

Summary of SC91760, *State of Missouri v. Melvin Stover Jr.*

Appeal from the Clay County circuit court, Judge Larry D. Harman
Argued and submitted Jan. 4, 2012; opinion issued Sept. 25, 2012

Attorneys: Stover was represented by Daniel L. Viets, a solo practitioner in Columbia, (573) 443-6866; and the state was represented by Evan J. Buchheim of the attorney general's office in Jefferson City, (573) 751-3321.

This summary is not part of the opinion of the Court. It has been prepared by the communications counsel for the convenience of the reader. It neither has been reviewed nor approved by the Supreme Court and should not be quoted or cited.

Overview: A man appeals his conviction for first-degree drug trafficking. In a decision written by Judge Patricia Breckenridge, the Supreme Court of Missouri reverses the trial court's judgment and remands (sends back) the case. All six judges participating in the opinion (the seventh retired from the Court while the case was pending) agree that there was sufficient evidence to support the man's conviction. The man's knowing possession of the drug reasonably may be inferred from circumstantial evidence presented of the 10 gallons of PCP found in a suitcase near the man's watch in the trunk of his rental vehicle. All six judges also agree that the trial court did not err in overruling the man's motion to suppress evidence obtained as a result of the traffic stop. The trooper detained the man under growing reasonable suspicion of criminal activity and did not delay his detention beyond the time necessary to conduct a reasonable investigation. All six judges further agree that certain evidence – of statements the man made during the traffic stop, of his refusal to consent to a search of the vehicle and of a commendation the trooper received as a result of the seizure of the PCP in the vehicle – is admissible.

Five judges agree that the verdict-directing instruction the trial court gave the jury resulted in manifest injustice requiring reversal of the conviction because it failed to require the state to prove one element of the crime – that the man knew the content or character of the substance in the suitcase. Judge Zel M. Fischer dissents as to this point. He would hold that, despite the instruction's failure to require the jury to find the man knew of the content or character of the drugs, no manifest injustice occurred because it was undisputed that the man's rental vehicle contained 10 gallons of PCP, the man never disputed the content and character of the substance, and the jury found the man knowingly distributed, delivered or sold 90 grams or more of PCP.

Facts: In November 2003, a highway patrol trooper observed a new vehicle with California license plates traveling eastbound on Interstate 70 in Lafayette County. The vehicle was being driven slower than the speed limit. The trooper saw the vehicle move from the left lane into the right lane between two tractor trailers, following fewer than two car lengths behind the first tractor trailer, then slow down to approximately 55 miles per hour in a 70-mile-per-hour zone. The trooper pulled the vehicle over and, with his partner, approached the vehicle to speak with its two male occupants. The driver, Melvin Stover, indicated they were returning from a gambling trip in Las Vegas and had to rent a vehicle to return home to Washington, D.C., because they could not afford to fly back. He later said he needed to return home because his mother was being admitted to a hospital in Washington, D.C. The passenger, however, indicated they chose to drive back to Washington, D.C., because they wanted to see the country. There

also were discrepancies in the men's descriptions of dates associated with their trip. A canine unit was called, and the dog indicated it sensed something in the trunk. When the troopers searched the vehicle, they found about 10 gallons of PCP in a suitcase in the trunk. The state charged Stover in February 2007 with the class A felony of first-degree drug trafficking. Stover moved to suppress evidence of the contraband seized during the search, of incriminating statements made during the traffic stop and of his refusal to consent to a search. The trial court overruled the motion. Ultimately, the jury found Stover guilty, and the trial court sentenced Stover to 12 years in prison without the possibility of probation or parole. Stover appeals.

REVERSED AND REMANDED.

Court en banc holds: (1) The trial court did not err in overruling Stover's motion for acquittal. There was sufficient evidence to support the conviction for first-degree trafficking as Stover's knowing possession of the PCP reasonably may be inferred from the evidence presented at trial. In support of the charge, the state alleged that Stover possessed 90 grams or more of the controlled substance and that such conduct was a substantial step toward committing the crime by attempting to distribute, deliver or sell the controlled substance to another person. Although possession is not an element of the crime of trafficking, substantial circumstantial evidence that Stover possessed the PCP supplies the requisite knowledge of its presence to support the trafficking conviction. A state laboratory technician testified that there was approximately 10 gallons of PCP in bottles found in the trunk of Stover's rental vehicle and that this quantity amounts to about 37,850 doses of the drug, giving it a large monetary value. Stover admitted he owned a watch found in the trunk next to the suitcase containing the PCP. The trooper also testified that there were inconsistencies in the stories of Stover and his passenger about their trip, that Stover exhibited physical symptoms of anxiety during the traffic stop, and that Stover became animated and argumentative when the trooper asked for consent to search the vehicle. Further, receipts and ticket stubs found in the vehicle show the statements the men made about their travel were false, demonstrating their intent to deceive the trooper.

(2) The trial court did not err in overruling Stover's motion to suppress evidence obtained as a result of the traffic stop. The trooper had sufficient justification to detain Stover during his reasonable investigation of the traffic stop. The trooper stopped the rental vehicle for following a tractor trailer in an unsafe manner. Stover's out-of-state license delayed the process for the trooper to issue the traffic warning, during which the trooper engaged in general conversation with Stover and the passenger about their trip and plans. The trooper also had sufficient justification to detain Stover further and investigate his activities because the circumstances supported an objective reasonable suspicion that criminal activity was occurring. The trooper's reasonable suspicion was ongoing and escalating throughout the stop. There were discrepancies between the stories told by Stover and the passenger and between their stories and the rental agreement. When confronted about the discrepancies, Stover became agitated and argumentative. The trooper testified that, in his experience, the circumstances of the stop and the men's unusual conduct led him to conclude that they may have been engaged in the crime of drug trafficking. The entire detention took 49 minutes, half of which was waiting for a canine unit to arrive and the other half was spent processing the traffic ticket and overcoming Stover's delays and requests. The trooper detained Stover under reasonable suspicion of criminal activity and did not delay his detention beyond the time necessary to conduct a reasonable investigation.

(3) In the verdict director it used, the trial court failed to instruct the jury that it was required to find that Stover knew the content or character of the drugs in the suitcase to find him guilty, requiring reversal of Stover's conviction. The verdict director was patterned after a Missouri approved instruction but omitted the phrase "knowing of the substance's content and character" from the definition of "trafficking" in the pattern instruction. Because Stover failed to object to the instruction for this reason at trial, raising it for the first time on appeal, this Court reviews to determine whether omission of the phrase is plain error, resulting in manifest injustice or a miscarriage of justice. The record here shows that Stover disputed his knowledge of the content and character of the suitcase's contents. The state's evidence related to whether he had constructive possession of the suitcase by showing he had access to it and control over the vehicle in which the PCP was found. Because there were two people in the vehicle, the state had the burden of presenting additional evidence connecting Stover, rather than his passenger, with the PCP in the suitcase. Stover told the trooper and a technician for the highway patrol that he did not look into the trunk, did not know what was in the trunk and did not know what was in the suitcase in the trunk. The trooper testified that there was no discernable odor in the trunk or suitcase that would alert Stover to the presence of a controlled substance and that Stover did emit any odor suggesting he had been around illegal drugs. By deviating from the pattern instruction, the verdict director did not require the jury to find Stover knew of the content or character of the drugs in the suitcase to find him guilty. The trial court's failure to instruct the jury of this requirement relieved the state of its burden of proving each element of the offense beyond a reasonable error. This failure was plain error.

(4) Although the plain error with regard to the verdict director is dispositive, this Court will review Stover's remaining claims of trial error because they are likely to arise on retrial.

(a) The statements Stover made during the traffic stop, before he was advised of his right to remain silent pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), are admissible. These statements did not occur during a custodial interrogation and, therefore, are not subject to suppression on the basis of *Miranda*.

(b) Evidence of Stover's refusal to consent to the trooper searching the rental vehicle is admissible. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976), prohibits use of a defendant's silence at the time of arrest and after receiving *Miranda* warnings. This holding rests on the fundamental unfairness of assuring a suspect his silence will not be used against him and then using his silence to impeach an explanation subsequently offered at trial, attempting to prove guilt. Here, however, the evidence of Stover's refusal to consent to the search was used to explain subsequent actions, not his guilt.

(c) Evidence of the arresting trooper's commendation from the federal drug enforcement agency is admissible. He testified that he received the commendation – for making the largest PCP seizure in United States history up to that time – after discovering the PCP in Stover's rental vehicle. The testimony was not introduced to prove that the seizure was, in fact, the largest of its kind in the United States up to 2003. Rather, it was introduced as circumstantial evidence to prove knowing possession as well as to demonstrate that the amount of PCP seized was a large amount, consistent with intent to sell or distribute.

Dissenting opinion by Judge Fischer: The author agrees the omission of the phrase “knowing of the substance’s content and character” from the verdict director – in noncompliance with the approved instruction – was error. He does not agree, however, that this error results in a miscarriage of justice or manifest injustice warranting relief. It was undisputed that 10 gallons of PCP were found in the trunk of Stover’s rental car, and he never disputed the “content and character” of the substance. It is implausible to suggest that the jury would have found Stover was unaware of the content and character of the PCP while simultaneously finding that he knowingly distributed, delivered or sold 90 grams or more of the substance. As the principal opinion notes, Stover’s knowing possession of the PCP reasonably may be inferred. The author would affirm the judgment.