

No. 45491-2-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Javier Espinoza,

Appellant.

Pierce County Superior Court Cause No. 12-1-01852-1

The Honorable Judge Ronald E. Culpepper

Appellant's Reply Brief

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ARGUMENT

I. THE COURT VIOLATED MR. ESPINOZA’S CONSTITUTIONAL RIGHTS BY DENYING HIS MOTION TO SEVER AND BY PRECLUDING HIM FROM CALLING CODEFENDANT HERNANDEZ TO PROVIDE CRITICAL EXCULPATORY EVIDENCE.

Mr. Espinoza was in Hernandez and Cruz Camacho’s apartment on the day of the drug bust, so he could pick up the cash payment for some real estate that his family had sold to Hernandez in Mexico. RP (7/9/13); CP 342. Hernandez was willing to testify to those facts on Mr. Espinoza’s behalf – but only if he did not have to waive his Fifth Amendment privilege at his own trial in order to do so. RP (7/9/13); CP 342.

The trial court erred by denying Mr. Espinoza’s motion to sever his case from Hernandez’s. Mr. Espinoza should have been able to present that significant and exculpatory evidence.

Mr. Espinoza provided the court with a declaration from Hernandez outlining Mr. Espinoza’s innocent explanation for his presence in the apartment and possession of a large amount of cash. CP 342. Hernandez declared that he would testify to those facts if Mr. Espinoza was tried separately. CP 342. Still, Respondent claims that “there was no admission or statement from defendant Hernandez exculpating Espinoza.” Brief of Respondent, p. 29. The state’s argument is not supported by the record.

The state also claims that Mr. Espinoza or some other witness could have testified about the Mexican real estate transaction in the joint trial with Hernandez. Brief of Respondent, p. 29. But Mr. Espinoza was unwilling to forego his right to remain silent. No other witness (such as a family member knowledgeable about the real estate transaction) could have accounted for Mr. Espinoza's presence in that particular apartment, why he was paid in cash, or why the cash was packaged in a suspicious manner. Only Hernandez – who had invited him to the residence, made the payment, and packaged the cash – could provide that testimony.

By denying the motion and prohibiting him from offering the critical exculpatory evidence, the court violated Mr. Espinoza's rights to present a defense and to compulsory process. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). The court also abused its discretion by denying the motion to sever. *See. United States v. Cobb*, 185 F.3d 1193, 1197 (11th Cir. 1999); CrR 4.4(c)(2)(i).

Mr. Espinoza's convictions must be reversed.

II. THE STATE PROVIDED INSUFFICIENT EVIDENCE TO CONVICT MR. ESPINOZA OF CONSTRUCTIVE DRUG POSSESSION.

1. No rational jury could have found that Mr. Espinoza had dominion and control over the drugs in the apartment based on the evidence only of his brief presence inside.

In order to convict Mr. Espinoza, the state was required to prove that he had dominion and control over the drugs hidden in the apartment. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). To do so, the state was required to present, at the very least, some evidence of his dominion and control over the premises where the drugs were found. *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996).

Despite ongoing surveillance (and previous sightings of both Hernandez and Cruz Camacho), no officer had ever seen Mr. Espinoza or his car at the apartment before. RP (9/10/13) 29, 34; RP (9/11/13) 5; RP (9/16/13) 68, 82, 92, 94. While the officers found identity documents for Cruz Camacho inside the apartment, the search did not turn up anything linking Mr. Espinoza to the premises. RP (9/16/13) 41, 81-83; Ex 64A-E.

Respondent does not point to any evidence that Mr. Espinoza had dominion and control over the apartment where the drugs were found. Brief of Respondent, pp. 11-17. Instead, the state can point only to Mr. Espinoza's admission to being inside the apartment on one occasion.¹

¹ As argued in the Opening Brief and below, Mr. Espinoza's admission to being inside the apartment is also insufficient to support his conviction under the rule of *corpus delicti*.

Brief of Respondent, p. 15. His brief presence, however, is far from sufficient to prove constructive possession of the drugs in the residence. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) *review denied*, 176 Wn.2d 1003, 297 P.3d 67 (2013).

Respondent also relies heavily on the assertion that the police had seen Mr. Espinoza walking back and forth from the apartment to a car in the parking lot of the apartment building. Brief of Respondent, pp. 13-17. But no witness identified Mr. Espinoza as one of the people who had been entering and exiting the apartment. Instead, the surveilling officer said only that they were Hispanic men. RP (9/10/13) 30. The fact that Mr. Espinoza is also Hispanic is far from proof beyond a reasonable doubt that he possessed the drugs in the apartment. The state's evidence was insufficient as to Mr. Espinoza.

The state did not present any evidence that Mr. Espinoza had dominion and control over the drugs or the apartment in which they were found. No rational jury could have found that he constructively possessed the drugs beyond a reasonable doubt. *Chouinard*, 169 Wn. App. at 899. Mr. Espinoza's convictions must be reversed and the charges dismissed with prejudice. *Id.* at 903.

2. The evidence was insufficient to convict Mr. Espinoza under the rule of *corpus delicti*.
 - a. Respondent cannot point to any independent evidence that Mr. Espinoza was ever in the apartment where the drugs were found.

Mr. Espinoza's statement to the police provided the only evidence that he had ever been inside the apartment where the drugs were found.

RP (9/12/13) 36. Because there is no independent evidence, Mr. Espinoza's conviction for possession of the drugs in the apartment must be reversed under the rule of *corpus delicti*.

In order to prove that Mr. Espinoza constructively possessed the drugs in the apartment, the state was required to demonstrate that he exercised dominion and control over them. *Cote*, 123 Wn. App. at 549. To fulfill the requirements of the *corpus* rule, however, the state points only to evidence found *inside* the apartment when the police searched it. Brief of Respondent, p. 19.

But none of that evidence was connected to Mr. Espinoza in any way. The state cannot point to any independent evidence that Mr. Espinoza had ever actually been in the apartment where the drugs were found. Respondent's arguments are unavailing.

The state presented insufficient evidence to convict Mr. Espinoza under the rule of *corpus delicti*. *State v. Dow*, 168 Wn.2d 243, 249, 227

P.3d 1278 (2010). Mr. Espinoza's convictions must be reversed and the charges dismissed with prejudice. *Id.*

- b. If Mr. Espinoza's claim of insufficiency under the rule of *corpus delicti* is not preserved, then he received ineffective assistance of counsel.

Mr. Espinoza relies on the argument set forth in his Opening Brief.

III. DRUG DOG ALERTS ARE TOO UNRELIABLE AND ATTENUATED TO PROVIDE THE PROBABLE CAUSE NECESSARY TO THE WARRANT TO SEARCH MR. ESPINOZA'S CAR.

Mr. Espinoza relies on the argument set forth in his Opening Brief.

IV. THE DOG SNIFF OF MR. ESPINOZA'S RENTAL CAR CONSTITUTED AN UNLAWFUL WARRANTLESS SEARCH UNDER WASH. CONST. ART. I, § 7.

Mr. Espinoza relies on the argument set forth in his Opening Brief.

V. MR. ESPINOZA'S DEFENSE ATTORNEY PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO ARGUE THAT HIS TWO POSSESSION CONVICTIONS CONSTITUTED THE SAME CRIMINAL CONDUCT FOR SENTENCING PURPOSES.

Respondent concedes that remand is necessary to correct Mr.

Espinoza's improperly-calculated offender score. Brief of Respondent, pp. 20-22. This court should accept the state's concession.

VI. THE TRIAL COURT ERRED BY ORDERING MR. ESPINOZA TO PAY \$5,800 IN LEGAL FINANCIAL OBLIGATIONS WITHOUT INQUIRING INTO HIS ABILITY TO PAY.

Mr. Espinoza relies on the argument set forth in his Opening Brief.

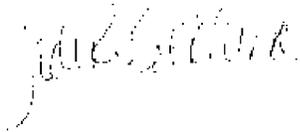
CONCLUSION

For the reasons set forth above and in the Opening Brief, Mr. Espinoza's convictions must be reversed

In the alternative, Mr. Espinoza's case must be remanded for resentencing.

Respectfully submitted on February 19, 2016,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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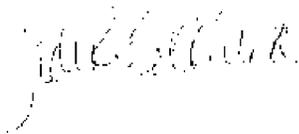
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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 February 19, 2016.



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BACKLUND & MISTRY

February 19, 2016 - 10:47 AM

Transmittal Letter

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