

NOT FOR PUBLICATION IN WEST'S HAWAI'I REPORTS AND PACIFIC REPORTER

NO. 27321

IN THE INTERMEDIATE COURT OF APPEALS  
OF THE STATE OF HAWAI'I

STATE OF HAWAI'I, Plaintiff-Appellee, v.  
DEBRA JANE ROBERTSON, Defendant-Appellant

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STATE OF HAWAI'I

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FILED

APPEAL FROM THE CIRCUIT COURT OF THE SECOND CIRCUIT  
(CR. NO. 02-1-0614(1))

SUMMARY DISPOSITION ORDER

(By: Foley, Presiding Judge, Nakamura and Fujise, JJ.)

Defendant-Appellant Debra Jane Robertson (Robertson) appeals from the Amended Judgment entered on July 8, 2005 in the Circuit Court of the Second Circuit<sup>1/</sup> (circuit court). On appeal, Robertson argues that (1) the circuit court erred in imposing a mandatory minimum term of ten years of imprisonment on Count I (Promoting a Dangerous Drug in the Second Degree) where (a) the jury's general verdicts did not reveal whether Robertson was a principal or accomplice in the firearms offense and (b) the indictment failed to provide notice to Robertson that she would be subject to a mandatory minimum term of imprisonment for this offense; and (2) there was insufficient evidence to support the convictions for the firearm and drug-related offenses where the evidence failed to establish that Robertson had actual or constructive possession of these items.

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<sup>1/</sup> The Honorable Joel E. August presided.

On November 18, 2002, the State of Hawai'i (the State) charged Robertson via an Indictment with:

Count One - Promoting a Dangerous Drug in the Second Degree, in violation of Hawaii Revised Statutes (HRS) § 712-1242(1)(b)(i) (1993 & Supp. 2003);

Counts Two and Four - Prohibited Acts Related to Drug Paraphernalia, in violation of HRS § 329-43.5(a) (1993);

Count Three - Promoting a Dangerous Drug in the Third Degree, in violation of HRS § 712-1243(1) (1993 & Supp. 2003);

Counts Five, Six, and Seven - Prohibited Possession of a Firearm, in violation of HRS § 134-7(b) (Supp. 2003);

Counts Eight and Nine - Prohibited Possession of Firearm Ammunition, in violation of HRS § 134-7(b) (Supp. 2003);

Count Ten - Promoting a Detrimental Drug in the Third Degree, in violation of HRS § 712-1249(1) (1993);

Counts Eleven, Twelve, and Thirteen - Storage of Firearm; Responsibility With Respect to Minors, in violation of HRS § 134-10.5 (1993);

Count Fourteen - Alteration of Identification Marks Prohibited, in violation of HRS § 134-10 (1993).

On November 8, 2004, the circuit court granted the State's Motion to Dismiss Counts Six, Seven, Twelve, and Thirteen with Prejudice.<sup>2/</sup>

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<sup>2/</sup> At trial, the circuit court renumbered the original Counts Eight, Nine, Ten, Eleven, and Fourteen to reflect the counts that had been dismissed by the State:

Count Eight became Count Six

Count Nine became Count Seven

Count Ten became Count Eight

(continued...)

On December 17, 2004, the jury returned guilty verdicts as to Counts One, Two, Three, Five, Eight (renumbered as Count 6), Ten (renumbered as Count 8), and Fourteen (renumbered as Count 10). The jury acquitted Robertson as to Counts Four, Nine (renumbered as Count 7), and Eleven (renumbered as Count 9).

On December 21, 2004, the State filed a Motion for Imposition of Mandatory Minimum Term of Imprisonment for Possession of Semiautomatic Firearm. The State asked the circuit court to impose, as part of its judgment and sentence on Count Five (Prohibited Possession of a Firearm), a mandatory minimum term of imprisonment of ten years without the possibility of parole, pursuant to HRS § 706-660.1(3)(c) (1993). On April 1, 2005, the circuit court granted the State's motion and entered its judgment accordingly.

On May 20, 2005, Robertson filed a motion to correct illegal sentence pursuant to Hawai'i Rules of Penal Procedure Rule 35 and State v. Coelho, 107 Hawai'i 273, 112 P.3d 759 (App. 2005). At the July 8, 2005 hearing, the circuit court granted in part Robertson's motion and imposed a mandatory minimum term of imprisonment of ten years as to Count One instead of Count Five.

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<sup>2/</sup>(...continued)  
Count Eleven became Count Nine

Count Fourteen became Count Ten

However, because it would be too confusing and cumbersome to use the circuit court's renumbering, we will refer to the counts by their original numbering as reflected in the Indictment and the Amended Judgment.

The circuit court entered its Amended Judgment on July 8, 2005. Robertson timely filed her Notice of Appeal.

Robertson argues that there was no substantial evidence to support her convictions for the firearms and drug-related charges. The Hawai'i Supreme Court has held:

[E]vidence adduced in the trial court must be considered in the strongest light for the prosecution when the appellate court passes on the legal sufficiency of such evidence to support a conviction; the same standard applies whether the case was before a judge or jury. The test on appeal is not whether guilt is established beyond a reasonable doubt, but whether there was substantial evidence to support the conclusion of the trier of fact.

State v. Richie, 88 Hawai'i 19, 33, 960 P.2d 1227, 1241 (1998) (quoting State v. Quitog, 85 Hawai'i 128, 145, 938 P.2d 559, 576 (1997)). "Substantial evidence" as to every material element of the offense charged is credible evidence which is of sufficient quality and probative value to enable a person of reasonable caution to support a conclusion." Richie, 88 Hawai'i at 33, 960 P.2d at 1241 (internal quotation marks and citation omitted).

Since no drugs, drug paraphernalia, or firearms were discovered in Robertson's actual possession or control, the State must present substantial (and sufficient) evidence to prove beyond a reasonable doubt that Robertson constructively possessed these items.

The law, in general, recognizes two kinds of possession: actual possession and constructive possession. A person who *knowingly* has direct physical control over a thing at a given time is then in actual possession of it. A person who, although not in actual possession, *knowingly* has both the power and the intention at a given time to exercise dominion over a thing either directly or through another person or persons, is then in constructive possession of it.

State v. Jenkins, 93 Hawai'i 87, 110, 997 P.2d 13, 36 (2000) (emphasis in original) (quoting State v. Mundell, 8 Haw. App. 610, 617, 822 P.2d 23, 27 (1991)). This court has held that "[t]o support a finding of constructive possession the evidence must show a sufficient nexus between the accused and the drug to permit an inference that the accused had both the power and the intent to exercise dominion and control over the drug. Mere proximity is not enough." State v. Moniz, 92 Hawai'i 472, 476, 992 P.2d 741, 745 (App. 1999) (internal quotation marks and citation omitted; emphasis added); see State v. Hironaka, 99 Hawai'i 198, 206, 53 P.3d 806, 814 (2002) ("[M]ere proximity to the drug, mere presence, or mere association [with] the person who does control the drug is insufficient to support a finding of possession.").

In situations where a defendant does not have exclusive possession or control of the place where drugs are found, therefore, it is necessary for the State to show facts that would permit a reasonable mind to conclude that the defendant had the intent and capability to exercise control and dominion over the drugs. That is, the evidence must raise a reasonable inference that the defendant was engaged in a criminal enterprise and not simply a bystander. Proof of the defendant's knowledge of the presence of drugs and the defendant's ownership or right to possession of the place where the drugs were found, alone, are insufficient to support a finding of the exercise of dominion and control. Other incriminating circumstances must be present to buttress the inference of knowing possession and provide the necessary link between a defendant and illegal drugs.

Moniz, 92 Hawai'i at 476-77, 992 P.2d at 745-46 (internal quotation marks, citations, and brackets omitted).

In evaluating the evidence in the light most favorable to the State, with the exception of Count Ten (renumbered as Count Eight), we conclude there was insufficient evidence to support a prima facie case so that a reasonable mind might fail to conclude guilt beyond a reasonable doubt that Robertson had constructive control of the drugs, drug paraphernalia, and firearms. Robertson did not live at the residence on Kahope Street. There were multiple adults living at the residence. The target of the search warrants was Gray. The residence was from where Gray operated his drug business. With the exception of Count Ten (renumbered as Count Eight), there was insufficient evidence that Robertson had both the power and the intent to exercise control over the drugs, drug paraphernalia, and firearms. Therefore, we reverse Counts One, Two, Three, Five, Eight (renumbered as Count 6), and Fourteen (renumbered as Count 10).

As to Count Ten (renumbered as Count Eight), Promoting a Detrimental Drug in the Third Degree (marijuana), there was sufficient evidence in that the marijuana was found in the blue bag along with Robertson's Maika'i card.

Therefore,

We reverse the Amended Judgment entered on July 8, 2005 in the Circuit Court of the Second Circuit as to Counts One, Two, Three, Five, Eight (renumbered as Count 6), and Fourteen

(renumbered as Count 10). As to Count Ten (renumbered as Count 8), we affirm Robertson's conviction, but vacate the sentence imposed by the circuit court and remand Count Ten to the circuit court for resentencing.

DATED: Honolulu, Hawai'i, March 29, 2007.

On the briefs:

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Daniel R. Foley  
Presiding Judge

  
Craig W. Moku  
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Associate Judge