a reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact could find that all elements of the crime were proven beyond a reasonable doubt. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

To convict Miller in this case, the State had to prove he unlawfully possessed methamphetamine with intent to deliver. CP 1; RCW 69.50.401(1), (2)(b). No methamphetamine was found on Miller's person, and the State did not argue he was in actual possession of a controlled substance. Rather, the State sought to prove Miller was in constructive possession of the methamphetamine discovered during the search of the

bedroom. 5RP 566. The State's evidence failed to establish constructive possession, however.

Whether a person has dominion and control over a controlled substance, and thus constructive possession, is determined by examining the totality of the situation. State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). Where there is no evidence that the defendant has dominion and control over the premises, however, proximity, knowledge, and even momentary handling of the drugs cannot form the basis for a finding of constructive possession. State v. Callahan, 77 Wn.2d 27, 31, 459 P.2d 400 (1969); State v. Spruell, 57 Wn. App. 383, 388, 788 P.2d 21 (1990).

The State's evidence failed to establish that Miller had dominion and control over the premises where the methamphetamine was found. Although Riggins had told the officers at the time of the search that Miller lived there, she explained at trial that she had only said that because she was nervous. 4RP 454. There was evidence that Miller used to live in the shop, but he had moved out almost four months before the search. 4RP 444-45. He had entered a sublet agreement at another location, moved in, and paid rent. 5RP 517, 520. Although the deputies found a piece of mail addressed to Miller in a shoebox under the nightstand and a discarded medical identification, there was no evidence they found any personal items such as clothing or toiletries belonging to Miller in the room. 2RP

135; 3RP 256-57. The presence in the room of two abandoned items associated with Miller was not sufficient to establish dominion and control over the premises. See Callahan, 77 Wn.2d at 31 (fact that defendant had personal possessions, other than clothing and toiletries, on the premises was insufficient to establish dominion and control of premises).

In Callahan, because the defendant, who was only a guest, did not have dominion and control over the premises, the court considered whether other evidence established dominion and control over the drugs. The defendant admitted that two guns, two books on narcotics, and a set of broken scales belonged to him. In addition, most of the drugs were found near the defendant, and he had admitted handling them earlier in the day. Callahan, 77 Wn.2d at 31. The Court held that this evidence was not sufficient to submit the question of constructive possession to the jury. Id.

There is even less evidence of dominion and control here. As in Callahan, the methamphetamine was found near where Miller had been standing. But unlike in Callahan, the personal property associated with Miller was unrelated to drugs, and Miller did not admit to handling any of the methamphetamine on the premises. Miller's mere proximity to the methamphetamine and his knowledge of its presence were not enough to establish constructive possession. See Callahan, 77 Wn.2d at 31.

In this case, a deputy testified that he saw Miller wiping the table top where a small amount of methamphetamine was discovered. 2RP 93. The State's theory was that Miller was attempting to destroy the methamphetamine to avoid being charged with possession of the substance. Similar facts were held insufficient to establish constructive possession in State v. Spruell. There, police forced entry into a home to execute a search warrant. They found defendant and another man standing in the kitchen, and one of the officers testified to his impression that the defendant had just moved from the table. Cocaine and other drug related items were found on the table. Spruell, 57 Wn. App. at 384. In addition, an officer testified that a few seconds after the police entered the house, he heard what sounded like a plate hitting the back door. White powder was found in the door jamb, and a plate was found a foot and a half from the door. The defendant's fingerprint was found on the plate. Id.

The State's relied on the defendant's presence in the kitchen, his fingerprint on the plate, and the officer's impression that the defendant stepped away from the table to establish he was in possession of the cocaine. Spruell, 57 Wn. App. at 385. The Court of Appeals found this evidence insufficient, however. It held that where there was no evidence the defendant had any connection with the drugs other than being present and having a fingerprint on the plate believed to have contained cocaine

immediately prior to the forced entry by police, there was no basis for finding he had dominion and control over the drugs. Spruell, 57 Wn. App. at 388-89.

Here, as in Spruell, the State failed to prove Miller had any connection to the methamphetamine other than his presence and his apparent attempt to wipe the substance off the table. Miller's mere proximity to the methamphetamine, his knowledge of its presence, or even the momentary handling observed by the officer was not enough to establish constructive possession. See Spruell, 57 Wn. App. at 388-89.

Even if the jury could have found that Miller was in possession of methamphetamine, the State still had to prove that Miller intended to deliver the methamphetamine. It is firmly established in Washington law that mere possession of a controlled substance is insufficient to support an inference of intent to deliver. State v. Goodman, 150 Wn.2d 774, 783, 83 P.3d 410 (2004). Possession must be coupled with substantial corroborating evidence to establish intent. State v. Brown, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993).

For example, in Goodman, the police found six baggies of white powder substance totaling 2.8 grams, three of which were tested and found to contain methamphetamine. A scale, an accessory kit, and additional baggies were found in Goodman's bedroom, and significantly, the baggies

bore the same logo as baggies used in an earlier controlled buy. This evidence as a whole was sufficient for the jury to convict. Goodman, 150 Wn.2d at 783.

Here, by contrast, police found only a .1 gram of methamphetamine, the substance was not packaged for sale, and there was no previous controlled buy to support an inference that Miller intended to deliver the miniscule amount collected by police. 2RP 112, 125; 4RP 348. Although the deputies located some empty baggies and three scales, there was no evidence the scales worked. Moreover, while the warrant authorized the deputies to search for and seize evidence of drug sales including telephone books, address books, lists of names, notes regarding drug transactions, and financial documents used to track proceeds from drug sales, no such documents were found. 5RP 522-25. Under these circumstances, there was insufficient corroborating evidence to establish that the methamphetamine was intended for delivery rather than for personal use as Riggins testified.

Because the State failed to prove Miller possessed methamphetamine with intent to deliver, the charge against him must be dismissed. See Hickman, 135 Wn.2d at 103.

2. THE STATE FAILED TO PROVE MILLER TAMPERED WITH PHYSICAL EVIDENCE.

The State charged Miller with tampering with physical evidence as follows:

(1) A person is guilty of tampering with physical evidence if, having reason to believe that an official proceeding is pending or about to be instituted and acting without legal right or authority, he:

(a) Destroys, mutilates, conceals, removes, or alters physical evidence with intent to impair its appearance, character, or availability in such pending or prospective official proceeding....

RCW 9A.72.150. No published Washington case has interpreted this statute.

The court below found that given the circumstances of the police entry, the jury could find Miller had reason to believe an official proceeding was about to be instituted. 4RP 391-93. "Official proceeding" is defined to include any proceeding before a judicial officer authorized to hear evidence under oath. RCW 9A.72.010(4)³. Arguably, since the police knocked, announced they were present to execute a search warrant, and forced entry into the shop, Miller had reason to believe charges would be filed which would result in a trial. But the State presented no evidence

³ "'Official proceeding' means a proceeding heard before any legislative, judicial, administrative, or other government agency or official authorized to hear evidence under oath, including any referee, hearing examiner, commissioner, notary, or other person taking testimony or depositions[.]"

from which the jury could find Miller destroyed, mutilated, concealed, removed, or altered physical evidence.

The first deputy to enter the bedroom testified that he saw Miller pouring Pepsi on a table and wiping it up. 2RP 93. The deputies conducting the search found a crystal substance on the table and collected it. That substance was found to contain methamphetamine, and Miller was charged with possession with intent to deliver that methamphetamine. That evidence was not destroyed or altered, and the tampering charge was not based on that methamphetamine. Instead, the tampering charge was based on the State's theory that there had been more methamphetamine on the table which Miller destroyed or altered by pouring Pepsi on it. 5RP 573. The evidence fails to support the State's theory, however.

The State's expert testified that methamphetamine is probably soluble in soda. 4RP 344. While she did not explain what that means, her testimony suggests that if soda were poured on methamphetamine, the soda on the table would contain dissolved methamphetamine. Thus, to prove there had been more methamphetamine than collected by the deputies, which was altered or destroyed when Miller poured Pepsi on it, the State would have to present evidence that the soda on the table contained dissolved methamphetamine. Because there was no effort to test the soda on the table for methamphetamine, there was no proof that

there was in fact more methamphetamine on the table before Miller poured the soda. Without such proof, the state's theory that Miller tampered with physical evidence is purely speculative. The state failed to prove Miller tampered with physical evidence, and the charge must be dismissed. See Hickman, 135 Wn.2d at 103.

D. CONCLUSION

The state failed to prove beyond a reasonable doubt that Miller was guilty of possession of methamphetamine with intent to deliver or tampering with physical evidence. His convictions on those counts must be reversed and the charges dismissed.

DATED this 12th day of June, 2009.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of Brief of Appellant in *State v. Vaughn A. Miller*, Cause No. 38859-6-II directed to:

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



Catherine E. Glinski
Done in Port Orchard, WA
June 12, 2009

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