

**RECEIVED
SUPREME COURT
STATE OF WASHINGTON
CLERK'S OFFICE**

Jun 16, 2016, 9:28 am

RECEIVED ELECTRONICALLY

No. 93253-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 47020-9-II)

STATE OF WASHINGTON,

Respondent,

vs.

JAMIE A. HESLEN,

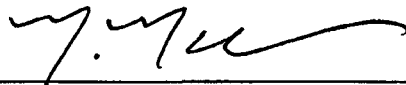
Appellant.

RESPONSE TO PETITION FOR REVIEW

On review from the Court of Appeals, Division Two,
And the Superior Court of Pacific County

MARK MCCLAIN
Pacific County Prosecuting Attorney

By:



Prosecuting Attorney
WSBA No. 30909

Pacific County Prosecutor's Office

PO Box 45
South Bend, WA 98586
(360) 875-9361

 ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITES ii

A. COURT OF APPEALS DECISION..... 1

B. ISSUES PRESENTED FOR REVIEW 1

C. STATEMENT OF FACTS 1

D. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED 3

E. ARGUMENT 4

 1. The Court Of Appeals Decision, Finding Sufficient Evidence To Sustain The Conviction For Possession Of Methamphetamine, Does Not Warrant Review, As It Based Upon The Correct Legal Standard And Therefore Is It In Conflict With Decisions Of This Court..... 4

 2. Whether A Sentencing Court Can Impose A Crime Related Prohibition, Including Prohibiting A Person From Consuming Marijuana, During The Period Of Community Custody Is A Matter Of Settled Law And Not Of Substantial Public Interest..... 6

F. CONCLUSION.....7

G. APPENDIX

TABLE OF AUTHORITIES

Washington Cases

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980).....5

State v. Goodman, 150 Wn.2d 774, 83 P.2d 410 (2004).....4

State v. Riley, 121 Wash.2d 22, 846 P.2d 1365 (1993)..... 6

State v. Thomas, 150 Wn.2d 821, 83 P.3d 970 (2004).....5

State v. Vasquez, 178 Wn.2d 1, 309 P.3d 318 (2013)..... 4, 5

Federal Cases

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

Statutes

RCW 9.94A.505(9).....6

RCW 9.94A.703(3)(c)..... 6

Other Rules or Authorities

RAP 13.4(b)(1),(3)..... 3

RAP 13.4(b)(4)..... 3, 4

A. COURT OF APPEALS DECISION

The Petitioner, Jamie A. Heslen, seeks review of the unpublished opinion in *State v. Heslen*, Court of Appeals, Division II, cause number 47020-9-II, filed May 3, 2016, attached for the Court's convenience as Appendix A.

B. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals apply the incorrect standard of review for a claim of insufficient evidence?
2. Did the trial court err when it prohibited Heslen from possessing or consuming marijuana during her period of community custody?

C. STATEMENT OF FACTS

On January 17, 2014 Officer Garrett Spencer stopped a 1998 Dodge Dakota pickup truck for a shattered windshield which blocked the driver's view and no mud flaps. RP¹ 10-11. The driver of the vehicle, James Heslen², produced a false insurance card, was arrested and search incident to his arrest Office Garrett located methamphetamine in James' front jean pants pocket. RP 12.

Jamie Heslen was the passenger in the pickup truck and is the daughter of the driver, James. Heslen. RP 13. Heslen was well-known by Office Garrett from many law enforcement contacts. *Id.*

¹ All cites to the verbatim report of proceedings are to the 8/6/14 proceedings.

² James Heslen will be referred to as James to avoid confusion, no disrespect intended.

Officer Garrett contacted Deputy Ryan Tully of the Pacific County Narcotics Task Force and Deputy Tully informed Officer Garrett there was probable cause to arrest Heslen for two counts of delivery of a controlled substance. RP 14. Officer Garrett arrested Heslen, provided her *Miranda*³ rights, and detained Heslen away from the pickup truck. RP 14.

Deputy Tully arrived at the scene and spoke with Heslen who told Deputy Tully that the backpack in the passenger seat of the pickup truck belonged to her and there would be marijuana inside the backpack. RP 32. The vehicle was sealed with evidence tape, transported from the scene, a search warrant obtained. RP 32, 34.

The following day Deputy Tully searched the pickup truck with the aid of additional officers. *Id.* Lieutenant Bergstrom searched the passenger compartment of the pickup truck and located the backpack Heslen indicated belonged to her on the passenger seat of the vehicle. RP 24. Lt. Bergstrom found three health care cards in the backpack with the name Jamie Heslen inside the backpack. RP 24. Lt. Bergstrom then turned the backpack over to Deputy Tully who located a pouch, similar to a sunglass case, inside Heslen's

³ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 Led 2d 694 (1966).

backpack. Inside the pouch was a pipe with what later was determined by the Washington State Crime Laboratory to be methamphetamine. RP 34, 35, 44, 46, 51

Officers did not locate any other backpacks in the vehicle. RP 36. The backpack that Deputy Tully located the methamphetamine in was the same backpack that Heslen identified as belonging to her. RP 36. Deputy Tully also located the marijuana Helson indicated would be located in her backpack. RP 17.

D. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

The Court should not accept review in this case. The first issue presented for review is not a significant question under the Constitution of the United States or the Washington State Constitution nor is there a conflict between the decision in this case and other cases in this State. RAP 13.4(b)(1),(3). The Court of Appeals applied the correct standard of review.

The second issue presented for review is not of substantial public interest. RAP 13.4(b)(4). It has long been determined that a court may impose crime related prohibitions during community custody, even if those prohibitions include actions that are normally lawful activities.

E. ARGUMENT.

The Court of Appeals analysis of the trial court's decision was correct, as the Court of Appeals applied the correct standard of review for a sufficiency of evidence claim. Further the trial court's imposition of a prohibition of possession and consumption of marijuana during Heslen's period of community custody is within the limits of law. Therefore, nothing in the opinion by the Court of Appeals, meets the criteria set forth in RAP 13.4(b) for this Court to grant review.

1. The Court Of Appeals Decision, Finding Sufficient Evidence To Sustain The Conviction For Possession Of Methamphetamine, Does Not Warrant Review, As It Based Upon The Correct Legal Standard And Therefore Is It In Conflict With Decisions Of This Court.

A claim of insufficiency of evidence requires the reviewing court to determine if any rational trier of fact could have found that the State proved all the essential elements of the crime charged beyond a reasonable doubt. *State v. Vasquez*, 178 Wn.2d 1, 6, 309 P.3d 318 (2013) (internal quotation and citations omitted). An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When

examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues regarding witness credibility, conflicting testimony and persuasiveness of the evidence presented. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

As Heslen correctly points out substantial evidence is not the standard for which a sufficiency of evidence claim is reviewed. *Vasquez*, 178 Wn.2d at 6. The Court of Appeals in this case cited to the correct standard of review. See *State v. Heslen*, Slip Op. at 3. The Court of Appeals stated determinations for sufficiency of evidence are reviewed under the standard of whether "any rational trier of fact could have found guilt beyond a reasonable doubt." *Id.* This Court should not take review of this case as the Court of Appeals clearly understood the standard of review.

The trial court's ruling was not an abuse of discretion. The Court of Appeals decision affirming the trial court's ruling of a basic evidentiary rule is not an issue that is in conflict between the divisions of the court of appeals. This is not an issue of significant public importance and therefore, review is not warranted by this Court.

2. Whether A Sentencing Court Can Impose A Crime Related Prohibition, Including Prohibiting A Person From Consuming Marijuana, During The Period Of Community Custody Is A Matter Of Settled Law And Not Of Substantial Public Interest.

It is long-settled that the trial court can impose crime related prohibition in the judgment and sentence and as part of community custody. RCW 9.94A.505(9); RCW 9.94A.703(3)(c); *State v. Riley*, 121 Wash.2d 22, 36-37, 846 P.2d 1365 (1993). Crime related prohibitions include possession or use of controlled substances or alcohol if the trial court finds that substance abuse or chemical dependence contributed to the offense. RCW 9.94A.505(9).

Contrary to Heslen's contention to this Court, there was evidence that she was in possession of marijuana at the time of the offense. RP 17, 32. Heslen even told Deputy Tully that there would be marijuana located in her backpack. RP 32. Marijuana is still defined as a controlled substance, although legal to possess under certain circumstances. The trial court made the required finding that Heslen had a chemical dependence that has contributed to the offense. CP 28.

It is disingenuous for Heslen to state that even though she was in possession of methamphetamine and marijuana, that it was only the methamphetamine that contributed to the offense and

therefore her chemical dependency issues. The trial court acted well within the statutory authority that has been granted to it for years to impose a crime related prohibition. The fact that the prohibition is marijuana does not make it a new or an issue of substantial interest.

F. CONCLUSION

The State respectfully requests this Court not accept review on the issues Heslen raises in her petition for review. If this Court were to accept review, the State would respectfully request an opportunity to submit supplemental briefing.

RESPECTFULLY submitted this 15th day of June, 2016.

MARK MCCLAIN
Pacific County Prosecuting Attorney

by: _____


MARK MCCLAIN, WSBA 30909
Attorney for Plaintiff

Appendix A

Filed
Washington State
Court of Appeals
Division Two

May 3, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JAMIE A. HESLEN,

Appellant.

No. 47020-9-II

UNPUBLISHED OPINION

SUTTON, J. — Jamie A. Heslen appeals her conviction for unlawful possession of a controlled substance (methamphetamine) and the imposition of a community custody provision. We hold that the State provided sufficient evidence to show that Heslen had actual or constructive possession of methamphetamine and the trial court did not err when it imposed a community custody condition prohibiting her from possessing or consuming marijuana. Accordingly, we affirm Heslen's conviction and sentence.

FACTS

On January 17, 2014, Officer Garrett Spencer stopped a pickup truck and arrested the driver. During a search incident to arrest, he found a small baggie of suspected methamphetamine in the driver's pocket. Heslen was a passenger in the truck.

Officer Spencer contacted Deputy Ryan Tully, who advised that he had probable cause to arrest Heslen for delivery of a controlled substance. Officer Spencer arrested Heslen and read her

No. 47020-9-II

*Miranda*¹ warnings. Deputy Tully arrived at the scene and spoke with Heslen. Heslen told Deputy Tully that the backpack in the passenger seat belonged to her and that there was “possibly some marijuana in it.” Verbatim Report of Proceedings (Aug. 6, 2014) at 32.

The following morning Deputy Tully, Officer Spencer, and Lieutenant Jim Bergstrom executed the search warrant for the truck. While searching the truck, Lieutenant Bergstrom located the only backpack found in the truck and found three cards that he believed to be health cards with Heslen’s name on them. Deputy Tully assisted in searching the backpack and located a pipe containing methamphetamine within a pouch inside the backpack.

After a bench trial, the trial court found Heslen guilty of unlawful possession of a controlled substance (methamphetamine). At sentencing, the trial court found that Heslen had a chemical dependency that contributed to the offense unlawful possession of a controlled substance (methamphetamine), ordered her to submit to a drug evaluation, ordered her to comply with recommended services and treatment, and prohibited her from possessing or consuming marijuana during her community custody term. Heslen appeals her conviction and the community custody prohibition related to possessing or consuming marijuana.

ANALYSIS

I. UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE

Heslen argues that the State did not show that she physically controlled a backpack, pipe, or methamphetamine at the time of her arrest or that she had constructive possession of the methamphetamine. We disagree.

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

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Berg* 181 Wn.2d 857, 867, 337 P.3d 310 (2014). A claim of insufficiency admits the truth of the State's evidence, and all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Andy*, 182 Wn.2d at 303.

Possession may be actual or constructive. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012). Constructive possession is the exercise of dominion and control over an item. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). Constructive possession is established by viewing the totality of the circumstances, including the proximity of the property and ownership of the premises where the contraband was found. *Davis*, 182 Wn.2d at 234. However, mere proximity is insufficient to show dominion and control. *Davis*, 182 Wn.2d at 234.

Here, by claiming insufficiency of the evidence, Helsen admits the State's evidence that the pipe containing methamphetamine was found within a pouch located in the backpack that she admitted belonged to her. The totality of the circumstances provides substantial evidence for the fact finder to reasonably infer that Helsen had constructive possession of the backpack and that she possessed the pipe containing methamphetamine. Accordingly, we affirm Helsen's conviction.

II. COMMUNITY CUSTODY CONDITION

Heslen also argues that the trial court erred when it imposed a prohibition from possessing or consuming marijuana while in community custody. We disagree.

A. RIPENESS

The State argues that the matter is not ripe for review because marijuana is a federally controlled substance and state law is preempted. We disagree.

The claim is ripe if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. *State v. Cates*, 183 Wn.2d 531, 534, 354 P.3d 832 (2015). Here, the issue is primarily legal because Heslen is arguing that the trial court did not have the statutory authority to prohibit her possession or consumption of marijuana as a condition of community custody. No factual developments are required and the challenged action is final. *State v. Valencia*, 169 Wn.2d 782, 789-90, 239 P.3d 1059 (2010) (holding that sentencing conditions are final).

B. COMMUNITY CUSTODY CONDITIONS

Heslen argues that the trial court did not have the statutory authority to impose a community custody condition prohibiting her possession or consumption of legal quantities of marijuana because it is not crime-related and it did not contribute to the offense of unlawful possession of a controlled substance (methamphetamine). We disagree.

We review a trial court's statutory authority to impose a community custody condition de novo. *State v. Acevedo*, 159 Wn. App. 221, 231, 248 P.3d 526 (2010). Where the trial court has statutory authority, we review the imposition of a condition for abuse of discretion. *State v. Polk*, 187 Wn. App. 380, 397, 348 P.3d 1255 (2015). We review the trial court's finding that the

No. 47020-9-II

community custody prohibition is crime-related for substantial supporting evidence. *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008).

A sentencing court has the statutory authority to impose crime-related prohibitions and community custody conditions as part of a sentence under RCW 9.94A.505(9).² RCW 9.94A.703 authorizes specific mandatory, waivable, and discretionary conditions as a part of any term of community custody. Unless waived by the court, the court shall order an offender to refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions. RCW 9.94A.703(2)(c). Additionally, the court may order an offender to refrain from possessing or consuming controlled substances, including alcohol, or to comply with any crime-related prohibitions. RCW 9.94A.703(3)(e), (f); *see State v. Julian*, 102 Wn. App 296, 304-05, 9 P.3d 851 (2000) (“While the link between the condition imposed and the crime committed need not be causal, the condition must be related to the circumstances of the crime.”).

Here, the trial court expressly found that Heslen had a chemical dependency that contributed to her offense of unlawful possession of methamphetamine and Heslen does not challenge the trial court’s finding. Thus, the prohibition against possession and consumption of marijuana was crime-related and we hold that the trial court properly exercised its discretion by prohibiting Heslen from possessing or consuming marijuana during her community custody.

² Former RCW 9.94A.505(8) (2010), *amended by* LAWS OF 2015, ch. 287, § 10.

CONCLUSION

We affirm Heslen's conviction and hold that the trial court did not err when it imposed a community custody condition prohibiting Heslen from possessing or consuming marijuana.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

SUTTON, J.

We concur:

Maxa, A.C.J.

MAXA, A.C.J.

Melnick, J.

MELNICK,

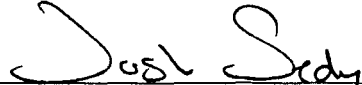
DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **RESPONSE TO PETITION FOR REVIEW** to which this declaration is affixed/attached, was filed in the **Supreme Court** under **Case No. 93253-1**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

- petitioner

- Attorney for Appellant
MAUREEN M. CYR (WSBA 28724)
Washington Appellate Project – 91052
1511 3rd Ave Ste 701
Seattle, WA 98101-3647
maureen@washapp.org

- Supreme Court
Supreme@courts.wa.gov


Joshua Sedy, Legal Assistant
Pacific County Prosecutor's Office

Date: June 16, 2016

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, June 16, 2016 9:29 AM
To: 'Josh Sedy'
Cc: maureen@washapp.org
Subject: RE: State of Washington vs. Jamie A. Heslen 93253-1

Received 6/16/2016.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Josh Sedy [mailto:jsedy@co.pacific.wa.us]
Sent: Thursday, June 16, 2016 8:54 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: maureen@washapp.org
Subject: State of Washington vs. Jamie A. Heslen 93253-1

Jamie A. Heslen
Supreme Court No. 93253-1
47020-9-II

Mark McClain WSBA# 30909
360-875-9361 ext 8
mmclain@co.pacific.wa.us

Josh Sedy

Legal Assistant | Diversion Coordinator
Pacific County Prosecuting Attorneys's Office
Phone: 360-875-9361 Ext: 5
Fax: 360-875-9362