IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,	)	
	)	
Respondent,	)	
	)	
vs.	)	No. SC95818
	)	
RANDY E. TWITTY,	)	
	)	
Appellant.	)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF ST. CHARLES COUNTY, MISSOURI
ELEVENTH JUDICIAL CIRCUIT
THE HONORABLE RICHARD K. ZERR, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

Emmett D. Queener, MOBar #30603
Attorney for Appellant
Woodrail Centre
1000 W. Nifong, Bldg. 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 777-9977
FAX (573) 777-9974
emmett.queener@mspd.mo.gov

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JURISDICTIONAL STATEMENT

Randy E. Twitty appeals his conviction for possession of a pseudoephedrine with intent to create a controlled substance, methamphetamine, in violation of Section 195.420, RSMo 2000, in the Circuit Court of St. Charles County, Missouri. The Honorable Richard K. Zerr sentenced Mr. Twitty to five years in the Department of Corrections. The Missouri Court of Appeals, Eastern District, reversed Mr. Twitty's conviction. This Court granted the State's application for transfer.

STATEMENT OF FACTS

St. Charles County, Missouri, charged Randy Twitty with the class C felony possession of a chemical with the intent to create a controlled substance while acting in concert with another, in that on or about August 29, 2013, he knowingly possessed pseudoephedrine with the intent to process that chemical to create methamphetamine (L.F. 18-19).[1] Mr. Twitty submitted the cause to the court without a jury (L.F. 6, Tr. 3-4).

Detective Chris Taylor of the O'Fallon police department was working with the St. Charles County Regional Drug Task Force on August 29, 2013 (Tr. 5-6). He searched the National Precursor Log Exchange (NPLEX), a database that logs purchases of pseudoephedrine (Tr. 7-8). Detective Taylor investigates who is buying pseudoephedrine to determine their purchase history (Tr. 8). If he thinks the purchases are questionable, he attempts to contact the person to "ask them if they still have the pseudo that they purchased from earlier that day." (Tr. 9).

Detective Taylor noticed a purchase of pseudoephedrine that day by Debra Galebach (Tr. 10-11). He discovered that this was her fourth purchase in the last thirty-eight days (Tr. 9).

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[1] The record on appeal consists of a legal file (L.F.) and transcript (Tr.).

Detective Taylor obtained Ms. Galebach's address and went to her apartment with Detective Charles Niel and Detective Daniel Plumb (Tr. 10, 12). Their purpose "was to go there and speak with somebody at the house and then question about the pseudoephedrine that was purchased earlier that day. And to see if they still had the 40 pills in their possession." (Tr. 11-12). Detective Taylor and Detective Plumb went to the front door, while Detective Niel stood outside the sliding glass door of the apartment (Tr. 12). A man opened the door and identified himself as "Bobby" (Tr. 13). The man was actually Randy Twitty (Tr. 13). Detective Taylor asked if he could speak with Mr. Twitty, and Mr. Twitty told him to wait until he put up his dog (Tr. 14). Mr. Twitty closed the door and Detective Taylor heard movement inside the apartment (Tr. 14). Mr. Twitty opened the door and allowed Detective Taylor and Detective Plumb inside the apartment (Tr. 14).

Detective Niel could see inside the apartment from his vantage point outside the sliding glass door (Tr. 43). He saw Mr. Twitty answer the door, talk to the other detectives, then close the door (Tr. 43). Mr. Twitty went to the back of the apartment, out of Detective Niel's sight, then returned to the kitchen (Tr. 43). Mr. Twitty tore up some pill boxes and blister packs, and put them in the trash can under other trash (Tr. 43). Mr.

Twitty returned to the front door and let Detective Taylor and Detective Plumb into the apartment (Tr. 43-44). Detective Niel entered the apartment through the sliding glass door when he saw the other detectives enter (Tr. 15, 44). He told the other detectives what he saw (Tr. 44).

Detective Plumb identified the officers and explained why they were there (Tr. 14, 63). He asked Mr. Twitty for permission to search the house and Mr. Twitty consented to a search, signing a written consent (Tr. 14, 67). Detective Niel went to the trash can and removed two pill boxes and blister packs (Tr. 16-17, 44-45). The two pill boxes were Wal-Phed, 20 count, containing 120 milligrams of pseudoephedrine per dose (Tr. 37, State's Exhibits 11G and 11N). Detective Niel also found two Walgreens receipts for purchases at 9:23 and 9:57 a.m. on August 29, 2013, matching the two Wal-Phed boxes (Tr. 45-46, 72). Detective Taylor said that the time of purchase on one receipt coincided with a purchase by Ms. Galebach reflected in the NPLEX record (Tr. 20). Detective Plumb said that the lot numbers on the blister packs were consistent with the purchases reflected in the NPLEX record (Tr. 72). Detective Niel also found two Walgreens bags used when purchasing medication (Tr. 47).

Detective Plumb advised Mr. Twitty of his rights, and Mr. Twitty signed a waiver of rights form (Tr. 65). Mr. Twitty said that he and Ms.

Galebach purchased the two boxes of pseudoephedrine at Walgreens and he removed the pills from the blister packs (Tr. 71-72). He took the pills to a commuter parking lot near Highway 270 and Highway 30 and traded them to another person for one-quarter of a gram of methamphetamine and fifty dollars (Tr. 72). Mr. Twitty refused to identify this person (Tr. 72). No methamphetamine was found in the apartment (Tr. 73). Mr. Twitty said that after trading the pills he went to a park and smoked the methamphetamine (Tr. 73). The detectives did not find fifty dollars in the apartment during their search (Tr. 81).

Detective Plumb prepared a written statement by Mr. Twitty (Tr. 78-80). The detective wrote out the questions, and Mr. Twitty wrote out answers to them (Tr. 79-80). Detective Plumb did not ask Mr. Twitty specifically about August 29, 2013 (Tr. 80). He asked, "Do you ever purchase pseudoephedrine to trade for cash or methamphetamine?" (State's Ex. 7). Mr. Twitty said that he did (State's Ex. 7). Detective Plumb asked, "How many times have you done this activity during the past month?" (State's Ex. 7). Mr. Twitty answered, "3 times" (State's Ex. 7). Detective Plumb asked, "You gave consent to search the apartment you share with Debbie. Drug Para and empty pseudo packs were found. Who

do these items belong to?" (State's Ex. 7). Mr. Twitty answered, "Pips hers sudo was mine" (State's Ex. 7).

The detectives did not find any pills containing pseudoephedrine in the apartment (Tr. 32). They did not arrest Mr. Twitty that day (Tr. 28).

The trial court found Mr. Twitty guilty of possession of a chemical with intent to manufacture a controlled substance (L.F. 22-23). The court sentenced Mr. Twitty to five years in the Department of Corrections (L.F. 24-25). This appeal followed (L.F. 28-30).

POINT RELIED ON

The trial court erred in imposing judgment and sentence against Mr. Twitty for possession of pseudoephedrine with the intent to manufacture methamphetamine, in violation of his right to due process of law, 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 prove beyond a reasonable doubt that Mr. Twitty possessed pseudoephedrine because the evidence produced by the State established only that Mr. Twitty had purchased Wal-Phed, a medication containing pseudoephedrine, but the actual pills containing the pseudoephedrine were not in Mr. Twitty's possession when the detectives searched the apartment where he was living.

State v. Agee, 37 S.W.3d 834 (Mo. App., S.D. 2001);

State v. Rollett, 80 S.W.3d 514 (Mo. App., W.D. 2002);

State v. Anderson, 220 S.W.3d 454 (Mo. App., S.D. 2007);

State v. Lubbers, 81 S.W.3d 156 (Mo. App., E.D. 2002);

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10;

Section 195.010, RSMo Cum. Supp. 2011;

Section 195.400.2(20), RSMo Cum. Supp. 2010; and

Section 195.420, RSMo 2000.

ARGUMENT

The trial court erred in imposing judgment and sentence against Mr. Twitty for possession of pseudoephedrine with the intent to manufacture methamphetamine, in violation of his right to due process of law, 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 prove beyond a reasonable doubt that Mr. Twitty possessed pseudoephedrine because the evidence produced by the State established only that Mr. Twitty had purchased Wal-Phed, a medication containing pseudoephedrine, but the actual pills containing the pseudoephedrine were not in Mr. Twitty's possession when the detectives searched the apartment where he was living.

The detectives went to the apartment where Mr. Twitty was living to "ask them if they still have the pseudo that they purchased from earlier that day," and "to see if they still had the 40 pills in their possession." (Tr. 9, 11-12). There was no pseudoephedrine in the apartment (Tr. 32). All that was found were empty pill boxes, empty blister packs, and receipts which corresponded to the boxes and the purchases reported on the

NPLEX log (Tr. 16-17, 37, 44-45, 45-46, 72). Detective Plumb said that Mr. Twitty acknowledged purchasing the pills with Ms. Galebach and trading them for methamphetamine and cash (Tr. 71-72). But there were no pills containing pseudoephedrine in Mr. Twitty's possession at the time the detectives were there (Tr. 32). The detectives did not arrest Mr. Twitty that day (Tr. 28).

Standard of review

In reviewing a challenge to the sufficiency of the evidence, this Court accepts as true all evidence and its inferences in a light most favorable to the verdict. ***State v. Botts***, 151 S.W.3d 372, 375 (Mo. App. W.D. 2004). The State may rely upon direct and circumstantial evidence to meet its burden of proof. ***State v. Howell***, 143 S.W.3d 747, 752 (Mo. App. W.D. 2004). This Court disregards contrary inferences, unless they are such a natural and logical extension of the evidence that a reasonable juror would be unable to disregard them. ***State v. Grim***, 854 S.W.2d 403, 411 (Mo. banc 1993). But this Court may not supply missing evidence, or give the State the benefit of unreasonable, speculative, or forced inferences. ***State v. Whalen***, 49 S.W.3d 181, 184 (Mo. banc 2001). This same standard of review applies when this Court reviews a motion for a judgment of

acquittal. ***Botts***, 151 S.W.3d at 375. "[T]he relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ***State v. Bateman***, 318 S.W.3d 681, 687 (Mo. banc 2010).

Law of possession

It is unlawful for any person to possess pseudoephedrine with the intent to manufacture a controlled substance. Section 195.420, RSMo 2000 and Section 195.400.2(20), RSMo Cum. Supp. 2010. To support a conviction under Section 195.420, the State must present sufficient evidence to convince a reasonable trier of fact beyond a reasonable doubt: 1) that the defendant possessed pseudoephedrine; and 2) that the defendant did so with the intent to manufacture a controlled substance, in this case methamphetamine. ***State v. Agee***, 37 S.W.3d 834, 836 (Mo. App., S.D. 2001).

The Due Process Clause protects a defendant against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. ***In re Winship***, 397 U.S. 358, 364 (1970); United States Constitution, Fourteenth Amendment; Missouri

Constitution, Article I, Section 10. This impresses "upon the fact finder the need to reach a subjective state of near certitude of the guilt of the accused" and thereby symbolizes the significance that our society attaches to liberty. ***Jackson v. Virginia***, 443 U.S. 307, 315 (1979). There must be more than a "mere modicum" of evidence, because "it could not seriously be argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt." ***Jackson***, 443 U.S. at 320.

The State must produce the prohibited substance

in order to sustain a conviction

The central issue presented by this appeal is whether the State must produce the pseudoephedrine at trial in order to sustain a conviction for possession of pseudoephedrine with intent to manufacture a controlled substance. The answer, as in any case involving a controlled substance or specified substance, is that the State must produce that substance to support a conviction. This conclusion is directed by the statutory definition of possession established by the legislature, and the history of the case law considering possession cases.

The defendant in ***State v. Agee*** was driving a car from which a purse containing 168 pseudoephedrine pills in seven blister packs was thrown.

37 S.W.3d at 836. A person has actual possession of a controlled substance when he has the substance on or about his person or within his easy reach and convenient control. ***Id.*** A person has constructive possession of a controlled substance where he has the power and intention at a given time to exercise dominion or control over the substance either directly or through another person. ***Id.*** The Southern District held that because the defendant was operating the car from which the purse containing the pills was thrown, and that her passenger was her twelve-year-old daughter, the evidence demonstrated her constructive control over the pills found in the purse. ***Id.*** at 837. As for the actual pills found in the purse, the Court held that defendant's statement to the police that Wal Mart sold the items and they were not illegal supported an inference that she was aware of the pseudoephedrine pills in the purse. A reasonable fact-finder could have found that the defendant was at least in joint control of the pills. ***Id.***

But it must be noted that ***Agee*** involved the actual presence of the pills containing pseudoephedrine. The actual pills were found in her possession, either constructive or joint.

The same was true in ***State v. Rollett***, 80 S.W.3d 514 (Mo. App., W.D. 2002). The Court found the evidence sufficient to support the defendant's possession of pseudoephedrine with the intent to make

methamphetamine because medicine containing pseudoephedrine was found in the passenger compartment between the seats the men were sitting in. ***Id.*** at 521. On the seat were nine boxes containing pills containing pseudoephedrine. ***Id.*** Actual pills. Not empty boxes that had apparently at one time contained pills containing pseudoephedrine, but actual pills containing the chemical.

The defendant in ***State v. Anderson*** was convicted of possession pseudoephedrine with the intent to manufacture methamphetamine. 220 S.W.3d 454, 455 (Mo. App., S.D. 2007). After the defendant made a suspicious purchase of pseudoephedrine, the store contacted police who stopped and arrested the defendant. ***Id.*** The police seized six unopened boxes of cold and allergy pills. ***Id.*** The defendant admitted that she used methamphetamine, that she was aware that pseudoephedrine is used to make methamphetamine, and that she planned to sell or trade the pills to another person who would use them to make methamphetamine. ***Id.***

Anderson's defense at trial and argument on appeal was that because the boxes were never opened and the pills were not tested, the evidence was insufficient to prove that she possessed pseudoephedrine. ***Id.*** The Southern District rejected this argument because the defendant admitted that she bought pseudoephedrine, that she intended to do so,

and she intended to pass it along to someone to make methamphetamine. ***Id.*** at 456. Judge Scott further addressed the argument that the evidence was insufficient because the pills inside the unopened boxes were not tested to establish the presence of pseudoephedrine. ***Id.*** He noted that cases hold that regulations and practices render medicine labels inherently accurate and trustworthy. ***Id.***, fn 2.

There are some similarities between ***Anderson*** and Mr. Twitty's case. The evidence was limited to boxes and both admitted buying pseudoephedrine to trade to a person manufacturing methamphetamine. But there is a critical distinction between the cases. In ***Anderson***, the pills were still inside the unopened boxes when they were seized by the police at the time of the defendant's arrest. 220 S.W.3d at 455. In Mr. Twitty's case, all that was in the apartment and seized by the police were empty boxes and blister packs. There were no pills.

The parties and the trial court below discussed ***State v. Lubbers***, 81 S.W.3d 156 (Mo. App., E.D. 2002), and ***State v. Walter***, 2014 WL4976913 (Mo. App., W.D. October 7, 2014).[2] The defendant in ***Lubbers*** was driving

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[2] ***State v. Chadwick Walter*** was accepted on transfer by the Supreme Court of Missouri on February 24, 2015. This Court reversed Walter's

her boyfriend's truck in which was found an active methamphetamine lab and finished methamphetamine. 81 S.W.3d at 158. She was convicted of possession of methamphetamine and possession of chemicals with the intent to manufacture methamphetamine. ***Id.*** The boyfriend testified that the contents of the lab were his and that defendant never helped him manufacture methamphetamine. ***Id.*** at 162. The Court of Appeals, Eastern District, held that the circumstances sufficiently demonstrated the defendant's knowledge of the nature and presence of the finished methamphetamine in the truck under her control for a conviction. ***Id.*** at 161. However, because the State's evidence failed to demonstrate the defendant knew how to manufacture methamphetamine or intended to do so, it reversed her conviction for possession of chemicals with the intent to manufacture methamphetamine. ***Id.*** at 162.

The defendant in ***Walter*** was convicted of attempting to manufacture methamphetamine. Slip Op. 3. The evidence at trial demonstrated that the defendant and his girlfriend purchased items used in the production of methamphetamine, including medicine containing pseudoephedrine. Slip Op. 1. Burnt pill boxes were found near a wood

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conviction due to error in the State's closing argument. 479 S.W.3d 118 (Mo. banc 2016).

burning stove. Slip Op. 2. The Court of Appeals, Western District, noted that the defendant did not challenge in the appeal that the evidence was insufficient to prove possession of the substances. Slip Op. at 4. Rather, the defendant relied upon ***Lubbers*** to argue that the State failed to show that he "knew how to manufacture methamphetamine, that he had the intent to do so or that he participated in an attempt to manufacture methamphetamine." Slip Op. 4-5. The Western District held that ***Lubbers*** did not require the State to make such a showing. Slip Op. at 5.

The important factor from ***Lubbers*** relevant to Mr. Twitty's case is that the chemicals she was accused of possessing – ether and lithium batteries – were found inside the truck she was driving. 81 S.W.3d at 157-158. But in Mr. Twitty's case, the chemical he was accused of possessing – pseudoephedrine – was *not* found in the apartment. The defendant in ***Walter*** did not possess the pills containing pseudoephedrine, but the important factor was that he was charged with attempting to manufacture methamphetamine, not with *possessing* specific chemicals with the intent to manufacture. Slip. Op. at 3. All the State had to prove to sustain a conviction was that the defendant took a substantial step toward manufacturing methamphetamine. Slip Op. at 3. Purchasing pseudoephedrine, even though not possessing it at the time of the search,

was sufficient to establish a "substantial step" toward the production of methamphetamine. But Mr. Twitty was charged with actually *possessing* pseudoephedrine. No pseudoephedrine was found in the apartment (Tr. 32). The State's evidence failed to establish this element of the offense.

It was principles such as these and the language of Section 195.010, RSMo Cum. Supp. 2011, that led the Court of Appeals, Eastern District, to vacate Mr. Twitty's conviction. The Court held: "[O]ne need not look further than the fact that Defendant was charged with 'possession' of a controlled substance, despite the circumstances that Defendant apparently lacked dominion or control over a controlled substance at the time of arrest and a controlled substance was never found." Slip Op. 8. "Sustaining Defendant's conviction premised upon 'actual possession' would run afoul of the statute's unambiguous language – that is '[a] person has actual possession if he *has the substance on his person or within easy reach and convenient control.*" ***Id.*** (emphasis in original).

The Eastern District went on to explain why the absence of the pseudoephedrine rendered a conviction based on constructive possession impossible under the statute. Slip Op. 8-9. The State claimed in its Application for Transfer to this Court that the Eastern District misunderstood its argument in this case; that its argument is solely that

Mr. Twitty was in actual possession of the pseudoephedrine. Application for Transfer at 7. This is not true. The Eastern District stated: "The State's argument is singular: sufficient evidence exists so as to convict Defendant of 'actual possession' of a controlled substance because Defendant voluntarily admitted that he possessed a controlled substance just mere hours before Defendant was arrested." Slip Op. 7. The Eastern District fully understood the State's argument. It simply found the State's argument to lack merit.

The Eastern District Court of Appeals considered the issue of constructive possession because the State's argument in favor of conviction failed under the statutory definition of actual possession. The Court noted that Mr. Twitty did not have the pseudoephedrine "on his person or within easy reach and convenient control," the definition of actual possession. Section 195.010(34). Slip Op. 8. The Court recognized that the State's argument would require a finding that Mr. Twitty had actual possession because he demonstrated the power and the intention at a given time *in the past* to exercise dominion or control over the substance which he no longer had on his person or within easy reach or convenient control. The Eastern District correctly noted: "However, the statute as

written, prescribes two separate and distinct categories of possession, neither of which fully encompasses the other." Slip Op. 9.

The State criticizes the Eastern District Court of Appeals for adding a statutory element to the offense; possession at the time of the arrest. Application for Transfer at 7. The Eastern District did no such thing. The Eastern District applied the statutory definition of actual possession exactly as it is written: a person is in actual possession of a controlled substance only if "he *has* the substance on his person or within easy reach and convenient control." Section 195.010(34).

The State's argument in its Application for transfer that "proof of actual possession at the time of the arrest is not an element of the offense" sounds attractive at first. Application for Transfer at 7. But the definition, "has" on his person or within easy reach and convenient control, implicitly requires that the substance be present when officers effectuate an arrest for a violation of the statute. While undersigned counsel's research has not been exhaustive, he is unaware of any case involving precursors or controlled substances where the substance or items have not been present when law enforcement officers made an arrest for a violation of the applicable statute. The substances or items have always been found on the person or within immediate reach and convenient control, or have been

present under circumstances demonstrating the person's ability to exercise dominion or control over them.

This principle is found in cases set out above, as well as in the "residue" cases. In 1996, the Court of Appeals, Western District, held in ***State v. Baker*** that the presence of an immeasurable amount of burnt residue of crack cocaine was insufficient to establish possession of the controlled substance. 912 S.W.2d 541, 545-546 (Mo. App., W.D. 1996). Significantly, the Court noted: "The minimal amount of burnt residue present on the pipe indicated only that it had been used to smoke crack cocaine *in the past*; it could not serve as a basis for finding Mr. Baker *in current possession* of the drug." ***Id.*** at 545 (emphasis added). The Court supported this conclusion by considering the effect of Section 195.010(18) which set out the factors for determining whether an object is drug paraphernalia. ***Id.*** at 546. One such factor is the presence of residue of a controlled substance on the object. ***Id.*** The Court noted that the statute made residue a factor in determining the use of the object, "rather than stating that it constitutes possession of the drug itself...." ***Id.*** In drafting this legislation, "the legislature had indicated that, at least in cases involving negligible residue, it sees such residue as merely an indication of

past drug use of the object, not as proof of present possession of the drug itself." ***Id.***

Missouri courts have since determined that the presence of residue which tests positive for the presence of a controlled substance is sufficient to support a conviction for possession. For instance, in 2004, the Court of Appeals, Southern District, held that there is no "threshold" amount that must be proven in order to convict a person of possession of a controlled substance. ***State v. McKelvey***, 129 S.W.3d 456, 460 (Mo. App., S.D. 2004). The Court stated that the test for possession of a controlled substance is not whether the drug is visible or measurable. ***Id.*** The test is whether the substance can be identified by chemical analysis as a controlled substance regardless of the quantity. ***Id.*** The drug in ***McKelvey***, methamphetamine, was found on a small piece of cotton found in a container in the defendant's pocket. ***Id.***

The Court of Appeals, Eastern District, similarly held in ***State v. Moore*** 352 S.W.3d 392, 400 (Mo. App., E.D. 2011), that the Missouri drug statutes do not establish a minimum amount necessary to sustain a conviction for illegal possession. A pipe containing residue of cocaine was found in the truck the defendant had been driving. ***Id.*** at 396. But in

affirming the conviction, the Court significantly noted: "The drug was present." *Id.* at 400.

Baker*, *McKelvey*,** and ***Moore are important in Mr. Twitty's case because they clearly demonstrate the understanding of Missouri courts that the possession statutes require that the substance be in the defendant's possession, actual or constructive, at the time the defendant is confronted by police officers and that the substance is actually present at that time. Past possession is not criminalized. Only current possession at the time law enforcement officers find the substance establishes that the statutes have been violated.

The State accuses the Eastern District of "confus[ing] an issue regarding the sufficiency of the evidence with one asserting a failure to establish the corpus delicti of the offense." Application for Transfer at 8. This is just not the case.

Corpus delicti describes the prosecutor's burden of proving that a crime was committed by someone, independent from the defendant's extrajudicial statements. ***State v. Madorie***, 156 S.W.3d 351, 353-354 (Mo. banc 2005). Mr. Twitty did not object to admission at trial of his statement because the State failed to establish the corpus delicti of the offense. He does not make this argument in this appeal. And the Eastern District did

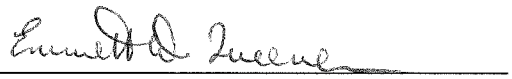
not reverse Mr. Twitty's conviction because the State failed to prove the corpus delicti independent from his statement. The Eastern District quite clearly considered Mr. Twitty's statements. Slip Op. at 7. The Court reversed Mr. Twitty's conviction because it ran "afoul of the of the statute's unambiguous language – that is, '[a] person has actual possession if he *has the substance on his person or within easy reach and convenient control*.'" Slip Op. at 8 (emphasis in original). According to the Court, "one need not look further than the fact that Defendant was charged with 'possession' of a controlled substance, despite the circumstances that Defendant apparently lacked dominion or control over a controlled substance at the time of arrest and a controlled substance was never found." Slip Op. at 8. The Eastern District held the State failed to meet its burden even considering *all* of the evidence. It did not mistakenly apply the corpus delicti rule.

Because the evidence was insufficient to establish Mr. Twitty's possession of pseudoephedrine, his conviction must be vacated and he must be discharged from the conviction.

CONCLUSION

Because the evidence was insufficient to establish Mr. Twitty's possession of pseudoephedrine, his conviction must be vacated and he must be discharged from the conviction.

Respectfully submitted,



Emmett D. Queener, MOBar #30603
Attorney for Appellant
Woodrail Centre
1000 W. Nifong, Bldg. 7, Suite 100
Columbia, Missouri 65203
Telephone (573) 777-9977
FAX (573) 777-9974
emmett.queener@mspd.mo.gov

Certificate of Compliance and Service

I, Emmett D. Queener, hereby certify to the following. The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, Office 2010, in Book Antiqua size 13 point font, which is no smaller than Times New Roman size 13 point font. Excluding the cover page, the signature block, this certificate of compliance and service, and appendix, the brief contains 4,848 words, which does not exceed the 31,000 words allowed for an appellant's brief.

On this 20th day of October, 2016, electronic copies of Appellant's Brief and Appellant's Brief Appendix were placed for delivery through the Missouri e-Filing System to Evan J. Buchheim, Assistant Attorney General, at evan.buchheim@ago.mo.gov.

Emmett D. Queener