

FILED  
Jul 15, 2015  
Court of Appeals  
Division I  
State of Washington

No. 72639-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

EDWARD WARNER,

Appellant.

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

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OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State presented insufficient evidence to convict Edward Warner of unlawful possession of a firearm in the second degree, in that the State failed to prove constructive possession.

2. Mr. Warner's convictions were entered in violation of his Fourteenth Amendment right to due process.

3. Mr. Warner's convictions were entered in violation of his right to appear and defend in person under Article I, section 22.

4. Mr. Warner was denied the right to assist in his own defense.

5. Mr. Warner was denied his Sixth and Fourteenth Amendment rights to the effective assistance of counsel when his attorney failed to seek accommodation for his hearing disability, leaving Mr. Warner unable to hear the trial proceedings.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove constructive possession, the State must prove beyond a reasonable doubt that the defendant exercised dominion and control over an item. Must Mr. Warner's convictions be reversed and dismissed where the State failed to prove beyond a reasonable doubt that he exercised dominion and control over the firearms seized?

2. An accused person has a constitutional right to appear in person and to be present in court, and to assist in his defense. Here, Mr. Warner's hearing loss was not accommodated, although it was pointed out to the court by his own counsel several times. Were Mr. Warner's convictions entered in violation of his rights under the Sixth and Fourteenth Amendments, as well as Article I, Section 22?

C. STATEMENT OF THE CASE

Edward Warner is a senior citizen with chronic health issues, including diabetes, kidney failure, and a hearing disability; he requires dialysis several times per week. CP 48, RP 30, 185-87. Following the amputation of one of his toes due to advanced diabetes, he was released from a long-term care facility in early October 2013 and was taken in by Wendy Christiansen. RP 30.

Ms. Christiansen had been introduced to Mr. Warner by an old boyfriend, Wayne Chin; Ms. Christiansen permitted Mr. Warner to stay at her Bellingham home after his discharge from the hospital facility, since he "didn't have any place to go." Id. Mr. Warner slept in a La-Z-Boy recliner in Ms. Christiansen's living room, located in the front part of the three-bedroom house. RP 32-33, 133. Ms. Christiansen said that

there was no space for him to stay in any of the bedrooms, as most of the rooms were used for storage. RP 33.

At some point in early October 2013, Ms. Christiansen stated that Mr. Warner and their mutual friend Mr. Chin asked if they could store some firearms in the closet in the back bedroom of her home. RP 31, 36-38. She did not know who actually put guns into the closet, as she was not there at the time. RP 37. Ms. Christiansen said the back bedroom was the furthest point in the house from the living room where Mr. Warner stayed, and that he would only have access to the cluttered back bedroom and its closet “if he could get in there.” RP 36. When asked who the firearms belonged to, Ms. Christiansen replied that she didn’t “suppose to know whose they are.” RP 134-35. Ms. Christiansen also said that after the firearms had been placed in her closet, she never saw Mr. Warner with them again – not holding them, firing them, cleaning them, or taking care of them. RP 40 (“No ... absolutely not.”).

During the same time period, Detective Jana Bouzek performed a welfare check on Ms. Christiansen, in response to a call that the older woman was being exploited for her prescription medications by her former boyfriend, Mr. Chin. RP 13-14, 18.<sup>1</sup> Detective Bouzek also

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<sup>1</sup> Ms. Christiansen denied her previous relationship with Mr. Chin at trial, but Detective Bouzek confirmed the nature of the complaint. RP 18.

looked into the allegation that Mr. Warner and Mr. Chin were storing firearms at the home – something that Ms. Christiansen had told her adult children. RP 16-18, 34. The detective asked Mr. Warner whether he had any guns in the house, and he said there was a .22 target shooting gun, as well as other firearms in another room. RP 15. Because the detective did not have the correct spelling of Mr. Warner’s name, however, his criminal record was not immediately apparent; Bouzek therefore took no law enforcement action, despite Mr. Warner’s statements regarding the firearms. RP 16.

Approximately two weeks later, pursuant to a continuing police investigation, a search of Mr. Warner’s criminal history revealed that he had a prior felony record. RP 54.<sup>2</sup> A search warrant for Ms. Christiansen’s home was obtained and executed on October 22, 2013, and five firearms were seized from the closet in the back bedroom. RP 56-62, 83.

No fingerprints were recovered from the firearms and no DNA analysis was conducted. RP 62-63, 96-97. Mr. Warner stipulated that he was previously convicted of a felony offense, and that the items seized

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<sup>2</sup> At trial, Mr. Warner stipulated to a prior felony conviction from April 26, 2012. CP 14-15.

from Ms. Christiansen's home were firearms as defined in the court's jury instructions. CP 14-15.

On the first day of trial -- on the first page of the transcript -- Mr. Warner told the trial judge that he could not hear the proceedings. RP 3. In response to the judge's question about whether Mr. Warner understood the amended information, Mr. Warner said, "I'm sorry, Your Honor, but my hearing is very bad." RP 3-4. The judge repeated the same question, to which Mr. Warner replied that he understood, and his counsel replied, "Still not guilty." RP 4. Mr. Warner then echoed, "Not guilty, Your Honor." RP 4. Neither the court, nor defense counsel, offered Mr. Warner an assisted listening device at this time -- nor at any other time -- during the trial, despite Mr. Warner's obvious difficulty hearing the proceedings. RP 77, 80, 82. 142.

Following a jury trial, Mr. Warner was found guilty as charged. RP 179-81; CP 30-31.

#### D. ARGUMENT

1. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MR. WARNER OF UNLAWFUL POSSESSION OF THE FIREARMS, AS THE STATE FAILED TO PROVE CONSTRUCTIVE POSSESSION.

- a. The prosecution bears the burden of proving all essential elements of an offense beyond a reasonable doubt.

The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Cronin, 142 Wn.2d 568, 580, 14 P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in article I, section 3 of the Washington Constitution and the 14<sup>th</sup> Amendment of the federal constitution. Sandstrom v. Montana, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); State v. Acosta, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the State, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In a claim of insufficiency, the reviewing court presumes the truth of the State's evidence as well as all inferences that can be reasonably drawn therefrom. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980). However, when an innocent explanation is equally as valid as one upon which the inference of guilt may be made, the interpretation consistent with innocence must prevail. United States v. Bautista-Avila, 6 F.3d 1360, 1363 (9<sup>th</sup> Cir. 1993). “[U]nder these circumstances, a reasonable jury must necessarily entertain a reasonable doubt.” United States v. Lopez, 74 F.3d 575, 577 (5<sup>th</sup> Cir. 1996). Speculation and conjecture are not a valid basis for upholding a jury’s guilty verdict. State v. Prestegard, 108 Wn. App. 14, 42-43, 28 P.3d 817 (2001).

b. In order to prove that Mr. Warner was guilty of unlawful possession of the firearms, the prosecution was required to show constructive possession.

Constructive possession is defined as the exercise of dominion and control over an item. State v. Callahan, 77 Wn.2d. 27, 29-30, 459 P.2d 400 (1969). Constructive possession is established by viewing the totality of the circumstances, including proximity to the property and ownership of the premises in which the contraband is found. State v. Turner, 103 Wn. App. 515, 523, 13 P.3d 234 (2000); State v. Cantabrana,

83 Wn. App. 204, 208, 921 P.2d 572 (1996). The circumstances must provide substantial evidence for the fact finder to reasonably infer the defendant had dominion and control. State v. Cote, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). Close proximity alone is never enough to infer constructive possession. Id.

Ownership of a vehicle, or a residence, where contraband is discovered, is one factor to consider when assessing constructive possession. Turner, 103 Wn. App. at 521-24; see Cantabrana, 83 Wn. App. at 208. For example, in Turner, the police found a gun in plain view in the car Turner owned. 103 Wn. App. at 518. Since Turner owned the car, drove it that day, and the gun was in plain view, his dominion and control over the gun was reasonably inferred. Id. at 524.

On the other hand, in Callahan, the defendant was not the owner of the houseboat where drugs were found, but was seen in close proximity to drugs discovered in a cigar box. Callahan was an overnight guest at the houseboat and even admitted to handling the drugs that day. 77 Wn.2d at 28-31 (emphasis added). Callahan also owned several pieces of personal property found on the boat, including two books, two guns, and broken scales for measuring drugs. Id. at 31. Yet the Supreme Court found his close proximity, knowledge of the drugs, and his

ownership of other incriminating items insufficient to consider him a constructive possessor of the drugs. Id. The Callahan Court stressed that the defendant was merely using the property, not paying rent or maintaining the houseboat as his residence. Id.

In State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990), the police observed the defendant standing up from a table as they entered the room; drugs and paraphernalia were found on the table. The Court found the State failed to prove possession where the only evidence was defendant's proximity to the drugs and his fingerprints on a plate containing cocaine residue. Id. at 387-89. The Spruell Court found that the fingerprints proved only fleeting possession at best, which was insufficient to prove actual possession or dominion and control. Id. at 387. Because the defendant in Spruell lacked dominion and control over the premises, mere proximity and momentary handling were insufficient to prove constructive possession. Id. at 389.

Likewise, in Cote, the defendant was a passenger in a vehicle where contraband was found, and his fingerprints were found on a jar containing some of the contraband. 123 Wn. App. at 548. The State proved that "Mr. Cote was at one point in proximity to the contraband and touched it," but this was "insufficient to establish dominion and

control. Accordingly, there was no evidence of constructive possession.”  
Id. at 550. Lastly, in State v. Alvarez, even though officers found other property belonging to the defendant in the same room as the gun they recovered, including his books, his photographs, and his bank records, the Court found insufficient evidence of dominion and control. 105 Wn. App. 215, 223, 19 P.3d 485 (2001).

- c. The prosecution failed to prove that Mr. Warner had dominion or control over either the premises or the firearms in the back closet; therefore, the evidence was insufficient to convict.

The testimony at trial was clear that Mr. Warner, like the defendants in Callahan, Spruell, Cote, and Alvarez, neither owned, rented, nor permanently resided in the location in which he was found. RP 30. Although according to Ms. Christiansen, Mr. Warner momentarily handled the firearms, along with Mr. Chin, when he asked if they could be stored in the cluttered back room closet, Ms. Christiansen testified that Mr. Warner never touched those guns again. RP 40. Such momentary handling of contraband is insufficient evidence of dominion and control. See Callahan, 77 Wn.2d at 28-31; Spruell, 57 Wn. App. at 389. Nor is it clear that Mr. Warner handled the weapons personally, in order to prove actual possession, since Ms. Christiansen admitted she was not present at the time the guns were placed in the closet. RP 37.

In sum, the prosecution did not offer evidence based on anything more than an assumption that Mr. Warner's presence in the same house as the seized firearms demonstrated that he exercised dominion and control over them.

d. The prosecution's failure to prove all essential elements requires reversal.

The prosecution failed to sufficiently connect Mr. Warner to the firearms, by failing to present sufficient evidence of dominion and control, an essential element of the charged offense. Absent proof of every essential element, the conviction must be reversed and the charge dismissed. State v. Hundley, 126 Wn.2d 418, 421-22, 895 P.2d 403 (1995).

2. MR. WARNER'S CONVICTIONS WERE ENTERED IN VIOLATION OF HIS RIGHT TO APPEAR AND DEFEND IN PERSON UNDER ARTICLE I, SECTION 22 AND THE SIXTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS.

a. The lack of accommodation denied Mr. Warner his constitutional right to appear and be present.

In Washington, an accused person has the constitutional right to "appear and defend in person..." Article I, Section 22. The federal constitution guarantees the right to be present at all critical stages of trial. U.S. Const. Amends. VI, XIV; State v. Irby, 170 Wn.2d 874, 880-81, 246

P.3d 796 (2011); see also State v. Ramirez-Dominguez, 140 Wn. App. 233, 243, 165 P.3d 391 (2007).

One component of these rights is “the right to have trial proceedings presented in a way that the accused can understand.” Linton v. State, 275 S.W.3d 493, 503 (Tex., 2009). The trial court “has a duty to devise a communication solution that provides the particular defendant with ‘that minimum level’ of understanding that is constitutionally required.” Id.; see also People v. James, 937 P.2d 781, 783 (Colo., 1996).

This standard requires accommodation that allows the accused to “sufficiently understand the proceedings against him such that he is able to assist in his own defense.” Linton, 275 S.W.3d at 503-04; see also United States v. McMillan, 600 F.3d 434, 453-54 (5<sup>th</sup> Circ. 2010); State v. Barber, 617 So.2d 974, 976 (La., 1993). The test is analogous to that used to determine competency to stand trial. Linton, 275 S.W.3d at 503 n.13 (collecting cases). This requires accommodation to permit understanding at the time live testimony is given. Id. at 504.

In People v. Doe, the court analogized the predicament of a hearing impaired individual without an accommodation to that of a non-English speaking defendant being forced to proceed without a language

interpreter. 602 N.Y.S.2d 507, 510, 158 Misc.2d 863 (1993) (“Clearly, a non-English speaking defendant could not meaningfully assist in his/her own defense without the aid of an interpreter.”). The court in Doe found it irrelevant whether a defendant could function well in the controlled environment of an audiology exam, which determined that she could hear at a rate of 92% accuracy. Id. at 509.

Unfortunately, the courtroom is not the optimal setting for a hearing impaired individual. The acoustics are poor, background noises are prevalent and with the defendant sitting at counsel table, she necessarily faces an attorney's back when a witness is being questioned. From all the documentary evidence provided, there can be no dispute that the defendant is hearing impaired nor can there be any dispute that due to this impairment and the courtroom acoustics and configuration, much of the trial may not have been comprehended, understood or heard by the defendant.

Doe, 602 N.Y.S.2d at 509.

The Doe Court concluded, that “even assuming that she was able to hear 92% of the trial, that percentage is not enough to satisfy due process. A defendant is entitled to hear 100% of the proceedings.” Id.

Once a trial court is alerted to an accused’s disability, the court is responsible for taking whatever steps are necessary to ensure the necessary level of understanding required by the constitution. Linton, 275 S.W.3d at 503-04. If the need for accommodation is acutely

obvious, the accused person need not even make a request to the trial court. Doe, 602 N.Y.S.2d at 510.

In this case, Mr. Warner suffers from a hearing impediment that affected his ability to hear the trial proceedings; he alerted the court to this fact no less than five times during the trial. RP 3-4, 77, 80, 82, 142.

Other than to ask witnesses to speak directly into the microphones, no accommodation was provided by the court in order to ensure that Mr. Warner could hear “100% of the proceedings,” as due process demands. See Doe, 600 N.Y.S.2d at 510. Although the court assured Mr. Warner that the court would “do everything that we can to make sure that [he] can hear us,” the court did nothing to follow through on that promise. RP 82.

b. Defense counsel was ineffective for failing to request an accommodation for Mr. Warner’s disability.

Likewise, Mr. Warner’s defense counsel failed to request any accommodation. Despite the fact that Mr. Warner complained within the first moments of not being able to hear the judge read the amended information, counsel never requested that a listening device be provided for his client. RP 3-4, 77, 80, 82, 142.

Mr. Warner’s early statement that “my hearing is very bad,” RP 3, together with counsel’s four additional reminders to the court that Mr.

Warner could not hear the proceedings, indicate that counsel should have sought accommodation from the court to assist Mr. Warner with his hearing disability, so that he could exercise his due process right to appear and defend in person.

To the degree that trial counsel failed to protect Mr. Warner's fundamental due process rights, counsel did not function as the effective advocate to which Mr. Warner was constitutionally entitled. U.S. Const. Amends. VI, XIV; Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); In re Hubert, 138 Wn. App. 924, 929, 158 P.3d 1252 (2007).

E. CONCLUSION

For the above reasons, Mr. Warner's case should be reversed and dismissed for failure to prove an essential element. In the alternative, due to the due process violation, the matter should be reversed and remanded for a new trial.

Respectfully submitted this 15<sup>th</sup> day of July, 2015.

s/ Jan Trasen

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Attorneys for Appellant

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

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STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
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v.	)	NO. 72639-1-I
	)	
EDWARD WARNER,	)	
	)	
APPELLANT.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15<sup>TH</sup> DAY OF JULY, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| [X ] | EDWARD WARNER<br>233061<br>MONROE CORRECTIONAL COMPLEX<br>PO BOX 777<br>MONROE, WA 98272                                | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____                              |

**SIGNED** IN SEATTLE, WASHINGTON THIS 15<sup>TH</sup> DAY OF JULY, 2015.

X \_\_\_\_\_ 