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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JEREMY JACOB JAMES, Appellant.	No. 48317-3-II UNPUBLISHED OPINION

MELNICK, J. — Jeremy James appeals his conviction for unlawful possession of a firearm in the first degree. Police officers validly stopped a vehicle in which James was a passenger. They did not seize James. They conducted a valid warrantless search that, in part, led to the issuance of a search warrant based on probable cause. In addition, sufficient evidence supports James's conviction. We do not reach the issue of appellate costs. We affirm.

FACTS[1]

On January 17, 2015 at approximately 1:41 A.M., Officer Ryan Moody and his partner, Officer Maxwell Criss, conducted a valid traffic stop of a vehicle, driven by Leon Oya. James sat in the backseat behind the driver. Another man sat behind the front passenger seat and a woman sat between them. Another woman sat in the front seat. James and the other male passenger in the backseat were not wearing seat belts.

[1] These facts are from the suppression hearing. The facts are generally not in dispute, and the officers testified to the same facts at trial.

The officers arrested Oya for driving with a suspended license. They searched Oya incident to arrest. Moody discovered a piece of charred foil and a small portion of a Percocet pill, for which Oya admitted he did not have a prescription. Oya consented to a search of the vehicle.

The officers instructed the four passengers to exit the vehicle. James sat down and remained near the front of the vehicle. The police located two purses, but the women denied consent to search them.

Moody found a blue jacket in the back seat. Moody searched it and found a 9mm bullet. Before the search, Moody and Criss did not know to whom the jacket belonged. However, based on the location of the jacket, Moody suspected the jacket belonged to "James more than the other two male passengers." Report of Proceedings (RP) (July 24, 2015) at 48.

After the search, and after waiving his *Miranda*[2] rights, James admitted he owned the jacket, but denied owning the bullet. The officers released Oya, and allowed him and three of the four passengers to leave, including James. James never asked the officers before that point if he could leave.

The officers impounded the car and sought a search warrant. The affidavit in support of the search warrant stated that, in addition to the above information, based on their training and experience, it was common for evidence to be in a vehicle under similar circumstances. The affidavit noted that James was a convicted felon and prohibited from possessing firearms. The officers also believed that the purses may have held more contraband. The affidavit stated that probable cause existed to believe two felonies were committed, unlawful possession of a controlled substance and unlawful possession of a firearm. The affidavit sought, in pertinent part, to search for controlled substances, drug paraphernalia, firearms, ammunition, documents, and records.

[2] *Miranda v. Arizona*, 384 U.S. 436, 468, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Pursuant to a search after a judge issued the search warrant, Criss found a 9mm handgun under the driver's seat. The State charged James with unlawful possession of a firearm in the first degree.[3]

I. MOTION TO SUPPRESS

James filed a motion to suppress evidence. He argued that the search warrant was defective because it relied on an unlawful warrantless search where the officers discovered the bullet in James's jacket. James also argued that the remaining information in the search warrant affidavit did not provide a nexus between the crime of unlawful possession of a controlled substance and the car.

The trial court held a suppression hearing and denied the motion to suppress.[4] It entered an order with written findings of fact and conclusions of law.

The trial court also held a confession hearing pursuant to CrR 3.5. The trial court found that the police officers neither detained nor arrested James and that his statements were admissible.

II. TRIAL

At James's trial, the parties stipulated that James had been convicted of a serious offense in 2008, and he knew that he was prohibited from possessing a firearm after that date.

Officers Moody and Criss testified to the same facts as at the suppression hearing. Moody opined that the seat's mechanical parts prohibited the driver from being able to push the gun underneath the seat from the front. The 9mm handgun had a round in the chamber. It was ready

[3] RCW 9.41.010; RCW 9.41.040(1)(a).

[4] James challenges only three findings of fact for substantial evidence. The remaining unchallenged findings are verities on appeal. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011).

to discharge. All of the males in the vehicle were prohibited from possessing firearms. Criss opined that James's feet would have likely been touching the gun as he sat in the car.

After James waived his *Miranda* rights, Criss asked him if he thought his fingerprints were on the gun. James shook his head and responded that he did not know. James denied knowing about the gun. According to the forensic expert, no forensic evidence existed that James touched the firearm.

The jury found James guilty of unlawful possession of a firearm in the first degree. The trial court sentenced James to 48 months of confinement.

James told the trial court that he received a monthly allowance of $1,600 from the Indian tribe of which he is a member. The trial court entered an order of indigency for appeal. James appeals.

ANALYSIS

I. MOTION TO SUPPRESS

James argues that the trial court erred by denying his motion to suppress because the officers illegally seized him and illegally searched his jacket. In addition, James argues that the search warrant was overbroad and not supported by probable cause. He specifically challenges findings of fact 31 and 34 and conclusions of law 3, 4, and 5 from the suppression hearing order.[5] We disagree.

[5] James also assigns error to finding of fact 26, which the State concedes. The finding states, "3 of the 5 people left the scene, the driver was arrested and the right rear passenger was arrested." Clerk's Papers (CP) at 59. The record reflects that four of the five occupants were released, because the driver was initially arrested, but then released by the officers.

A. Substantial Evidence Supports Challenged Findings of Fact

We review a trial court's denial of a suppression motion in two parts. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011). We review whether the trial court's findings of fact are supported by substantial evidence and whether the findings support the court's conclusions of law. *Lohr*, 164 Wn. App. at 418. Substantial evidence is evidence sufficient to convince a reasonable person of the truth of the trial court's finding. *Lohr*, 164 Wn. App. at 418. Unchallenged findings of fact are verities on appeal. *Lohr*, 164 Wn. App. at 418. We defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *Lohr*, 164 Wn. App. at 418. We review the trial court's conclusions of law de novo. *Lohr*, 164 Wn. App. at 418.

First, we consider whether the challenged findings are supported by substantial evidence. James challenges findings of fact 31 and 34.

In finding of fact 31, the trial court found that "[u]nder these circumstances, the jacket was not 'readily recognizable' as belonging to any particular occupant. Before [James] admitted the jacket was his (after it had already been searched) the officers credibly believed it could have belonged to anyone in the car, including the driver." Clerk's Papers (CP) at 59.

Moody testified that before the search he did not know to whom the jacket belonged because Oya and James were close enough in size that it could have belonged to any of the male passengers. Criss also testified that before the search, he did not know who owned the jacket. The trial court made a determination that the officers were credible in believing the jacket could have belonged to any one of the males. Therefore, substantial evidence supports this finding.

Finding of fact 34 states, "The affidavit for the search warrant did not contain any facts that were illegally obtained." As outlined above, this finding is supported by substantial evidence.

"Thus [the warrant] contained sufficient facts to establish probable cause to search the car [James] had been riding in and all items within." CP at 60.

Next, we consider whether the challenged conclusions of law are supported by the findings and whether the trial court erred by denying James's motion to suppress.

B. Warrantless Seizure and Search

1. Detention

James challenges the legality of his seizure because there existed no articulated reason to detain him for more time than giving a traffic citation for his failure to wear a seatbelt. We disagree.

The trial court entered findings of fact that are not challenged. They are verities on appeal. *Lohr*, 164 Wn. App. at 418. The officers did not detain James. He stayed near the car during the search by his own choice, not under the officers' orders. The officers neither ordered the passengers to stay nor placed them under arrest. The trial court found that James "was never arrested or detained, and left the scene of his own volition." CP at 64.

We also note that the police did not obtain any evidence as a result of James's alleged unlawful detention. Even if we concluded that James was illegally seized, there is nothing to suppress. James's argument on this issue fails.

2. Jacket Search

James argues the trial court erred by denying his motion to suppress because the jacket was readily recognizable as belonging to him, and thus, the officers illegally searched his jacket without his consent. We disagree.

A warrantless search is per se unreasonable, unless it fits within one of the "'jealously and carefully drawn exceptions.'" *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996)

(quoting *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)) (internal quotation marks omitted). "These exceptions include exigent circumstances, consent, searches incident to a valid arrest, inventory searches, the plain view doctrine, and *Terry*[6] investigative stops." *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 310, 178 P.3d 995 (2008). The State bears the burden of showing that the search and seizure was supported by a warrant or an exception to the warrant requirement. *Hendrickson*, 129 Wn.2d at 71. The fruits of an unconstitutional search and seizure must be suppressed. *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

Under article I, section 7 of the Washington Constitution, people have a privacy interest in their vehicles and their contents. *State v. Snapp*, 174 Wn.2d 177, 187, 275 P.3d 289 (2012). In situations involving the search of motor vehicles, "the voluntary consent of one with common authority over a vehicle may support a search and evidence discovered can be used against a nonconsenting occupant." *State v. Cantrell*, 124 Wn.2d 183, 191, 875 P.2d 1208 (1994). A person can only consent to a search of a personal item if he or she has an ownership or possessory interest in that item. *State v. Hamilton*, 179 Wn. App. 870, 886-87, 320 P.3d 142 (2014).

Furthermore, "the arrest of one or more vehicle occupants does not, without more, provide the 'authority of law' under article I, section 7 of our state constitution to search other, nonarrested vehicle passengers, including personal belongings clearly associated with such nonarrested individuals." *State v. Parker*, 139 Wn.2d 486, 502-03, 987 P.2d 73 (1999). "[R]eadily recognizable personal effects are protected from search to the same extent as the person to whom they belong." *Parker*, 139 Wn.2d at 498. "Personal effects need not be worn or held to fall within the scope of protection." *Parker*, 139 Wn.2d at 499.

[6] *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Whether an item within a vehicle is "clearly and closely" associated with a nonarrested passenger is determined by utilizing the following test. Officers may

> assume all containers within the vehicle may be validly searched, unless officers *know or should know* the container is a personal effect of a passenger who is not independently suspected of criminal activity and where there is no reason to believe contraband is concealed within the personal effect immediately prior to the search.

Parker, 139 Wn.2d at 503.

We determine whether the trial court's findings support its conclusion of law that the search was lawful because the jacket was not readily recognizable as James's jacket. Conclusion of law 3 stated, that "Moody's search of the vehicle was lawful and reasonable in scope. Since the owner of the blue jacket was not readily recognizable to the officers before and during the search, the officers lawfully searched it and lawfully found the 9mm round." CP at 60.

The trial court's finding that the jacket was not readily recognizable as James's jacket supports a conclusion that the police lawfully searched the jacket because the police did not readily recognize James as the owner of the item. Thus, we conclude that the warrantless search of James's jacket was lawful, and the trial court did not err by denying his motion to suppress.

C. SEARCH WARRANT

James argues that the search warrant was overbroad and not supported by probable cause. We disagree.

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, issuance of a search warrant must be based on probable cause. "Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). There must be a "nexus between criminal activity and

the item to be seized and between that item and the place to be searched." *State v. Neth*, 165 Wn.2d 177, 183, 196 P.3d 658 (2008). "Probable cause requires more than suspicion or conjecture, but it does not require certainty." *State v. Chenoweth*, 160 Wn.2d 454, 476, 158 P.3d 595 (2007). A warrant is "overbroad" if it describes items for which probable cause does not exist. *State v. Higgs*, 177 Wn. App. 414, 426, 311 P.3d 1266 (2013), *review denied*, 179 Wn.2d 1024 (2014).

Appellate courts generally review the issuance of a search warrant for an abuse of discretion. *State v. Maddox*, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004). Great deference is given to the probable cause determination of the issuing judge. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994).

> However, at the suppression hearing the trial court acts in an appellate-like capacity; its review, like ours, is limited to the four corners of the affidavit supporting probable cause. Although we defer to the magistrate's determination, the trial court's assessment of probable cause is a legal conclusion we review de novo.

Neth, 165 Wn.2d at 182 (internal citations omitted).

In conclusion of law 4, the trial court stated, "After they found the 9mm round in the car and discovered [James] could not lawfully possess firearms, the officers had probable cause to believe there would be other evidence in the car relating to a violation of [title 9.41 RCW], such as firearms and ammunition." CP at 60. In conclusion of law 5, the trial court stated, "The search warrant was validly issued because the affidavit's contents were sufficient to establish probable cause to believe there was evidence of firearms crimes within the vehicle." CP at 60.

Based on the facts outlined above, and as presented to the judge in the search warrant affidavit, we conclude that the trial court did not abuse its discretion by finding that probable cause

existed to search for items related to the firearm, including ammunition.[7] Therefore, we conclude that the trial court did not err by denying James's motion to suppress.

II. SUFFICIENCY OF THE EVIDENCE

James argues insufficient evidence exists to support his conviction because there existed no evidence that he knew of the firearm, or as a passenger had dominion and control over the firearm. We disagree.

A. Standard of Review

To determine whether sufficient evidence supports a conviction, we view the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Any inferences "'must be drawn in favor of the State and interpreted most strongly against the defendant.'" *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). In addition, we "must defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence." *Homan*, 181 Wn.2d at 106.

[7] We need not address whether the portion of the warrant related to drug paraphernalia was supported by probable cause because we conclude that probable cause existed to search the vehicle.

B. Sufficient Evidence Supports the Conviction

To prove that James unlawfully possessed a firearm in the first degree, the State had to prove he had a firearm in his possession or control after having previously been convicted of any serious offense. RCW 9.41.040.

Possession may be actual or constructive. *State v. Raleigh*, 157 Wn. App. 728, 737, 238 P.3d 1211 (2010). Constructive possession is established by showing that the defendant had dominion and control over the firearm. *State v. Murphy*, 98 Wn. App. 42, 46, 988 P.2d 1018 (1999). "Dominion and control" means that the item "may be reduced to actual possession immediately." *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). The defendant's control over the firearm does not have to be exclusive, but mere proximity to the firearm is insufficient to show control. *Raleigh*, 157 Wn. App. at 737. The ability to reduce an object to actual possession is an aspect of dominion and control, but other aspects such as physical proximity should also be considered. *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989). "[K]nowledge of the presence of contraband, without more, is insufficient to show dominion and control to establish constructive possession." *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012).

We look at the totality of the circumstances to determine if the jury could reasonably infer dominion and control. *State v. Alvarez*, 105 Wn. App. 215, 221, 19 P.3d 485 (2001). No single factor is dispositive. *Alvarez*, 105 Wn. App. at 221. "Thus, a defendant with prior felony convictions may not be in violation of the law by simply being near a firearm if he or she has not exercised dominion or control over the weapon or premises where the weapon is found." *State v. Lee*, 158 Wn. App. 513, 517, 243 P.3d 929 (2010).

Here, the State presented sufficient evidence to prove James to exercised dominion and control over the firearm. He sat in close proximity to the firearm. Criss opined that James's feet

would have likely touched the gun while he sat in the car. The officers also testified that because of the mechanics of the driver's seat, the firearm could only have been placed there from the backseat. James had knowledge of the firearm because when Criss asked James if he thought his fingerprints were on the gun, James shook his head and responded that he did not know. In addition, James had a 9mm bullet in his jacket, the same type of bullet that would be used in the firearm found in the car. The gun had 15 bullets in it, but it could hold 16 bullets. A reasonable inference is that the 16th bullet was the one in James's coat.

James cites *Chouinard* for support. In *Chouinard*, the State charged a passenger with possession of a firearm. 169 Wn. App. at 897-98. In the vehicle, "the backrest on the backseat had been detached from the car, creating a gap between the backrest and the rear dash." *Chouinard*, 169 Wn. App. at 898. We determined that the backseat passenger's mere proximity to a weapon in the trunk of the vehicle he did not own, along with his knowledge of the weapon's presence, were insufficient to establish dominion and control, and that this evidence alone could not sustain a conviction for constructive possession of a firearm. *Chouinard*, 169 Wn. App. at 903. Here, the state presented a great deal more evidence showing James constructively possessed the firearm.

Based on all of the facts, a rational fact finder could have found that James had constructive possession of the gun beyond a reasonable doubt. Therefore, the State presented sufficient evidence to support the conviction.

III. APPELLATE COSTS

James opposes appellate costs in light of *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016), asserting that he does not have the ability to pay. Under *State v. Grant*, 196 Wn. App. 644, 650, 385 P.3d 184 (2016), a defendant is not required to

address appellate costs in his or her briefing to preserve the ability to object to the imposition of costs after the State files a cost bill. A commissioner of this court will consider whether to award appellate costs in due course under the newly revised provisions of RAP 14.2 if the State decides to file a cost bill and if James objects to that cost bill.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Bjorgen, C.J.

Lee, J.