

FILED

DECEMBER 20, 2011

No. 30101-0-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

RACHAEL A. CASSELL,

Defendant/Appellant.

Appellant's Brief

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR.....4

B. ISSUE PERTAINING TO ASSINGMENT OF ERROR.....4

C. STATEMENT OF THE CASE.....4

D. ARGUMENT.....6

Ms. Cassell’s right to due process under Washington Constitution,
Article 1, § 3 and United States Constitution, Fourteenth
Amendment was violated where the State failed to prove an
essential element of the crime of possession of marijuana, to wit,
that the substance was in fact marijuana.....6

E. CONCLUSION.....15

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>In re Winship</u> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	6
<u>United States v. Dominguez</u> , 992 F.2d 678, (7th Cir.),cert. denied, 510 U.S. 891, 114 S.Ct. 250, 126 L.Ed.2d 203 (1993).....	8, 10, 14
<u>In re Delmarter</u> , 124 Wn.App. 154, 101 P.3d 111 (2004).....	12, 13
<u>In re Reismiller</u> , 101 Wn.2d 291, 678 P.2d 323 (1984).....	8
<u>State v. Baeza</u> , 100 Wn.2d 487, 670 P.2d 646 (1983).....	6, 8

State v. Collins, 2 Wn. App. 757, 470 P.2d 227, 228 (1970).....7

State v. Colquitt, 133 Wn.App. 789, 137 P.3d 892 (2006).....8, 9

State v. Eddie A., 40 Wn.App. 717, 700 P.2d 751 (1985).....8

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980).....7

State v. Hernandez, 85 Wn.App. 672, 935 P.2d 623 (1997).....8, 13

State v. Moore, 7 Wn. App. 1, 499 P.2d 16 (1972).....6, 7

State v. Myers, 133 Wn.2d 26, 941 P.2d 1102 (1997).....8

State v. Partin, 88 Wn.2d 899, 567 P.2d 1136 (1977).....7

State v. Roche, 114 Wn.App. 424, 59 P.3d 682 (2002).....11, 12, 13

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992).....7

State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1973).....7

State v. Theroff, 25 Wn. App. 590, 608 P.2d 1254,
aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).....7

State v. Zamora, 63 Wn. App. 220, 817 P.2d 880 (1991).....8

State v. Watson, 231 Neb. 507, 437 N.W.2d 142 (1989).....9

Constitutional Provisions

United States Constitution, Fourteenth Amendment.....6

Washington Constitution, Article 1, § 3.....6

A. ASSIGNMENT OF ERROR

The evidence was insufficient to support the conviction for possession of marijuana.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Was Ms. Cassell's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment violated where the State failed to prove an essential element of the crime of possession of marijuana, to wit, that the substance was in fact marijuana?

C. STATEMENT OF THE CASE

Sheriff's deputies searched Ms. Cassell's residence after obtaining a search warrant and found what appeared to be evidence of drugs and drug use. RP 15-19. Ms. Cassell was out of town when the search occurred. RP 92. The items discovered included roaches in a living room ashtray, a bong and several pipes with residue, a white powdery substance that tested positive for methamphetamine, and baggies containing what appeared to be marijuana leaves and resin. RP 19-38.

Deputy Henzel requested the search warrant and participated in the search of the residence. RP 18-19. He testified he had received training in how to identify marijuana and knew its smell and appearance. He stated

he had investigated over 100 cases involving marijuana or the use of drug paraphernalia. The deputy further testified it was the policy in Columbia County Courts that an officer's testimony is sufficient evidence to identify marijuana. Therefore, suspected marijuana or residue is never sent to the crime lab for testing. RP 12-13.

Deputy Henzel testified the bags or baggies he found in Ms. Cassell's residence contained marijuana leaves and marijuana residue. He provided no specific basis for this conclusion. RP 33-34, 38. The roaches found in the ashtray field-tested positive for marijuana. RP 42. A defense objection for lack of proper foundation to the deputy's statement that residue in a pipe was marijuana resin was overruled based on the deputy's previous testimony regarding his training and experience. RP 39.

Ms. Cassell was convicted by the court of possession of methamphetamine and marijuana less than 40 grams, as well as use of drug paraphernalia. RP 105-07. This appeal followed. CP 32-42.

D. ARGUMENT

Ms. Cassell's right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment was violated where the State failed to prove an essential element of the crime of possession of marijuana, to wit, that the substance was in fact marijuana.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment the state must prove every element of a crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in Winship: “[T]he use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” In re Winship, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. State v. Moore, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process

violation. Id. “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting State v. Collins, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)).

In determining the sufficiency of the evidence, the test is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Salinas, 119 Wn.2d at 201, 829 P.2d 1068 (citing State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

While circumstantial evidence is no less reliable than direct evidence, State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. Baeza, 100 Wn.2d at 491, 670 P.2d 646. Specific criminal intent may be inferred from circumstances as a matter of logical probability." State v. Zamora, 63 Wn.App. 220, 223, 817 P.2d 880 (1991).

Generally, a chemical analysis is not vital to uphold a conviction for possession of a controlled substance. See State v. Hernandez, 85 Wn.App. 672, 675, 935 P.2d 623 (1997) (circumstantial evidence and lay testimony may be sufficient to establish the identity of a drug in a criminal case) (citing In re Reismiller, 101 Wn.2d 291, 294, 678 P.2d 323 (1984) and State v. Eddie A., 40 Wn.App. 717, 720, 700 P.2d 751 (1985)). However, an officer's visual identification of the items based on mere conjecture, is insufficient circumstantial evidence by itself to prove the identity of the substance beyond a reasonable doubt. State v. Colquitt, 133 Wn.App. 789, 801, 137 P.3d 892 (2006).

The government's failure to prove the identity of the substance underlying a drug conviction creates a significant problem, as it casts doubt on an essential element of the crime. United States v. Dominguez,

992 F.2d 678, 682 (7th Cir.), cert. denied, 510 U.S. 891, 114 S.Ct. 250, 126 L.Ed.2d 203 (1993). Circumstantial evidence must prove the identity of the substance beyond a reasonable doubt. Whether the State has met its burden of establishing the identity of the items depends on a non-exhaustive list of factors, including: (1) testimony by witnesses who have a significant amount of experience with the drug in question, so that their identification of the drug as the same as the drug in their past experience is highly credible; (2) corroborating testimony by officers or other experts as to the identification of the substance; (3) references made to the drug by the defendant and others, either by the drug's name or a slang term commonly used to connote the drug; (4) prior involvement by the defendant in drug trafficking; (5) behavior characteristic of use or possession of the particular controlled substance; and (6) sensory identification of the substance if the substance is sufficiently unique. Colquitt, 133 Wn.App. at 801, 137 P.3d 892 (citing State v. Watson, 231 Neb. 507, 514-17, 437 N.W.2d 142 (1989) (citations omitted)).

In Dominguez, the court stated that "as long as the available circumstantial evidence establishes its identity [as a controlled substance] beyond a reasonable doubt [,] ... [c]ircumstantial evidence establishing identification may include ... lay-experience based on familiarity through

prior use, trading, or law enforcement." Dominguez, 992 F.2d at 681 (Citations omitted). The Dominguez court, however, emphasized that when the record lacked indicia as to what factors a DEA agent considered in determining the identification of a substance, the prosecution failed to establish the identity of that substance. Dominguez, 992 F.2d at 681-82.

Here, Deputy Henzel testified the bags or baggies he found in Ms. Cassell's residence contained marijuana leaves and marijuana residue. He provided no specific basis for this conclusion. RP 33-34, 38. There was no testimony that the substance smelled or looked like marijuana. The deputy merely stated his conclusion. A defense objection for lack of proper foundation to the deputy's statement that residue in a pipe was marijuana resin was overruled by the court based on the deputy's previous testimony regarding his training and experience. RP 39. In other words, the court reached its verdict that the substance was in fact marijuana, based solely on the deputy's general testimony regarding his training and experience in identifying marijuana. Since the record lacked indicia as to what factors the deputy considered in determining that the substance was marijuana, the prosecution failed to establish that the substance was in fact marijuana. See Dominguez, 992 F.2d at 681-82.

The positive field-test on the roaches found in Ms. Cassell's living-room ashtray is also insufficient to establish the identity of the substance. In State v. Roche, 114 Wn.App. 424, 59 P.3d 682 (2002), the court of appeals reversed a conviction for possession of a controlled substance, even with a police officer's testimony and a positive field test for methamphetamine. Roche, 114 Wn.App. at 431, 440, 59 P.3d 682. Roche appealed his conviction after it was discovered that the State crime lab chemist who tested Roche's substance tampered with evidence to hide his own heroin addiction. Roche, 114 Wn.App. at 428, 59 P.3d 682. A search at Roche's home disclosed the following: a pouch containing a substance that looked like methamphetamine, along with a razor blade and a paper rolled into a device commonly used to ingest drugs; several baggies of powdery substance that appeared to be methamphetamine; a ledger of drug sales; a scale; and \$3,000 in cash. Roche, 114 Wn.App. at 431, 59 P.3d 682. At trial, a deputy testified that the substance: (1) looked like methamphetamine; (2) was packaged in a manner common in the methamphetamine trade; and (3) tested positive for methamphetamine in a field test. Roche, 114 Wn.App. at 431-32, 59 P.3d 682. In addition, the chemist testified that the substances were methamphetamine. Roche, 114 Wn.App. at 432, 59 P.3d 682.

Despite this circumstantial evidence, the court held that the officer's testimony and a positive field test were inadequate for the State to try or sentence the defendant and reversed the conviction. Roche, 114 Wn.App. at 440, 59 P.3d 682.

On the other hand, independent evidence provided to the trial court can be sufficient to find that a substance is what it is purported to be beyond a reasonable doubt, even without reliable laboratory reports, when the defendant admits to the identity of the substance. See, e.g., In re Pers. Restraint of Delmarter, 124 Wn.App. 154, 163-64, 101 P.3d 111 (2004). In Delmarter, the court upheld Delmarter's conviction for possession of cocaine even after it was discovered that the same crime lab chemist in the Roche case tested Delmarter's evidence. Delmarter, 124 Wn.App. at 157, 101 P.3d 111. In Delmarter, however, not only did a field test support Delmarter's conviction, but Delmarter admitted that he had in fact possessed cocaine. Delmarter, 124 Wn.App. at 163-64, 101 P.3d 111. Explicitly distinguishing the facts in Roche, the Delmarter court weighed the additional evidence of the confession in affirming the conviction. Delmarter, 124 Wn.App. at 163, 101 P.3d 111 ("Roche did not admit that the substances found in his home were methamphetamines, despite a positive field test").

The fact pattern in the present case is more similar to Roche than Delmarter, as Ms. Cassell did not confess that the substance found in her residence was marijuana. A challenge to the sufficiency of the evidence, by its terms, is fact sensitive. Hernandez, 85 Wn.App. at 678, 935 P.2d 623. The facts supporting Ms. Cassell's conviction for possession of marijuana are even less indicative of guilt than those in Roche. For example, in Roche, the prosecutor had a strong circumstantial case, including a positive laboratory analysis corroborating the field test, even if its authenticity was questioned. Roche, 114 Wn.App. at 437-38, 59 P.3d 682. Here, in contrast, the State did not have a positive laboratory analysis corroborating the field test on the roaches.

Moreover, in Roche, the deputy testified at trial that the substance looked like methamphetamine and was packaged in a manner common in the methamphetamine trade, while in the present case Deputy Henzel gave only his conclusion that the substance was marijuana. Accordingly, the marijuana conviction herein should be reversed.

In summary, lay testimony and circumstantial evidence may be sufficient to establish the identity of a controlled substance where (1) an independent field test and confession support a conviction for possession of a controlled substance, as in Delmarter, 124 Wn.App. at 163-64; or (2)

the record contains evidence of a law enforcement officer's experience and training that would allow him or her to properly identify the substance, *and* the record contains evidence of what factors that officer considered in determining the identification of the substance. Dominguez, 992 F.2d at 681-82. Other than these two sets of factual circumstances, our courts have been unwilling to find sufficient evidence to identify a controlled substance in a strictly possession case in the absence of a laboratory test. Herein, there was no confession, and the deputy gave no basis for his conclusion that the substance was marijuana. Therefore there was insufficient evidence to establish the essential element that the substance was indeed marijuana.

E. CONCLUSION

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

Respectfully submitted December 20, 2011.

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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on December 20, 2011, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of brief of appellant:

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