

No. 31115-5-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED
JAN 27, 2014
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON, Respondent

v.

BRIAN M. PARKER, Appellant

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The State's evidence was insufficient to support the conviction.

Issues Pertaining to Assignment of Error

A. Was the evidence insufficient to support the conviction because the State failed to prove beyond a reasonable doubt that Brian M. Parker had dominion and control over the methamphetamine? (Assignment of Error 1).

B. Was the evidence insufficient to support the conviction because Mr. Parker showed unwitting possession of the methamphetamine? (Assignment of Error 1).

II. STATEMENT OF THE CASE

Mr. Parker was charged by information with one count of unlawful possession of a controlled substance, methamphetamine. (CP 1). The case proceeded to jury trial.

On April 12, 2011, Detective Roman Trujillo of the Kennewick Police Department was involved in an operation targeting Angel Paradise, who was suspected of selling marijuana at 710 S. Fir. (3/5/12 RP 53). The police were going to execute a search warrant there. (*Id.*) Detective Trujillo saw Mr. Parker and

Ms. Paradise leave in his car; they were stopped shortly thereafter. (*Id.* at 54-55). Although not in his report, the detective saw Mr. Parker go to the trunk and then get inside the car. (*Id.* at 55-57).

Detective Cheryl Veitenheimer was on surveillance at 710 S. Fir on April 12, 2011. (3/5/12 RP 61). She saw Mr. Parker and Ms. Paradise arrive in a car. He removed some items from the car trunk and took them inside the home. (*Id.* at 62). The two left and were stopped less than a minute later. (*Id.* at 62-63).

Detectives Isaac Merkl and Chris Slocombe were waiting on April 12, 2011, for Ms. Paradise to leave the house and arrest her on probable cause for delivery of drugs. (3/5/12 RP 68). They stopped Mr. Parker's car to effect the arrest of Ms. Paradise. (*Id.* at 70). Detective Merkl detained her while Detective Slocombe made contact with Mr. Parker. (*Id.*).

Detective Slocombe had no intention of actually contacting Mr. Parker, but for safety issues, he went up to the driver and stood right beside him. (3/5/12 RP 76). The car's window was open and the detective was going to keep an eye on him. (*Id.*). On approaching the car, however, he smelled the odor of marijuana

inside. (*Id.*). Detective Slocombe told Mr. Parker he could smell marijuana coming from the car and was going to detain him. (*Id.* at 77). He could also smell marijuana on Mr. Parker's person. (*Id.*).

Detective Slocombe asked him to get out of the car and to get his license so he could identify him. (3/5/12 RP 77). Mr. Parker grabbed his wallet out of Ms. Paradise's purse and asked the detective to pull a card out. (*Id.* at 78). It was a legal advice card saying he was not going to answer questions by police. (*Id.*). Detective Slocombe did not ask Mr. Parker any questions and just responded to his about what was going on. (*Id.*).

Mr. Parker then said he had a pipe in his pocket and blurted out he did not give consent to a search of his vehicle. (3/5/12 RP 78). The car was subsequently searched pursuant to a warrant. (*Id.* at 79-80). As part of the search warrant, Detective Slocombe opened the trunk with Mr. Parker's keys. (*Id.* at 89). He found a black bag filled with items, including methamphetamine. (*Id.* at 103). Mr. Parker was arrested on April 12, 2011, for misdemeanor possession of the pipe.

Detective Slocombe testified Mr. Parker was not suspected of being involved in any of the marijuana sales by Ms. Paradise.

(3/6/12 RP 144-45). He said the items in the black bag found in the trunk contained tools of the trade of a drug dealer. (*Id.* at 147).

Moreover, the detective was unable to find anything at all establishing who would be the owner of the bag. (*Id.*).

The jury found Mr. Parker guilty as charged. (3/6/12 RP 244; CP 101). The court sentenced him to a standard range sentence of 24 months. (CP 125). This appeal follows. (CP 132).

III. ARGUMENT

A. The evidence was insufficient to support the conviction because the State failed to prove beyond a reasonable doubt that Mr. Parker had dominion and control over the methamphetamine.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). So viewed, the State's evidence still fell short of showing by the requisite quantum of proof that Mr. Parker had dominion and control over the methamphetamine in the car's trunk. *State v. Stevenson*, 128 Wn. App. 179, 192, 114 P.3d 699 (2005).

The to-convict instruction stated the element of the crime that “on or about the 12th day of April, 2011, [Mr. Parker] possessed a controlled substance, methamphetamine.” (CP 92). Instruction 9 defined possession:

Possession means having a substance in one’s custody or control. It may be either actual or constructive. Actual possession occurs when an 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 substance.

Proximity alone, without proof of dominion and control, is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession. In deciding whether the defendant had dominion and control over a substance, you are to consider all of the relevant circumstances in the case.

Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision. (CP 93-94).

Mr. Parker did not have actual physical custody of the methamphetamine so the question is whether he had constructive

possession, which requires dominion and control over the substance. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994).

The methamphetamine was found in the car's trunk in a bag, but there was nothing establishing who owned the bag. (3/6/12 RP 147). Before the stop, Mr. Parker was only seen removing items from the trunk. (3/5/12 RP 62). He was not observed putting anything into it. (*Id.* at 57). The bag contained the tools of the trade of a drug dealer, but Mr. Parker was not suspected of such activity. (*Id.* at 72, 76). Although the bag was in the car, proximity alone is insufficient to show dominion and control. *Staley*, 123 Wn.2d at 801. Since the methamphetamine was in a bag inside a bag in the trunk of the car, Mr. Parker did not have immediate access to it. Moreover, the State made no showing he had the ability to exclude others from possessing the methamphetamine in the bag simply because he had the car keys. Detective Slocombe acknowledged he did not "recall anything – anything we would call an article of dominion." (3/6/12 RP 147).

Although credibility is for the jury to determine, the existence of facts cannot be based on guess, speculation, or conjecture.

State v. Hutton, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). But to find the essential element that Mr. Parker possessed methamphetamine, the jury had to resort to speculation because the evidence showed only that the bag containing the substance was in his car trunk – not that he had dominion and control over it. Accordingly, Mr. Parker did not have constructive possession of the methamphetamine. *Staley, supra*. The conviction must be reversed.

B. The evidence was insufficient to support the conviction because Mr. Parker showed unwitting possession of the methamphetamine.

In any event, the possession was unwitting. Mr. Parker admitted having a marijuana pipe, but said nothing about methamphetamine. The detectives further testified the bag contained all the tools of the trade of a drug dealer and that Mr. Parker was neither suspected of being a dealer nor was he involved in Ms. Paradise's drug deliveries. Even if it is assumed he was in constructive possession of the substance, the circumstantial evidence nonetheless showed by a preponderance that his possession was unwitting. *State v. Bradshaw*, 152 Wn.2d 528,

538, 98 P.3d 1190 (2004), *cert. denied*, 544 U.S. 922 (2005). The conviction cannot stand.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Parker urges this court to reverse his conviction and dismiss the charge.

DATED this 27th day of January, 2014.



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CERTIFICATE OF SERVICE

I certify that on January 27, 2014, I served a copy of the brief of appellant by first class mail, postage prepaid, on Brian M. Parker at his last-known address, 4804 W. Henry, Kennewick, WA 99301; and by email, as agreed by counsel, on Andrew K. Miller at prosecuting@co.benton.wa.us.


