

No. 31829-0-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

FILED  
APR 07, 2014  
Court of Appeals  
Division III  
State of Washington

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STATE OF WASHINGTON, Respondent,

v.

THOMAS ALVA CURTIS, Appellant.

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

I. Assignment of Error.....1

    1. The court erred by not giving the unwitting possession instruction requested by the defense.....1

*Issue Pertaining to Assignment of Error*

        A. When evidence supported it, did the court err by not giving the unwitting possession instruction requested by the defense? (Assignment of Error 1).....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....5

    A. The court erred by not giving the unwitting possession instruction when the evidence supported it.....5

IV. CONCLUSION.....8

TABLE OF AUTHORITIES

Table of Cases

*State v. Balzer*, 91 Wn. App. 44, 954 P.2d 931, *review denied*, 136 Wn.2d 1022 (1998).....6

*State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004), *cert. denied*, 544 U.S. 922 (2005).....5

*State v. Buford*, 93 Wn. App. 149, 967 P.2d 548 (1998).....6, 8

*State v. Deer*, 175 Wn.2d 725, 287 P.3d 539 (2012).....5

*State v. Staley*, 123 Wn.2d 794, 872 P.2d 502 (1994).....7, 8

Other Authority

WPIC 52.01 .....5

## I. ASSIGNMENT OF ERROR

1. The court erred by not giving the unwitting possession instruction requested by the defense.

### *Issue Pertaining to Assignment of Error*

A. When the evidence supported it, did the court err by not giving the unwitting possession instruction requested by the defense? (Assignment of Error 1).

## II. STATEMENT OF THE CASE

Thomas Alva Curtis was convicted of one count of unlawful possession of a controlled substance – methamphetamine. (CP 117). By stipulation of the State and Mr. Curtis, the court imposed an exceptional sentence of 12 months and one day when the standard range was 6-12 months. (CP 121, 129).

On October 5, 2012, Officer Kelly Gregory received a report that Margaret Horn, who had a felony warrant, was seen at the Wenatchee Valley Mall. (7/11/13 RP 135-36). The officer showed up at the mall and tried to find her. (*Id.* at 136). He saw a male, who might have been sleeping, and a female near the breezeway by Shari's Restaurant. (*Id.* at 137). The female, Ms. Horn, went inside the mall. (*Id.* at 138). Officer Gregory followed and placed

her in custody. (*Id.* at 139). He had confirmed there was a warrant for Ms. Horn before contacting her. (*Id.*). She told the officer the man with her was violating a no-contact order they had against each other. (*Id.* at 140). That man, Mr. Curtis, had a misdemeanor warrant out of Ellensburg. (*Id.* at 141). He was arrested by Officer Greg Renggli pursuant to that warrant and violation of the no-contact order. (*Id.* at 161-62).

Officer Renggli searched Mr. Curtis incident to the arrest. (7/11/13 RP 162). The officer found in his right front pocket two pipes, which Mr. Curtis admitted he used recently to smoke marijuana. (*Id.* at 163). In the left front pocket, Officer Renggli found another pipe with what appeared to be methamphetamine residue. (*Id.* at 165). Mr. Curtis told him he had used it recently to smoke methamphetamine. (*Id.*). He was transported to the Chelan County Regional Jail. (*Id.* at 168).

At the jail, Officer Renggli noticed Mr. Curtis had his hand clasped when he went to take off the right handcuff. (7/11/13 RP 170). The officer had previously noticed nothing was on the floor. (*Id.*). As he took off the left handcuff, Mr. Curtis stepped back and dropped something. (*Id.* at 171). He told the officer there were

baggies on the floor. (*Id.*). Officer Renggli saw small baggies with white powder that he thought was methamphetamine. (*Id.* at 173). He said he had apparently missed those baggies in searching Mr. Curtis. (*Id.* at 181).

Deputy Gilbert Lerma, a corrections duty officer at the jail, saw Mr. Curtis drop the baggies on the floor. (7/11/13 RP 189, 194).

Washington State Patrol Crime Lab supervising forensic scientist, Jayne Aunan, testified the residue in the pipe from the left hand pocket was methamphetamine as well as the powder in one of the baggies from the jail. (7/11/123 RP 213, 216).

Mr. Curtis testified he saw Ms. Horn at the mall. (7/11/13 RP 221). He was asleep when police arrived. (*Id.* at 223). After waking up, Mr. Curtis acknowledged he had a misdemeanor warrant. (*Id.*). He saw Ms. Horn get arrested. (*Id.* at 222, 224). Mr. Curtis admitted he had the pipes in his pockets, but nothing else. (*Id.* at 225-26). The two marijuana pipes were his, but not the other pipe that he got from Ms. Horn. (*Id.* at 226). He said she asked him to hold it for her. (*Id.*). He did not know it had methamphetamine in it. (*Id.* at 227, 236). Mr. Curtis also denied

telling the officer he had used the pipe recently to smoke methamphetamine. (*Id.* at 240). As for the baggies on the jail floor, he did not bring them into the area and did not know what they were. (*Id.* at 229, 242).

Although requested by the defense, the court decided not to give an unwitting possession instruction:

I have reviewed *State v. Staley*, 123 Wn.2d 794, *State v. Cleppe* at 96 Wn.2d 373. And *State v. Adame* at 56 Wn. App. 803. I kind of analyze it to shoplifting. If you shoplift something that's \$249.00 you are charged with a misdemeanor. Gross misdemeanor. If you shoplift something \$251.00 you're charged with a felony. Same thing here. Testimony from Mr. Curtis was that he knew it was a pipe. Knew it was a pipe used to ingest an illegal substance. He thought it was marijuana or methamphetamine. I think he probably, under the law has that duty. So I'm not going to give the instruction. (7/11/13 RP 247).

The defense excepted:

I have exception to the court not giving my unwitting defense. I think the case law is clear that it is not only whether or not you have the item in your possession, but know the nature of the substance. And I think that's especially important in Washington law. Because, I believe, it's a sentencing issue. Which, of course, the court's just alluded to. You know clearly, having illegal possession of marijuana would be

a misdemeanor. Whereas, this is a class felony. (7/11/13 RP 248).

The jury convicted Mr. Curtis of unlawful possession of a controlled substance, methamphetamine. (CP 117). This appeal follows. (CP 134).

### III. ARGUMENT

A. The court erred by not giving the unwitting possession instruction when the evidence supported it.

The unwitting possession instruction, WPIC 52.01, provides:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know the substance was in his possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

The court declined to give this instruction that was proposed by the defense. (7/11/13 RP 247).

Unwitting possession, as reflected in the pattern instruction, is an affirmative defense. See *State v. Deer*, 175 Wn.2d 725, 733, 287 P.3d 539 (2012). The crime of possession of a controlled

substance has no mens rea element. *State v. Bradshaw*, 152 Wn.2d 528, 534-38, 98 P.3d 1190 (2004), *cert. denied*, 544 U.S. 922 (2005). The State must prove two elements of unlawful possession of a controlled substance – the nature of the substance and possession. *Id.* at 538. Mr. Curtis did not contest either with respect to the pipe containing methamphetamine residue, but sought to excuse his conduct by contending his possession was unwitting.

“Unwitting possession is a judicially created affirmative defense that may excuse the defendant’s behavior, notwithstanding the defendant’s violation of the letter of the statute.” *State v. Balzer*, 91 Wn. App. 44, 67, 954 P.2d 931, *review denied*, 136 Wn.2d 1022 (1998). A criminal defendant, however, is not entitled to an unwitting possession instruction unless the evidence presented at trial is sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that the defendant unwittingly possessed the contraband. *State v. Buford*, 93 Wn. App. 149, 153, 967 P.2d 548 (1998).

Here, the defense did indeed present sufficient evidence at trial to justify giving the instruction. Mr. Curtis testified he was

merely holding the pipe for Ms. Horn. (7/11/13 RP 226). Although he figured the pipe was probably for using drugs, he did not know there was methamphetamine residue in it. (*Id.* at 240). In other words, he neither knew the substance was in his possession nor did he know the nature of the substance. *State v. Staley*, 123 Wn.2d 794, 799-800, 872 P.2d 502 (1994). All he had was a pipe with no knowledge he was even in possession of a controlled substance. *Id.*

The methamphetamine pipe's importance in finding guilt is reflected in the question by the jury while deliberating:

Is the pipe residue considered a controlled substance?  
(CP 105).

The court answered:

Yes, if it contains methamphetamine. (*Id.*).

As to the baggies found on the floor of the jail, Mr. Curtis testified he neither had them in his possession nor knew what they were. (7/11/13 RP 229). These baggies apparently did not factor into the jury's finding of guilt because if it did, there would have been no reason for the question by the jury as to the pipe residue.

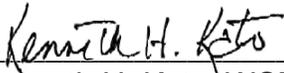
In these circumstances, the evidence presented by Mr.

Curtis as to his unwitting possession of the methamphetamine in Ms. Horn's pipe was sufficient to permit a reasonable juror to conclude, by a preponderance of the evidence, without speculation or conjecture, that his possession of the substance was unwitting. *Buford*, 93 Wn. App. at 152-53. The instruction was crucial to his defense and should have been given. He did not know the methamphetamine was in his possession and did not know the nature of the substance. What he knew was he was holding the pipe for Ms. Horn. Because the court failed to give the unwitting possession instruction, Mr. Curtis could not present the defense theory of the case. The court erred. *Staley*, 123 Wn.2d at 803.

#### IV. CONCLUSION

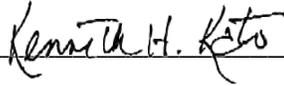
Based on the foregoing facts and authorities, Mr. Curtis respectfully urges this court to reverse his conviction and remand for new trial.

DATED this 7<sup>th</sup> day of April, 2014.

  
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Thomas Alva Curtis, # 303200, 191 Constantine Way, Aberdeen, WA 98520; and by email, as agreed by counsel, on Eric C. Biggar at prosecutor@co.douglas.wa.us.

  
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