

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON  
CLERK'S OFFICE

Aug 29, 2016, 8:26 am

RECEIVED ELECTRONICALLY

S. Ct. No. 93516.5  
COA No. 33041-9-III

SUPREME COURT OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

v.

RUVIM DEZHNYUK,

Petitioner.

---

PETITION FOR REVIEW

---

Kenneth H. Kato, WSBA # 6400  
Attorney for Petitioner  
1020 N. Washington St.  
Spokane, WA 99201  
(509) 220-2237

## TABLE OF CONTENTS

|  |   |
|--|---|
| A. IDENTITY OF PETITIONER.....   | 1 |
| B. COURT OF APPEALS DECISION.....  | 1 |
| C. ISSUE PRESENTED FOR REVIEW.....   | 1 |
| Was the State’s evidence insufficient to support<br>the conviction for possession of a controlled<br>substance, heroin?..... | 1 |
| D. STATEMENT OF THE CASE.....  | 1 |
| E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.....   | 3 |
| F. CONCLUSION.....   | 5 |

## TABLE OF AUTHORITIES

### Table of Cases

|  |      |
|--|------|
| <i>State v. Borrero</i> , 147 Wn.2d 353, 58 P.3d 245 (2002).....   | 3, 4 |
| <i>State v. Reid</i> , 66 Wn.2d 243, 401 P.2d 988 (1965).....  | 5    |
| <i>State v. Rudd</i> , 70 Wn. App. 871, 856 P.2d 699 (1993).....   | 4    |
| <i>State v. Solomon</i> , 73 Wn. App. 724, 870 P.2d 1019,<br><i>review denied</i> , 124 Wn.2d 1028 (1994)..... | 4    |
| <i>State v. Witherspoon</i> , 180 Wn.2d 875, 329 P.3d 888 (2014).....  | 3    |

### Statutes

|                        |     |
|------------------------|-----|
| RCW 9A.08.020.....     | 1   |
| RCW 69.50.4013(1)..... | 1,4 |

## Rules

RAP 13.4(b)(1).....3, 5

RAP 13.4(b)(2).....3, 5

A. IDENTITY OF PETITIONER

Ruvim Dezhnyuk asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The decision of the Court of Appeals which Mr. Dezhnyuk wants reviewed was filed on July 28. A copy of the decision is in the Appendix.

C. ISSUE PRESENTED FOR REVIEW

1. Was the State's evidence insufficient to support the conviction for possession of a controlled substance, heroin?

D. STATEMENT OF THE CASE

Ruvim Dezhnyuk was charged by information with one count of possession of a controlled substance, heroin, in violation of RCW 69.50.4013 (1) and RCW 9A.08.020. (CP 2). The case proceeded to jury trial.

Mr. Dezhnyuk was driving a car belonging to Jessica Robinson-Willers, who was in the right front passenger seat. (RP 154, 158). The car was stopped by Washington State Patrol Trooper Paul Woodside for speeding, while Trooper Charles Ferrell arrived to assist. (RP 153-54). Trooper Ferrell smelled what he

thought was heroin. (RP 159-60). Upon searching the car with the owner's permission, he found a digital scale between a child's car seat frame and the padding in the back seat. (RP 161-64). Black, sticky residue, appearing to be heroin, was on the scale. (RP 165, 169-70).

Trooper Woodside read *Miranda* rights to Mr. Dezhnyuk, who was outside the car. (RP 184). On searching the car, the trooper found the barrel of a pen and a clear plastic baggie shoved down between the driver's seat and the console. (RP 185). The tube, *i.e.*, the pen barrel, contained black residue. (RP 187).

Trooper Woodside testified tubes were used to suck up smoke from drugs. (RP 188). The tube field-tested for heroin and it was also submitted to the Washington State Patrol Crime Lab for testing. (RP 195-96).

Devon Hause, a drug chemist for the crime lab, testified she tested the tube with the residue and concluded it contained heroin. (RP 198, 207-08). The tube was neither offered nor admitted into evidence. (RP 198-208).

Mr. Dezhnyuk was convicted of possession of a controlled substance, heroin. (RP 327). He was sentenced within the

standard range. (CP 89). The Court of Appeals affirmed his conviction by unpublished opinion on July 28, 2016. (App.).

#### E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Review should be accepted by this court because the Court of Appeals decision conflicts with other appellate decisions. RAP 13.4(b)(1), (2).

The Court of Appeals misapprehended Mr. Dezhnyuk's argument by focusing on direct and circumstantial evidence proving the identity of the controlled substance that tested as heroin. But that is not the issue. He is contesting the possession element, not the substance's identity.

The State has the burden of proving the elements of a crime beyond a reasonable doubt. *State v. Borrero*, 147 Wn.2d 353, 364, 58 P.3d 245 (2002). In a sufficiency challenge, the evidence must be viewed in a light most favorable to the State to determine whether any rational trier of fact could find the crime's essential elements beyond a reasonable doubt. *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014). Such a challenge admits the truth of the State's evidence. *Id.*

To convict a person for the crime of possession of a controlled substance, heroin, the State must prove the defendant

possessed a controlled substance, heroin, in the State of Washington. See RCW 69.50.4013(1). Those essential elements of the offense were reflected in the to-convict instruction, no. 9. (CP 74). The point is that the State did not prove an essential element of the offense – possession of the drug itself. Contrary to what the Court of Appeals mistakenly thought was the issue, Mr. Dezhnyuk did not challenge the identity of anything he purportedly possessed. Rather, the issue was whether the State proved beyond a reasonable doubt he did indeed possess it. Without the heroin itself, possession of which must be shown, the State could not, and did not, prove that essential element. *Borrero, supra*.

Even if it is assumed the crime lab testing showed the tube contained heroin residue, the tube itself was neither offered by the State as evidence nor admitted by the court. (RP 196-215). The State did not produce the heroin at trial. The offense charged here requires proof of possession of a controlled substance. See *State v. Solomon*, 73 Wn. App. 724, 728-29, 870 P.2d 1019, review denied, 124 Wn.2d 1028 (1994). Absent possession of a drug, there is no crime. *State v. Rudd*, 70 Wn. App. 871, 874, 856 P.2d 699 (1993); cf. *State v. Hornaday*, 105 Wn.2d 120, 126, 713 P.2d

71 (1986) (consumption of substance not possession, citing *State v. Reid*, 66 Wn.2d 243, 247, 401 P.2d 988 (1965).

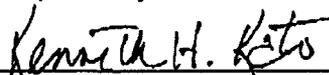
Review is warranted under RAP 13.4(b)(1) and (2).

F. CONCLUSION

Based on the foregoing facts and authorities, Mr. Dezhnyuk respectfully urges this court to grant his petition for review.

DATED this 28<sup>th</sup> day of August, 2016.

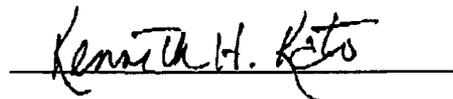
Respectfully submitted,



Kenneth H. Kato, WSBA # 6400  
Attorney for Petitioner  
1020 N. Washington St.  
Spokane, WA 99201  
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on August 28, 2016, I served a copy of the petition for review by USPS on Ruvim Dezhnyuk, 29833 – 125<sup>th</sup> Pl. SE, Auburn, WA 98092; and by email, as agreed, on Jodi Hammond at [jodi.hammond@co.kittitas.wa.us](mailto:jodi.hammond@co.kittitas.wa.us).



## APPENDIX

Renee S. Townsley  
Clerk/Administrator

(509) 456-3082  
TDD #1-800-833-6388

*The Court of Appeals  
of the  
State of Washington  
Division III*



July 28, 2016

500 N Cedar ST  
Spokane, WA 99201-1905

Fax (509) 456-4288  
<http://www.courts.wa.gov/courts>

E-mail  
Gregory Lee Zempel  
Jodi Marie Hammond  
Kittitas County Prosecuting Attorney  
205 W 5th Ave Ste 213  
Ellensburg, WA 98926-2887

Kenneth H Kato  
Attorney at Law  
1020 N Washington St  
Spokane, WA 99201-2237  
khkato@comcast.net

CASE # 330419  
State of Washington v. Ruvim Dezhnyuk  
KITTITAS COUNTY SUPERIOR COURT No. 141001222

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley  
Clerk/Administrator

RST:jab  
Enc.

c: **E-mail**—Hon. Scott R. Sparks

c: Ruvim Dezhnyuk  
29833 - 125th Place, SE  
Auburn, WA 98092

**FILED**  
**JULY 28, 2016**  
In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

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

|                      |   |                     |
|----------------------|---|---------------------|
| STATE OF WASHINGTON, | ) |                     |
|                      | ) | No. 33041-9-III     |
| Respondent,          | ) |                     |
|                      | ) |                     |
| v.                   | ) |                     |
|                      | ) |                     |
| RUVIM DEZHNYUK,      | ) | UNPUBLISHED OPINION |
|                      | ) |                     |
| Appellant.           | ) |                     |

SIDDOWAY, J. — Ruvim Dezhnyuk was convicted by a Kittitas County jury of possession of a controlled substance: heroin. He contends the evidence is insufficient to prove the identity of the narcotic because the drug was not actually presented at trial. We conclude that circumstantial evidence here is more than sufficient to prove beyond a reasonable doubt that he possessed heroin. Accordingly, we affirm his conviction.

FACTS

In September 2013, two Washington State Patrol troopers stopped a car on Interstate 82 for speeding. Mr. Dezhnyuk was the driver, and the owner of the car—Jessica Robinson-Willers—was in the passenger seat. One of the troopers smelled what he thought was heroin when he contacted the car’s occupants.

Ms. Robinson-Willers gave the troopers permission to search the car. They found a digital scale with black, sticky residue hidden under the padding of a child's car seat in the back seat, where the smell of heroin seemed to originate. The residue appeared to the troopers to be heroin. The troopers also found the barrel of a pen and a clear plastic baggie shoved down between Mr. Dezhnyuk's seat and the console. One of the troopers later testified that the tube contained black residue and that such tubes were used to inhale smoke from burning narcotics. The residue in the pen barrel field tested positive for heroin; later, the Washington State Patrol Crime Lab verified the identity of the substance. Although the pen barrel was not admitted into evidence, a drug chemist from the crime lab testified that she did the drug test and concluded that the tube contained heroin.

To convict Mr. Dezhnyuk of possessing heroin, the jury had to find beyond a reasonable doubt from the evidence that on September 18, 2013, he possessed a controlled substance (heroin) and that this act occurred in Washington. *See* Jury Instruction 9, Clerk's Papers at 74; RCW 69.50.4013(1). The jury returned a verdict of guilty.

#### ANALYSIS

Mr. Dezhnyuk contends the evidence does not support the drug identity element of possessing heroin because neither the actual pen barrel containing the heroin residue nor

the residue itself was admitted at trial. He asserts that the failure to present this direct evidence is the equivalent of having evidence suppressed by the court, requiring dismissal. He fails to give credit to other direct and circumstantial evidence that supports the elements of his offense.

Due process requires the State to prove beyond a reasonable doubt each element of an offense. *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). Evidence is sufficient if, when viewed in the light most favorable to the State, it allows a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). A defendant who claims insufficiency of the evidence necessarily admits the truth of the State's evidence and all inferences that arise from that evidence. *Id.*

Here, the State presented evidence that established beyond a reasonable doubt the identity of the residue in the pen barrel. The troopers testified that they had extensive experience with heroin and recognized it on sight and by smell. Their field test of the residue in the pen barrel was reinforced by the test of the material by the crime lab. And the lab employee who conducted the chemical analysis testified as to her qualifications and her conclusion that the residue was heroin. Finally, Ms. Robinson-Willers testified that after officers initiated their traffic stop of her car, Mr. Dezhnyuk emptied out his pockets, placed contents between the seats, reached back and placed a scale underneath

No. 33041-9-III  
*State v. Dezhnyuk*

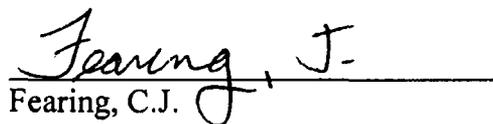
the child car seat cover, and handed her \$800 in cash to hold for him. This evidence is sufficient for a rational juror to find beyond a reasonable doubt that Mr. Dezhnyuk possessed heroin.

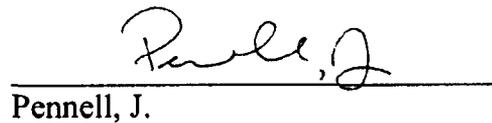
Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
Siddoway, J.

WE CONCUR:

  
Fearing, C.J.

  
Pennell, J.

## OFFICE RECEPTIONIST, CLERK

---

**From:** OFFICE RECEPTIONIST, CLERK  
**Sent:** Monday, August 29, 2016 8:27 AM  
**To:** 'Kenneth H. Kato'  
**Cc:** Jodi Hammond  
**Subject:** RE: petition for review in st v dezhnyuk, coa no. 33041-9-III

Received 8/29/16.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

Questions about the Supreme Court Clerk's Office? Check out our website:

[http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/clerks/](http://www.courts.wa.gov/appellate_trial_courts/supreme/clerks/)

Looking for the Rules of Appellate Procedure? Here's a link to them:

[http://www.courts.wa.gov/court\\_rules/?fa=court\\_rules.list&group=app&set=RAP](http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=app&set=RAP)

Searching for information about a case? Case search options can be found here:

<http://dw.courts.wa.gov/>

**From:** Kenneth H. Kato [mailto:khkato@comcast.net]  
**Sent:** Sunday, August 28, 2016 5:19 PM  
**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>  
**Cc:** Jodi Hammond <jodi.hammond@co.kittitas.wa.us>  
**Subject:** petition for review in st v dezhnyuk, coa no. 33041-9-III

Dear Clerk: Attached for filing is the petition for review in State v. Dezhnyuk, COA No. 33041-9-III. Thank you. Kenneth H. Kato, WSBA # 6400, 1020 N. Washington St., Spokane, WA 99201; tel: (509) 220-2237; email: [khkato@comcast.net](mailto:khkato@comcast.net)