

COURT OF APPEALS NO. 65312-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

REC'D  
AUG 31 2010  
King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON

v.

K.G.,

Appellant.

2010 AUG 31 PM 4:03  
COURT OF APPEALS  
DIVISION ONE  
K

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Julia Garratt, Commissioner

OPENING BRIEF OF APPELLANT

DANA M. LIND  
Attorney for Appellant

NIELSEN, BROMAN & KOCH  
1908 East Madison  
Seattle, WA 98122  
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u> .....	1
<u>Issues Pertaining to Assignments of Error</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	2
C. <u>ARGUMENT</u> .....	7
1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT APPELLANT'S MIP CONVICTION. ....	7
2. THE COURT'S ADMISSION OF EVIDENCE APPELLANT REFUSED A VOLUNTARY PORTABLE BREATH TEST VIOLATED HIS RIGHT TO A FAIR TRIAL. ....	12
D. <u>CONCLUSION</u> .....	16

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State v. Allen</u> , 63 Wn. App. 623, 821 P.2d 533 (1991).....	8, 10
<u>State v. A.T.P.-R.</u> , 132 Wn. App. 181, 130 P.3d 877 (2006).....	10
<u>State v. Dalton</u> , 72 Wn. App. 674, 865 P.2d 575 (1994).....	8-9
<u>State v. Duncan</u> , 146 Wn.2d 166, 43 P.3d 513 (2002).....	9
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980).....	7
<u>State v. Frampton</u> , 95 Wn.2d 469, 627 P.2d 922 (1981).....	13
<u>State v. Francisco</u> , 148 Wn. App. 168, 199 P.3d 478 (2009).....	7, 9-12
<u>State v. Hornaday</u> , 105 Wn.2d 120, 713 P.2d 71 (1986).....	7-8
<u>State v. Jones</u> , 71 Wn. App. 798, 863 P.2d 85 (1993).....	15
<u>State v. Roth</u> , 131 Wn. App. 556, 128 P.3d 114 (2006).....	11
<u>State v. Rupe</u> , 101 Wn.2d 664, 683 P.2d 571 (1984).....	13

## TABLE OF AUTHORITIES

	Page
 <u>FEDERAL CASES</u>	
<u>Doyle v. Ohio</u> , 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976) .....	14
 <u>Griffin v. California</u> , 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) .....	13
 <u>Grunewald v. United States</u> , 353 U.S. 391, 77 S. Ct. 963, 1 L. Ed. 2d 931 (1957) .....	14
 <u>In re Winship</u> , 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) .....	7
 <u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) .....	7
 <u>United States v. Hale</u> , 422 U.S. 171, 95 S. Ct. 2133, 45 L. Ed. 2d 99 (1975) .....	14
 <u>United States v. Jackson</u> , 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2d 138 (1968) .....	12
 <u>United States v. Prescott</u> , 581 F.2d 1343 (9 <sup>th</sup> Cir. 1978) .....	12, 14

TABLE OF AUTHORITIES

	Page
<u>RULES, STATUTES AND OTHERS</u>	
Const. article 1, § 7 .....	12
Former RCW 66.04.010(9) (2005) .....	8
Fourth Amendment .....	12
RCW 66.44.270(2)(a).....	8

A. ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict appellant of being a minor in possession of alcohol.

2. Admission of evidence appellant declined to take a voluntary portable breath test violated appellant's right to a fair trial.

Issues Pertaining to Assignments of Error

1. Case law holds evidence of intoxication and proximity to alcohol are insufficient to support a charge of being a minor in possession of alcohol. Where the state presented evidence appellant was intoxicated and standing in a room with cups of alcohol and cans of beer on a table, but there was no evidence anyone observed appellant with a cup or can and no alcohol was recovered from his person, was the evidence insufficient to convict?

2. Case law holds the state may not draw an adverse inference from a defendant's exercise of a constitutional right. In this case, over defense counsel's objection, the state was allowed to elicit evidence appellant declined to submit to a voluntary portable breath test. Where this created the adverse inference he must have had something to hide, did the admission of the evidence deprive appellant of his right to a fair trial?

B. STATEMENT OF THE CASE

K.G. is appealing his conviction for being a minor in possession of alcohol (MIP), following an adjudicatory hearing in King County Superior Court. CP 7-12 (disposition), CP 19 (notice of appeal). He was arrested when the “party patrol” responded to a noise complaint about a house party in Kenmore. RP 7-24 (testimony of Deputy Dodd).

Around 9:45 p.m. on November 12, 2009, Deputy Tracey Dodd was working the “party patrol,” when she was dispatched to a noise complaint about a house party in Kenmore. RP 8-9. She testified that as she approached, she could hear “screaming and party noises” from two blocks away. RP 9.

When she arrived, Dodd saw “about 20 people running around the property.” RP 9. According to her, some “appeared to be quite young.” RP 9. She testified some “were holding alcohol,” and she could smell marijuana. RP 9.

Dodd contacted the renter of the house, Matisse Howard, and advised he was violating a noise ordinance. After inquiring whether Howard’s guests were of legal drinking age, Dodd left. RP 10.

Dodd was dispatched back to the same residence, however, following another noise complaint about an hour later. RP 11. This time, Dodd told Howard she would like to see everyone's identification. RP 13. According to Dodd, Howard invited her in, and they went downstairs to the party. RP 14. Dodd testified "it was a medium-size room which was full of people who were – many of which were holding alcohol cups and smoking." RP 14. Reportedly, there were "a large number of Bud Light beer cans sitting around and that were being consumed by persons in addition to the cups." RP 15.

Dodd asked to see everyone's identification and separated those who were 21 and those who were not into two groups on opposite sides of the room. K.G. was one of 5 or 6 in the latter category. RP 15-16.

According to Dodd, K.G. "was very profane" and "very unhappy with his contact." RP 19. She claimed "[h]is speech was slurred, his eyes were bloodshot, he was exhibiting difficulty in maintaining his balance, alternating between leaning on the wall and grabbing onto his friend that was next to him." RP 19. Dodd further claimed she could smell alcohol on his breath. RP 20.

Dodd admitted, however, that she had not observed K.G. holding either a cup or can when she came downstairs. RP 37. She testified there were cups and cans on the pool table and on another table, but did not testify where K.G. was standing in relation to the tables. RP 36-37, 41.

Dodd testified that after she advised the underage guests of their rights, she asked if K.G. would “give a voluntary PBT, which he declined.” RP 21. Defense counsel immediately objected, and the following exchange occurred:

MR. EPPLER: Objection, your Honor, on the grounds I indicated earlier at pretrial.

THE COURT: Does the State have a response?

MS FURMAN: Well, your Honor, I’m just laying a foundation because I believe that the respondent’s voluntary response to that question is relevant, going to show his state of mind at the time.

MR. EPPLER: That’s the part that’s irrelevant and inappropriate when someone declines a Fourth Amendment request to search.

THE COURT: The officer is continuing in her investigation. I will overrule the objection. It is – I believe it’s relevant. I’m not going to suppress at this time, so you can go ahead.

RP 21.

As indicated by defense counsel, he moved pre-trial to exclude K.G.'s PBT refusal, explaining:

The basis for [the motion to exclude] is he has no legal duty to provide a breath sample. It is a request under the Fourth Amendment for the State to take a sample of his breath and then analyze it. He has every right to exercise his Fourth Amendment rights and refuse to provide a breath sample. This is not a DUI where the legislature has deemed that individuals have given consent to provide a breath sample for the same reason that if police come to your door at 3:00 in the morning and said can we come in and see your marijuana grow operation, you could require them to go and obtain a warrant, and the fact that you refuse to allow them in your home absent the authority of a warrant would be inadmissible. The refusal for Mr. K.G. to have provided a breath sample and to comply with a consent to acquiesce in a Fourth Amendment search is just as irrelevant, and I would ask the court to exclude any reference to his refusal to take or give a breath test on of portable PBT.

RP 5. The court had reserved ruling at that time, however. RP 6.

Having received the court's permission to continue, the prosecutor accordingly questioned Dodd further about K.G.'s refusal:

Q. And then did he make – what did he say to you? He indicated that he understood those rights and then you asked him a question, and what was his response?

A. I believe his exact words were along the lines of he fucking understood his rights. I asked him if he would give a voluntary PBT and he said no, because then I wouldn't be able to prove anything. If

he didn't give a PBT, he didn't believe that I could prove that he had been drinking and I had to let him go.

RP 23.

On the contrary, however, K.G. and his friend were arrested and transported to the police station. RP 23.

In its oral ruling, the court found "overwhelming circumstantial evidence" K.G. "did consume alcohol and at that time was under 21 years of age." RP 63. In both its oral ruling and written findings, the court noted K.G.'s PBT refusal and his response that Dodd could not prove anything without it. RP 62; CP 17.

At presentation of the written findings about a month later, defense counsel objected to the court's inclusion of K.G.'s refusal and his response to Dodd's PBT request. RP 75. The court did not recall counsel's earlier objection. RP 75-76. When asked for a response, the prosecutor stated she had no objection to simply striking the finding. RP 76. The court's written findings and conclusions incorporated its oral ruling. CP 18.

C. ARGUMENT

1. THE EVIDENCE IS INSUFFICIENT TO SUPPORT APPELLANT'S MIP CONVICTION.

In all criminal prosecutions, due process requires that the state prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

As defense counsel argued in closing, "it's basic Hornbook (phonetic) law that under State v. [H]ornaday once alcohol is in a person's system they are no longer consuming it or no longer possessing it. That's under 105 Wn.2d."<sup>1</sup> RP 58. That there is a difference between possession and *assimilation* was recently reiterated in State v. Francisco, 148 Wn. App. 168, 199 P.3d 478 (2009). In finding sufficient evidence of consumption here, the

court failed to understand that assimilation – in the absence of other corroborating evidence – is not sufficient to support a MIP conviction.

RCW 66.44.270(2)(a) makes it “unlawful for any person under the age of twenty-one years to possess, consume, or otherwise acquire any liquor.” “‘Consume’ includes the putting of liquor to any use, whether by drinking or otherwise.” Former RCW 66.04.010(9) (2005). 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).

However, the presence of liquor in a person’s body does not constitute possession because the person’s power to control, possess, or dispose of it ends upon assimilation. State v. Hornaday, 105 Wn.2d 120, 126, 713 P.2d 71 (1986); State v. Allen, 63 Wn. App. 623, 625, 821 P.2d 533 (1991). But evidence of assimilation is circumstantial evidence of prior possession and *when combined with other corroborating evidence*, alcohol consumption may support a possession conviction. Dalton, 72 Wn.

---

<sup>1</sup> State v. Hornaday, 105 Wn.2d 120, 126, 713 P.2d 71 (1986).

App. at 676; State v. Duncan, 146 Wn.2d 166, 182 n.9, 43 P.3d 513 (2002).

The circumstances here are analogous to those in Francisco, where the evidence was found to be insufficient to support the MIP conviction. In Francisco, Officer Croft responded to a report of a person sleeping in a driveway and found Francisco lying on a driveway about 20-30 feet from the street. Croft tried to rouse Francisco, but he was unresponsive. Croft could detect a strong odor of alcohol coming from Mr. Francisco. After a few minutes, Croft elicited a few incoherent responses from Francisco pertaining to his name, address and birthday. Francisco, 148 Wn. App. at 172-73.

Upon confirming Francisco was under the age of 21, Croft arrested him for being a minor in possession of alcohol by consumption. During a search incident to arrest, Croft found a baggie of cocaine in Francisco's jeans. Accordingly, he was also charged with possessing cocaine. Francisco, at 172.

During trial, Croft testified that Francisco was so inebriated upon contact that he could not have walked the short distance to his home. He also testified Francisco said he was 19 years old,

although he was within three months of turning 21. Francisco, 148 Wn. App. at 173.

After the court denied Francisco's motion to dismiss the MIP charge, on grounds the state failed to prove the alcohol was consumed in Washington, Francisco presented his defense. Four witnesses testified he did not have a reputation as a drug user. Francisco testified he remembered going to two parties that night. He could only recall about 20 minutes of the second party, because he was already drunk when he arrived. He believed he blacked out and could not recall how he came into possession of the cocaine. Francisco, 148 Wn. App. at 173-74.

On appeal, Division Three agreed the evidence was insufficient to support the MIP conviction, albeit on different grounds than was argued below:

Here, Officer Croft testified that Mr. Francisco smelled of alcohol, that it took several minutes to rouse him, and that he was incoherent and unable to walk. However, 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. See, e.g., Allen, 63 Wash.App. 623, 821 P.2d 533 (evidence of intoxication without more does not support minor in consumption of liquor conviction); State v. A.T.P.-R., 132 Wash.App. 181, 185-86, 130 P.3d 877 (2006) (odor of alcohol on juvenile's body and proximity to an open bottle of beer is insufficient

to sustain conviction); State v. Roth, 131 Wash.App. 556, 128 P.3d 114 (2006) (evidence of intoxication (swaying and odor of alcohol) and proximity to refrigerator full of beer insufficient to support a finding of constructive possession). Viewing the evidence in the light most favorable to the State, the evidence was insufficient to establish that Mr. Francisco exercised any dominion and control over any alcohol. Accordingly, we reverse Mr. Francisco's conviction for minor in possession/consumption of alcohol.

Francisco, 148 Wn. App. at 175-76.

The only meaningful distinction between K.G.'s case and Francisco's is that there was evidence of alcohol containers in the room where K.G. was standing. However, Dodd did not describe where K.G. was standing in relation to the tables with the cups and cans. Regardless, as set forth in the passage above, evidence of intoxication and proximity to liquor is insufficient to support a conviction.

In response, the state may attempt to argue that K.G. confessed to possessing liquor by virtue of his refusal to submit to a voluntary portable breath test and his response that Dodd would not be able to prove he had been drinking. As will be set forth in the argument section below, however, this evidence was wrongly admitted and cannot be used to draw an adverse inference against K.G. Alternatively, however, K.G. did not admit *possession*. He did

not confirm any of the cups or cans observed by Dodd was his. He merely stated that without a breath test, Dodd could not prove *assimilation or prior consumption*. As set forth in Francisco and the cases cited therein, however, prior consumption is not sufficient to support an MIP charge. Accordingly, even if K.G.'s statement was admissible, it was not tantamount to an admission of possession. As in Francisco, the evidence was insufficient to convict.

2. THE COURT'S ADMISSION OF EVIDENCE APPELLANT REFUSED A VOLUNTARY PORTABLE BREATH TEST VIOLATED HIS RIGHT TO A FAIR TRIAL.

Due process prohibits the State from drawing adverse inferences from a defendant's exercise of a constitutional right, such as the right to be free from warrantless searches and seizures under the Fourth Amendment and article 1, § 7 of the Washington Constitution. See e.g. United States v. Prescott, 581 F.2d 1343, 1350-1353 (9<sup>th</sup> Cir. 1978) (no adverse inference can be drawn against a householder for exercising his Fourth Amendment rights by refusing consent to an officer to make a warrantless search); United States v. Jackson, 390 U.S. 570, 581, 20 L. Ed. 2d 138, 88 S. Ct. 1209 (1968) (capital punishment provision of Federal Kidnapping Act unconstitutionally chilled Fifth Amendment right not

to plead guilty and Sixth Amendment right to demand jury trial); Griffin v. California, 380 U. S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965) (drawing adverse inference from defendant's failure to testify unconstitutionally infringed on defendant's Fifth Amendment rights); State v. Frampton, 95 Wn.2d 469, 478-79, 627 P.2d 922 (1981) (previous Washington death penalty statute needlessly chilled defendant's right to plead not guilty and demand a jury trial).

Such inferences amount to a penalty imposed . . . for exercising a constitutional privilege. Griffin, 380 U.S. at 614. To protect the integrity of constitutional rights, the courts have developed two related propositions. The State can take no action that will unnecessarily chill or penalize the assertion of a constitutional right, and the State may not draw adverse inferences from the exercise of a constitutional right. State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984).

In K.G.'s case, the state was allowed to draw an adverse inference from K.G.'s right to be free from warrantless searches. As a result of the court's ruling, the state was allowed to elicit not only K.G.'s refusal to take the portable breath test, but that K.G. "said no, because then I [Dodd] wouldn't be able to prove anything."

RP 23. The obvious inference was that K.G. must be guilty or he would have nothing to hide. As the Prescott Court noted:

Because the right to refuse entry when the officer does not have a warrant is equally available to the innocent and the guilty, just as is the right to remain silent, the refusal is as "ambiguous" as the silence was held to be in United States v. Hale, 1975, 422 U.S. 171, 176-77, 95 S.Ct. 2133, 45 L.Ed.2d 99. Yet use by the prosecutor of the refusal of entry, like use of the silence by the prosecutor, can have but one objective to induce the jury to infer guilt. In the case of the silence, the prosecutor can argue that if the defendant had nothing to hide, he would not keep silent. In the case of the refusal of entry, the prosecutor can argue that, if the defendant were not trying to hide something or someone (in this case Duvernay), she would have let the officer in. In either case, whether the argument is made or not, the desired inference may be well drawn by the jury. This is why the evidence is inadmissible in the case of silence. United States v. Hale, *supra*, 422 U.S. at 180, 95 S.Ct. 2133; Doyle v. Ohio, 1976, 426 U.S. 610, 617 fn.8, 96 S.Ct. 2240, 49 L.Ed.2d 91; Grunewald v. United States, 1957, 353 U.S. 391, 421-24, 77 S.Ct. 963, 1 L.Ed.2d 931. It is also why the evidence is inadmissible in the case of refusal to let the officer search.

Prescott, 581 F.2d at 1352.

In this case, the state intended to comment on K.G.'s constitutionally protected right in order to show his guilt. This violated K.G.'s due process right to a fair trial. Although the court later struck the finding regarding K.G.' refusal from its written findings, the facts of the refusal were part of the court's oral ruling

and pronouncement of guilt, which was also incorporated into its written findings and conclusions.

Under the constitutional harmless error standard, the state has the heavy burden of proving the error was harmless beyond a reasonable doubt. Constitutional error is presumed prejudicial and is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Jones, 71 Wn. App. 798, 812, 863 P.2d 85 (1993). Considering that Dodd never observed K.G. with a cup or can of alcohol in his possession, the inference drawn by the state – that he must have had something to hide – was particularly prejudicial. This Court should reverse and remand for a new trial.

D. CONCLUSION

Because the evidence was insufficient, this Court should reverse and dismiss the MIP conviction. If this Court disagrees, however, remand for a new trial is nevertheless appropriate based on the adverse inference drawn from K.G.' exercise of his constitutional right to be free from a warrantless search.

Dated this 31<sup>st</sup> day of August, 2010.

Respectfully submitted

NIELSEN, BROMAN & KOCH



---

DANA M. LIND, WSBA 28239

Office ID No. 91051

Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

---

STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 65312-1-1
	)	
KRISTIAN GONZALVES,	)	
	)	
Appellant.	)	

---

**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31<sup>ST</sup> DAY OF AUGUST 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KRISTIAN GONZALVES  
600 NE 190<sup>TH</sup> STREET  
KENMORE, WA 98028

**SIGNED** IN SEATTLE WASHINGTON, THIS 31<sup>ST</sup> DAY OF AUGUST 2010.

x Patrick Mayovsky

2010 AUG 31 PM 4:03

COPIES FILED  
FILED  
K