

65312-1

65312-1

NO. 65312-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

KRISTIAN GONZALVEZ,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULIA GARRATT, COMMISSIONER

---

**BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

MICHELLE M. SCUDDER  
Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 Third Avenue  
Seattle, Washington 98104  
(206) 296-9000

*Handwritten signature and initials*

TABLE OF CONTENTS

|   | Page |
|---|------|
| A. <u>ISSUES PRESENTED</u> .....  | 1    |
| B. <u>STATEMENT OF THE CASE</u> .....   | 1    |
| C. <u>ARGUMENT</u> .....  | 3    |
| 1. THE APPROPRIATE STANDARD OF REVIEW .....   | 5    |
| 2. GIVEN THE APPROPRIATE STANDARD OF<br>REVIEW, THE STATE PRESENTED<br>SUFFICIENT EVIDENCE FROM WHICH A<br>REASONABLE TRIER OF FACT COULD INFER<br>AND CONCLUDE THAT THE APPELLANT<br>CONSUMED OR POSSESSED LIQUOR.....   | 6    |
| 3. TESTIMONY ABOUT APPELLANT'S REFUSAL<br>TO SUBMIT TO A PORTABLE BREATH TEST IS<br>NOT ANALOGOUS TO THE EXERCISE OF A<br>CONSTITUTIONAL RIGHT AND IS RELEVANT<br>TO SHOW A CONSCIOUSNESS OF GUILT .....  | 10   |
| 4. IN THE ALTERNATIVE, IF THE COURT FINDS<br>THAT THE APPELLANT'S REFUSAL WAS<br>INADMISSIBLE, ANY ERROR IS HARMLESS<br>BECAUSE IT WAS NOT INCLUDED IN THE<br>TRIAL JUDGE'S WRITTEN FINDINGS OF FACT<br>AND SUBSTANTIAL EVIDENCE EXISTS TO<br>SUPPORT THE TRIAL JUDGE'S FINDINGS..... | 12   |
| D. <u>CONCLUSION</u> .....  | 14   |

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

State v. A.T.P.-R., 132 Wn. App. 181,  
130 P.3d 877 (2006)..... 7

State v. Bell, 59 Wn.2d 338,  
368 P.2d 177, *cert. denied*,  
371 U.S. 818, 83 S. Ct. 34,  
9 L. Ed. 2d 59 (1962)..... 12

State v. Bencivenga, 137 Wn.2d 703,  
974 P.2d 832 (1999)..... 5

State v. Butler, 53 Wn. App. 214,  
766 P.2d 505 (1989)..... 6

State v. Camarillo, 115 Wn.2d 60,  
794 P.2d 850 (1990)..... 5

State v. Dalton, 72 Wn. App. 674,  
865 P.2d 575 (1994)..... 6

State v. Duncan, 146 Wn.2d 166,  
43 P.3d 513 (2002)..... 7

State v. Echeverria, 85 Wn. App. 777,  
934 P.2d 1214 (1997)..... 7

State v. Francisco, 148 Wn. App. 168,  
199 P.3d 478 (2009)..... 9

State v. Gallagher, 112 Wn. App. 601,  
51 P.3d 100 (2002)..... 5, 6

State v. Green, 94 Wn.2d 216,  
616 P.2d 628 (1980)..... 9

State v. Hendrickson, 129 Wn.2d 61,  
917 P.2d 563 (1996)..... 5

|  |    |
|--|----|
| <u>State v. Jones</u> , 71 Wn. App. 798,<br>863 P.2d 85 (1993).....        | 6  |
| <u>State v. Miles</u> , 77 Wn.2d 593,<br>464 P.2d 723 (1970).....          | 13 |
| <u>State v. Ryan</u> , 48 Wn.2d 304,<br>293 P.2d 399 (1956).....           | 12 |
| <u>State v. Salinas</u> , 119 Wn.2d 192,<br>829 P.2d 1068 (1992).....      | 5  |
| <u>State v. Stalsbrotten</u> , 138 Wn.2d 227,<br>978 P.2d 1059 (1991)..... | 10 |
| <u>State v. Swan</u> , 114 Wn.2d 613,<br>790 P.2d 610 (1990).....          | 6  |
| <u>State v. Walton</u> , 64 Wn. App. 410,<br>824 P.2d 533 (1992).....      | 5  |

### Constitutional Provisions

#### Federal:

|                            |        |
|----------------------------|--------|
| U.S. Const. amend. V ..... | 10, 11 |
|----------------------------|--------|

### Statutes

#### Washington State:

|                    |      |
|--------------------|------|
| RCW 66.44.270..... | 4, 6 |
|--------------------|------|

**A. ISSUES PRESENTED**

1. Viewing the evidence in the light most favorable to the State, did the State provide sufficient evidence such that any rational trier of fact could find the Appellant guilty beyond a reasonable doubt of the crime of Minor in Possession of Liquor?

2. Did the trial court's admission of the Appellant's refusal to submit to a portable breath test violate the defendant's right to a fair trial?

3. Is it harmless error when the trier of fact in a bench trial did not include evidence in its findings of fact as a basis for its verdict and substantial evidence exists to support the trial judge's finding of guilt?

**B. STATEMENT OF THE CASE**

On November 12, 2009, KCSO Deputy Tracy Dodd was working on patrol. She was dispatched to a noise complaint at a residence in Kenmore, Washington. RP 9. When she arrived, around 9:45 P.M., she observed about twenty people running around the property. RP 8-9. Many of the individuals appeared very young. RP 9. Deputy Dodd observed many people drinking alcohol and smoking and she detected an odor of marijuana. RP 9.

Deputy Dodd and another officer contacted the property owner and asked him if all the people on the property were over twenty one years of age. RP 9-10. The deputies then left the residence. RP 11.

Around 11:10 P.M. that same night, the deputies were dispatched back to the same residence for a complaint that the party had resumed. RP 11. When they arrived, Deputy Dodd observed people running all over the property and inside the house. RP 12. She heard loud voices coming from the back door. RP 12. When no one answered her knocks at the door, Deputy Dodd went around the back to see what was going on. RP 12. She met the owner of the property and told him she wanted to see the identifications of the people at the party. RP 13. The owner invited Deputy Dodd into the house and took her downstairs where all the occupants were. RP 14. Downstairs, Deputy Dodd observed many people in the room smoking and drinking alcoholic beverages. RP 14. Specifically, Deputy Dodd noted there were numerous Bud Light cans sitting around the room and being held by many of the individuals. RP 15. Many others had cups in their hands. RP 15. Deputy Dodd then asked for ID from all the people in the room. RP 15. She then separated them by moving all the people under

twenty one years of age to one side of the room and then releasing those over twenty one years of age. RP 15.

Deputy Dodd saw the Appellant and his ID which showed him to be under twenty one. RP 19. Deputy Dodd spoke with the defendant and noticed he was very agitated and unhappy. RP 19. He had slurred speech, bloodshot eyes, and had difficulty maintaining his balance. RP 19. The Appellant would lean on the wall or his friend for support. RP 19. Deputy Dodd smelled the strong odor of intoxicants from Appellant's body and mouth while she stood about two feet from his person. RP 20. Deputy Dodd then read the individuals their Miranda warnings and asked the Appellant to provide a PBT sample. RP 15-23. The defendant told Deputy Dodd "no" because she "wouldn't be able to prove anything." RP 23. Deputy Dodd informed Appellant he was not free to leave and proceeded to arrest him for minor in possession. RP 23-24. Deputy Dodd noticed a strong odor of intoxicants from the Appellant's person throughout her contact with him. RP 23-24.

**C. ARGUMENT**

The elements of minor in possession are that the Appellant:

1) was under the age of twenty one, 2) possessed, consumed, or

otherwise acquired any liquor, 3) that the acts occurred in the State of Washington. RCW 66.44.270. Appellant contends that there was insufficient evidence presented to the trier of fact to support a finding of guilt. See Brief of Appellant (hereinafter "Appellant's Brief"). More specifically, Appellant argues that there was insufficient evidence with regards to his possession of liquor. Id. Appellant also argues that admission of his refusal to submit to the portable breath test was erroneous and violated his right to a fair trial.

Appellant's argument must fail. The State presented sufficient evidence at trial such that a reasonable trier of fact could find that Appellant did constructively possess liquor when he was contacted by Deputy Dodd. Additionally, the trial judge properly admitted evidence of Appellant's refusal to submit to a breath test as it was relevant to his consciousness of guilt.

In the alternative, if the court finds admission of the refusal was improper, any error was harmless as it was not relied upon by the trial judge in her findings and there was additional and substantial evidence to support her finding of guilt.

## 1. THE APPROPRIATE STANDARD OF REVIEW.

Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements proved beyond a reasonable doubt. State v. Hendrickson, 129 Wn.2d 61, 81, 917 P.2d 563 (1996). An Appellant's claim of insufficient evidence admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992). Also, "all reasonable inference from the evidence must be drawn in favor of the State and against the Appellant." State v. Gallagher, 112 Wn. App. 601, 613, 51 P.3d 100 (2002) (citing Salinas, 119 Wn.2d at 201).

In reviewing for sufficiency, appellate courts draw no distinction between circumstantial and direct evidence presented at trial, because both are considered equally reliable. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). Credibility determinations are for the finder of fact and are not reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Thus, an appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). Furthermore, reviewing courts need

not themselves be convinced of an Appellant's guilt beyond a reasonable doubt, but only that a reasonable trier of fact could so find. Gallagher, 112 Wn. App. at 613. The appellate court may affirm for any basis apparent in the record. State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993); State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990); State v. Butler, 53 Wn. App. 214, 766 P.2d 505 (1989).

**2. GIVEN THE APPROPRIATE STANDARD OF REVIEW, THE STATE PRESENTED SUFFICIENT EVIDENCE FROM WHICH A REASONABLE TRIER OF FACT COULD INFER AND CONCLUDE THAT THE APPELLANT CONSUMED OR POSSESSED LIQUOR.**

RCW 66.44.270(2)(a) makes it unlawful for any person under twenty one years of age to "possess, consume or otherwise acquire any liquor." "Consume" includes the putting of liquor to any use, whether by drinking or otherwise. Possession can be established if a person knows of the substance's presence, it is immediately accessible, and he or she exercises dominion and control over it. State v. Dalton, 72 Wn. App. 674, 676, 865 P.2d 575 (1994). While the presence of liquor or alcohol in a person's body is not sufficient to prove consumption or possession, it is

circumstantial evidence of prior possession and when combined with other corroborating evidence, alcohol consumption may support a possession conviction. Id. at 676; State v. Duncan, 146 Wn.2d 166, 182 n.9, 43 P.3d 513 (2002). If possession is not actual, it may be constructive, and constructive possession may be joint. State v. A.T.P.-R., 132 Wn. App. 181, 185, 130 P.3d 877 (2006). While close proximity alone is not enough for constructive possession, other indicia of dominion and control must exist such as the defendant's ability to actually possess the object. Id., quoting State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997).

Here, there is more than evidence of mere consumption of alcohol and mere proximity to alcohol. Deputy Dodd testified that she observed obvious signs of intoxication from the Appellant such as odor of alcohol emanating from his breath, unsteadiness, glassy, bloodshot eyes. RP 19-20. In addition to obvious signs of alcohol consumption, the Appellant was contacted at a house party where Deputy Dodd observed a large group of attendees consuming alcoholic beverages. RP 12-15. When Deputy Dodd went to the "medium sized" room where Appellant was located, she observed a "large number of Bud Light" beer cans sitting around and being

consumed by individuals. RP 14. She testified there were about ten to fifteen people in the room, which included the Appellant. RP 14. She stated there were beer cans and cups on the pool table, some on another table to the left, and some people were holding their cups or cans and some put them down when she arrived. RP 15. Deputy Dodd also testified that post Miranda, the Appellant told her "you're wasting my fucking time. You can't do nothing about this. It's only alcohol. It's not a big deal." RP 43. The Appellant also told her he wanted to get back to the party. RP 43. Deputy Dodd believed the defendant and his friend were the most impaired individuals at the party. RP 43.

The fact that Deputy Dodd observed on the Appellant obvious signs of intoxication, the Appellant's own statements combined with the proximity to numerous cans of beer placed all over the room he was contacted in, is sufficient evidence for a rational trier of fact to find that he committed the crime of minor in possession. Deputy Dodd described the room as having beer cans and cups all along the pool table and another table. RP 14. These were open containers of alcohol immediately accessible and in close proximity to the Appellant. RP 14.

Appellant cites Francisco in support of the proposition that the Appellant did not constructively possess liquor. This is misplaced. In that case, the juvenile was located by police in a driveway exhibiting signs of intoxication. 148 Wn. App. 168, 172-73, 199 P.3d 478 (2009). While it was obvious that the juvenile was under twenty one years of age and intoxicated, the court dismissed the case because the State offered “no corroborating evidence to prove possession. For example, no alcohol containers were found on *or near* Mr. Francisco and he did not confess to possessing any liquor.” Id. at 176 (emphasis added). In the present case, there are numerous open and accessible containers of alcohol near the Appellant, obvious signs of intoxication and incriminating statements. These facts make this case distinguishable from Francisco and support the inference that the Appellant was in possession of alcohol on the date in question.

The role of the appellate court in the instant case is to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have found, beyond a reasonable doubt, all the essential elements of the crime. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The State provided sufficient evidence at trial, when viewed in a light

most favorable to the State, to prove beyond a reasonable doubt that the Appellant consumed or possessed alcohol, thus his appeal must fail.

**3. TESTIMONY ABOUT APPELLANT'S REFUSAL TO SUBMIT TO A PORTABLE BREATH TEST IS NOT ANALOGOUS TO THE EXERCISE OF A CONSTITUTIONAL RIGHT AND IS RELEVANT TO SHOW A CONSCIOUSNESS OF GUILT.**

A defendant's right against self incrimination protects him or her from being compelled to provide evidence of a "testimonial" or "communicative" nature or from testifying against him or herself. State v. Stalsbrot, 138 Wn.2d 227, 232, 978 P.2d 1059 (1991). The Fifth Amendment does not prevent admission of physical or real evidence. Id. The State may compel physical or real evidence, which includes blood samples, fingerprints, measurements, voice or writing samples. Id. at 233. The State may not compel testimonial evidence or force a defendant to testify against him or herself. Id. Courts have regularly held that evidence, such as breath samples and field sobriety tests, are not testimonial evidence and that refusal to provide such evidence when asked, is relevant and admissible to show consciousness of guilt on the part of the person refusing to provide the evidence. Id.

In the present case, Appellant's refusal to provide a breath sample is not protected by the Fifth Amendment and is relevant to show his consciousness of guilt.

Appellant was asked by Deputy Dodd to provide a breath sample for her portable breath test device. He refused to provide a breath sample and went on to state that Deputy Dodd could not prove anything if he did not provide a breath sample. Such evidence was properly admitted by the trial court as it is probative of the defendant's consciousness of guilt. As the case law demonstrates, a breath sample is not testimonial evidence, but is physical evidence. As such, there is no Fifth Amendment implication arising from the refusal to provide a breath sample for a breath test device. A suspect being asked to provide physical evidence which could exonerate him from suspicion is probative of that person's consciousness of guilt. Because there is no Fifth Amendment implication from the refusal to provide such evidence, the State was properly allowed to introduce such evidence for the purpose of showing the defendant's state of mind at the time of the contact.

**4. IN THE ALTERNATIVE, IF THE COURT FINDS THAT THE APPELLANT'S REFUSAL WAS INADMISSIBLE, ANY ERROR IS HARMLESS BECAUSE IT WAS NOT INCLUDED IN THE TRIAL JUDGE'S WRITTEN FINDINGS OF FACT AND SUBSTANTIAL EVIDENCE EXISTS TO SUPPORT THE TRIAL JUDGE'S FINDINGS.**

In the State of Washington, there is a practice of liberal admission of evidence at trial and also a presumption on appeal that the trial judge, knowing the rules of evidence, will not consider matters which are inadmissible when making his or her findings. State v. Bell, 59 Wn.2d 338, 352, 368 P.2d 177, *cert. denied*, 371 U.S. 818, 83 S. Ct. 34, 9 L. Ed. 2d 59 (1962). In non-jury trials, a new trial ordinarily will not be granted for error in the admission of evidence, if there remains substantial admissible evidence to otherwise support the trial court's findings. State v. Ryan, 48 Wn.2d 304, 293 P.2d 399 (1956). Regardless of whether the evidence about Appellant's refusal to submit to the portable breath test should have been admitted or not, the trial court did not include the fact in its findings. Even without evidence of the Appellant's refusal, there is substantial evidence to support the trial judge's

findings and any error in admitting the refusal is harmless. See State v. Miles, 77 Wn.2d 593 at 601, 464 P.2d 723 (1970).

In the present case, the trial judge's findings do not include the appellant's refusal to submit to the portable breath test. The findings included in the final order and relied upon by the judge are enough to support her conclusion that the Appellant was guilty of possessing or consuming alcohol. Further, the fact that this was a non-jury trial, there is a strong presumption that the trial judge will not rely on inadmissible evidence in its findings. The trial judge initially reserved ruling on the issue of the Appellant's refusal to submit to a portable breath test and then admitted the evidence as relevant to the Appellant's state of mind. However, when the State submitted its proposed findings to the trial judge there was some dispute over this evidence. The trial judge removed the refusal from the findings. Presumably, the trial judge did not rely on the evidence since it was not included in the signed and filed findings of fact and conclusions of law. In fact, the finding was actually stricken from the final order, creating an even stronger presumption that the trial judge did not intend to rely on this piece of evidence for

her ruling. As stated above, even without this evidence there were substantial, additional facts that supported the trial court's findings. Thus, any error for admitting this evidence at trial is harmless, as it was not relied upon by the judge in her finalized findings and additional, substantial evidence supports the judge's ruling.

**D. CONCLUSION**

There was sufficient evidence from which a reasonable trier of fact could find that Appellant possessed and or consumed liquor on the date in question. Admission of the Appellant's refusal to submit to a portable breath test should have been admissible as it is relevant to show Appellant's consciousness of guilt and the defendant does not have a constitutional right to refuse such test. However, since the trier of fact in the bench trial did not include the refusal in her findings, any error in its admission was harmless, as there was still sufficient evidence from which a reasonable trier of fact could find that Appellant possessed or consumed liquor on the

date in question. The State, therefore, respectfully requests that this Court affirm Appellant's conviction.

DATED this \_\_\_\_\_ day of November, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
MICHELLE M. SCUDDER, WSBA #39276  
Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Lind, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. KRISTIAN GONZALVEZ, Cause No. 65312-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

*Sandra Atkinson*  
Name Sandra Atkinson  
Done in Seattle, Washington

11/29/2010  
Date

2010 NOV 29 PM 1:08  
U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
SEATTLE