

No. 289737

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

FILED

OCT 13 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

STATE OF WASHINGTON,

Respondent,

vs.

MICHEAL J. REID,

Appellant.

APPELLANT'S REPLY BRIEF

RICHARD D. WALL, #16581
Attorney for Appellant

Richard D. Wall, P.S.
221 W. Main Avenue, Suite 200
Spokane, WA 99201
(509) 747-5646

TABLE OF CONTENTS

1. Appellant Has Not Waived His Right To Challenge the Sufficiency of the Evidence to Prove Possession..... 1

2. The Trial Court’s Findings of Fact Are Insufficient to Support a Guilty Verdict2

CONSLUSION7

CERTIFICATE OF SERVICE9

1. Appellant Has Not Waived His Right To Challenge the Sufficiency of the Evidence to Prove Possession.

The State argues that Mr. Reid has waived his right to challenge whether the State presented sufficient evidence in its case in chief to establish possession of the drugs allegedly found in the officer's patrol car. The State is correct that, as a general rule, the presentation of evidence by the defense waives the right to challenge the court's failure to dismiss at the end of the State's case. The reason for the rule is that the State is entitled to the benefit of any evidence presented by the defense. Therefore, all the evidence presented at trial would normally be considered in determining whether the State had presented sufficient evidence to establish guilt.

The present case presents a unique set of facts, however. The State charged Mr. Reid with possession of drugs that were allegedly found in the back seat of a police patrol car after Mr. Reid had been handcuffed and placed in the car. Clearly, Mr. Reid did not exercise any dominion or control over any part of the patrol car either before or after he was placed in the vehicle. Thus, the State's theory of the case was that the drugs must have belonged to Mr. Reid because they were not present in the car prior to Mr. Reid being put into the car. Obviously, the defense was in no

position to present any evidence regarding what may or may not have been in the police car prior to Mr. Reid's arrest, since the car was entirely within the custody and control of the officer. Thus, there is no distinction in this case between the court's ruling as to the sufficiency of the evidence to establish possession at the close of the State's case or at the close of all the evidence. In either case, the sole evidence presented to establish that the drugs were not in the vehicle prior to Mr. Reid's arrest was the testimony of Deputy Frost. No evidence was, or could have been, presented by the defense on that issue except through the cross examination of Deputy Frost during the State's case in chief.

Furthermore, the State does not contend that any evidence presented by the defense is relevant to the issue of whether the drugs were already in the patrol car prior to Mr. Reid's arrest. Thus, although Appellant has framed the issue in terms of the trial court's failure to dismiss at the close of the State's case, Mr. Reid's appeal is clearly based upon a challenge to the sufficiency of the all the evidence as to the issue of possession.

2. The Trial Court's Findings of Fact Are Insufficient to Support a Guilty Verdict.

The State argues that, because Mr. Reid does not challenge any of the trial court's findings of fact, the verdict must be upheld. The State contends that the findings made by the trial court amount to a finding that the drugs were not in the patrol car prior to Mr. Reid's arrest and, therefore, the drugs belonged to and were possessed by Mr. Reid.

The trial court did not make any express finding whether or not the drugs allegedly found in the patrol car were there before Mr. Reid was placed in the car. Instead, the trial court found only that "Deputy Frost has been a law enforcement officer for sixteen years. He always searches his vehicle after making an arrest; therefore he is certain that these items were not in hi patrol car prior to the defendant being placed therein." CP 14 (Finding of Fact #12). Those findings do not, as a matter of law, establish that the drugs were not in the patrol car before Mr. Reid was arrested and placed in the car.

How long Deputy Frost has been a patrol officer is irrelevant to whether the drugs were already in the car. Similarly, how certain Deputy Frost claimed to be that the drugs were not already in the car is also irrelevant. Even if those findings are considered relevant to the issue of Deputy Frost's credibility as a witness, they say nothing whatsoever about the actual presence or absence of drugs in the back seat of his patrol car.

Furthermore, the court's finding that Deputy Frost "always searches his vehicle after making an arrest" says nothing about what happened on this particular occasion. At most, that finding would support an inference that Deputy Frost probably searched his patrol car prior to Mr. Reid's arrest. But, that inference, by itself, tells us nothing about the nature or results of the search. Did Deputy Frost find anything when he searched? Was he able to clearly observe the entire area of the back seat of the patrol car? Did Deputy Frost search well enough to locate any drugs that might have been present? Could the drugs have been placed in the car after Deputy Frost conducted his search? For example, was someone standing near enough to the patrol car during a time when they were not being directly observed by Deputy Frost such that the person could have tossed a baggie of drugs into the back seat of the car after it had been searched?

The answers to such questions can never be known, not because the defense failed to cross examine Deputy Frost, but because Deputy Frost professed to have no recollection of having actually searched the patrol car. Because Deputy Frost had no memory of conducting a search of the car, cross examination as to the timing, method, conditions, and thoroughness of any such search was entirely foreclosed. In other words, the trial court was left with nothing more than Deputy Frost's

unsupported, self-serving conclusion that there were no drugs in the back seat of his patrol car prior to Mr. Reid's arrest. The trial court had no factual basis upon which to judge for itself whether that conclusion was correct. As a result, Deputy Frost was allowed to act as the trier of fact in lieu of the trial court making a factual determination based on testimony of actual observations made by witnesses or on other competent evidence.

This court should hold as a matter of law that an officer's (or any witnesses') conclusory testimony as to the existence or non-existence of a fact can never serve as the basis for a finding of guilt in a criminal case. It simply does not matter how certain Deputy Frost claimed to be that there were no drugs in the back seat of his patrol car prior to Mr. Reid's arrest. The fact is that Deputy Frost could not remember whether he had even searched the vehicle prior to Mr. Reid's arrest. Therefore, Deputy Reid's testimony was not based upon actual knowledge or observation. The State presented no other testimony or evidence to establish that the drugs were not in the car prior to Mr. Reid's arrest, a fact that was essential to establishing Mr. Reid's guilt.

This court should also hold as a matter of law that an arrestee who has been handcuffed and placed in the back of a patrol vehicle is not constructively in possession of any items that might later be found in the vehicle. The degree of control and authority exercised by the police over

both the arrestee and the interior of the patrol car should preclude any finding that the arrestee exercises the type of dominion and control necessary to establish constructive possession. While in theory there could be some set of unusual facts or circumstances under which a finding of constructive possession could be appropriate, the potential for abuse by law enforcement officer in these circumstances is obvious. The law should not merely presume that all officers never make a mistake or that all officers always act ethically or honestly, even if the vast majority of them do the vast majority of the time. Police officers are human, too, and are subject to the same flaws and failings as the rest of us. To allow a conviction under the circumstances presented here creates a grave danger that unscrupulous or careless police officers will employ similar tactics to bring false charges against innocent citizens such as Mr. Reid.

One of the most troubling aspects of this particular case is that the manner in which it was presented by the State absolutely precluded any possibility of a defense. The State's case against Mr. Reid depended entirely upon Deputy Frost's claim that the drugs were not in the patrol car prior to his arrest. The normal method by which the defense would challenge such testimony, other than by collateral attack on credibility of the witness, would be to question the witness about the details of witness' observations and basis of knowledge. When the witness professes a

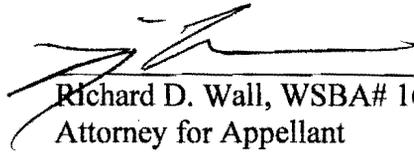
complete lack of memory of having made any relevant observations or otherwise having any direct knowledge of a fact, cross examination becomes impossible.

Since the trial court here was obviously predisposed to accept Deputy Frost's assertion that he always checks the back seat of his patrol car and never misses anything, Mr. Reid was denied any real opportunity to defend himself. Other than deny that the drugs were his and to demonstrate to the court that he was not a drug user, both of which Mr. Reid did, there was literally nothing that the defense could do to contest the State's claim that the drugs were not in the patrol car prior to Deputy Frost arresting him and putting him in the car. The allegation that the drugs were not already in the patrol car was the sole basis upon which the trial court concluded that the Mr. Reid had been in possession of the drugs and was guilty of the charged offense.

V. CONCLUSION

The arguments raised by the State in its Response Brief are without merit. This court should grant the relief requested by Appellant in his opening brief.

Respectfully submitted this 12th day of October, 2010.



Richard D. Wall, WSBA# 16581
Attorney for Appellant

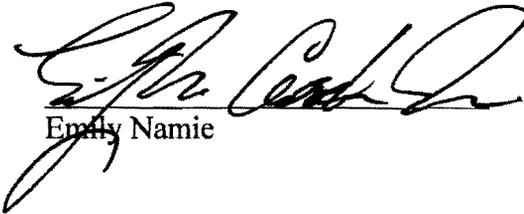
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of October 2010, a true and correct copy of the foregoing BRIEF OF APPELLANT was delivered via legal messenger to the following:

Andrew J. Metts
Spokane County Prosecuting Attorney's Office
1100 W. Mallon
Spokane, WA 99260

And by U.S. Mail to:

Michael Reid
12104 E. Fairview
Spokane Valley, WA 99216



Emily Namie