

July 10, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM DAVID BEST,

Appellant.

No. 50739-1-II

UNPUBLISHED OPINION

JOHANSON, J. — A jury convicted William D. Best of one count of unlawful possession of a controlled substance, methamphetamine, and two counts of bail jumping. Best appeals and asserts that the evidence was insufficient to support his possession conviction. We disagree and affirm Best’s possession conviction.

FACTS

I. BACKGROUND

Best was arrested for unlawful possession of a controlled substance, methamphetamine. After Best failed to appear at two court proceedings, the State added two counts of bail jumping.

II. TRIAL TESTIMONY

A. POLICE TESTIMONY

At Best's trial, two police officers, Detective Benjamin Mortensen and Sergeant Mark Langlois, testified about Best's arrest.¹

On an evening in April 2016, the officers had observed a minivan parked in a Walmart parking lot. The van was at the end of a row of parking spots, next to a planting strip with beauty bark and shrubbery. Because this was the second day the van had been parked in the same spot and because the windows were fogged up, the officers decided to make contact.

The officers approached the van from the passenger side. As they approached, Detective Mortensen saw the driver's side sliding door open slightly and then close again. Sergeant Langlois could see a hand making a motion through the door.

It took the officers about five seconds from when the door opened to reach the van; they did not hear any movement inside during this time. When they reached the van, Best exited and spoke with Detective Mortensen. Sergeant Langlois observed a wadded piece of a plastic shopping bag in a shrub on the planting strip, within a couple feet of the van's driver's side door. Thinking that the plastic, which did not have any dust on it, seemed out of place, Sergeant Langlois opened it and found an amount of methamphetamine worth about \$20 inside.

Although a woman was in the van with Best, Sergeant Langlois noted that Best was the closer of the two to the driver's side door when police reached the van. Sergeant Langlois opined

¹ A deputy court clerk also testified about the bail jumping charges.

that it was the person closer to the driver's side door who had thrown the methamphetamine outside.

Detective Mortensen explained that in the area, it was "very rare" to find methamphetamine left on the ground because "it's going to be picked up very soon if somebody comes across it because they're going to use it." Verbatim Report of Proceedings (VRP) (March 21, 2017) at 34-35.

B. BEST'S TESTIMONY

Best testified in his own defense, explaining that he and his girlfriend were living in his van at the time of his arrest. Best said that he and his girlfriend were in the van having sex, and he opened the door and threw a cigarette outside.² Then Best saw one of the officers run to the front of the van, where he picked up something off the ground and confronted Best with the object, saying it was methamphetamine. Best denied having possessed methamphetamine.

III. CONVICTIONS AND SENTENCE

The jury convicted Best of all counts: unlawful possession of a controlled substance and two counts of bail jumping. Best received a 70-day sentence. Best appeals.³

ANALYSIS

Best argues that his conviction for possession of a controlled substance, methamphetamine, should be dismissed with prejudice because there was insufficient evidence that he ever actively

² Neither officer could recall if there was a cigarette butt outside the van's driver's side door.

³ A commissioner of this court granted Best's motion for accelerated review.

or constructively possessed the methamphetamine found on the planting strip. We disagree and hold that there was sufficient evidence to support both actual and constructive possession.

I. SUFFICIENCY OF THE EVIDENCE AND POSSESSION PRINCIPLES

The State bears the burden to prove beyond a reasonable doubt all elements of an offense. *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016). When we review a claim that the evidence was insufficient to support a conviction, we view the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found the crime's essential elements beyond a reasonable doubt. *Rich*, 184 Wn.2d at 903. A defendant who challenges the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences therefrom. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). However, we do not draw inferences that are unreasonable or that are based on speculation. *Rich*, 184 Wn.2d at 903.

We defer to the trier of fact's determinations of witness credibility. *Cardenas-Flores*, 189 Wn.2d at 266. In evaluating sufficiency of the evidence, circumstantial and direct evidence are equally reliable. *Cardenas-Flores*, 189 Wn.2d at 266.

It is unlawful to possess a controlled substance, subject to exceptions not relevant here.⁴ RCW 69.50.4013(1). Possession may be actual or constructive, a distinction depending on whether the item is in the defendant's personal custody or whether the defendant had dominion and control over the item. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). For either actual or constructive possession, the control must be more than passing, based on the totality of the circumstances presented. *Staley*, 123 Wn.2d at 802.

⁴ Methamphetamine is a schedule II controlled substance. RCW 69.50.206(d)(2).

II. EVIDENCE WAS SUFFICIENT

A. ACTUAL POSSESSION

We begin by determining whether there was sufficient evidence to support that Best had actual possession⁵ of the methamphetamine found on the planting strip. Here, circumstantial evidence viewed in the light most favorable to the State supports that Best had physical custody of the piece of plastic containing the methamphetamine when he threw it into the parking strip.

As they approached the van, officers observed the driver's side door slide open and a hand make a throwing motion through the door. The officers' testimony supports that one of the occupants of the van threw something out when police were spotted approaching the van, and it is a reasonable inference, given the timing, that the item was thrown because it was incriminating in nature.

Although both Best and his girlfriend were in the van, Sergeant Langlois noted that Best was the closer of the two to the driver's side door when police reached the van within about five seconds after when the door opened. The officers did not hear any movement inside the van during this five-second period. Sergeant Langlois also testified as to his belief that it was the person closer to the driver's side door—Best—who threw the piece of plastic. Thus, the State's evidence and reasonable inferences from it support that Best, not his girlfriend, opened the door and threw the incriminating object from the van.

⁵ At trial, the State did not differentiate between actual and constructive possession. Rather, based on the jury instructions' definition of possession as "having a substance in one's custody or control," Clerk's Papers at 43, the prosecutor simply argued that Best was "in possession of this methamphetamine before he threw it out of the window." VRP (March 21, 2017) at 117.

Sergeant Langlois found the methamphetamine, which was worth about \$20, wadded inside a piece of plastic, in a shrub within a couple feet of the van's driver's side door. Sergeant Langlois testified that he noticed the plastic was not dusty and that its location was incongruous. Detective Mortensen also testified that methamphetamine was very rarely left on the ground for long in the area. And we can reasonably infer from the methamphetamine's value that someone would likely have picked it up, had it been left on the ground for long. Thus, the officers' testimony about the piece of plastic's location and appearance and about the methamphetamine's value supports that the methamphetamine had been recently thrown from the van, rather than that it was present before the officers arrived.

Thus, the evidence viewed in the light most favorable to the State and reasonable inferences therefrom support that Best threw the methamphetamine out of the van when police approached. Although officers never directly observed Best holding the methamphetamine, circumstantial evidence of possession is just as reliable as direct evidence. *Cardenas-Flores*, 189 Wn.2d at 266; *see also State v. DuPont*, 14 Wn. App. 22, 25, 538 P.3d 823 (1975) (circumstantial evidence adequate for the jury to conclude the defendant had actual possession of drugs).

Best relies on *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969), to argue that even if he threw the plastic piece containing methamphetamine, his mere momentary handling would not be sufficient evidence to support a possession conviction. He is correct that standing alone, mere momentary handling of a controlled substance is not enough. *See Callahan*, 77 Wn.2d at 29. In *Callahan*, our Supreme Court held that “[s]ince the drugs were not found on the defendant, the only basis on which the jury could find . . . actual possession would be the fact that he had handled the drugs earlier.” 77 Wn.2d at 29. Momentary handling is only a passing control, not actual

control, and thus in *Callahan*, having earlier, briefly handled drugs was insufficient to establish actual possession of them. 77 Wn.2d at 29.

However, our Supreme Court has since explained that “[t]he duration of the handling . . . is only one factor to be considered in determining whether control, and therefore possession, has been established.” *Staley*, 123 Wn.2d at 801. “Depending on the total situation, a ‘momentary handling,’ along with other sufficient indicia of control over the drugs, may actually support a finding of possession.” *Staley*, 123 Wn.2d at 802. And applying *Staley*, we have held that “evidence of momentary handling, when combined with other evidence, such as . . . a motive to hide the item from police, is sufficient to prove possession.” *State v. Summers*, 107 Wn. App. 373, 386-87, 28 P.3d 780 (2001). Indeed, we have held that seizing drugs for “‘a fleeting second’” and throwing them under a bathtub to hide them from police went beyond the passing control in *Callahan* and established a prima facie case of actual possession. *State v. Werry*, 6 Wn. App. 540, 542, 548, 494 P.2d 1002 (1972).

As set forth above, viewed in the light most favorable to the State, the evidence supports not only that Best at least momentarily handled the methamphetamine when he threw it from the van but also that he did so with a motive to hide the methamphetamine from the officers. This goes beyond mere passing control to establishing actual possession of the methamphetamine when it was in Best’s physical custody. *See Summers*, 107 Wn. App. at 386-87; *Werry*, 6 Wn. App. at 548.

Best also argues that there was insufficient evidence because he testified that the throwing motion that officers witnessed was Best throwing out his cigarette. But we defer to the jury's determination of Best's credibility. Thus, that there was evidence to support Best's theory does not change the result because the jury could have chosen to disbelieve Best's explanation. For these reasons, there is sufficient evidence to support that Best had actual possession of the methamphetamine.

B. CONSTRUCTIVE POSSESSION

Although, as set forth above, there is sufficient evidence for the jury to have found Best guilty of actual possession, we also hold that there is sufficient evidence for the jury to have found Best guilty based on constructive possession.

Constructive possession is established if “the defendant was in dominion and control of either the drugs or the premises on which the drugs were found.”⁶ *Callahan*, 77 Wn.2d at 30-31. Mere proximity and an earlier momentary handling are insufficient, standing alone, to establish dominion and control. *Staley*, 123 Wn.2d at 800-01. However, manipulating contraband in some way to hide it supports that the defendant had dominion and control over the contraband. *State v. Nyegaard*, 154 Wn. App. 641, 648, 226 P.3d 783 (2010), *remanded on other grounds*, 172 Wn.2d 1006 (2011).

⁶ The State presented no evidence tending to show that Best had dominion and control over where the drugs were found—the parking strip adjacent to his van. Thus, we look to whether there was evidence that Best constructively possessed the drugs.

Here, the evidence went beyond merely that Best was near the methamphetamine and had handled it in a manner suggesting only passing control. The officers' testimony supported that the methamphetamine, which showed signs of being recently placed in the planting strip, had been thrown by Best, who was the closer of the two van occupants to the driver's side door. Reasonable inferences from the evidence support that it was Best who threw the methamphetamine and that he did so in an attempt to hide it, establishing that he exercised dominion and control over the methamphetamine. *See Nyegaard*, 154 Wn. App. at 648 (evidence that contraband was within a vehicle's passenger's reach coupled with evidence that the passenger appeared to be hiding something in that area when the vehicle was pulled over was sufficient to establish the passenger had constructive possession of the contraband).

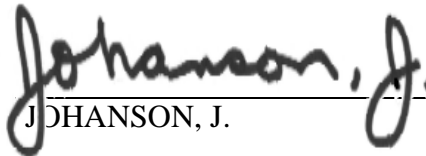
Accordingly, from the facts presented, the trier of fact could reasonably have inferred dominion and control over the drugs, in addition to proximity to them. Because the facts support that Best had dominion and control over the drugs, this case is distinguishable from *State v. George*, on which Best relies. 146 Wn. App. 906, 193 P.3d 693 (2008). In that case, the State's evidence "boil[ed] down to mere proximity." *George*, 146 Wn. App. at 923.

The State provided sufficient evidence to show that Best constructively possessed the methamphetamine.

C. CONCLUSION

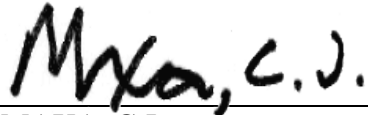
Sufficient evidence supports both that Best actually and constructively possessed the methamphetamine. We affirm his conviction for possession of a controlled substance.

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.

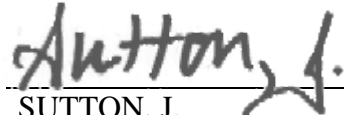


JOHANSON, J.

We concur:



MAXA, C.J.



SUTTON, J.