

No. 47020-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JAMIE A. HESLEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PACIFIC COUNTY

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The State did not prove the elements of the crime beyond a reasonable doubt.

2. The court erred in imposing a condition of community custody that prohibits Jamie Heslen from possessing or consuming marijuana while on community custody.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove the crime of possession of methamphetamine, the State must prove beyond a reasonable doubt that the accused actually or constructively possessed methamphetamine. Here, the State alleged Ms. Heslen possessed a pipe containing methamphetamine residue that was found in a backpack in a truck. But the truck belonged to someone else; the State did not produce the backpack or the documentation allegedly found inside identifying it as Ms. Heslen's; and the officer who first searched the backpack testified that he found no pipe inside. Moreover, although the officer who allegedly found the pipe claimed that he took photographs of the search, no photographs were produced at trial. Under these circumstances, did the State fail to prove beyond a reasonable doubt that Ms. Heslen possessed the pipe containing methamphetamine?

2. A sentencing court may impose conditions of community custody only as authorized by statute. The controlling statute does not authorize a court to prohibit an offender from possessing or using a legal quantity of marijuana during community custody if there is no showing that marijuana contributed to the offense. Did the court err in imposing a condition of community custody that prohibits Ms. Heslen from possessing or using marijuana where there is no showing that marijuana contributed to the offense?

C. STATEMENT OF THE CASE

On January 17, 2014, at around 9 p.m., South Bend Police Officer Garrett Spencer stopped a pickup truck near Highway 101 in South Bend for having no mud flaps and a defective windshield.

8/06/14RP 11. The truck belonged to James Heslen, who was driving it. 8/06/14RP 11. His daughter, appellant Jamie Heslen, was in the passenger seat. 8/06/14RP 12-13.

Officer Spencer determined that James Heslen's insurance policy had been cancelled and the insurance card he provided was invalid. 8/06/14RP 19. The officer arrested Mr. Heslen for providing false proof of insurance and, during a search incident to arrest, found a

small baggie of suspected methamphetamine in Mr. Heslen's jeans pocket. 8/06/14RP 12.

While still at the scene, Officer Spencer contacted Ryan Tully, a deputy with the Pacific County Sheriff Drug Task Force. 8/06/14RP 12. Officer Spencer contacts Deputy Tully any time he finds drugs on a person during an arrest, to see if the deputy has any interest in the case. 8/06/14RP 12. Officer Spencer, who knew Jamie Heslen from prior contacts, informed Deputy Tully that she was at the scene. 8/06/14RP 12-13. Deputy Tully told Officer Spencer that he had probable cause to arrest Ms. Heslen for a prior delivery of a controlled substance, and asked Officer Spencer to arrest her. 8/06/14RP 14. Officer Spencer arrested Ms. Heslen and read her Miranda¹ rights. 8/06/14RP 14. Ms. Heslen said she understood her rights and was willing to talk. 8/06/14RP 14. Officer Spencer did not ask her any questions, however, but simply waited for Deputy Tully to arrive. 8/06/14RP 15.

Deputy Tully arrived about 30 to 45 minutes later. 8/06/14RP 15. He said he spoke to Ms. Heslen, who told him "there was a backpack in the passenger seat that was hers." 8/06/14RP 32. Deputy

¹ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Tully asked Officer Spencer to secure the truck and then he applied for a search warrant. 8/06/14RP 32. Officer Spencer moved some items that looked like they might have some value from the bed of the truck to the cab and then closed up the cab and secured it with evidence tape. 8/06/14RP 16. The truck was towed to an impound lot. 8/06/14RP 17. Officer Spencer took Ms. Heslen to jail. 8/06/14RP 14-15.

The next morning, Officer Spencer, Deputy Tully, and Pacific County Sheriff Lieutenant James Bergstrom executed the search warrant at the impound lot. 8/06/14RP 18. Officer Spencer found nothing of evidentiary value in the truck. 8/06/14RP 18. Lieutenant Bergstrom searched the passenger area of the truck and found a backpack there. 8/06/14RP 24. He said he found three "health cards" inside the backpack that had Ms. Heslen's name on them, but no such cards were ever produced at trial. 8/06/14RP 24. He also found a laptop computer and some writings in the backpack. 8/06/14RP 25. He did not find anything incriminating inside the backpack, however. 8/06/14RP 25-27. The backpack itself was not produced at trial.

Deputy Tully said he searched the backpack after Lieutenant Bergstrom did and, although Bergstrom had not found any drugs or paraphernalia, Deputy Tully happened to find a pouch inside the

backpack that contained a pipe with a suspicious-looking white residue. 8/06/14RP 34-35. Deputy Tully said he took photographs of the search but no photographs were ever produced at trial. 8/06/14RP 39. He sent the pipe to the Washington State Patrol crime lab for analysis. 8/06/14RP 37. The residue in the pipe tested positive for methamphetamine. 8/06/14RP 43-44.

Ms. Heslen was charged with one count of possession of a controlled substance, methamphetamine.² CP 9-12; RCW 69.50.4013. She waived her right to a jury trial and proceeded to a bench trial. CP 13; 2/28/14RP 2-6. The court found her guilty of possession of methamphetamine as charged. CP 25-26.³

At sentencing, the court imposed 12 months of community custody. CP 31. The court ordered that Ms. Heslen “shall not possess or consume alcohol or marijuana during the term of community custody.” CP 37.

² Ms. Heslen was also charged with four other crimes arising from this incident and two other unrelated incidents. CP 9-12. Those four charges were ultimately dismissed with prejudice for various reasons. CP 18, 24, 42; 4/04/14RP 2; 8/06/14RP 6-8.

³ A copy of the court’s written findings and conclusions is attached as an appendix.

D. ARGUMENT

1. The State did not prove beyond a reasonable doubt that Ms. Heslen possessed the pipe containing methamphetamine

Constitutional due process required the State to prove every element of the charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

In reviewing the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a 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, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). In order to find a defendant guilty beyond a reasonable doubt, the trier of fact must “reach a subjective state of near certitude of the guilt of the accused.” Jackson, 443 U.S. at 315. On review, the Court presumes the truth of the State's evidence and all reasonable inferences that can be drawn from it. State v. Colquitt, 133 Wn. App. 789, 796, 137 P.3d 892 (2006). But the

existence of an essential fact cannot rest upon guess, speculation, or conjecture. Id.

To prove the charged crime of possession of methamphetamine, the State was required to prove beyond a reasonable doubt that Ms. Heslen possessed the methamphetamine found in the pipe. CP 9-12; RCW 69.50.4013(1). Possession can be actual or constructive. State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Actual possession requires that the controlled substance be in the personal, physical custody of the person charged with the crime. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Constructive possession involves “dominion and control” over the drugs in question or the premises in which they are discovered. Id. Mere proximity to a controlled substance alone is insufficient to show dominion and control. State v. Bradford, 60 Wn. App. 857, 862, 808 P.2d 174 (1991).

Here, the State did not show that Ms. Heslen had a backpack, pipe, or methamphetamine in her actual physical control at the time of her arrest. The State also did not prove that she had constructive possession of a controlled substance.

The truck in which the backpack was supposedly found was not Ms. Heslen’s but instead belonged to her father. 8/06/14RP 11.

Lieutenant Bergstrom said he found “health cards” inside the backpack that had Ms. Heslen’s name on them, but no health cards—or any other kind of identification found in the backpack—were ever produced at trial. 8/06/14RP 24. Moreover, the backpack itself was not produced at trial.

Lieutenant Bergstrom searched the backpack but did not find a pipe, a controlled substance, or anything else incriminating inside. 8/06/14RP 25-27. Only Deputy Tully said he found something incriminating inside the backpack. But he searched the backpack after Lieutenant Bergstrom did. 8/06/14RP 34-35. Deputy Tully said he took photographs of the search, but no photographs were ever admitted into evidence. 8/06/14RP 39.

This evidence was not sufficient to prove beyond a reasonable doubt that Ms. Heslen had actual or constructive possession of a backpack containing a pipe that had methamphetamine residue inside. Therefore, the evidence is not sufficient to sustain the conviction.

2. The court erred in imposing a condition of community custody that prohibits Ms. Heslen from possessing or consuming marijuana, where marijuana did not contribute to the offense

A trial court's authority to impose sentencing conditions is derived wholly from statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). This Court reviews de novo whether the trial court had statutory authority to impose a challenged condition of community custody. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

Ms. Heslen may challenge the erroneous sentencing condition for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

A sentencing court imposing conditions of community custody must comply with the provisions of RCW 9.94A.703. See RCW 9.94A.703 ("When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section."). Subsection (3) of the statute sets forth six "discretionary conditions" a court may impose when sentencing an offender to community custody. RCW 9.94A.703(3).

Generally, a court may not order an offender to refrain from engaging in otherwise lawful behavior during community custody unless the prohibition is “crime-related.” RCW 9.94A.703(3)(f) (“As part of any term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions.”). A “crime-related prohibition” is “an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10). In order to justify a crime-related prohibition, the court must find and the record must show that the conduct to be prohibited “contributed to the offense.” State v. Julian, 102 Wn. App. 296, 305, 9 P.3d 851 (2000).

The philosophy underlying the “crime-related” provision is that offenders may be punished for their crimes and may be prohibited from doing things that are directly related to their crimes, but they may not be coerced into doing things that are believed to rehabilitate them. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993); David Boerner, Sentencing in Washington, §4.5, at 4-7 (1985).

The Legislature has carved out a single exception to the general rule regarding crime-related prohibitions, pertaining to the consumption of alcohol. The statute specifically provides a court with authority to

order an offender to “[r]efrain from consuming alcohol” during community custody, even if alcohol did not contribute to the offense. RCW 9.94A.703(3)(e); State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). But that is the only “discretionary condition” set forth in RCW 9.94A.703(3) that a court is authorized to impose that is not inherently crime-related. State v. Riles, 135 Wn.2d 326, 349-50, 957 P.2d 65 (1998), overruled in part on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). There is no such provision pertaining to the consumption of marijuana.

The consumption of marijuana is lawful in Washington State. Initiative 502, passed in November 2012, legalized possession of small amounts of marijuana for individuals over 21 years of age. See RCW 69.50.4013 (possession, by person twenty-one years of age or older, of useable marijuana in amounts not exceeding those set forth in RCW 69.50.360(3) is not a violation of any provision of Washington state law). Thus, a court may not prohibit an offender on community custody from possessing or consuming a legal quantity of marijuana unless the prohibition is “crime-related.” RCW 9.94A.703(3)(f).

Here, as a condition of community custody, the court ordered that Ms. Heslen “shall not possess or consume alcohol or marijuana

during the term of community custody.” CP 37. But the court did not find that marijuana had contributed to the offense. Ms. Heslen was convicted of possession of *methamphetamine*, not marijuana. CP 25-26. There is no evidence in the record that Ms. Heslen was in possession of, or under the influence of, marijuana at the time of the offense. There is no showing that marijuana played any part at all in the crime. Thus, the court acted without statutory authority in imposing a condition of community custody that prohibits her from consuming marijuana because the prohibition is not “crime-related.” RCW 9.94A.030(10); RCW 9.94A.703(3)(f); Riley, 121 Wn.2d at 36-37; Julian, 102 Wn. App. at 305.

When a term included in a sentencing order is found to be improper, “[t]he simple remedy is to delete the questionable provision from the order.” Riles, 135 Wn.2d at 350. Thus, the condition of community custody prohibiting Ms. Heslen from possessing or consuming marijuana must be stricken.

E. CONCLUSION

The State did not prove beyond a reasonable doubt that Ms. Heslen possessed methamphetamine. The conviction must therefore be reversed and the charge dismissed with prejudice. In the alternative,

the condition of community custody prohibiting Ms. Heslen from possessing or consuming marijuana was not authorized by statute and must be stricken.

Respectfully submitted this 4th day of May, 2015.

/s Maureen M. Cyr


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Washington Appellate Project - 91052
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APPENDIX

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2014 AUG -8 PM 5: 13

VIRGINIA LEWIS
PACIFIC COUNTY, WA

BY  DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PACIFIC

STATE OF WASHINGTON,)	CAUSE NO. 14-1-00019-5
)	
Plaintiff,)	COURT'S VERDICT
)	
vs.)	
)	
JAMIE HESLEN,)	
)	
Respondent.)	

The court held a bench trial August 6, 2014.

The defendant's main argument is that the State failed to provide corroborating, physical evidence in support of the verbal testimony of the officers and, therefore, the court should carefully consider the quality of the evidence that was presented. The only physical evidence offered and admitted was State's Exhibit No. 1, which scientist Dunn stated was tested and determined by him to be methamphetamine. This meth was located in a pipe that was taken from a backpack which the defendant admitted to the police was hers. After this admission, the backpack was placed into the cab of the Dakota pickup and the pickup was then sealed with evidence tape. Several officers testified that the truck was sealed with this evidence tape which tape was tamper-proof. The truck was towed to Maynard's Towing and kept there until officers

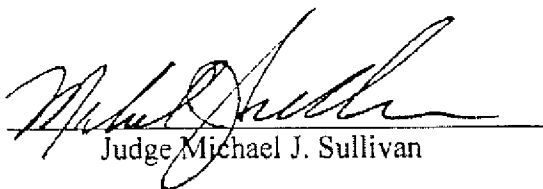
broke the evidence tape to retrieve the backpack. The pipe was sent by law enforcement to the WSP for analysis.

The State decides how to prosecute their case. Only the State called witnesses and offered any exhibit. Therefore, the court must decide whether the evidence was sufficient to find beyond a reasonable doubt the defendant's guilt.

The court renders this verdict: the defendant is guilty of possession of methamphetamine beyond a reasonable doubt.

The court carefully observed all witnesses and found their testimony credible. Together with the testimony of the WSP scientist Dunn, the court is convinced that its verdict is the correct verdict even absent other physical evidence such as the back pack and papers inside the pack with the defendant's name on them.

DATED this 8th day of August, 2014.


Judge Michael J. Sullivan

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 47020-9
)	
JAMIE HESLEN,)	
)	
APPELLANT.)	

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