

NO. 283666-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED

AUG 17 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

THE STATE OF WASHINGTON, Respondent

v.

MARK ERIC DAVIS, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 08-1-00232-6

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

ROCHELLE A. OLDFIELD, Deputy
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ISSUES

1. The theory of Passing or Momentary possession is not warranted in this case because the evidence does not support it.
2. There is sufficient evidence to sustain the conviction.
3. No reversible error was committed by the court, as there was no improper vouching testimony solicited by the State.

STATEMENT OF THE CASE

On December 16, 2007, officers of the Kennewick Police Department responded to a disturbance call at the home of the defendant, Mark Davis. (CP 3; RP 06/30/09, 24) After several minutes of struggling with the officers, the defendant was placed in handcuffs. (CP 3; RP 06/30/09, 28-29). Officer Meyer patted the defendant down and found a metal tube, typically used for smoking drugs in his right-front pocket. (CP 3; RP 06/30/09, 29). The metal tube was tested, and the results indicated cocaine. (RP 06/30/09, 17-18).

A jury found the defendant guilty of Possession of a Controlled Substance-Cocaine on June 30, 2009. (CP 21). On July 29, 2009, defendant filed a Notice of Appeal. (CP 33-34).

ARGUMENT

A. MOMENTARY POSSESSION

In his brief, the defendant argues that the court erred in failing to instruct the jury on passing or momentary possession. (App. Brief, 1). In a prosecution for possession of narcotics, the State must prove possession of a controlled substance. RCW 69.50.401. It is not until possession is proven that the analysis can move to the discussion of whether the possession was momentary or passing. This was discussed in State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994):

The State may establish that possession is either actual or constructive. State v. Walcott, 72 Wash.2d 959, 968, 435 P.2d 994 (1967); *cert denied*, 393 U.S. 890, 89 S.Ct. 211, 21 L.Ed. 2d 169 (1968). "Actual possession means that the goods are in the personal custody of the person charged with possession;

whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged has dominion and control over the goods." State v. Callahan, 77 Wash.2d at 29, 459 P.2d 400.
State v. Staley, 123 Wn.2d at 798.

In this case, the defendant had actual possession, as the pipe was found on his person by law enforcement. (CP 3).

The defendant argues, "he was going through his garage and found the pipe in the tool box. He then picked it up with the intention of throwing it away in a garbage can outside." (App. Brief, 5). It is the claim that he had the intention to throw it away that fueled the defendant's argument that the jury should have been instructed on momentary possession. The defendant testified that he didn't want his grandchildren to find it, and didn't know when or if he had ever used the pipe. (RP 06/30/09, 45). His argument attempts to paint the situation differently than it was. Earlier in his testimony, the defendant testified that he had

used drugs that day, but not with that pipe. (RP 06/30/09, 45). This implies that there were other pipes on the property of the defendant that his grandchildren could have found, and the argument that he intended to throw it away so his grandchildren wouldn't find it defies common sense.

In support of defendant's argument for momentary possession, he refers to State v. Staley, 123 Wn.2d 794. Staley was a musician that was arrested for possession of a vial of cocaine that Staley claims was wrapped in a \$20 bill in his tip jar. Staley alleged that he was embarrassed and intended to discard the cocaine, but forgot he had it. In State v. Staley, the defendant requested an instruction on unwitting possession stating that "fleeting, momentary, temporary or unwitting possession is not unlawful" to support its argument that Staley's possession of cocaine was not unlawful. State v. Staley, 123 Wn.2d at 800). However, the Court said that, "the terms

'momentary, temporary and fleeting' are not related to the defense of 'unwitting' possession but go rather to the element of possession". *Id.* In separating 'unwitting possession' from 'momentary possession', the Court in *Staley* found that,

evidence of brief duration or 'momentary handling' goes to the question of whether the defendant had 'possession' in the first instance. Depending on the total situation, 'momentary handling,'... may actually support a finding of possession. *Id.* at 802.

The State was required to prove that the defendant had possession of a controlled substance. According to a jury of his peers, the State succeeded. (CP 21). Since the defendant had actual possession of the substance, the trial court was correct in not instructing the jury on momentary possession. At the time of his arrest, the defendant's possession of the substance was ongoing. In both *State v. Werry*, 6 Wn. App. 540, 494 P.2d 1002 (1972), and *State v. Bowman*, 8 Wn. App. 148, 504 P.2d 1148 (1972), the Court of

Appeals acknowledged that the possession at question was only terminated by police when the drugs were discovered. In Bowman, the Court held that, "that kind of possession constitutes more than 'momentary handling.'" State v. Bowman, 8 Wn. App. at 153. In Werry the Court stated:

the police terminated his control when they found the drugs. An example of passing control, which is only a momentary handling, would be a casual and brief inspection of the bag of drugs by someone who was not in actual or constructive possession of the drugs".

Werry, 6 Wn. App. at 548.

As in Bowman and Werry, the defendant's possession of the substance in this case was only terminated due to the discovery of the drugs on his person by law enforcement.

In State v. Summers, the Court summarized the law of possession as follows:

Based upon the analysis of Callahan in Staley, Bowman, and Werry, the following rules apply in possession cases. Possession is more than passing control. Momentary handling, without more, is insufficient to prove possession. But evidence of momentary handling, when combined with other

evidence, such as dominion and control of the premises, or a motive to hide the item from police, is sufficient to prove possession. Finally, even passing control of contraband is not legal; it is merely insufficient to prove possession.

State v. Summers, 107 Wn. App. 373, 386-387, 28 P.3d 780 (2001).

When the defendant was arrested, he had actual possession of a pipe containing cocaine. (RP 06/29/09, 45). He testified that he came across the pipe as he was cleaning up in the garage. (RP 06/29/09, 45). He admitted to using drugs earlier. (RP 06/29/09, 45-46). In addition, the defendant testified that the pipe was in his garage in a toolbox. (RP 06/29/09, 45). These facts clearly show actual possession as well as dominion and control of the premises. Yet, the defendant is asking this Court to go back to the day of defendant's arrest and look into the future and find that the defendant was planning on throwing the pipe away, and therefore, although he was in actual possession of the pipe, it was only momentary and therefore not unlawful.

To allow this argument to succeed would be to open the floodgates for defendants to claim that they had intentions of discarding their drugs and drug paraphernalia in the future, and would defy common sense.

As a final note, the instructions given to the jury allowed the defendant to argue his theory of the case. If the jury had a reasonable doubt that the defendant only had momentary possession of the controlled substance, it would have found him "not guilty."

B. INSUFFICIENT EVIDENCE

The defendant next argues that there is insufficient evidence to support the conviction. (App. Brief, 1). In his brief, defendant argues that based on the evidence produced at trial (1) the defendant was planning to throw away the pipe, (2) that the amount of drugs in the pipe was very small and had to be removed from inside the pipe, and a jury would be unable to find beyond a reasonable doubt that the defendant

possessed the cocaine for more than a momentary or temporary period of time. (App. Brief, 14-15).

The issue of whether his possession of the cocaine was momentary was discussed above and need not be furthered analyzed here. The issue of the amount of cocaine found in the pipe is irrelevant to a charge of possession. A lab technician testified that cocaine residue was recovered from the pipe that was found on the defendant's person. (RP 06/30/09, 17). The defendant then argues that the affirmative defense of unwitting possession leads the court to "only one inescapable burden of not guilty." (App. Brief, 15). Unwitting possession is a defense that is supported by "a showing that the defendant did not know he was in possession of the controlled substance." State v. Staley, 123 Wn.2d at 799. The defendant testified that he had used drugs that day, but not with that pipe. (RP 06/30/09, 45). This testimony shows that the defendant is a drug user; that the pipe found was

his and was used by him at one time. The fact that the pipe contained drugs was most likely not a surprise to the defendant.

As the defendant acknowledges in his brief, when sufficiency of the evidence is in question, "all reasonable inferences must be drawn in the states favor and interpreted most strongly against the defendant." (App. Brief, 14). It is a more than reasonable inference that as an admitted drug user who testified that he had used a pipe earlier that day to ingest drugs, he would be aware that the pipe contained cocaine residue. For these reasons, it is clear that there was sufficient evidence for the jury to find the defendant guilty.

C. VOUCHING TESTIMONY

The defendant's third argument is that the court committed reversible error in denying the defense objection to improper vouching testimony. (App. Brief, 1). During the direct examination of

Officer Ken Melone, the prosecutor asked the officer to clarify which officer, he or Officer Meyer, found the pipe on the defendant. (RP 06/30/09, 32). The prosecutor then inquired if Melone knew that Officer Meyer remembered finding the pipe in the defendant's pants pocket rather than in the front-right jacket pocket as stated in Melone's report. (RP 06/30/09, 32). The prosecutor then asked, "Do you have an opinion on whose memory would be better of that aspect of the incident? Yours or his?" (RP 06/30/09, 32).

The State would agree that according to case law, a witness may not give an opinion as to another witness's credibility. State v. Casteneda-Perez, 61 Wn. App. 354, 360, 810 P.2d 74 (1991). The prosecutor in this case did not ask Melone whether or not Meyer was telling the truth, which would clearly be giving an opinion as to Meyer's credibility. Rather, Melone was asked who he thought had a better memory. The belief is that such questioning invades the

province of the jury and is unfair and misleading. *Id.* at 362. This would be true in the case at bar had the prosecutor asked Melone, "Do you believe that Officer Meyer is telling the truth?" However, Melone gave a complete testimony as to what he remembered had occurred, and Meyer did the same. The jury was allowed to see both officers testify as to what they remembered, and was able to determine credibility on their own.

Finally, if there was error in this instance it was harmless.

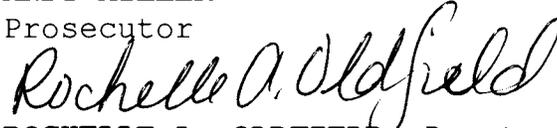
CONCLUSION

The trial court correctly denied giving a Staley instruction to the jury, as the facts did not warrant it. For the reasons stated above, the State respectfully requests the Court dismiss the appeal and deny the defendant's request for a new trial.

RESPECTFULLY SUBMITTED this 16th day of
August 2010.

ANDY MILLER

Prosecutor

A handwritten signature in black ink that reads "Rochelle A. Oldfield". The signature is written in a cursive, flowing style.

ROCHELLE A. OLDFIELD, Deputy
Prosecuting Attorney

Bar No. 42488

OFC ID NO. 91004

COURT OF APPEALS, DIVISION III
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STATE OF WASHINGTON,

Respondent,

NO. 283666

vs.

DECLARATION OF SERVICE

MARK ERIC DAVIS,

Appellant.

I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Brief of Respondent* and this *Declaration of Service*, on August 16, 2010.

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

EXECUTED at Kennewick, Washington, on August 16, 2010.


PAMELA BRADSHAW