

ORIGINAL

NO. 40715-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

TERRELL BOOKER,

Appellant.

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STATE OF WASHINGTON
BY [Signature] DEPUTY
COURT OF APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 10-1-00032-0

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED January 27, 2011, Port Orchard, WA [Signature]
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

I. COUNTERSTATEMENT OF THE ISSUE.....1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY1

 B. FACTS1

III. ARGUMENT.....3

 THE EVIDENCE WAS SUFFICIENT TO SHOW THAT
 BOOKER KNOWINGLY POSSESSED THE HANDGUN
 WHERE IT WAS FOUND IN A BAG IN THE CLOSET OF
 HIS BEDROOM AND AMMUNITION FOR THE GUN
 WAS VISIBLE IN THE OPEN SAFE THAT WAS ON THE
 FLOOR OF THE CLOSET UNDER HIS CLOTHES.....3

IV. CONCLUSION.....9

TABLE OF AUTHORITIES

CASES

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). 4

State v. Alvarez, 105 Wn. App. 215, 19 P.3d 485 (2001)..... 5, 6, 7

State v. Amezola, 49 Wn. App. 78, 741 P.2d 1024 (1987) 6

State v. Basford, 76 Wn.2d 522, 457 P.2d 1010 (1969). 3

State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969) 6, 7

State v. Collins, 76 Wn. App. 496, 886 P.2d 243 (1995)..... 5

State v. Hernandez, 85 Wn. App. 672, 935 P.2d 623 (1997)..... 4

State v. Myers, 133 Wn.2d 26, 941 P.2d 1102 (1997) 4

State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990)..... 6, 7

State v. Theroff, 25 Wn. App. 590, 608 P.2d 1254 (1980) 4

OTHER AUTHORITIES

WPIC 50.03..... 8

I. COUNTERSTATEMENT OF THE ISSUE

Whether the evidence was sufficient to show that Booker knowingly possessed the handgun where it was found in a bag in the closet of his bedroom and ammunition for the gun was visible in the open safe that was on the floor of the closet under his clothes?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Terrell Booker was charged by information filed in Kitsap County Superior Court with first-degree unlawful possession of a firearm. CP 1. A jury found him guilty as charged. CP 69.

B. FACTS

On the day of Booker's arrest, the police were serving a search warrant at his apartment. RP 52. Deputy Todd Byers called the apartment and requested Booker and the other three occupants to leave. RP 47. They all came out. RP 47.

Deputy Elizabeth Gundrum searched the bedroom and found a safe with some ammunition in it and a bag with a gun in it. RP 52-53. The closet had men's clothing on one side and women's on the other. RP 53. The bag was on the floor in the middle. RP 53. The safe was on the side with the men's clothing and was open when they arrived. RP 54. She also found a duffel bag in the closet. RP 57.

A handgun was in the duffel bag. RP 59. A loaded magazine was in the handgun. RP 72-73. The handgun was a 9 mm semiautomatic handgun. RP 80.

Deputy Frank O'Brien searched the bedroom with Gundrum. RP 67. He found ammo and a holster in the safe. RP 67. There were three types of ammunition in the safe: 9mm, .357 magnum, and .38 special. RP 84. There was a second holster next to the bed. RP 86. The 9 mm would fit the holster from the safe. RP 89.

A wallet containing Booker's identification was found on the computer desk in the bedroom. RP 74. The desk was between the closet and the bed. RP 90.

Megan Hopkins's wallet and mail were also in the room. RP 75. The was located in a purse that was inside the duffel bag. RP 91. Hopkins's wallet The mail was on the desk, and there were some letters in her wallet as well. RP 93.

After his arrest, Booker stated that he had a room in the apartment with his girlfriend. RP 96.

III. ARGUMENT

THE EVIDENCE WAS SUFFICIENT TO SHOW THAT BOOKER KNOWINGLY POSSESSED THE HANDGUN WHERE IT WAS FOUND IN A BAG IN THE CLOSET OF HIS BEDROOM AND AMMUNITION FOR THE GUN WAS VISIBLE IN THE OPEN SAFE THAT WAS ON THE FLOOR OF THE CLOSET UNDER HIS CLOTHES.

Booker argues that the evidence was insufficient to support his conviction because the State failed to prove that he possessed the gun. This claim is without merit because the handgun was found in a bag in the closet of his bedroom and ammunition for the gun was visible in the open safe that was on the floor of the closet under his clothes.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of

the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Here, the police testified that they called one of the residents of the apartment on the phone and told them that law enforcement was outside. Five to seven minutes elapsed between the call and when the occupants exited the apartment. The jury could infer that the people in the apartment knew that law enforcement was outside and that they had five to seven minutes to do things in the apartment, such as trying to hide things.

During the subsequent search of the bedroom of the apartment, the police found a duffel bag and the safe in the closet. There was a 9mm handgun in bottom of the duffel.

There was male clothing on the left side of the closet, and female

clothing on the right side of the closet. The clothing on the left looked as if it belonged to a large male. Booker was 6' 2" and weighed 265 pounds. Exh. 10. The jury could reasonably infer that the clothes in the closet were Booker's.

Notably, the safe was on the left side of the closet where the clothes for the large male were hanging. The door to the safe was open, and ammunition was visible through the open door. There was also a holster in the safe that would have fit the gun in the duffel. A second holster was on the floor next to the bed.

The duffel containing the 9 mm handgun was in the middle of the closet. The bag also contained a purse and other documentation belonging to Megan Hopkins.

Booker admitted to the police that he shared the room with Megan Hopkins. Between the bed and the closet was a computer desk. On the desk were papers belonging to Hopkins, and Booker's wallet.

Possession may be actual or constructive. *State v. Alvarez*, 105 Wn. App. 215, 221, 19 P.3d 485 (2001). Constructive possession can be established by showing the defendant had dominion and control either over the firearm itself or over the premises where the firearm was found. *Id.* In establishing dominion and control over the premises, the totality of the

circumstances must be considered. *Id.* No single factor is dispositive. *See e.g., State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243 (1995) (evidence of residence, personal possessions on the premises, and knowledge of the presence of contraband sufficient to establish dominion and control). Further, exclusive control by the defendant is not required. *State v. Amezola*, 49 Wn. App. 78, 86, 741 P.2d 1024 (1987).

The evidence was sufficient to show that Booker resided in the room, thus giving him dominion and control of the premises where the gun was found. Moreover, the safe was on his side of the closet and in addition to a holster for the gun, contained ammunition that was visible through its open door. Another holster was on the floor next to the bed near to where his wallet was located. Not only does this evidence show knowledge and constructive possession, any other conclusion from the evidence would be unreasonable.

The cases Booker cites do not persuade otherwise. *See State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969); *State v. Alvarez*, 105 Wn. App. 215, 19 P.3d 485 (2001); and *State v. Spruell*, 57 Wn. App. 383, 788 P.2d 21 (1990). In *Callahan*, the Supreme Court first determined that the defendant did not have dominion and control over the residence where he was a visitor and that the defendant's admitted passing control of the drugs did not amount to actual possession. *Callahan*, 77 Wn.2d at 28-29. The court then

determined that the circumstantial evidence of the defendant's constructive possession, i.e., his proximity to the drugs and his admission that he had handled the drugs earlier in the day, was not sufficient to show constructive possession when there was undisputed evidence that another person had exclusive ownership of the drugs. *Callahan*, 77 Wn.2d at 31-32. But here, there was evidence that Booker lived in the room where the gun was found. Booker thus had dominion and control over the immediate area where it was found. Although he shared the space with Hopkins, there is no requirement that dominion and control be exclusive. *Amezola*, 49 Wn. App. at 86.

In *Alvarez*, the issue was whether the defendant had constructive possession of the premises. The court found the evidence insufficient to establish the defendant's constructive possession of a bedroom where the police discovered a firearm inside the bedroom closet. *Alvarez*, 105 Wn. App. at 217. There, however, while some items belonging to Alvarez were found in the room, there was evidence that he lived elsewhere. Here there was no such evidence, and indeed, Booker admitted to living there.

In *Spruell*, the only evidence of possession was the defendant's mere presence and proximity to the drugs and a fingerprint on a plate that had held the drugs. *Spruell*, 57 Wn. App. at 387-89. The record in *Spruell* did not show that the defendant had dominion and control over the house where the drugs were found, why he was present, or that he had dominion and control

over the drugs. By contrast, again, here there is evidence that Booker resided in the room.

Moreover, even if the evidence were insufficient to show dominion and control over the premises, it would be sufficient to show dominion and control over the gun itself. The following factors may be considered:

[whether the defendant had the [immediate] ability to take actual possession of the substance,] [whether the defendant had the capacity to exclude others from possession of the substance,] [and] [whether the defendant had dominion and control over the premises where the substance was located].

WPIC 50.03

Booker had the ability to take actual possession of the item. The firearm was in a bag in his closet. If he was in the bedroom he could have taken actual possession of it easily. It wasn't locked away. It wasn't in a safe in a separate container. It was in a bag in his bedroom.

Booker had capacity to exclude others from possession of the gun. It was his bedroom that he shared with Hopkins.

As discussed previously, Booker also had dominion and control over the premises where the item was located.

Finally, Booker had knowledge and possession. The circumstantial evidence showed that Booker knew that the gun was in his bedroom. The safe with similar ammunition and a holster was open and directly under his

clothes. His documents were there. He admitted he shared this bedroom with Hopkins. All these things point to the fact that Booker knew the handgun was in his room.

In view of the foregoing, the evidence was sufficient to show that Booker knowingly possessed the firearm. His conviction should be affirmed.

IV. CONCLUSION

For the foregoing reasons, Booker's conviction and sentence should be affirmed.

DATED January 27, 2011.

Respectfully submitted,

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A handwritten signature in black ink, appearing to be 'R. Hauge', written over a horizontal line.

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