

FILED

FEB 25 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 29245-2-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

AIMEE MARIE KEMPE,

Defendant/Appellant.

Appellant's Brief

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in finding Ms. Kempe guilty of possession of methamphetamine.

2. The trial court erred in finding that Ms. Kempe stated that she had used methamphetamine before, but quit using a year ago and concluded that the methamphetamine may have been left over from that timeframe. Written Finding of Fact No. 8; CP 44.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court abuse its discretion when it failed to consider the affirmative defense of unwitting possession before finding Ms. Kempe guilty of possession of methamphetamine?

C. STATEMENT OF THE CASE

On September 28, 2009, Trooper Spencer of the Washington State Patrol stopped Ms. Kempe while she was driving her car. CP 43. Trooper Spencer was initially investigating the passenger, Michael Davis, who was the subject of an unspecified on-going investigation. CP 43, RP 12-13. Trooper Spencer had Ms. Kempe get out of her car and took her to his patrol car, where he ran her information with DOL. CP 43. Trooper Spencer left Davis sitting in the passenger's seat of Ms. Kempe's car and told him to keep his hands on the dashboard. RP 21-22.

Trooper Spencer read Ms. Kempe a search consent card and obtained her permission to search her car. RP 10, 31. Because Davis was the target, Trooper Spencer attempted to maintain eye contact on him while talking with Ms. Kempe. RP 27-28. However this surveillance was not constant, as when Trooper Spencer read the consent card to Ms. Kempe or when he was placing Ms. Kempe in his patrol car. RP 30-31.

At one point Trooper Spencer saw that Davis had taken his hands off the dashboard. RP 22. Trooper Spencer ordered Davis to put his hands back on the dashboard. Davis eventually complied after some arguing. RP 29. Trooper Spencer ended up taking Davis out of the car, patting him down and placing him in his patrol car. RP 29. He had Ms. Kempe step out of the patrol car and stand by her car while he searched it. RP 22-23.

On the right rear floor board area behind the passenger's seat Trooper Spencer located a pink Victoria's Secret shopping bag, which Ms. Kempe said was hers. RP 11-12. Inside the bag, Trooper Spencer located a small fabric zipper pouch which contained a small plastic container. Inside this container were several small baggies of white crystal powder, later determined to be methamphetamine. CP 44-45. Ms. Kempe stated at the time of the search and later under oath in trial, that the zipper pouch

containing the methamphetamine did not belong to her, but all the other items did. CP 44; RP 14. Ms. Kempe told the trooper that she had used methamphetamine before, but quit using a year ago, and said it was possible that the methamphetamine may have been left over from that timeframe. RP 18. At trial she admitted making the statement but also stated, “I don’t know why I would have anything like that in my bag after years—you know what I mean—and not wanting anything to do with it in the first place.” RP 53.

The Victoria's Secret bag also contained another small zipper pouch which contained a smoking device and a small amount of green vegetable matter. Defendant identified the matter as being marijuana and belonging to her. A further search of the vehicle revealed a glass smoking device with residue located between the right side of the driver's seat and center console. RP 24-26; CP 44.

Trooper Spencer testified that Davis could have reached around from the passenger’s seat where he was sitting and dropped something in the Victoria's Secret shopping bag. RP 24. Trooper Spencer further testified that Davis could have reached to the right side of the driver’s seat between the driver’s seat and center console. RP 24.

Ms. Kempe waived jury and tried her case to the court. RP 3-5. She asserted an unwitting possession defense to the charge of possessing methamphetamine. RP 67-72. Following closing arguments, the court made a number of inquiries to the lawyers regarding unwitting possession, constructive possession, strict liability, and whether possession requires ownership. RP 72-76. The court concluded that Ms. Kempe had dominion and control over the methamphetamine and marijuana because the items were in her bag that was in her car. As such, she was guilty of possession of a controlled substance, methamphetamine and possession of marijuana, less than 40 grams. CP 45; RP 76-81. This appeal followed. CP 23-40. Additional facts will be added to the argument where appropriate.

D. ARGUMENT

The trial court abused its discretion when it failed to consider the affirmative defense of unwitting possession before finding Ms. Kempe guilty of possession of methamphetamine.¹

A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Ryan v. State*, 112 Wn.App. 896, 899, 51 P.3d 175 (2002) (citing *State ex rel. Carroll v. Junker*, 79

¹ This issue encompasses both assignments of error.

Wn.2d 12, 26, 482 P.2d 775 (1971)). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *Ryan*, 112 Wn.App. at 899-900 (citing *In re Marriage of Littlefield*, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997)) A decision based on a misapplication of law rests on untenable grounds. *Ryan*, 112 Wn.App. at 900 (citing *Ausler v. Ramsey*, 73 Wn. App. 231, 235, 868 P.2d 877 (1994)). A clear misstatement of the law is presumed prejudicial. *Thompson v. King Feed & Nutrition Serv., Inc.*, 153 Wn.2d 447, 453, 105 P.3d 378 (2005).

The law regarding the defense of unwitting possession is well-established. The State has the burden of proving the elements of unlawful possession of a controlled substance as defined in the statute--the nature of the substance and the fact of possession. *State v. George*, 146 Wn.App. 906, 914-15, 193 P.3d 693 (2008). Defendants then can prove the affirmative defense of unwitting possession. This affirmative defense ameliorates the harshness of a strict liability crime. *George*, 146 Wn.App. at 915 (citing *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190

(2004). Unwitting possession must be proved by a preponderance of the evidence. *Id.* (citing *State v. Balzer*, 91 Wn. App. 44, 67, 954 P.2d 931 (1998)). The evidence must show that the defendant "[did not know that the substance was in [his or her] ... possession] [or] [did not know the nature of the substance]." 11 WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 52.01 (2d ed.1994); *State v. Buford*, 93 Wn. App. 149, 152, 967 P.2d 548 (1998). The defense must be considered in light of all the evidence presented at trial, without regard to which party presented it. *State v. Olinger*, 130 Wn.App. 22, 26, 121 P.3d 724 (2005) (citing *State v. Callahan*, 87 Wn. App. 925, 933, 943 P.2d 676 (1997)).

Here, the trial court failed to even consider the affirmative defense of unwitting possession to the charge of possessing methamphetamine. There is no question that sufficient evidence was presented during the trial to warrant consideration of this defense by the court. The essence of the defense was that Davis placed the pouch containing methamphetamine in the Victoria's Secret shopping bag, and placed the glass pipe between the driver's seat and console while the trooper was talking to Ms. Kempe in his patrol car.

When Trooper Spencer had Ms. Kempe get out of her car and took her to his patrol car, he left Davis sitting in the passenger's seat of Ms.

Kempe's car, even though Davis was the target of his investigation. RP 21-22. He attempted to maintain eye contact on him while talking with Ms. Kempe, but this surveillance could not have been constant. Trooper Spencer was doing other things such as reading the consent card to Ms. Kempe or placing her in his patrol car. RP 27-31.

Trooper Spencer admitted that Davis could have reached around from the passenger's seat where he was sitting and dropped something in the Victoria's Secret shopping bag. RP 24. He also admitted that Davis could have reached to the right side of the driver's seat between the driver's seat and center console where the glass pipe was found. RP 17, 24. The evidence further revealed that at one point Davis had taken his hands off the dashboard, even though he had previously been told to keep them there. RP 22.

Ms. Kempe stated at the time of the search and later under oath in trial, that the zipper pouch containing the methamphetamine did not belong to her, but all the other items did. CP 44; RP 14. Ms. Kempe told the trooper that she had used methamphetamine before, but quit using a year ago, and said it was possible that the methamphetamine may have been left over from that timeframe. RP 18. At trial she admitted making the statement but also stated, "I don't know why I would have anything

like that in my bag after years—you know what I mean—and not wanting anything to do with it in the first place.” RP 53.² She also argued unwitting possession in closing argument. RP 67-72.

Despite hearing all this evidence and argument, the court merely concluded that Ms. Kempe had dominion and control over the methamphetamine because it was in her bag that was in her car, and was therefore guilty. The court gave no consideration to the unwitting possession defense. CP 45.

Following closing arguments, the court made a number of inquiries to the lawyers regarding unwitting possession, constructive possession, strict liability, and whether possession requires ownership. RP 72-76. These inquiries, together with the court’s responses and comments made while rendering its decision, suggest a misunderstanding of the defense of unwitting possession. Nowhere in its oral or written ruling does the court find that Ms. Kempe failed to establish the affirmative defense of unwitting possession by a preponderance of the evidence. Instead the court appears to believe that somehow constructive possession negates or trumps any consideration of unwitting possession. See RP 77-81.

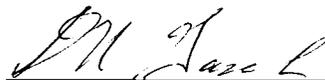
² Contrary to the trial court’s Written Finding of Fact No. 8, CP 44, Assignment of Error No. 2. Nowhere in the record did Ms. Kempe *conclude* that the methamphetamine may have been left over from that timeframe.

The court's findings and conclusions, or lack thereof, constitute a misunderstanding and misstatement of the law pursuant to the legal authority cited above. A decision based on a misapplication of law rests on untenable grounds. *Ryan*, supra. A clear misstatement of the law is presumed prejudicial. *Thompson v. King Feed & Nutrition Serv., Inc.*, supra. Therefore, the court's failure to consider the affirmative defense of unwitting possession before finding Ms. Kempe guilty of the charge of possessing methamphetamine was an abuse of discretion.

E. CONCLUSION

For the reasons stated, the conviction for possession of methamphetamine should be reversed.

Respectfully submitted February 24, 2011.



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