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Jun 14, 2013

Court of Appeals

Division III

State of Washington

30716-6-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CELERINO MOJICA-PULIDO, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S AMENDED BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering the following portion of

Finding of Fact 6:

Mr. Mojica was observed near the garage on one of the buys.

(FF/CL re: Suppression Motion, p. 2)

2. The trial court erred in entering Conclusion of Law 2:

The search warrant was lawful and the affidavit established the nexus between the illegal activity, selling methamphetamine, and the residence at 726 North Avenue in Sunnyside, Washington where Mojica lived and sold drugs.

(FF/CL re: Suppression Motion, p. 3)

3. The trial court erred in entering Conclusion of Law 4:

The motion to suppress the evidence found during the search of the residence is denied.

(FF/CL re: Suppression Motion, p. 3)

4. The trial court should have suppressed the evidence seized from the defendant's house pursuant to a search warrant.

5. The trial court erred in finding the defendant guilty of first degree unlawful possession of a firearm, where the evidence was insufficient.

B. ISSUES

1. The affidavit in support of a search warrant alleges that evidence of criminal activity could be found in a detached garage located near a house. The affidavit does not contain observations of criminal activity relating to the house. Should the evidence found in the search of the house be suppressed, because under the Fourth Amendment and Const. Art. I, § 7, the affidavit does not provide probable cause to issue a warrant to search the house?
2. The evidence showed a pistol was found in a detached garage some distance from the house where Mr. Mojica-Pulido was found. He did not own the pistol, and there was no evidence that he used it. Because it should have been suppressed, ammunition found during the search of the house should not be considered in determining whether Mr. Mojica-Pulido possessed the firearm. The only evidence linking him to the detached garage was a traffic citation in his name, found in a drawer in the garage. Under these facts, was the evidence sufficient to support a finding that Mr. Mojica-Pulido constructively possessed the firearm, as

required to find him guilty of first degree unlawful possession of a firearm?

C. STATEMENT OF THE CASE

Sunnyside Detective Scott Bailey set up two controlled buys at the residence of Celerino Mojica-Pulido, located at 726 North Avenue in Sunnyside, using two confidential sources. (RP 152, 182-189). Detective Bailey did not see the confidential sources go into the residence or a detached garage on the property. (RP 188). He stated that other detectives made these observations, and reported that the confidential sources had gone into the garage area. (RP 185-186, 188). In both controlled buys, the confidential sources returned with controlled substances. (RP 182-189, 220-221).

Detective Bailey obtained a search warrant for Mr. Mojica-Pulido's house and the detached garage. (CP 32-33, 35-40; RP 152-153). The search warrant authorized the search for and seizure of "the items relating to the trafficking of methamphetamine and or manufacturing. . . ." (CP 33). In his affidavit for a search warrant, Detective Bailey wrote:

Various sources of information had come forward indicating that [Mr. Mojica-Pulido] was selling quantities of methamphetamine in the area of a school on North Avenue. During the investigation that followed, Detective Bailey was able to determine that the residence at 726

North Avenue, where [Mr. Mojica-Pulido] is living, is located directly across the street from the Sunnyside Christian Elementary School[.]

(CP 38).

Detective Bailey's affidavit also stated that for both controlled buys, the confidential sources approached the detached garage. (CP 38-39). He wrote the following regarding a connection to the house itself:

Detective Bailey additionally believes that though all purchases have been made from [Mr. Mojica-Pulido] out of the detached garage, the documents such as identification along with documentation indicating dominion and control of the residence at 726 North Avenue can be found within the residence itself. There is no indication that the detached garage has been fully converted to an apartment with operational plumbing and sewer services, thus [Mr. Mojica-Pulido] must also utilize the main residence for sanitary purposes along with cooking and other functions.

(CP 39-40).

Law enforcement officers executed the search warrant. (CP 42-43; RP 153-155). Mr. Mojica-Pulido, his father, and his brother were in the house at the time. (RP 154, 205-206, 222). Mr. Mojica-Pulido's bedroom was the northeast bedroom of the house. (RP 246, 271-272).

Detective Bailey found a safe in the closet of the southeast bedroom of the house. (RP 155-156). In the safe, he found, among other items, "a white sock containing twenty-seven rounds of .380 caliber

ammunition . . . plastic Ziploc bags containing a white crystalline substance[,]” and “one clear plastic parcel knotted at the top containing a pinkish crystalline substance.” (RP 157-158). The crystalline substances later tested positive for methamphetamine. (RP 161; Pl.’s Ex. 19). Mr. Mojica-Pulido told officers the items in the safe belonged to him. (RP 263-264, 274-276).

Officers also searched the detached garage. (RP 266-267, 278-279). They found a loaded Hi Point .380 caliber pistol, located under a table covered by a blanket. (RP 163-164, 191-192, 238-239, 279-281). They also found a criminal traffic citation issued to Mr. Mojica-Pulido, located in a drawer. (RP 211-213, 223-225, 267, 281). The officers did not find any other documentation with other names on it in the garage. (RP 269). The phone number for Mr. Mojica-Pulido listed on the traffic citation was 831-2396. (RP 212-213). The phone number called by the confidential source for the second controlled buy was 831-0352. (CP 39; RP 213-214, 223-224).

The State charged Mr. Mojica-Pulido with one count of possession of a controlled substance, methamphetamine, with intent to deliver, with a school zone enhancement, and one count of first degree unlawful

possession of a firearm.¹ (CP 1-6, 66-67, 129-130). Mr. Mojica-Pulido moved to suppress the evidence seized during the execution of the search warrant. (CP 29-52).

Following a hearing, the trial court denied Mr. Mojica-Pulido's motion to suppress. (FF/CL re: Suppression Motion, p. 3); RP 6-48). The trial court entered written findings of fact and conclusions of law on the motion. (FF/CL re: Suppression Motion).

At the jury trial held on the charges, an interpreter testified regarding a phone call made by Mr. Mojica-Pulido from the Yakima County Jail. (RP 130-147). In the call, Mr. Mojica-Pulido mentioned the pistol found in the garage:

But the only thing is that's a fucking problem is . . . the fucking gun that they found in the . . . garage, you know? Well, I was telling them, you know, that somebody had left it there you know? And a lot of people came, people help me[.]

. . . .

They took everything - - the - - just - - they took all - - my wallet too. They took all my shit, you know? They'll probably take over my papers if anything. But . . . I'm not really tripping on that, just on the fucking gun, you know?

(RP 139, 145).

¹ The State also charged Mr. Mojica-Pulido with one count of maintaining a drug building and one count of bail jumping. (CP 129-130). Neither charge is at issue here. The jury did not reach a verdict on the charge of maintaining a drug building, and the State moved to dismiss the bail jumping charge prior to trial. (CP 132, 199; RP 86, 95, 404-409).

Mr. Mojica-Pulido also stated that when the officers arrived to execute the search warrant, he was asleep. (RP 138-139).

Detective Bailey testified that the detached garage is located approximately seventy-five feet from the house. (RP 154, 214). With respect to the first controlled buy, he acknowledged he could not testify that any officer saw Mr. Mojica-Pulido. (RP 214-215). With respect to the second controlled buy, he testified that no officers indicated that they saw Mr. Mojica-Pulido that day. (RP 215).

City of West Richland Police Captain Albert Escalera testified that research was done on the pistol found in the garage, and that no stolen record or ownership record was found. (RP 240).

City of Wapato Police Officer Robert Hubbard testified that the detached garage is located approximately thirty feet from the house. (RP 278). He testified that the pistol found inside was loaded with .380 caliber ammunition, but “I don’t know the brand or the grains on it.” (RP 280-281).

The trial court instructed the jury that in order to find Mr. Mojica-Pulido guilty of first degree unlawful possession of a firearm, it had to find that:

- (1) That on or about November 18, 2008, the defendant knowingly had a firearm in his possession or control;

- (2) That the defendant had previously been convicted of a serious offense; and
- (3) That the possession or control of the firearm occurred in the State of Washington.

(CP 184).

The trial court also instructed the jury on the definition of “possession” and “dominion and control.” (CP 182).

The jury found Mr. Mojica-Pulido guilty of the lesser-included offense of possession of a controlled substance, methamphetamine, and guilty of first degree unlawful possession of a firearm. (CP 196, 198; RP 408-409). Following the jury’s verdict, Mr. Mojica-Pulido moved to arrest judgment on the charge of first degree unlawful possession of a firearm. (CP 202-205). The trial court denied the motion. (RP 419-427). Mr. Mojica-Pulido appealed. (CP 231).

D. ARGUMENT

1. THE TRIAL COURT SHOULD HAVE SUPPRESSED THE EVIDENCE SEIZED FROM THE DEFENDANT’S HOUSE PURSUANT TO A SEARCH WARRANT.

A motion to suppress is reviewed “to determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law.” *State v. Cole*, 122 Wn. App. 319, 322–23, 93 P.3d 209 (2004)

(citing *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). Unchallenged findings of fact are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Conclusions of law are reviewed *de novo*. *Cole*, 122 Wn. App. at 323.

The Fourth Amendment of the United States Constitution and Article I, § 7 of the Washington Constitution protect citizens from unreasonable searches and seizures, and provide that a search warrant may only be issued upon a showing of probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Article I, § 7 of the Washington Constitution provides that “[n]o person shall be disturbed in his private affairs, or his home invaded, without the authority of law.” Wash. Const. Art. 1, § 7.

A search warrant “must be supported by an affidavit that particularly identifies the place to be searched and items to be seized.” *Lyons*, 174 Wn.2d at 359. In order for an affidavit to establish probable

cause, it “must set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched.” *Id.* (citing *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004)). “[P]robable cause requires a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched.” *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (quoting *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)).

This second nexus “cannot be met merely by showing that a drug dealer lives at a particular residence and that drug dealers commonly cache drugs where they live.” *State v. McGovern*, 111 Wn. App. 495, 499, 45 P.3d 624 (2002) (citing *Thein*, 138 Wn.2d at 151).

“It can be met by showing *not only* that a drug dealer lives at a particular residence and that drug dealers commonly cache drugs where they live, *but also* ‘additional facts’ from which to reasonably infer that *this* drug dealer probably keeps drugs at *his or her* residence.” *Id.* at 499-500 (quoting Wayne R. LaFare, *Search and Seizure*, § 3.7(d), at 378-79 (3d. ed. 1996)).

While the courts must evaluate an affidavit in a commonsense, rather than a hypertechnical manner, “the [reviewing] court must still

insist that the magistrate perform his ‘neutral and detached’ function and not serve merely as a rubber stamp for the police.” *Lyons*, 174 Wn.2d at 360 (citations omitted) (internal quotation marks omitted) (alteration in original). The existence of probable cause is a legal question which the reviewing court considers *de novo*. *State v. Chamberlin*, 161 Wn.2d 30, 40, 162 P.3d 389 (2007).

In *State v. Kelley*, a search warrant was granted for a house and an attached carport. *State v. Kelley*, 52 Wn. App. 581, 584, 762 P.2d 20 (1988). The affidavit submitted in support of the search warrant contained observations relating to a detached garage and a barn on the property. *Id.* at 583-84. The court found that there was not probable cause to issue a search warrant for the house. *Id.* at 586. The court reasoned that the affidavit in support of the search warrant contained no information which provided probable cause for a search for the house, but rather, only contained observations regarding the outbuildings on the property. *Id.*

Here, the affidavit submitted in support of the search warrant stated that sources indicated that Mr. Mojica-Pulido was selling methamphetamine in the area of a school. (CP 38). It also detailed two controlled buys from the detached garage near Mr. Mojica-Pulido’s house. (CP 38-40). This information is insufficient to establish a nexus between the item to be seized (items relating to the trafficking or manufacturing of

methamphetamine) and the place to be searched (Mr. Mojica-Pulido's house). *See Thein*, 138 Wn.2d at 140 (*quoting Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997)). As in *Kelley*, the affidavit in support of the search warrant contained no information which provided probable cause for a search for the house. *See Kelley*, 52 Wn. App. at 586. There were no additional facts in the affidavit, beyond the mere fact that Mr. Mojica-Pulido lived in the house, from which to infer that he kept drugs in his residence. *See McGovern*, at 499-500 (*quoting Wayne R. LaFare, Search and Seizure*, § 3.7(d), at 378-79 (3d. ed. 1996)).

Accordingly, Detective Bailey's affidavit in support of a search warrant did not set forth sufficient facts that criminal activity could be found in the house. *See Lyons*, 174 Wn.2d at 359 (*citing Maddox*, 152 Wn.2d at 509). Because the affidavit does not contain observations of criminal activity relating to the house, there was no probable cause for the issuance of a search warrant for the house. *See Thein*, 138 Wn.2d at 140 (*quoting Goble*, 88 Wn. App. at 509). The evidence found in Mr. Mojica-Pulido's house should have been suppressed.

The evidence that should have been suppressed includes all of the evidence found in the safe, both the methamphetamine and the .380 caliber ammunition. (RP 157-158). Because the ammunition should have been suppressed, it should not be considered in evaluating whether the

evidence was sufficient to support Mr. Mojica-Pulido's conviction for first degree unlawful possession of a firearm, discussed below.

2. THE TRIAL COURT ERRED IN FINDING THE DEFENDANT GUILTY OF FIRST DEGREE UNLAWFUL POSSESSION OF A FIREARM, WHERE THE EVIDENCE WAS INSUFFICIENT.

In every criminal prosecution, due process requires that the State prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). When a defendant challenges the sufficiency of the evidence, the proper inquiry is “whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt 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)). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, “[a] claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff’d*, 95 Wn.2d 385, 622 P.2d 1240 (1980)).

In order to find Mr. Mojica-Pulido guilty of first degree unlawful possession of a firearm, the jury had to find that he knowingly had a firearm in his possession or control. (CP 184); *see also* RCW 9.41.040(1)(a) (defining first degree unlawful possession of a firearm). The trial court defined “possession” as:

Possession means having a firearm in one’s custody or control. Possession may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

(CP 182).

Regarding “dominion and control,” the trial court instructed the jury:

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the ability to take actual possession of the item, whether the defendant had the capacity to exclude others from the possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

(CP 182).

Mr. Mojica-Pulido did not have actual possession of the pistol. At the time the pistol was found, Mr. Mojica-Pulido was in the house, and the

pistol was in detached garage. (RP 154, 163-164, 191-192, 205-206, 222, 238-239, 279-281). Therefore, the issue for the jury was whether Mr. Mojica-Pulido had constructive possession of the pistol.

“Constructive possession can be established by showing the defendant had dominion and control over the firearm or over the premises where the firearm was found.” *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). “The ability to reduce an object to actual possession is an aspect of dominion and control.” *Id.* (citing *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989)). “[O]ther aspects such as physical proximity’ should be considered as well.” *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012) (quoting *Hagen*, 55 Wn. App. at 499). “[K]nowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession.” *Id.* at 120 (citing *State v. Hystad*, 36 Wn. App. 42, 49, 671 P.2d 793 (1983)).

The totality of the circumstances must be considered in determining whether a person has dominion and control over the premises. *State v. Alvarez*, 105 Wn. App. 215, 221, 19 P.3d 485 (2001). “Evidence of temporary residence or the mere presence of personal possessions on the premises is, however, not enough.” *Id.* at 222 (citing *State v. Partin*, 88 Wn.2d at 906). In *Alvarez*, the court found that three books of savings

account deposits in the defendant's name, some books, and pictures and newspaper articles relating to him, was insufficient evidence to show the defendant had dominion and control over the premises where a firearm was found. *Id.* at 218-19, 223.

Mr. Mojica-Pulido did not have constructive possession of the pistol found in the detached garage. First, he did not have dominion and control over the pistol itself. He did not own the pistol, and there was no evidence that he used the pistol. (RP 240). Mr. Mojica-Pulido was not in close physical proximity to the pistol. *See Chouinard*, 282 P.3d at 119-20. He was in the house, and the pistol was in detached garage. (RP 154, 163-164, 191-192, 205-206, 222, 238-239, 279-281). Detective Bailey testified that the detached garage is located approximately seventy-five feet from the house. (RP 154, 214). Officer Hubbard testified that the detached garage is located approximately thirty feet from the house. (RP 278). Given this distance, Mr. Mojica-Pulido did not have the ability to reduce the pistol to actual possession. *See Echeverria*, 85 Wn. App. at 703. In addition, he was asleep at the time the search warrant was executed. (RP 138-139).

There was evidence that Mr. Mojica-Pulido knew the pistol was there, but this alone is not enough to establish constructive possession.

See Chouinard, 282 P.3d at 120. Further, there was evidence that the pistol belonged to someone else. (RP 139).

As stated above, because it should have been suppressed, the .380 caliber ammunition found in the safe should not be considered in determining whether the evidence was sufficient to convict Mr. Mojica-Pulido of first degree unlawful possession of a firearm. However, if this court disagrees, the ammunition does not show that Mr. Mojica-Pulido had constructive possession of the pistol. Although the ammunition found in the safe was the same caliber as the ammunition found in the pistol, it was not compared or tested to see if it was compatible with the pistol. (RP 280-281). In addition, there was no evidence that the pistol was routinely kept in the house where Mr. Mojica-Pulido could access it.

Second, Mr. Mojica-Pulido did not have dominion and control over the detached garage. There was no evidence that he lived in the detached garage. It was not an apartment. (CP 39-40). The only evidence linking Mr. Mojica-Pulido to the detached garage was the traffic citation issued in his name. (RP 211-213, 223-225, 267, 281). The presence of this document alone is not enough to establish his dominion and control over the detached garage. *See Alvarez*, 105 Wn. App. at 222-23.

There was no evidence that anyone ever saw Mr. Mojica-Pulido in the detached garage.² (RP 214-215). In addition, the phone number called by the confidential source for the second controlled buy was different from the phone number listed for Mr. Mojica-Pulido on the traffic citation, indicating he was not involved. (CP 39; RP 212-214, 223-224).

A rational jury could not have found Mr. Mojica-Pulido guilty, beyond a reasonable doubt, of first degree unlawful possession of a firearm. *See Salinas*, 119 Wn.2d at 201 (citing *Green*, 94 Wn.2d at 220-22). Thus, the evidence presented at trial was insufficient to support Mr. Mojica-Pulido's conviction for this charge, and this conviction must be reversed and the charge dismissed with prejudice. *See State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005) (stating “[r]etrial following reversal for insufficient evidence is ‘unequivocally prohibited’ and dismissal is the remedy.”) (quoting *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998)).

² Finding of Fact 6 entered following the suppression hearing states, in relevant part, that “Mr. Mojica was observed near the garage on one of the [controlled] buys.” (FF/CL re: Suppression Motion, p. 2). However, there was no evidence presented at the suppression hearing to support this finding. (RP 6-48). Therefore, this finding is not supported by substantial evidence, and the trial court erred in entering it. *See State v. O’Neill*, 148 Wn.2d at 571 (in order to be binding, challenged findings of fact entered after a suppression hearing must be supported by substantial evidence).

E. CONCLUSION

The trial court should have suppressed the evidence found in Mr. Mojica-Pulido's house. Mr. Mojica-Pulido's conviction for possession of a controlled substance, methamphetamine, should be dismissed, and the .380 caliber ammunition found in the safe should not be considered in determining whether the evidence was sufficient to convict him of first degree unlawful possession of a firearm.

The evidence was insufficient to support Mr. Mojica-Pulido's conviction for unlawful possession of a firearm in the first degree, because the State failed to prove constructive possession. Mr. Mojica-Pulido's conviction for first degree unlawful possession of a firearm must be reversed and the charge dismissed with prejudice.

Dated this 14th day of June, 2013.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 30716-6-III
)	
vs.)	CERTIFICATE
)	OF MAILING
CELERINO MOJICA-PULIDO,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on June 14, 2013, I served a copy of Appellant's Amended Brief in this matter by email to the attorney for the respondent, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on June 14, 2013, I mailed a copy of Appellant's Amended Brief in this matter to:

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