

No. 31419-7-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

FILED
Aug 06, 2013
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON, Respondent

v.

MIGUEL AMEZOLA, Appellant

APPEAL FROM THE SUPERIOR COURT
OF BENTON COUNTY
THE HONORABLE CAMERON MITCHELL

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

- A. The trial court erred when it entered Finding of Fact 12: “The pills were found to contain morphine sulfate, a schedule I narcotic.” CP 19.
- B. The trial court erred when it entered Finding of Fact 27: “The white crystal material was tested and found to contain methamphetamine, a controlled substance.” CP 20.
- C. The trial court erred when it found that Mr. Amezola was guilty of unlawful possession of a controlled substance. CP 20.
- D. The trial court erred when it found that Mr. Amezola was guilty of being an alien in possession of a firearm. CP 20.
- E. The evidence was insufficient to sustain a conviction for possession of controlled substances.
- F. The evidence was insufficient to sustain a conviction for alien in possession of a firearm without a permit.
- G. The trial court erred when it imposed a \$600 domestic violence fine as part of the legal financial obligations.

Issues Related To Assignments of Error

- A. Was The Evidence Insufficient To Sustain A Conviction For Possession Of Controlled Substances?
- B. Was The Evidence Insufficient To Sustain A Conviction For Alien In Possession Of A Firearm Without A Permit?
- C. Did The Trial Court Err When It Imposed A \$600 Domestic Violence Fine As Part Of The Legal Financial Obligations?

II. STATEMENT OF FACTS

Miguel Amezola was charged with possession of a controlled substance, methamphetamine and/or morphine, and possession of a firearm without an alien firearm permit. CP 1-2. At a CrR 3.5 hearing, the court ruled statements made by Mr. Amezola were freely, voluntarily and intelligently given. CP 15-16. The matter proceeded to a stipulated facts trial. CP 17; (1/16/13 RP 31-32). Police reports recorded the following pertinent events that occurred on November 23, 2012. CP 21-33.

Richland police officer Garcia saw a male driver, Mr. Amezola, and ran a random license plate check. CP 22. The front license plate did not match the rear plate, and neither plate matched the vehicle. CP 23. After he was stopped, Mr. Amezola explained he had borrowed the vehicle from a friend named

“Sergio” and was unaware there was a problem with the license plates. He produced papers showing an expired California license tab that matched the VIN for the vehicle. He was arrested for driving without a valid operator’s license. CP 23.

In a search incident to arrest, the officer found Mr. Amezola’s wallet contained his ICE identification card, a Social Security card in the name of Jose Ramos, and a pill bottle in his front pants pocket. CP 23. Officers reported he said he used the fictitious name so that he could work. CP 23. In a later discussion with an ICE agent, officers learned that Mr. Amezola was out on bond from an ICE hold. CP 23.

The officer reported he observed, through the driver’s side window, a glass pipe with burnt residue on the driver’s side floorboard. The car’s ignition was missing. CP 23. The car was impounded, and officers subsequently obtained a search warrant for the vehicle. CP 27.

During the search of the vehicle officers found, among other items, new and used glass pipes and a plastic container holding a white crystal substance. CP 27,31. The substance in the plastic container field-tested positive for methamphetamine. CP 20.

Officer Garcia lifted a gray jacket from behind the passenger seat

on the floorboard and a 9mm handgun fell out. CP 28. The officers secured a second warrant to search the locked trunk and under the hood of the vehicle. CP 28. The only item of interest located in the trunk was a small scale. CP 28.

Mr. Amezola was found guilty of unlawful possession of a controlled substance and alien in possession of a firearm. CP 20; 34. In the judgment and sentence, the trial court ordered a \$600 domestic violence penalty assessment. CP 37. This appeal follows. CP 44.

III. ARGUMENT

In a stipulated facts trial, as here, the defendant merely agrees that what the State presents is what the witnesses would say. *State v. Johnson*, 104 Wn.2d 338, 342, 705 P.2d 773 (1985). The trial court independently reviews the evidence and makes its own findings of fact. *State v. Mierz*, 127 Wn.2d 460, 468-69, 901 P.2d 286 (1995). Following a bench trial, the factual findings are reviewed for substantial evidence, and the legal conclusions *de novo*. The reviewing court determines whether the findings support the conclusions. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003). Sufficiency of the evidence is a question of constitutional magnitude and may be raised for the

first time on appeal. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983).

A. The Evidence Insufficient To Sustain A Conviction For Possession Of A Controlled Substance.

Due process rights, guaranteed under the United States Constitution and the Washington Constitution, require the State to prove every element of a crime charged beyond a reasonable doubt. U.S. Const. Amend. VI; Const. art. 1 §3,22;. *Baeza*, 100 Wn.2d at 488. 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, 615 P.2d 628 (1980).

To convict Mr. Amezola of the offense of possession of methamphetamine, a controlled substance as defined by statute, the State was required to prove the fact of possession and the nature of the substance RCW 69.50.401;4013(1). The State did not meet that burden.

Mr. Amezola was charged by information of possessing two different controlled substances, methamphetamine and/or

morphine. CP 1. He was found guilty only of possession of methamphetamine. (1/30/13 RP 5). Officer Garcia's report noted that during the impound search of the vehicle:

"I located a plastic container that I found in a plastic bag on the floorboard behind the passenger seat. In the container I found a small plastic bindle and I handed it to Cpl. Croskrey....He later field tested the substance and it tested positive for Methamphetamine." CP 28.

Corporal Croskrey's supplemental report read:

"Officer Garcia also handed me a plastic container that contained a white/crystal substance inside. I field tested the substance and it tested positive for Methamphetamine....I completed a Washington State Patrol request for laboratory examination for and will be sending Evidence item 13 to the lab for examination." CP 27.

"Cpl. Croskrey also filled out a Washington State Patrol request for laboratory examination for Item 13 [the suspect substance]. CP 28.

In this case, the only evidence in the record regarding the identification of the white substance found in the vehicle was the police account and the field test.

In *Colquitt*, a booking search of Colquitt yielded a small plastic bag with several white, rocklike items in his pants pocket. *State v. Colquitt*, 133 Wn. App. 789, 792, 137 P.3d 892 (2006). The arresting officer reported that the substance appeared to be rock cocaine; a field test reported a positive result for the presence of

cocaine. *Id.* at 793. The State did not conduct a laboratory test and the court did not have any laboratory reports before it. *Id.* at 794. The Court reversed the conviction, holding that “[T]he police report, the only evidence offered to establish the identity of the substance, contains a statement that the officer thought the substance appeared to be cocaine and that the substance tested positive in a field test for cocaine. We agree with *Colquitt*, speculation and an unverified field test, with nothing more is insufficient to support the conviction.” *Id.*

The Court went on to trace a line of cases that centered on the type of evidence necessary to uphold a conviction for possession of a controlled substance. Beginning with *Hernandez*, the Court pointed out that chemical analysis is not vital to uphold a conviction, however, in each case analyzed, lay testimony and circumstantial evidence was of such a caliber as to remove the guesswork out of the conviction.

For example, in *Hernandez*, the evidence was sufficient in several delivery or possession with intent to deliver charges because officers provided detailed testimony about their expertise in (1) identifying drugs and drug-sale behaviors, (2) their observations of behavior consistent with drug sales, (3) the drug-

using behavior of persons who contacted the defendants, (4) discovery of materials on the defendants consistent with those they saw the defendants delivery; and (5) discovery of money in amounts consistent with drug sales. Moreover, the State *also* presented laboratory tests demonstrating that the materials found on the defendants were controlled substances. *Id.* at 796-97 (internal citations omitted).

In *State v. Roche*, on retrial, the Court held that an officer's testimony and a positive field test were inadequate for the State to try or sentence the defendant. *State v. Roche*, 114 Wn.App. 424, 440, 59 P.3d 682 (2002). A search at Roche's home resulted in the finding of a pouch containing a substance that looked like methamphetamine, a razor blade, a paper 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. Because it was discovered later that the chemist who laboratory tested the substance had tampered with other type of drug evidence, Roche appealed his conviction. Even with the strong circumstantial evidence, the Court held "there must be a good confession and a positive field test to meet the sufficiency test." *Id.* at 439.

In *Delmarter*, the Court found the evidence sufficient, even without reliable laboratory results. *In re Pers. Restraint of Delamrter*, 124 Wn.App. 154, 163-64, 101 P.3d 111 (2004). In that case, while there was only a positive field test, it was accompanied by Delmarter's confession. *Id.*

Here, the facts are definitively similar to *Colquitt* and *Roche*. There was no confession or admission of possession of methamphetamine. No record was made of the officer's training and experience that would allow him to identify the substance as methamphetamine. Although the police report indicated the substance was going to be sent to the Washington State Patrol Crime Lab, there was no laboratory report in the record that established identification of the substance.

As the *Colquitt* court so elegantly stated: "Finally, if an officer's opinion and field test, without more, is sufficient in this case to prove the identity of a controlled substance beyond a reasonable doubt, then an officer's opinion and field test, without more, certainly will be sufficient in other trials. Such an evidentiary standard would eliminate the need for laboratory tests, laboratory reports, or forensic chemists. *Colquitt*, 133 Wn.App. at 802.

The trial court's finding of fact 27, "The white crystal material was tested and found to contain methamphetamine, a controlled substance" is not supported by substantial evidence. The conviction for possession of a controlled substance should be reversed and the matter remanded to vacate the judgment with prejudice.¹

B. The Evidence Insufficient To Sustain A Conviction For Alien In Possession Of A Firearm Without A Permit.

In the crime of "Unlawful possession of a Firearm by an Alien" the State must prove that the accused is not a lawful permanent resident, that he possessed a firearm, and that he did not have an alien firearm license. RCW 9.41.171. Mr. Amezola contends there was no evidence establishing beyond a reasonable doubt that he possessed the firearm found in the borrowed car he drove.

¹ The judgment and sentence indicates the only drug Mr. Amezola was convicted of possessing was Methamphetamine. CP 34. The trial court made a finding that the pills found during the arrest search were a Schedule I narcotic. The argument about the pills is the same as the white substance: no evidence was presented substantiating that finding.

Actual possession occurs when the firearm is in the personal custody of the person charged. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Access and proximity to the firearm are insufficient to establish actual possession. *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969). Here, because access and proximity are insufficient to establish actual possession, and Mr. Amezola did not have the gun on his person there was no actual possession of the gun.

Constructive possession requires a showing of dominion and control over the item or over the premises where the firearm was found. *State v. Echeverria*, 85 Wn.App. 777, 783, 934 P.2d 1214 (1997). Close proximity alone is not enough to establish constructive possession. *State v. Davis*, 117 Wn.app. 702, 708-09, 72 P.3d 1134 (2003), rev. denied, 151 Wn.2d 1007 (2004). Whether an individual has dominion and control is evaluated by considering the totality of the circumstances. *State v. Partin*, 88 Wn.2d 889, 906, 567 P.2d 1136 (1977).

Here, the ownership of the vehicle was never established: Mr. Amezola told police that he had borrowed the car, and the police investigation revealed the registered owner lived somewhere in Washington. The weapon was found inside of a grey jacket,

behind the passenger seat on the floorboard. No evidence was presented as to the identity of the owner of the coat. The weapon was not reported as stolen. CP 28. No fingerprints were taken from the weapon.

The court's conclusion that Mr. Amezola was guilty of alien in possession of a firearm without a permit is not supported by substantial evidence. This conviction should be reversed and dismissed with prejudice.

C. The Trial Court Erred When It Imposed A \$600 Domestic Violence Fine As Part Of The Legal Financial Obligations.

Whenever a person is convicted in superior court, the court may order the payment of a legal financial obligation as part of the sentence. The court must on either the judgment and sentence or on a subsequent order to pay, designate the total amount of a legal financial obligation and segregate this amount among the separate assessments made for restitution, costs, fines, and other assessments required by law.

RCW 9.94A.760.

The trial court here imposed a \$600 domestic violence penalty assessment, relying on RCW 10.99.080. CP37. RCW 10.99.080(1) is as follows:

(1) All superior courts, and courts organized under Title 3 or 35 RCW, may impose a penalty assessment not to exceed one hundred dollars on any person convicted of a crime involving domestic violence.

Mr. Amezola was not convicted of a crime involving domestic violence, and the delineated amount is beyond the court's statutory authority to impose. Accordingly, Mr. Amezola should be relieved of paying the assessment.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Amezola respectfully asks this Court to reverse his convictions and dismiss all charges with prejudice. He further requests that he be relieved of paying the domestic violence fine.

Dated this 6th day of August 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant Miguel Amezola, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that on August 6th, 2013 that a true and correct copy of the Brief of Appellant was emailed per agreement between the parties to :

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