COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
CASE NO. 2008-SC-000749

HARRY FINN, JR. **APPELLANT**

VS. **ON APPEAL FROM LOGAN CIRCUIT COURT**
HON. TYLER L. GILL, JUDGE
INDICTMENT NO. 07-CR-00014

COMMONWEALTH OF KENTUCKY **APPELLEE**

REPLY BRIEF FOR APPELLANT, HARRY FINN, JR.

Submitted by

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief for Appellant has been served by first-class mail upon Honorable Tyler L. Gill, Judge, Logan County Courthouse, P.O. Box 667, Russellville, KY 42276-0667; Hon. Kristy D. Vick-Stratton, Assistant Commonwealth's Attorney, 329 West 4th Street, Russellville, KY 42276; Hon. Leilani M. Krashin, Trial Counsel for Appellant, 1100 South Main St., Hopkinsville, KY, 42240; and by messenger to Hon. Jack Conway, Attorney General, Criminal Appellate Branch, 1024 Capital Center Drive, Frankfort, Kentucky 40601 on this 10th day of November, 2009.

Roy Durham

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Purpose of Reply Brief

The purpose of this brief is to rebut arguments made by the Commonwealth in the Brief for Appellee.

Statement Concerning Oral Argument

Mr. Finn welcomes oral argument if this Court believes it would assist in rendering a fair and just opinion in this case.

ARGUMENT

THE COURT OF APPEALS ERRED WHEN IT AFFIRMED THE TRIAL COURT'S FINDING THAT MICROSCOPIC AMOUNTS OF COCAINE ARE SUFFICIENT TO JUSTIFY CONVICTING MR. FINN OF POSSESSION OF A CONTROLLED SUBSTANCE AND USE OF DRUG PARAPHERNALIA.

Appellee concludes that "in Martin v. Commonwealth, this Court stated very specifically that it would not readdress its holdings in Shivley and Bolen. The Martin court was not persuaded by either the cash in circulation argument, or the legislative intent argument that Appellant raises in his brief." (Appellee's brief p. 5). However, the case at bar is distinguishable from every case cited by Appellee in that the amount in question in this case was not only immeasurable but also invisible by the naked eye. That "amount" was tested on a microscopic level, according to Joseph Tanner of the Kentucky State Police Western Regional Crime Lab who testified for the Commonwealth.

As stated in Appellant's original brief, while there are no Kentucky cases dealing with possession of microscopic levels, courts in other jurisdictions have found that possession of microscopic amounts is not enough for a conviction of possession. The Texas Court of Criminal Appeals "[took note] of the fact that it was only by the use of a microscope that the chemist was able to determine the presence of marijuana in the dustings which were scraped from the lining of appellant's pocket. **It would be a harsh rule, indeed, that would charge appellant with knowingly possessing that which it required a microscope to identify.**" Pelham v. State, 298 S.W.2d 171, 173 (Tex. Cr. App. 1956) (See also Coleman v. State, 545 S.W.2d 831, 835 (Tex. Cr. App. 1977) (emphasis added).

The Arizona Supreme Court found a similar result. "We believe the correct rule to be applied under a statute such as ours is that where the amount of a narcotic is so small as to require a chemical analysis to detect its presence, the quantity is sufficient if useable under the known practices of narcotic addicts. We hold that **only in those cases where the amount is incapable of being put to any effective use** will the evidence be insufficient to support a conviction." State v. Moreno, 374 P.2d 872, 875 (Ariz. 1962) (emphasis added).

The Virginia Supreme Court stated:

> [t]he majority rule is that possession of a modicum of an illegal drug is sufficient to sustain a conviction under the Uniform Narcotic Drug Act. The rule was enunciated in State v. Dodd, 137 N.W.2d 465, 469 (1965), where it said: 'A modicum means a little or a small quantity and this is to be understood in relationship to the nature of the drug. The amount need not be a usable amount and * * * the quantity of the drug possessed is not material. * * * This view is taken because the statute does not prescribe any minimum amount which must exist. * * *

Robbs v. Commonwealth, 176 S.E.2d 429, 430 (VA. 1970). However, the Court was dealing with a visible quantity. The Court went on to differentiate between a modicum and a microscopic amount. The Court found that "[t]he 'residue' of heroin in the 'cooker' was a discernible amount constituting a modicum and not just a microscopic quantity." Id.

Relying on Robbs, a Virginia appellate court held "where the amount of illegal drugs seized is sufficient to conduct qualitative tests to determine the nature of the substance, **and the sample is more than a microscopic** quantity, the amount is sufficient to support a conviction for possession of illegal drugs." Jordan v. Commonwealth, 2007 WL 1813580 (Va. App. 2007) citing Stanley v. Commonwealth, 407 S.E.2d 13, 17 (Va.

App. 1991); Robbs v. Commonwealth, 176 S.E.2d 429, 430 (Va. 1970). (emphasis added).

An Ohio appellate court "agree[d] with the appellant that his conviction for drug abuse cannot stand as a matter of law where he allegedly has 'knowingly' possessed such a minute quantity of cocaine, to-wit, .001 grams that its very presence must be confirmed by extraordinary microscopic analysis. We also believe this decision is consistent with the intent of the legislative scheme in proscribing narcotics possession and distribution." State v. Susser, 1990 WL 197958 *11 (Ohio App. 2 Dist.) abrogated on other grounds by Steve v. Teamer, 696 N.E.2d 1049 (Ohio 1998).

The 2nd District Appellate Court in California said "[g]uilt or innocence on a charge of illegal possession may not be determined solely by the skill of the forensic chemist in isolating a trace of the prohibited narcotic in articles possessed by the defendant. As forensic science, measuring devices and techniques improve, smaller and smaller amounts of residue are required for the chemist to detect the presence of the narcotic." People v. Aguilar, 223 Cal. App.2d 119, 122 (Cal. App. 2 Dist. 1963). The Court held "under the circumstances of this case, where the narcotic was imperceptible to the human eye and its presence, qualitatively and quantitatively, could be detected only with the aid of a forensic chemist and laboratory, the evidence is not sufficient to sustain a conviction of known possession of a narcotic. Id.

That Court later held "[t]he presence of minute quantities of the residue of a narcotic which can be recognized and identified only by scientific tests does not suffice to show knowing possession of such narcotic residue." People v. Huerta, 238 Cal.App.2d 162, 163 (Cal App. 2 Dist. 1965). (citations omitted).

The Hawaii Supreme Court also was confronted with the issue in the case at bar. It stated:

> We mention in passing, however, that where a literal application of HRS s 712-1243 would compel an unduly harsh conviction for possession of a microscopic trace of a dangerous drug, HRS s 702-236, 'De minimis infractions' may be applicable to mitigate this result. HRS s 702-236 provides that the court may dismiss a prosecution if, considering all the relevant circumstances, it finds that the defendant's conduct did not actually cause or threaten the harm sought to be prevented by the law or did so only to an extent too trivial to warrant the condemnation of conviction.
>
> The evil sought to be controlled by the statutes mentioned above is the use of narcotic drugs and their sale or transfer for ultimate use. Where the amount of narcotics possessed is an amount which can be used as a narcotic, the probability of use is very high and the protection of society demands that the possession be proscribed. **However, where the amount is microscopic or is infinitesimal and in fact unusable as a narcotic, the possibility of unlawful sale or use does not exist, and proscription of possession under these circumstances may be inconsistent with the rationale of the statutory scheme of narcotics control.** Thus, the possession of a microscopic amount in combination with other factors indicating an inability to use or sell the narcotic, may constitute a de minimis infraction within the meaning of HRS s 702-236 and, therefore, warrant dismissal of the charge otherwise sustainable under HRS s 712-1243.

State v. Vance, 602 P.2d 933, 944 (Haw. 1979) (emphasis added).

In the case at bar, Joseph Tanner testified that the residue found was on a microscopic level and invisible to the naked eye. Additionally, Joseph Tanner testified that since the glass pipe that was found in the cigarette pack and the pen casing that was found on Mr. Finn was transported in one evidence bag, it was possible that cross-contamination occurred between the two. Therefore, it is highly probable that the

microscopic level of cocaine that was found was contaminated by the glass pipe that was found in the cigarette pack and not the pen casing that was found on Mr. Finn.

Harry Finn was unable to find one single jurisdiction that specifically allows a conviction for microscopic amounts. Finn requests this court to follow the other jurisdictions and hold that possession of mere microscopic amounts is not enough for a conviction for possession of a controlled substance.

CONCLUSION

Mr. Finn reiterates his arguments and statements from his Original Brief. Based on those arguments, and the foregoing arguments made in this Reply Brief, Mr. Finn respectfully requests that the Order and Judgment of the Logan Circuit Court must be reversed.

Respectfully submitted,

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