IN THE

MISSOURI SUPREME COURT

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	**No. SC 84377**
	)	
ALEJANDRO FRANCO-AMADOR,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CALLAWAY COUNTY, MISSOURI
THIRTEENTH JUDICIAL CIRCUIT, DIVISION I
THE HONORABLE GENE HAMILTON, JUDGE

APPELLANT'S SUBSTITUTE REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Alejandro Franco-Amador, incorporates herein by reference the Jurisdictional Statement from his opening brief as though set out in full.

STATEMENT OF FACTS

Alejandro incorporates herein by reference the Statement of Facts from his opening brief as though set out in full.

POINT RELIED ON

The trial court erred in overruling Alejandro's motion for judgment of acquittal at the close of all the evidence, and in entering judgment on the verdict of guilty of second degree trafficking, because the rulings violated Alejandro's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to establish beyond a reasonable doubt that Alejandro possessed a controlled substance because the jury could not have reached a "subjective state of near certitude" that Alejandro was aware of or exercised control over the methamphetamine hidden in Jose's car.

State v. Whalen, 49 S.W.3d 181 (Mo. banc, 2001);

State v. Grim, 854 S.W.2d 403 (Mo. banc), *cert. denied*, 510 U.S. 997 (1993);

State v. Withrow, 8 S.W.3d 75 (Mo. banc 1999);

U.S. Const., Amend. XIV;

Mo. Const., Art. I, Sec. 10; and

§ 195.010.

ARGUMENT

The trial court erred in overruling Alejandro's motion for judgment of acquittal at the close of all the evidence, and in entering judgment on the verdict of guilty of second degree trafficking, because the rulings violated Alejandro's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that the evidence was insufficient to establish beyond a reasonable doubt that Alejandro possessed a controlled substance because the jury could not have reached a "subjective state of near certitude" that Alejandro was aware of or exercised control over the methamphetamine hidden in Jose's car.

The State claims that five items of evidence demonstrate Alejandro's control over the methamphetamine in Jose's car (Resp.Br. 11):

(1) strong odors of drug masking agents in the car;

(2) Alejandro giving a "false story" when stopped;

(3) Alejandro's nervousness when stopped;

(4) his flight after the officer found the drugs; and

(5) duct tape used to package the drugs and a roll of duct tape under the seat.

None of these factors permits a reasonable inference that Alejandro had possession and control over the methamphetamine.

Odor

The officer smelled a strong odor of air freshener, along with "a lot of spices." (Tr. 162). He eventually determined that this was black pepper, or some similar spice, but he could not do so until he began his search -- the spices were not in view (Tr. 165, 169, 202). It was the officer's training and experience that allowed him to conclude that the spices and air freshener were a drug "masking agent" (Tr. 165, 203).

But there was no evidence that Alejandro had similar training. There was no evidence that he knew what a masking agent was, or why it is used. For all the State proved, Alejandro could have believed that the air freshener was in the car to cover the spice smell. It would be mere speculation, not a reasonable inference, to determine from the smell that Alejandro was connected to the drugs, let alone had control over them.

The State cites several cases dealing with the smell of "masking agents." (Resp. Br. 14-15). In ***State v. Castellanos***, 863 S.W.2d 384 (Mo.App., S.D. 1993), the defendant had driven a van from California to Springfield, in which the arresting officer smelled a very strong odor of deodorizers or air freshener. The defendant told the officer that he had been to California to visit his mother in the hospital but could not recall the hospital or the city where it was located. He also gave the officer a false name and identification papers. *Id*. The Court really did not discuss the facts of the case in any more detail than the outline above. From that, it is impossible to tell how significant it found the odor alone, or whether the apparent fact that the defendant was

alone in a van with more than 31 kilograms of cocaine was paramount. Alejandro therefore suggests that the case has little precedential value in this situation.

Similarly, in ***State v. Mercado***, 887 S.W.2d 688, 691 (Mo. App., S.D. 1994), the Court was not called upon to decide the significance of an odor of a "masking agent." Indeed, it mentioned that there was no such odor, so it is only *dicta* that a discernable odor of drugs or masking agents might have provided sufficient evidence to convict.

The State also cites ***U.S. v. Ojeda***, 23 F.3d 1473 (8th Cir. 1994); ***U.S. v. Ortiz-Ortiz***, 57 F.3d 892 (10th Cir. 1995); ***U.S. v. Sanchez-Lopez***, 879 F.2d 541 (9th Cir. 1989); ***U.S. v. Gutierrez-Espinoza***, 516 F.2d 249 (9th Cir. 1975); ***State v. Reynaga***, 643 So.2d 431 (La.App. 3 Cir. 1994); ***State v. Hernandez***, 964 P.2d 825, 125 N.M. 661 (Ct.App. 1998); ***Fields v. State***, 932 S.W.2d 97 (Tex.Ct.App. 1996); as cases holding that the odor of a drug masking agent is a "valid factor" in considering the sufficiency of the evidence. (Resp. Br. 14-15). These cases are all distinguishable, or can be limited to the issue of knowledge of the presence of the drugs, which Alejandro has already noted is the most that can be *reasonably* inferred in this case.

In ***Ojeda***, in addition to the smell, *the defendant's fingerprints were on the packages of drugs*. 23 F.3d at 1474 (this was also the case in ***Sanchez-Lopez***, 879 F.2d at 546). Further, neither Ojeda nor his nephew, the other occupant, owned the car, and the defendant could not give a coherent explanation of his reason for traveling or his destination. *Id*. Nothing like this connection with the drugs and illegal activity is present here.

Ortiz-Ortiz is similar. In addition to the smell of perfume -- which it called a masking agent -- the Tenth Circuit noted that the vehicle, stopped at a border inspection station, did not belong to either defendant, and that

> [a]t the time of their arrest, both defendants gave similar statements concerning calls at local bars, the trip to the auto repair shop, and the mysterious appearance of two "good Samaritans" who offered the use of their car to apparent strangers without any arrangements for the return of the vehicle which contained contraband of a minimum value of $28,000. Ortiz and Hernandez gave conflicting stories as to whether the car belonged to a "friend" or to strangers. The marijuana was scarcely concealed under a loose seat in the back. . . .

57 F.3d at 895. Again, the important factors are the "scarcely" concealed drugs, the fact that it was neither one of the men's car, and that they gave obviously highly suspect explanations for their possession of the car. The smell alone would not have been sufficient.

In ***Reynaga***, the defendant gave a false name -- one of sixteen aliases; he lied to officers, saying that one of the passengers, the owner of the truck, was his wife; in addition to the smell of air freshener, there was an odor of marijuana itself; and a codefendant testified that Reynaga had use of the truck for three days before leaving on the trip. 643 So.2d at 437. All of these factors more immediately connect Reynaga

with the marijuana than any evidence in this case connects Alejandro to the hidden methamphetamine.

The other cases cited by the State are also distinguishable. In ***Hernandez***, the defendant was alone in the truck, the seat of which had been so obviously modified to carry drugs that the defendant's head nearly touched the ceiling and his legs nearly touched the steering wheel. 964 P.2d at 827-28. In ***Gutierrez-Espinoza***, the issue was not sufficiency of the evidence but merely the relevance of evidence, not at issue here. 516 F.2d at 250.

Finally, in ***Fields***, the court noted, (1) the car had been rented by Fields' girlfriend, and he had had possession of the vehicle for the preceding five or more days; (2) the drugs were found concealed beneath the closed hood, and the hood latch was controlled from the interior of the car; (3) a can of air freshener, the odor of which was on the drugs, was under the seat occupied by Fields; (4) Fields lied about his prior drug offenses; (5) Fields and a codefendant gave conflicting stories as to their purpose and activities; (6) Fields carried an inadequate amount of clothing for a five day trip; (7) Fields exhibited unnatural equanimity and lack of concern throughout the temporary detention and the subsequent investigation.

In Alejandro's case, there was no showing that he ever had exclusive possession of Jose's car, there was no showing of his access to the drugs' hiding place; there was no visible sign of the spices; he did not lie to the police; he did not give conflicting stories about his activities, and there was no evidence that his luggage was inadequate. There was no connection to the drugs similar to the one in ***Fields***.

The smell of spices and/or pepper is only evidence of knowledge of the presence of the drugs -- and even that only if the Court *assumes* that ordinary persons without Highway Patrol training can recognize the smell as that of a masking agent. It demonstrates nothing about Alejandro's control of the drugs, and therefore is not sufficient evidence of possession.

False Story

As Alejandro pointed out in his opening brief, this was a new theory for the State. It did not raise this at trial or in the Court of Appeals, but it now proclaims Alejandro's statement "false" because Missouri is not along the shortest route from Phoenix to Atlanta. (Resp. Br. 17). As may be seen from the cases cited for the "masking agent" theory, a false statement plays a role in many cases, but it a statement that is verifiably false, such as giving false names, claiming to be visiting a relative one cannot name, or two defendants giving contradictory explanations of their activities.

Nothing like that is present here. The State merely has decided that driving through Missouri to get from Phoenix to Atlanta is so preposterous that it must be false. It ignores Alejandro's own testimony that he did not know how to get to Atlanta (Tr. 249). And it ignores that there was no evidence of Jose's itinerary. He may have had other, valid reasons, for taking this route. This route is also easily explained by the obvious inference -- more likely true than the State's declaration of falsehood -- that illegal aliens from Mexico would not travel along a southern route through the United States.

Nervousness and Flight

This really is a single issue. The State cannot break down nervousness and flight -- two manifestations of the same condition -- into every component or symptom, and claim that this is additional evidence of guilt. And of course Alejandro's nervousness was not due simply to a traffic stop. (Resp. Br. 18). He was an illegal alien (Tr. 248). The longer the officer stayed on the scene, the more likely Alejandro's status would be discovered. And this was even more likely to make him nervous when the reason for the original stop was completed.

But even if a jury could infer a consciousness of guilt from this behavior, it is not reasonable to infer that he was in possession of drugs. As Alejandro has explained, this is an impermissible speculative inference, ***State v. Whalen***, 49 S.W.3d 181, 184 (Mo. banc 2001), arrived at only by stacking one inference on another, like a house of cards.

Duct Tape

The State's continuing reference to the duct tape is hardly worthy of reply. Undersigned counsel has a roll of duct tape in his car (and has had it there since long before Alejandro was even charged in this case). It proves nothing, and one completely hidden item does not link Alejandro with another completely hidden item.

All Factors in Combination

The State's "five factors" (Resp. Br. 21-22), are in reality but two: the spice odor, and Alejandro's nervousness and flight. As shown above, there is no evidence that his statements or testimony about his trip were false, and the duct tape proves

nothing. Thus the State's case comes down to whether it is permissible to infer consciousness of guilt from the odor and nervousness/flight, and if so, can a second inference be stacked on that one, that the *particular* crime of which Alejandro was allegedly conscious was that of possessing, or trafficking in, drugs. Where the defendant is an illegal alien who has shown no other connection with the hidden drugs, such inference-stacking would be the sort of speculation prohibited by ***Whalen*** and ***State v. Grim***, 854 S.W.2d 403, 411 (Mo. banc), *cert. denied*, 510 U.S. 997 (1993).

Even if the inference of knowledge is reasonable, there was no evidence from which the jury could take the next, crucial, step and infer *control* of the drugs. Without the power to exercise dominion there is no control, and without control, there is no possession. § 195.010(32); ***State v. Withrow***, 8 S.W.3d 75, 80 (Mo. banc 1999). The State did not prove that Alejandro possessed the drugs, and this Court must reverse his conviction and discharge him from his sentence.

CONCLUSION

For the reasons set forth herein and in his opening brief, appellant Alejandro Franco-Amador respectfully requests that this Court reverse his conviction and sentence and discharge him therefrom.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I, Kent Denzel, hereby certify as follows:

The attached reply brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word 2002, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 2,466 words, which does not exceed the 7,750 words allowed for a reply brief.

The floppy disks filed with this brief and served on opposing counsel contain a complete copy of this brief, and have been scanned for viruses using McAfee VirusScan 4.5.1, updated in June, 2002. According to that program, these disks are virus-free.

On the _____ day of June, 2002, two true and correct copies of the foregoing reply brief and a floppy disk containing a copy thereof were mailed, postage prepaid, to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65101.

_____
Kent Denzel