

IN THE SUPREME COURT OF THE STATE OF NEVADA

MATTHEW JAMES RITTER,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 52753

**FILED**

FEB 26 2010

ORDER OF REVERSAL

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of trafficking in a schedule I controlled substance. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge. The district court sentenced appellant Matthew Ritter to 25 years with minimum parole eligibility after 10 years.<sup>1</sup>

DISCUSSION

Insufficient evidence supports the conviction of trafficking in a controlled substance

On appeal, Ritter argues that insufficient evidence supports the conviction of trafficking in a controlled substance because the State failed to prove that Ritter had actual or constructive possession of the methamphetamine.<sup>2</sup> We conclude that insufficient evidence supports the

---

<sup>1</sup>The parties are familiar with the facts and procedural history of this case, and we do not recount them except as necessary to our disposition.

<sup>2</sup>Ritter also argues that (1) the district court erred by admitting Ritter's prior convictions, (2) the district court erred in admitting the DNA evidence, (3) the evidence of the drug dog's alert on Ritter's car violated his Sixth Amendment Confrontation Clause rights, (4) the district court erred in admitting evidence of the street value of the methamphetamine, and (5) cumulative error warrants reversal. We conclude that these arguments lack merit.

trafficking conviction because no rational trier of fact could find beyond a reasonable doubt, Rose v. State, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007), that Ritter had actual or constructive possession of the methamphetamine under NRS 453.3385(3). This statute requires that Ritter knowingly or intentionally be in actual or constructive possession of a schedule I substance in the amount of 28 grams or more. NRS 453.3385(3)

#### Actual possession

A person has actual possession over an item when he or she has physical control over it at a particular time. Palmer v. State, 112 Nev. 763, 768, 920 P.2d 112, 115 (1996). Being near contraband and having handled it earlier in the day before the police arrived is insufficient to establish actual possession. State v. Spruell, 788 P.2d 21, 23 (Wash. Ct. App. 1990) (citing Blacks Law Dictionary 1163 (6th ed. 1990)). In this case, the State established that Ritter may have been in the car at the same time as the methamphetamine because he was in the car the day before Officer Marshowsky found the methamphetamine, when Officer Marshowsky transported Ritter in his patrol car to jail on an outstanding warrant. When Officer Marshowsky let Ritter out of the car at the police station and began searching the car, Ritter asked him why he was searching the car, and backed into Officer Silva, causing Officer Marshowsky to stop searching the car and intervene. As a result, Officer Marshowsky did not finish searching the car. The State also established that Ritter may have handled the methamphetamine at some point, given the partial DNA match from the bag of methamphetamine. However, statistically, the DNA source could have been 1 in any 239 Caucasians. Also, Officer Marshowsky did not find methamphetamine on Ritter's person, and the police did not find any in his car when they searched it.

Under these facts, the State failed to demonstrate that Ritter actually possessed the methamphetamine at a particular time. Therefore, a rational juror could not find beyond a reasonable doubt that Ritter had actual possession of the methamphetamine.

Constructive possession

The State also failed to show that Ritter had constructive possession of the methamphetamine because the evidence does not demonstrate that he knowingly had the ability and intent, at a particular time, to exercise dominion or control over the methamphetamine directly or through someone else. Palmer, 112 Nev. at 768, 920 P.2d at 115 (citing Blacks Law Dictionary 1163 (6th ed. 1990)).

Instead, the evidence shows that Officer Marshowsky transported Ritter in his patrol car to jail on an outstanding warrant. Officer Marshowsky used the patrol car for the remainder of his shift, and then Officer Aaron Hildreth used it for his shift. Bonnie Plumb, an employee at the police car maintenance shop, picked up the patrol car and brought it to the maintenance shop. She vacuumed it, left it unattended while she ran an errand, then washed it and brought it to the mechanic shop across the street. Darrin Windous, a mechanic, checked the tire pressure then left the car on the street unlocked for about 15 minutes. Officer Jeremy Shelley then used the patrol car for his shift and turned it over to Officer Marshowsky. It was not until the next day that Officer Marshowsky searched the car at the beginning of his shift and found the methamphetamine under the front passenger seat.

We conclude that this evidence demonstrates that Ritter did not have exclusive access to the patrol car nor dominion and control over it. Id. at 769, 920 P.2d at 115 (constructive possession includes when contraband is found in an area to which the accused has immediate and exclusive access and it is subject to his dominion and control); See also

Glispey v. Sheriff, 89 Nev. 221, 223-24, 510 P.2d 623, 624 (1973) (concluding that a defendant did not have constructive possession because she did not have exclusive access to the restroom where contraband was found after a prison guard searched the women's restroom and found no contraband, and then three inmates used the restroom, the defendant being the last, and subsequently contraband was found). As such, no rational trier of fact could have found beyond a reasonable doubt that Ritter had constructive possession of the methamphetamine.

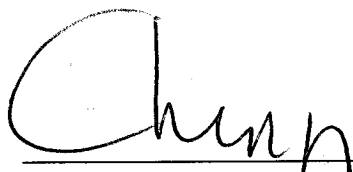
#### Abandonment


Additionally, assuming that Ritter did have possession of the methamphetamine at some point, he abandoned it and, therefore, did not have constructive possession of it. Glispey, 89 Nev. at 223-24, 510 P.2d at 624. This case is analogous to People v. Showers, 440 P.2d 939 (Cal. 1968). In Showers, the police pulled over the defendant and released him. Id. at 941. The next day, the police received a report that the defendant was searching through the ivy near where he was pulled over. Id. The police searched the ivy and found a balloon of heroin. Id. The California Supreme Court held that insufficient evidence supported the defendant's conviction of possession because he did not have exclusive access to the ivy patch, and he did not have control over the location. Id. at 943. Further, the evidence showed that the defendant threw the heroin out of the car, thereby abandoning it, and even if he intended to recover the heroin the next day, it did not reinstate his possession of the heroin on the day before. Id.

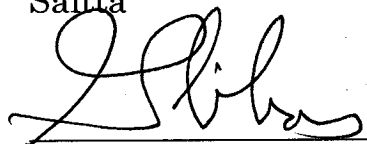
Similarly, in this case, if Ritter had possession of the methamphetamine on March 12, 2006, and then left it under the seat of the patrol car, he abandoned it. The State presented evidence that Ritter was attempting to recover the methamphetamine. During his shift, Officer Hildreth saw Ritter's girlfriend's car make a U-turn and follow

him. Officer Spring saw Ritter following Officer Hildreth during the same shift and pulled him over, but he did not cite him. That night, between 11 p.m. and 7 a.m., various officers saw Ritter driving slowly near the police station at two different times, saw his passenger walking towards the police station, and saw him drive below the speed limit past officers in their patrol cars. Even if this conduct establishes Ritter's intent to recover the methamphetamine, he had abandoned it, and mere intent to recover it does not reinstate his possession for the previous day. Glispey, 89 Nev. at 223-24, 510 P.2d at 624; Showers, 440 P.2d at 943. Therefore, the State cannot impute constructive possession to Ritter after he abandoned the drugs. Thus, we conclude that a rational juror could not find beyond a reasonable doubt that Ritter had constructive possession of the methamphetamine. As such, insufficient evidence supports actual or constructive possession, and consequently, Ritter's conviction.

Accordingly, we ORDER the judgment of the district court REVERSED.

  
\_\_\_\_\_, J.  
Cherry

  
\_\_\_\_\_, J.  
Saitta

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. J. Michael Memeo, District Judge  
Victor N. Bunitsky Jr.  
Richard F. Cornell  
Attorney General Catherine Cortez Masto/Carson City  
Elko County District Attorney  
Elko County Clerk