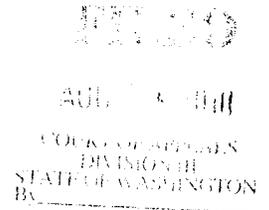


No. 289737

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON



STATE OF WASHINGTON,

Respondent,

vs.

MICHEAL J. REID,

Appellant.

APPELLANT'S OPENING BRIEF (Corrected)

RICHARD D. WALL, #16581
Attorney for Appellant

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

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I. ASSIGNMENTS OF ERROR

1. The Trial Court Erred by Failing to Grant Defendant's Motion to Dismiss for Lack of Evidence to Prove Constructive Possession.

ISSUE: Whether the evidence presented at trial established that the defendant constructively possessed drugs allegedly "found" in the back of a police patrol car when (1) the defendant, had been arrested, searched, handcuffed behind his back, and placed in the back seat of the patrol car by the officer who claimed to have found the drugs, (2) after failing to find any drugs on the defendant's person or in the defendant's vehicle, the officer removed the defendant from the patrol car, (3) the officer had transported another person to jail in the same patrol car prior to arresting the defendant and placing him in the car, and (4) the officer testified that he could not remember whether he had checked the back seat area of the patrol car after transporting that person to jail.

II. STATEMENT OF THE CASE

In the early morning hours of March 31, 2008, Micheal J. Reid was in his vehicle delivering papers for the Spokesman-Review newspaper. Mr. Reid's route covered an area from 27th Avenue and Pines Road to 32nd Avenue and Pines Road in Spokane Valley, Washington. RP 73. Mr. Reid's job required him to pick up the papers for his route at 2:00 a.m. each morning and deliver them that same morning. RP 72. Mr. Reid delivered up to 200 papers seven days a week to support his family. RP 74. Mr. Reid also worked a second job operating heavy equipment for a local excavating company. RP 73.

When delivering papers, Mr. Reid would stack the papers on the front passenger seat of his car and in the back seat. RP 76. He would then deliver the papers by placing them in a box by the side of the street or by tossing the paper onto the recipient's porch. RP 74. For part of his route, Mr. Reid would drive on the left hand side of the street so that he could place papers directly in the newspaper box without getting out of his vehicle. RP 75-76.

While delivering papers on that day, Mr. Reid observed three police cars near 31st Avenue. It appeared to Mr. Reid that the three patrol vehicles had gathered there for some purpose. RP 77. Mr. Reid continued along his route. RP 78. Mr. Reid made a left hand turn in front of the

police vehicles and continued down the street. When he reached the last delivery on that street, Mr. Reid made a U-turn and came to a stop at a stop sign. RP 78. At about that time, one of the patrol vehicles went past Mr. Reid at a fairly high rate of speed. RP 79. Mr. Reid then made a turn onto 32nd Avenue. After making that turn, he was pulled over by Deputy Brian Frost, who was driving one of the patrol cars that Mr. Reid had just seen. RP 80.

Mr. Reid pulled into a parking lot and stopped. RP 80-81. He was then approached by Deputy Frost and another officer. RP 80. As the officers were approaching, Mr. Reid called his mother using his cell phone to tell her that he was being stopped. RP 80. Mr. Reid then produced his license and registration at Deputy Frost's request. RP 81. Deputy Frost then took Mr. Reid's license and went back to his patrol car. A short time later, Deputy Frost came back to Mr. Reid's vehicle and asked him to step out, which Mr. Reid did. RP 82. Deputy Frost immediately took Mr. Reid into custody, telling him that he was under arrest for driving on a suspended license. RP 82.

After handcuffing Mr. Reid with his hands behind his back, Deputy Frost patted him down. RP 83. Mr. Reid was wearing blue jeans and a long sleeve shirt. RP 84. Deputy Frost did not find anything on Mr.

Reid when he patted him down.¹ RP 84. Deputy Frost then placed Mr. Reid in his patrol car. RP 84.

After placing Mr. Reid in the patrol car, Deputy Frost and the other officer searched the interior of Mr. Reid's vehicle using their flashlights. RP 85. After the officers had searched Mr. Reid's car, Deputy Frost came back to the patrol car and opened the door where Mr. Reid was sitting. RP 86. Deputy Frost asked Mr. Reid "where my drugs was at." RP 85. Mr. Reid told Deputy Frost that he did not have any drugs with him and that he was delivering newspapers. RP 86. Deputy Frost appeared to be upset with Mr. Reid. RP 86. Deputy Frost then took Mr. Reid out of the vehicle. RP 87.

After getting Mr. Reid out of the patrol vehicle, Deputy Frost told the other officer that he needed to search the back seat of the patrol car because he had not properly searched Mr. Reid before putting him in the patrol car and he had seen the vehicle shaking "violently." RP 87. Deputy Frost went into the back seat of the patrol vehicle while the other officer maintained custody of Mr. Reid. RP 88. Deputy Frost appeared to

¹ Officer Frost testified that he conducted only a pat down search for weapons at the time he took Mr. Reid into custody. That testimony is belied by Officer Frost's own actions in immediately conducting a thorough search of Mr. Reid's vehicle with the obvious purpose of looking for controlled substances. Since Officer Frost obviously suspected that Mr. Reid was in possession of controlled substances at the time he arrested him, he would have conducted a search of his person with that purpose in mind.

be searching the back seat area with his flashlight. RP 89. After a few seconds, Deputy Frost came out of the vehicle with a “baggie full of white stuff” that he showed to Mr. Reid and said to him, “I got you.” RP 89. Deputy Frost then told Mr. Reid that he “did not transport scum like me in his car.” RP 90. The officers then put Mr. Reid into another patrol vehicle. RP 90. Mr. Reid was then told that the baggie contained cocaine. Mr. Reid denied that the baggie was his and insisted that he did not use cocaine. RP 90-91.

After Mr. Reid was placed in the other patrol vehicle, his mother and father arrived on the scene. RP 92. Mr. Reid was then transported to jail. RP 93. Mr. Reid was released from jail late at night the same day or in the early morning hours of the next day. RP 94. Mr. Reid then went to a drug testing facility and had his blood tested for the presence of illegal drugs. He did so because it was the only way he could think of to prove his innocence. RP 94-95. The blood test was negative for any illegal drugs other than marijuana. CP 14-16. Mr. Reid testified that he was not surprised that he tested positive for marijuana because, at the time, he occasionally used marijuana. RP 99-100.

Mr. Reid was charged with possession of cocaine and possession of hydrocodone. CP 1. At trial, Deputy Frost testified that after placing Mr. Reid in his patrol car, he had observed the patrol car rocking from

“[s]ide to side like somebody was moving in the back of the patrol car.”

RP 27. No other officer testified to having observed the vehicle rocking. In fact, Deputy Frost was the only officers to testify at trial. Deputy Frost testified that it was after he observed the patrol car rocking from side to side that he removed Mr. Reid from the back seat and searched the back seat area. RP 27. According to Deputy Frost, when he searched the back seat area of the patrol car, he found plastic baggies containing a rock like substance that field tested positive for cocaine and some pills that were determined to be hydrocodone. RP 28. Deputy Frost had no recollection of where in the back seat he allegedly found the baggie of drugs in relation to Mr. Reid other than that “[i]t was in the floorboard.” RP 27.

Deputy Frost also testified on direct examination that the baggies were not in the back seat area of the patrol car when Mr. Reid was placed in the car. RP 29. When asked how he knew that, Deputy Frost testified “Because I check my car everyday before I start duty, I get off duty and each and every time somebody sits in the back of my patrol car.” RP 29. On cross examination, however, Deputy Frost admitted that he did not remember having any other persons in the back of his patrol car prior to Mr. Reid. RP 39. After reviewing an incident report from the same evening, Deputy Frost admitted that he had, in fact, transported another individual in the back of his patrol car earlier that same shift. RP 39-40.

Deputy Frost had no recollection of that incident and no recollection of whether he had searched the back seat after transporting that individual to jail. Deputy Frost testified, however, that he routinely did so as part of his standard procedure and practice. RP 41. When asked whether it was his testimony that he never overlooks anything when conducting a search of his patrol vehicle, Deputy Frost simply stated, “I look, and if I see something, I remove it.” RP 41.

Mr. Reid was found guilty by the court sitting without a jury. CP 14-16. Mr. Reid now appeals that verdict. CP 17.

III. STANDARD OF REVIEW

On a challenge to the sufficiency of the evidence in a criminal case, the reviewing court, taking the evidence in the light most favorable to the State, must determine whether a rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A claim of insufficiency of the evidence admits the truth of the State’s evidence and all reasonable inferences that can be drawn from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The inference of one fact from other facts is valid only when “it can at least be said with

substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend.” *State v. Kovac*, 50 Wn. App. 117, 120, 747 P.2d 484 (1987) quoting *Turner v. United States*, 396 U.S. 398, 405, 90 S. Ct. 642, 24 L. Ed. 2d 57 (1970).

IV. ARGUMENT

1. The State Failed to Present Any Competent Evidence that the Mr. Reid Constructively Possessed the Drugs Allegedly Found in the Back Seat of the Patrol Car.

The evidence presented at trial was insufficient to support a finding beyond a reasonable doubt that Mr. Reid was in possession of the drugs allegedly found in the back seat of the patrol car. Mr. Reid was patted down before being placed in the patrol car. The officer did not find any drugs on Mr. Reid at that time. Mr. Reid was then removed from the patrol car and the same officer, Officer Frost, looked into the back seat. Officer Frost and emerged a few seconds later claiming to have found a baggie containing several hydrocodone pills and a small quantity of cocaine. It is unknown where in the back seat of the patrol car Officer Frost claims to have found the drugs.

Because no drugs were found in Mr. Reid's possession, Mr. Reid can be convicted of possessing the drugs only if there is sufficient evidence to establish that he had "constructive" possession of the drugs. To prove constructive possession, the State must establish that the person charged with possession exercised dominion and control over the item or the premises where the item was found. *State v. Mathews*, 4 Wn.App. 653, 656, 484 P.2d 942 (1971). An automobile is a premises for purposes of constructive possession, and a person may constructively possess items found in the area of a vehicle occupied by a passenger, if it is shown that the passenger exercised dominion and control over the place where the items are found. *See, State v. Coahran*, 27 Wn.App. 664, 668-69, 620 P.2d 116 (1981). Mere proximity to the item is not enough to establish constructive possession. *Id.*

Here, Mr. Reid clearly did not exercise any dominion or control over any part of Officer Frost's patrol car. He was not a passenger. He was handcuffed behind his back and placed in the back seat of the patrol car by Officer Frost against his will. Being in custody at the time, Mr. Reid was completely under the control of Officer Frost.

Under these circumstances, it cannot be said that Mr. Reid exercised any form of "dominion or control" over the back seat of Officer Frost's vehicle. The words "dominion" and "control" are both defined as the

ability to exercise power or authority over a place, persons, or things.

“Dominion” means having “supreme authority” or “absolute ownership.”

<http://www.merriam-webster.com/dictionary/dominion>. “Control” means

to exercise “restraining and directing influence.” <http://www.merriam->

[webster.com/dictionary/control](http://www.merriam-webster.com/dictionary/control). A person who is handcuffed with his

hands behind his back and forcibly placed into a vehicle does not exercise

supreme authority or have any directing influence over the interior of the

vehicle or any thing that may be inside the vehicle. On the contrary, such

a person is, for the most part, under the supreme authority and directing

influence of the arresting officer.

Even if it could be said that such a person has some ability to exercise dominion and control over certain aspects of their surroundings, any such ability is extremely limited, and would not encompass the entire range of area that would arguable be within the control of an unrestrained passenger. Here, it is not known where in the back seat of the patrol car the drugs were allegedly found by Officer Frost because Officer Frost provided no testimony on that issue other than to say it was “in the floorboard.” RP 27. It is not known whether the drugs were in an area that was within the potential reach of Mr. Reid, even though his hands were cuffed behind his back. It is not known whether the drugs were close in proximity to Mr. Reid, or whether it would have been possible for Mr.

Reid to have somehow placed the drugs in the location where they were “found.”

Moreover, the State provided no evidence that the drugs were not already in the patrol car before Mr. Reid was placed in the back seat. Officer Frost had no recollection of having had any person in the back seat prior to placing Mr. Reid in the patrol car. Yet, he admitted on cross examination that the Incident Report showed that he had transported another person to jail in the back seat of his car earlier that same shift. Officer Frost had no recollection of having searched the back seat area after transporting that person to jail to make sure that the person had not left anything behind.

The State’s apparent theory in this case is that the drugs could not have been in the patrol car prior to Mr. Reid being placed in the car because Officer Frost testified that it is his practice to check his patrol car at the beginning of each shift and after transporting someone. Thus, according to the State, it is not necessary for Officer Frost to document having done so on this particular occasion or to have any independent recollection of having done so.²

² Officer Frost’s testimony was not offered as evidence of a “habit” under ER 406, and in any event, was insufficient to establish a “habit” because he provided no testimony as to the number, frequency, regularity or similarity of the circumstances other than to say that it was his normal practice to search the back seat at the beginning of his shift and after transporting someone. *See, State v. Young* 48 Wn.App. 406, 412, 739 P.2d 1170 (1987).

Even if Officer Frost's testimony could be characterized as evidence of a habit admissible under ER 406 there is still a complete lack of evidence to support Mr. Reid's conviction. Under ER 406, evidence of a habit is admissible only to show that the conduct of the person on a particular occasion was in conformity with the habit. ER 406. The State presented no evidence to establish what "conduct" Officer regularly engaged in other than that he conducted some kind of search. Officer Frost gave no testimony as to how he conducted such searches or whether the manner in which he searched varied in any respect from one occasion to another.

For example, it is unknown whether Officer Frost always used a flashlight. It is unknown whether he routinely looked in particular places in the back seat where drugs or other items might be concealed or difficult to find. It is unknown whether he used his hands to feel certain areas of the back seat, or whether he always relied solely on his ability to see if anything was present. All that Officer Frost could say regarding the manner in which he conducted such searches was, "I look, and if I see something, I remove it." RP 41.

Not only did Officer Frost offer no testimony regarding what he actually did when searching the back seat area of his patrol car as a matter of routine or practice, he was unable to provide any testimony as to what he did on this particular occasion because he had no memory of having

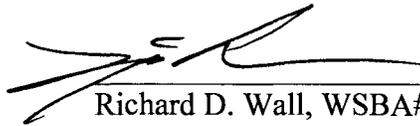
done any search. Thus, there is no basis from which a trier of fact could assess the likelihood that Officer Frost actually conducted such a search on this occasion and no basis from which any trier of fact would determine whether any search that Officer Frost might or have conducted prior to placing Mr. Reid in the patrol car would have revealed the presence drugs or any other items. Ultimately, the testimony produced by the State at trial amounts to nothing more than: “Trust me. I’m a police officer, and I never make a mistake.”

In sum, there is a complete lack of evidence as to whether the baggie of drugs allegedly found by Officer Frost after taking Mr. Reid out of the patrol car was already present in the back seat prior to Mr. Reid being placed in the car. The testimony presented at trial is simply not sufficient to establish either (1) that Officer Frost in fact searched the back seat of his patrol car after previously transporting another person to jail that same shift, or (2) that any such search would, beyond any reasonable doubt, have revealed the presence of the drugs allegedly “found” by Officer Frost after Mr. Reid was removed from the patrol car. The State’s theory that the drugs must have been placed there by Mr. Reid is simply not supported by any testimony or other competent evidence.

V. CONCLUSION

For the foregoing reasons, this court should reverse the decision of the court below and remand this case with instructions to dismiss the Information with prejudice.

Respectfully submitted this 13th day of August, 2010.

A handwritten signature in black ink, appearing to read 'R. Wall', is written over a horizontal line.

Richard D. Wall, WSBA# 16581
Attorney for Appellant

CERTIFICATE OF SERVICE

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

Stephanie Collins, DPA
Spokane County Prosecuting Attorney's Office
1100 W. Mallon
Spokane, WA 99260



Emily Namie