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State v. Ebokosia Appellant's Brief Dckt. 46176

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Idaho Supreme Court
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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent. vs. BRIAN EBOKOSIA, Defendant-Appellant,	S.Ct. No. 46176-2018 Elmore Co. CR20-17-03673

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fourth Judicial District of the State of Idaho
In and For the County of Elmore

HONORABLE NANCY BASKIN
Presiding Judge

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A. *Nature of the Case*

This is an appeal in a criminal case. This Court should vacate the judgment and sentence for Trafficking in Marijuana because there was insufficient evidence to show the defendant Brian Ebokosia was in possession of the marijuana or that he aided and abetted in the possession.

B. *Procedural History and Statement of Facts*

1. Pretrial proceedings

Deputy Laura Gutierrez made a traffic stop on December 9, 2017 at about 7:18 p.m. Joseph Severn was driving. Mr. Ebokosia was the sole passenger. The vehicle was eventually searched and twenty-five pounds of marijuana was discovered in the trunk. R 8. Mr. Ebokosia was charged with trafficking in marijuana. The Information charged that he "was knowingly in actual and/constructive possession of 25 pounds or more of marijuana, a Schedule I non—narcotic controlled substance, all in violation of I.C. § 37-2732B(1)(C)." R. 22. The court denied the state's motion to amend the Information to add an allegation that Mr. Ebokosia aided and abetted Joseph Severn in the trafficking of marijuana. R 89. Nevertheless, it instructed the jury on accomplice liability. R 79. The jury found Mr. Ebokosia guilty of trafficking in marijuana but the verdict form did not require the jury to answer whether it found Mr. Ebokosia was a principal or an accomplice to the offense. R 88.

2. Rule 29 motions

Mr. Ebokosia moved the court for a judgment of acquittal after the close of the state's case. The court denied the motion. T pg. 261, ln. 4 – pg. 272, ln. 10.

After the guilty verdict, Mr. Ebokosia renewed his motion. R 91-101. The state objected and the court held a hearing. R 114; T pg. 369 - 383. It took the matter under advisement and issued a written ruling denying the motion. R 117 – 128.

In the written ruling, the court set forth the facts as follows:

> On December 9, 2017, Elmore County Sherriff's Deputy Laura A. Gutierrez stopped an eastbound vehicle on Interstate 84 for following another vehicle too closely. Deputy Gutierrez also observed that the vehicle appeared to be traveling in a three-vehicle convoy.
>
> After stopping the vehicle, Deputy Gutierrez made contact with the driver and Defendant, who was a passenger in the front seat. The driver told Deputy Gutierrez that he was closely following the other vehicle because he did not have GPS, and that the people in the other two cars would be waiting for them to catch up at the next highway exit. While speaking with the car's occupants, Deputy Gutierrez observed a small clear plastic bag containing a small amount of a leafy green substance near the vehicle's center console. The driver handed Deputy Gutierrez the bag. Defendant told Officer Gutierrez that he and the driver knew each other from work and they were travelling to Missouri after sightseeing in a redwood forest in Oregon. Defendant also admitted that he smoked marijuana while in Oregon.
>
> At Deputy Gutierrez's request, Deputy Stryker and Trooper Rodean reported to the scene. The officers searched the vehicle while Defendant and the driver waited in the police cars due to the cold weather. However, the luggage found in the car's backseat contained little to no winter clothing or coats. The officers also observed that the vehicle contained between four and six air fresheners, including one in the trunk, as well as boxes of uneaten cooked chicken. The officers testified that they either did not smell, or only intermittently smelled, marijuana while they searched the vehicle's passenger compartment, but each testifying officer stated that the smell of marijuana was overwhelming once they opened the divider between the trunk and the car's back seat.

R 118-119

Officer Gutierrez thought the absence of hiking boots and heavy jackets in the luggage did not match the sightseeing statements. T pg. 146, ln. 14-18.

In the trunk, the officers found two large duffle bags and a large black garbage bag. The bags contained sealed packages of at least 25 pounds of marijuana. The officer noted that Mr. Severn was "Fidgety. Pacing back and forth nervously," while Mr. Ebokosia was "very calm and collected. His demeanor did not change." T pg 143, ln. 14-17. T pg. 165, ln. 23-25. The video recording of the traffic stop also showed Mr. Severn was visibly shaken and upset by the events while Mr. Ebokosia appeared calm and cooperative. Exhibit 14.

The court found there was sufficient evidence to show that that Mr. Ebokosia knew there was marijuana in the vehicle, but also observed that "[w]hether the evidence supported an inference that Defendant had 'control' over the marijuana is less clear." R 124. It continued:

> There was no evidence presented that Defendant owned or had rented the car, nor that he possessed any keys that he could use to access the trunk from outside the car. Defendant was in the front passenger seat, not the driver's seat when the vehicle was stopped. Although the bag containing marijuana residue was found near Defendant, and he admitted to smoking marijuana in Oregon, there was no evidence that marijuana was found on Defendant's person. Further, there was no evidence that the bags or packaging that housed the marijuana contained anything tying them to Defendant or indicating that they, or their contents, belonged to him.

R 124-125.

However, the court determined that it did not need to decide whether there was sufficient evidence to show Mr. Ebokosia had control of the marijuana "because

the evidence could have allowed a rational jury to conclude that Defendant aided and abetted the driver in trafficking marijuana." R 125. It reasoned:

> The Court concludes that a rational jury could have found that Defendant was riding in a car that was travelling in a convoy-like formation, that Defendant knew there was a large amount of marijuana in the vehicle, that Defendant was familiar with marijuana, and that Defendant knew the driver from work. Although there is no direct evidence that Defendant purchased the marijuana, loaded it into the car, or agreed to drive the car, a rational juror could have inferred that Defendant learned of the plan to transport a large quantity of marijuana across state lines at some point during the trip, and was not an innocent bystander, but knowingly encouraged, promoted, or assisted in the operation.

R 127-128. Accordingly, the court denied the motion. R 128.

At sentencing, the court imposed the mandatory minimum five-year sentence with all five years determinate. It also imposed the mandatory $15,000 fine. R 134.

A timely Notice of Appeal was filed. R 140.

III. ISSUE PRESENTED ON APPEAL

Is there sufficient evidence that Mr. Ebokosia possessed the marijuana or aided and abetted someone else's possession to support the guilty verdict?

IV. ARGUMENT

A. *Introduction*

A finding of guilt will be overturned on appeal where there is not substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained its burden of proving the essential elements of a crime beyond a reasonable doubt. The Court considers the evidence in the light most favorable to the prosecution. *State v. Morales*, 146 Idaho 264, 266, 192 P.3d 1088, 1090 (Ct.

App. 2008). "Evidence is substantial if a reasonable trier of fact would accept it and rely upon it in determining whether a disputed point of fact has been proven." *State v. Kraly*, 164 Idaho 67, 423 P.3d 1019, 1021 (2018), *quoting State v. Smith*, 161 Idaho 782, 790, 391 P.3d 1252, 1260 (2017) (internal quotations and citation omitted).

Idaho's substantial evidence rule is similar, but not identical, to the federal rule, mandated by the Fourteenth Amendment's due process clause, which requires the reviewing court to determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also In re Winship*, 397 U.S. 358, 364 (1970) ("[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.").

Here, there was not sufficient evidence to sustain the conviction under either the Idaho or federal rule. As explained below, the evidence is not sufficient to sustain the conviction because there was no evidence presented that Mr. Ebokosia possessed the marijuana or aided and abetted in its possession.

B. *There is insufficient evidence to prove Mr. Ebokosia was guilty as a principal.*

The jury was instructed that:

> The law makes no distinction between a person who directly participates in the acts constituting a crime and a person who, either before or during its commission, intentionally aids, assists, facilitates, promotes, encourages,

> counsels, solicits, invites, helps or hires another to commit a crime with intent to promote or assist in its commission. Both can be found guilty of the crime. Mere presence at, acquiescence in, or silent consent to, the planning or commission of a crime is not sufficient to make one an accomplice.

R 79. Under this instruction, the state could prevail if it showed either that Mr. Ebokosia possessed the marijuana or aided and abetted Mr. Severn's possession.

As an initial matter, Mr. Ebokosia will explain why the state failed to present sufficient evidence of principal liability.

"Possession of a controlled substance may be either actual or constructive." *State v. Garza*, 112 Idaho 776, 777, 735 P.2d 1087, 1088 (Ct. App. 1987). To prove constructive possession, a defendant must have, either jointly or exclusively, "both knowledge and control of the drugs." *Id.* A defendant's "nonexclusive possession of the premises upon which drugs were found," without additional evidence from which individual knowledge and control may be inferred, is inadequate. *Id.*; *see also State v. Warden*, 97 Idaho 752, 754, 554 P.2d 684, 686 (1976) (same); *State v. Vinton*, 110 Idaho 832, 834, 718 P.2d 1270, 1272 (Ct. App. 1986) ("There must be substantial evidence, either direct or circumstantial, that establishes the guilt of each defendant as an individual rather than the collective guilt of two or more persons."). Instead, the state must produce "substantial evidence, either direct or circumstantial, that establishes the guilt of a defendant as an individual rather than the collective guilt of two or more persons." *Garza*, *supra* (quotations and brackets omitted). Joint possession and access to areas containing contraband is not sufficient without more to establish control. *See id.*

In *Garza*, the police found marijuana, paraphernalia, and evidence that

marijuana was being sold in three rooms of the home that the defendant shared with her husband. Both spouses were found guilty of both possession of marijuana and possession of a controlled substance with intent to deliver. On appeal, the Court of Appeals reversed Mr. Garza's conviction because the state failed to produce sufficient evidence showing that he exercised individual control over the contraband. Although it was clear that he was in close proximity to the drugs, the Court found "[m]ere proximity cannot establish constructive possession." *Id.*

Thus, where a defendant is in non-exclusive possession of the premises upon which drugs were found there can be no legitimate inference that he knew of the drugs and had control of them in the absence of other circumstances such as incriminating statements which tend to support such inference. *State v. Warden*, 97 Idaho at 754, 554 P.2d at 686. "There must be substantial evidence, either direct or circumstantial, that establishes the guilt of [a] defendant as an individual rather than the collective guilt of two or more persons." *State v. Vinton*, 110 Idaho at 834, 718 P.2d at 1272.

In *State v. Maland*, 124 Idaho 537, 539, 861 P.2d 107, 109 (Ct. App. 1993), officers approached a parked car containing three people, including the defendant, an 18-year-old backseat passenger. On the backseat floor, within the defendant's reach, the officers found an open case of beer that contained both empty and unopened beer cans. A magistrate judge convicted the defendant of underage possession of alcohol. That conviction was reversed on appeal because while his

very close proximity to the beer supported an inference that he knew it was there, there was insufficient evidence from which a rational factfinder could have concluded that he controlled it; no evidence was admitted showing who owned the car, who else was in the car, their relationship to the defendant, or that the defendant smelled of alcohol. *Id.* at 542, 861 P.2d at 112.

Similarly here, the state did not present evidence sufficient for a rational trier of fact to conclude based on substantial evidence that Mr. Ebokosia exercised control and dominion over the marijuana contained in the trunk of the vehicle. All the evidence shows was that Mr. Ebokosia was a front seat passenger in a vehicle that contained at least twenty-five pounds of marijuana. The evidence showed and the court found that:

> It is undisputed that Defendant did not have actual, physical possession of the marijuana when Deputy Gutierrez stopped the vehicle; there was no evidence that Defendant had any marijuana on his person or in his hands at any point during his encounter with Deputy Gutierrez, and other than a few nuggets of marijuana that were discovered on the car's floor, and the small amount of leafy marijuana residue in the plastic bag, there was no evidence that any marijuana was within Defendant's immediate reach.

R 120-121

Accordingly, the state had to prove that Mr. Ebokosia constructively possessed the marijuana. But, as noted by the district court, there was no evidence that Mr. Ebokosia owned or rented the car. He did not have access to the trunk, as he was not in possession of car keys. He was not the driver, but was in the front passenger seat when the when the vehicle was stopped. No marijuana was found on his person. "Further, there was no evidence that the bags or packaging that

housed the marijuana contained anything tying them to Defendant or indicating that they, or their contents, belonged to him." R 124-125.

Finally, Mr. Ebokosia's calm demeanor during the search of the vehicle while Mr. Severn was fidgeting and pacing nervously, shows it was Mr. Severn's marijuana. Mere presence in a vehicle that contains contraband is insufficient to establish dominion and control over the contraband and "guilt by association" is not sufficient to sustain a conviction. *State v. Garza*, supra; *State v. Maland*, *supra.* Consequently, this Court should find the evidence is insufficient to prove that Mr. Ebokosia is guilty of possessing the marijuana as a principal.

C. *There is insufficient evidence to prove Mr. Ebokosia aided and abetted in the possession of the marijuana.*

Even though the court found that there was no direct evidence that Defendant purchased the marijuana, loaded it into the car, or agreed to drive the car, it still found there was substantial evidence to support the conviction under an aiding and abetting theory for the five reasons below. R 127-128. In fact, none of these facts are sufficient either individually or collectively.

1. Mr. Ebokosia "was riding in a car that was traveling in a convoy-like formation." (R 127.)

Even taken in the light most favorable to the state, this fact is only circumstantial evidence that Mr. Ebokosia was aware Mr. Severn was transporting marijuana. It is not evidence that he assisted Mr. Severn in any manner.

2. He "knew there was a large amount of marijuana in the vehicle." (Id.)

The evidence of the convoy-like formation and the lack of trunk space,

necessitating the storage of personal luggage in the back seat, is at best some circumstantial evidence that Mr. Ebokosia was aware of the presence of marijuana in the trunk. Again, it does not show that he assisting Mr. Severn in trafficking the marijuana.

3. That Defendant "was familiar with marijuana." (Id.)

While Mr. Ebokosia smoked marijuana in Oregon and was aware of the presence of some shake in the passenger compartment, that does not tend to show he aided or abetted Mr. Severn in trafficking.

4. Mr. Ebokosia "knew the driver from work." (*Id.*)

This is not substantial evidence that Mr. Ebokosia aided or abetted Mr. Severn in trafficking marijuana. In particular, there is no evidence that his statement about sightseeing was not true, especially as he never claimed that they had gone hiking or engaged in any kind of outdoors activity. Moreover, a bystander's mere acquiescence in, or silent consent to, the commission of an offense is not sufficient to make that person an accomplice. *State v. Brooks, 103 Idaho 892, 804, 655 P.2d 99, 111 (Ct. App. 1982)*. *See also*, *State v. Adair*, 99 Idaho 703, 587 P.2d 1238 (1978).

Thus, the court's conclusion that "a rational juror could have inferred that Defendant learned of the plan to transport a large quantity of marijuana across state lines at some point during the trip, and was not an innocent bystander, but knowingly encouraged, promoted, or assisted in the operation," is not supported by constitutionally sufficient evidence. Idaho Const. Art. 1, § 13; U.S. Const. Amend.

14; *Jackson v. Virginia*, *supra*; *In re Winship, supra.*

D. *Conclusion*

As the state failed to present any evidence that Mr Ebokosia possessed the marijuana or aided and abetted Mr. Severn in possessing it, the conviction violates the due process clauses of the state and federal constitutions. *State v. Morales*, *supra*; *Jackson v. Virginia*, *supra*.

V. CONCLUSION

In light of the above, Mr. Ebokosia asks the Court to vacate the judgment and sentence, and order that a judgment of acquittal be entered. *See State v. Kraly*, 164 Idaho 67, 423 P.3d 1019, 1026 (2018).

Respectfully submitted this 14th day of January, 2019.

/s/ Dennis Benjamin
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CERTIFICATE OF COMPLIANCE AND SERVICE

The undersigned does hereby certify that the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that an electronic copy was served on each party at the following email address(es): Idaho State

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Dated and certified this 14th day of January, 2019.

/s/Dennis Benjamin
Dennis Benjamin