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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

Mr. Twitty will rely on the jurisdictional statement set out in his initial substitute brief.

STATEMENT OF FACTS

Mr. Twitty will rely upon the statement of facts set out in his initial substitute brief.

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. Krutz, 826 S.W.2d 7 (Mo. App., W.D. 1991);

State v. Roper, 591 S.W.2d 58 (Mo. App., E.D. 1981);

State v. Stover, 388 S.W.3d 138 (Mo. banc 2012);

State v. Lowrance, 619 S.W.2d 354 (Mo. App., E.D. 1981);

United States Constitution, Fourteenth Amendment;

Missouri Constitution, Article I, Section 10;

Section 195.010, RSMo, Cum. Supp. 2011;

Section 565.010, RSMo 2000;

Section 565.021, RSMo 2000;

Section 565.023, RSMo 2000; and

Section 565.024, RSMo Cum. Supp. 2008.

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 State asserts that Mr. Twitty's argument that a conviction for actual possession of a prohibited substance requires that a defendant has the substance on his person or within his easy reach and convenient control at the time of his seizure or arrest is "not contained in the plain language of the statute." (Respondent's Substitute Brief, 17). In fact, that is the precise language of the statute. "A person with knowledge of the presence and nature of a substance ***has*** actual possession of the substance … if he ***has*** the substance on his person or

within easy reach and convenient control." Section 195.010(34) (emphasis added). The State then disregards the statutory language to argue that the evidence satisfied the statutory requirement because Mr. Twitty "***had*** the pseudoephedrine within his 'easy reach and convenient control.'" (Respondent's Substitute Brief, 18). The State argues: "As long as the State proves actual possession of the substance within the time period charged, the element of possession is satisfied whether or not the defendant has actual possession when arrested." (Respondent's Substitute Brief, 18). What the statute requires is proof that the person ***has*** the substance on his person or within his easy reach and convenient control, not that he ***had*** the substance on his person or within his easy reach and convenient control at some time in the past. The State's evidence failed to establish this requirement. If the substance is not on the defendant's person or within his easy reach or convenient control at the time he is seized or arrested, he could only have ***had*** the substance on his person or within easy reach and convenient control in the past. The statutory language "has" creates a temporal element requiring the presence of the substance at the time the person is seized or arrested. At the time the detectives arrived at the apartment and contacted Mr. Twitty, pseudoephedrine was not on his person or within his easy reach or convenient control.

While Mr. Twitty is not suggesting that police officers get to decide the law, the conduct of the detectives in this case demonstrate that they believed the law of possession is that set out by Mr. Twitty rather than by the State in this appeal. 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) (emphasis added). These were detectives assigned to drug interdiction activities, and they were focused on the presence of the substances during their investigation, not presence of the substances sometime in the past. This accounts for why they did not arrest Mr. Twitty during the contact (Tr. 28).

The State supports its argument that there is no temporal element in the statute for the presence of the substance with ***State v. Krutz***, 826 S.W.2d 7 (Mo. App., W.D. 1991); ***State v. Neal***, 624 S.W.2d 182 (Mo. App., S.D. 1981); ***State v. Moore***, 279 S.W. 133 (Mo. 1925); and ***State v. Roper***, 591 S.W.2d 58 (Mo. App., E.D. 1979). (State's Substitute Brief, 18-21). These cases offer the State no support for its argument because they analyzed a different element of the statute.

As the State recognized, "[t]o prove possession of a controlled substance, the state must show conscious and intentional possession of the substance, either actual or constructive, and awareness of the presence and nature of the substance." ***State v. Stover***, 388 S.W.3d 138, 146-147 (Mo. banc 2012). Thus,

there are two separate elements: possession of the substance, and knowledge of the presence and nature of the substance. The cases cited by the State apply only to the element of the nature of the substances involved.

The defendant in ***Krutz*** was convicted of possession of cocaine. 826 S.W.2d at 8. He alleged on appeal that the evidence was insufficient to support his conviction because the State relied upon "user-experts" rather than laboratory analysis of a recovered substance to prove it was cocaine. ***Id.*** The Court disagreed: "It is clear that the government may prove, beyond a reasonable doubt, the ***nature of an illegal substance*** through the use of circumstantial evidence." ***Id.*** (emphasis added). The Court pointed to evidence where the witnesses, drug dealers and drug users identified the substance as cocaine. ***Id.*** at 9. But there was no challenge to the presence of the substance, and the Court did not discuss this element of the offense. The opinion does not discuss how the crime was discovered and how or even whether the substance was seized. The element of possession was irrelevant to the Court's analysis.

The defendant in ***Neal*** was convicted of selling marijuana. 624 S.W.2d at 183. Therefore, the Court of Appeals, Southern District, did not discuss actual or constructive possession at all. The issue in the appeal was whether the "opinion testimony" of a drug user was sufficient to prove that the substance he purchased was marijuana. ***Id.*** The evidence established that the purchaser was a

long-time marijuana smoker and was familiar with the effects caused by marijuana. ***Id.*** This witness identified the ten pounds of material he purchased from the defendant as marijuana. ***Id.*** The Court held that this evidence was sufficient because "[a]n expert witness can acquire his knowledge from practical experience, as well as by scientific study or research." ***Id.***

But what is critical in ***Neal*** is that the Court was dealing with the question of the identification of the substance as marijuana. ***Id.*** The contested issue was the nature of the substance, not its presence. Possession was not an element of the crime, and the defendant in ***Neal*** did not challenge evidence of his possession of the substance or his transfer of the substance to the buyer. ***Id.*** There is nothing in the opinion as to how or whether the substance was seized or presented at trial, because those issues were irrelevant to the issue on appeal. Thus, ***Neal*** is relevant only to the second element required for conviction of possession of a prohibited substance in Mr. Twitty's appeal: awareness of the presence and nature of the substance. ***Neal*** does nothing to support the State's argument regarding the element of actual or constructive possession at issue in this appeal.

The same is true with ***Moore***, cited both by the ***Neal*** Court and the State in its brief. The defendant in ***Moore*** was convicted of selling moonshine whisky. 279 S.W. at 133. The challenge in the appeal was "to the sufficiency of the

qualifications of the witness who testified that the liquor in the bottle procured from the defendant was moonshine whisky." ***Id.*** at 184. The Court found the witnesses sufficiently qualified by their experience drinking moonshine whisky to make their testimony admissible. ***Id.***

Again, this goes to an element not at issue in Mr. Twitty's appeal: the nature of the substance. ***Moore*** did not discuss whether the liquor was seized or how it was seized because that issue was not before the Court. ***Moore*** says nothing about the issue on appeal in Mr. Twitty's case, whether the evidence was sufficient to establish the separate element of his actual possession of the substance as defined by the statute.

Roper presents a unique set of circumstances. The defendant in ***Roper*** was convicted of possession of more than thirty-five grams of marijuana. 591 S.W.2d at 60. A deputy sheriff and others removed three garbage bags full of plant material from defendant's car after he was stopped. ***Id.*** The material was later placed in the Sheriff's Office property room. ***Id.*** A few months later, the material was stolen from the property room. ***Id.*** Plant material was swept from the floor, sent to a laboratory, and tested positive for marijuana. ***Id.*** at 60-61. This material was admitted as State's Exhibit 5. ***Id.*** at 61. Two leaves were removed from one of the bags when it was removed from the defendant's car, and these two leaves were tested and were positive for marijuana. ***Id.*** These two

leaves were admitted as State's Exhibit 4. ***Id.*** The defendant challenged the admission of these exhibits on appeal, arguing that there was an insufficient chain of custody for their admission. ***Id.*** The Court of Appeals, Eastern District, agreed that the exhibits were erroneously admitted. ***Id.***

The Court affirmed the defendant's conviction, however. ***Id.*** It noted that "[t]he crucial issue in this case relates to the proof that the plants found in defendant's car were marijuana." ***Id.*** The Court held that law enforcement officers who have considerable experience in investigating marijuana cases can testify that in their opinion a substance is marijuana, and such testimony is sufficient proof to make a submissible case even in the absence of a laboratory analysis. ***Id.*** The Sheriff and a deputy both testified that the plant material in the bags removed from the defendant's car was or appeared to be marijuana. ***Id.*** at 63. The Court found this evidence sufficient to prove that "the bags in defendant's car contained marijuana." ***Id.*** The issue resolved by the Court was, once again, the sufficiency of the evidence establishing the nature of the substance, not its presence in the defendant's possession.

Roper does present an important consideration in Mr. Twitty's case. The Court noted: "Under this point, without citation or authority, the defendant states: 'that the state failed to prove the charge alleged against defendant because of the state's total failure to produce at any time, the alleged evidence seized.'"

Id. at 62. The Court held that the corpus delicti can be proven by circumstantial evidence, and that only the best proof presently obtainable need be shown in order to establish the corpus delicti. *Id.*

The Eastern District followed this portion of *Roper* in *State v. Lowrance*, 619 S.W.2d 354 (Mo. App., E.D. 1981). The defendant in *Lowrance* was contacted by a Highway Patrol officer while parked on the side of the road. *Id.* at 355. The officer observed and seized a hypodermic syringe from the floorboard of the car which contained liquid containing cocaine. *Id.* The defendant was arrested and ultimately convicted of possession of a controlled substance. *Id.* The defendant claimed on appeal that he was denied due process of law because the liquid was consumed by the testing at the laboratory and he was unable to conduct an independent analysis of the liquid. *Id.* at 356. The Court rejected this argument because the defendant did not challenge the results of the analysis and did not request independent testing of the substance prior to trial. *Id.* The Court indicated in a footnote, citing *Roper*, that the circumstantial evidence was sufficient to support the conviction "notwithstanding the fact that all the fluid in the hypodermic syringe had been used up in the testing procedure."

Roper and *Lowrance* do not require affirmance of Mr. Twitty's conviction. In both cases, the substance was recovered from the defendant's person or within his easy reach and convenient control at the time they were arrested. The

substances were present at the time of the police contact. The corpus delicti of possession is that the person has the substance on his person or in easy reach and convenient control, with knowledge of the presence and nature of the substance. The evidence in ***Roper*** and ***Lowrance*** was sufficient, even circumstantially, to establish the element of possession at the time the defendants were arrested. The substances were unavailable at trial only because of intervening circumstances. In Mr. Twitty's case, the pseudoephedrine was not on his person or within his easy reach and convenient control at the time of the police contact. This distinguishes his case from ***Roper*** and ***Lowrance***.

Mr. Twitty may have overstated his case in this regard when he argued in his initial brief that the substance must be produced at trial. There may be circumstances where that is not required. But as discussed in ***Roper*** and ***Lowrance***, the absence of the substance at trial should be explained by reasonable intervening circumstances. Nor does this alter Mr. Twitty's argument that Section 195.010(34) requires that the substance must be recovered from his person or within his easy reach and convenient control, or recovered under circumstances demonstrating his power and intention to exercise dominion or control over the substance at the time he is seized or arrested.

The State analogizes Mr. Twitty's argument to murder cases where the victim's body is never recovered, citing ***State v. Davis***, 814 S.W.2d 593 (Mo. banc

1991) and ***State v. Byrd***, 389 S.W.3d 702 (Mo. App., E.D. 2012). (Respondent's Substitute Brief, 21-22). These situations are not analogous. In neither ***Davis*** or ***Byrd*** was the defense that the evidence was insufficient because the body was not recovered. The defense in ***Davis*** was that the evidence was insufficient to establish the defendant's criminal agency in the disappearance of the victim. 814 S.W.2d at 587. The defense in ***Byrd*** was that the evidence was insufficient to establish the defendant's awareness that his conduct was practically certain to cause the victim's death. 389 S.W.3d at 709.

Most importantly, the statutory definitions of the crimes distinguish murder from possession of a prohibited substance. The crimes of murder or manslaughter occur when the person "causes" the death of another under prescribed circumstances. *See*, Sections 565.010, 565.021, 565.023, and 565.024. These statutes do not limit when the person "causes" the death. In contrast, Section 195.010(34) limits when the person must be in possession to the time that he "***has*** on his person or within easy reach and convenient control" the prohibited substance. The differences in the statutory elements distinguish possession of a prohibited substance from murder or manslaughter and impose different requirements. The State's argument is inapplicable to Mr. Twitty's case.

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,

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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 2002, 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 2,887 words, which does not exceed the 7,250 words allowed for an appellant's reply brief.

On this 1st day of December, 2016, an electronic copy of Appellant's Substitute Reply Brief was 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