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Supreme Court No. 98650-9
(COA No. 52519-4-II)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MEAGAN GREENHAW,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Megan Greenhaw, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Ms. Greenhaw seeks review of the Court of Appeals decision dated May 12, 2020, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

Does requiring a defendant charged with possession of a controlled substance to prove the affirmative defense of unwitting possession rather than requiring the government to prove knowledge violate due process? As such, must this Court find that proof of unlawful possession of a controlled substance requires knowledge, and if not, must this Court find the statute unconstitutional?

D. STATEMENT OF THE CASE

Meagan Greenhaw was without a home and having a hard time in her life. RP 116. She went into the Chehalis Walmart to steal items for her basic needs, including cold medicine and some trial-sized containers of hygiene products, including toothpaste and face cream. RP 99, 103, 117.

Store security observed Ms. Greenhaw acting nervous, then saw a man approach her, who appeared to be stealing a watch. RP 102. Ms. Greenhaw cooperated when the guard confronted her, handing over the items she concealed in her purse. RP 103.

The guard took Ms. Greenhaw to the loss prevention office. RP 117. Law enforcement arrived shortly after. RP 114. She made no excuses for the theft. RP 121.

The officer searching Ms. Greenhaw discovered a small coin pocket containing a clear plastic bag with what the officer believed to be methamphetamines. RP 124.

The officer asked Ms. Greenhaw about the coin pocket and its contents. RP 124. She said she was holding on to it for her boyfriend because security was less likely to search women if they were apprehended. RP 124-25.

The substance found in the purse was methamphetamine. RP 151. The lab technician who tested the substance testified that based on observation, the substance found in the coin purse could be several things of than methamphetamine, including table salt, sugar, or bath salts. RP 154-55.

Ms. Greenhaw testified. She admitted to the theft but stated she did not know the substance inside the coin purse her boyfriend gave her contained a controlled substance, although it was possible. RP 161.

The jury was instructed on the required elements to convict Ms. Greenhaw. They were told:

> To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about June 25th, 2018, the defendant possessed a controlled substance, to wit, methamphetamine;
>
> And (2) that this act occurred in the State of Washington.

CP 20 (instruction 6).

The court also instructed the jury on unwitting possession. CP 23 (instruction 9). The court did not instruct the jury that the prosecution was required to prove beyond a reasonable doubt Ms. Greenhaw knew she possessed a controlled substance.

The jury found Ms. Greenhaw guilty of possession of a controlled substance and sentenced within the standard range. RP 213.

Ms. Greenhaw appealed her conviction. The Court of Appeals rejected her argument that she was entitled to have the government prove knowledge or to find this statute unconstitutional. APP 1.

E. ARGUMENT

Review should be accept to hold that the drug possession statute requires a knowledge element. Review should otherwise be accepted to declare the statute unconstitutional.

Ms. Greenhaw asks this Court to accept review of whether possession of a controlled substance requires the government to prove knowledge. This issue is before this Court in *State v. Blake*, S.Ct. No. 96873-0, argued today, June 11, 2020.

1. *Due process restricts a state's authority to create strict liability crimes or to shift the burden of proof to defendants.*

The presumption of innocence in favor of the accused is a fundamental principle of justice rooted in the traditions and conscience of our people. *Nelson v. Colorado*, __ U.S. __, 137 S. Ct. 1249, 1256 n.9, 197 L. Ed. 2d 611 (2017); *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394 (1895). To overcome this presumption, due process requires the prosecution to prove every element of a criminal offense to the trier-of-fact beyond a reasonable doubt. *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. The beyond a reasonable doubt "standard provides concrete substance for the presumption of innocence." *Winship*, 397 U.S. at 363.

A related principle central to our law is that "wrongdoing must be conscious to be criminal." *Morissette v. United States*, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952). "[T]he understanding that an injury is criminal only if inflicted knowingly 'is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.'" *Rehaif v. United States*, __ U.S. __, 139 S. Ct. 2191, 2196, 139 L. Ed. 2d. 594 (2019) (quoting *Morissette*, 342 U.S. at 250); accord *State v. Anderson*, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000). A "defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'" *Apprendi v. New Jersey*, 530 U.S. 466, 493, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000).

Dovetailing these principles is the longstanding presumption that criminal statutes require proof of a "culpable mental state regarding 'each of the statutory elements that criminalize otherwise innocent conduct.'" *Rehaif*, 139 S. Ct. at 2195 (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72, 115 S. Ct. 464, 130 L. Ed. 2d 372 (1994)); accord *State v. A.M.*, 194 Wn.2d 33, 46-47, 448 P.3d 35 (2019) (Gordon McCloud, J., concurring). Thus, courts presume a

mental element or "scienter" is required, even where the text is silent or when it results in an ungrammatical reading. *Rehaif*, 139 S. Ct. at 2197; *Anderson*, 141 Wn.2d at 367. The legislature has adopted this rule in providing that courts "supplement all penal statutes" in Washington with "[t]he provisions of the common law relating to the commission of crime and the punishment thereof" "insofar as not inconsistent with the Constitution and statutes of this state." RCW 9A.04.060.

2. As interpreted, drug possession is a strict liability crime that requires the innocent to prove unwitting possession. The constitutionality of this scheme is doubtful.

As interpreted, Washington's possession of a controlled substance statute turns the presumption of innocence and the prosecution's burden of proof on their head. Notwithstanding the presumption that every criminal statute imposes a mens rea requirement, this Court has interpreted the offense of simple possession to be a strict liability crime with no mens rea. *State v. Bradshaw*, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); *State v. Cleppe*, 96 Wn.2d 373, 380, 635 P.2d 435 (1981). The prosecution need only prove the nature of the substance and the fact of possession. *Bradshaw*, 152 Wn.2d at 537-38.

A person convicted of simple possession is subject to a maximum punishment of five years in prison and a fine of up to ten thousand dollars. RCW 69.50.4013(1), (2)[1]; RCW 9A.20.021(1)(c). As a felony offense, the person loses constitutional rights: the right to vote and the right to possess firearms. RCW 9.41.040; RCW 10.64.120. A person convicted of a felony also experiences social stigma and numerous collateral consequences. *A.M.,* 194 Wn.2d at 66 (Gordon McCloud J., concurring).[2]

For the innocent accused of drug possession to avoid this fate, they bear the burden of proving, by a preponderance of the evidence, that their possession was unwitting. *Bradshaw*, 152 Wn.2d at 538. In other words, instead of a presumption of innocence, there is a presumption of guilt.

The constitutionality of this scheme is doubtful. Although legislatures have broad authority to define crimes and some strict liability crimes may be permitted, "due process places some limits on

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[1] Unlawful possession of marijuana, being a misdemeanor, is the exception. RCW 69.50.4013(2); RCW 69.50.4014.

[2] Citing Michael Pinard & Anthony C. Thompson, *Offender Reentry and the Collateral Consequences of Criminal Convictions: An Introduction*, 30 N.Y.U. Rev. L. & Soc. Change 585 (2006); Tarra Simmons, *Transcending the Stigma of a Criminal Record: A Proposal to Reform State Bar Character and Fitness Evaluations*, 128 Yale L. J. F. 759 (2019).

its exercise." *Lambert v. California*, 355 U.S. 225, 228, 78 S. Ct. 240, 2 L. Ed. 2d 228 (1957). This limitation makes sense because the due process principles of proof beyond a reasonable doubt and the presumption of innocence, are "concerned with substance," not "formalism." *Mullaney v. Wilbur*, 421 U.S. 684, 699, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975).

Were it otherwise, states could evade these constitutional principles through labels. Thus, in defining the elements of crimes and allocating the burdens of proof and persuasion, "there are obviously constitutional limits beyond which the States may not go." *Patterson v. New York*, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977); see *Apprendi*, 530 U.S. at 467 (recounting that the Supreme Court had not "budge[d] from the position that . . . constitutional limits exist to States' authority to define away facts necessary to constitute a criminal offense"). For example, "it is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." *McFarland v. Am. Sugar Ref. Co.*, 241 U.S. 79, 86, 36 S. Ct. 498, 60 L. Ed. 899 (1916); accord *Speiser v. Randall*, 357 U.S. 513, 523-25, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958).

By imposing strict liability and allocating the burden of disproving knowledge to the accused, the drug possession scheme upends two fundamental values: the presumption of innocence and the requirement of proof beyond a reasonable doubt. *Winship*, 397 U.S. at 363-64. Moreover, this scheme is contrary to the drug possession laws of the federal government, all other 49 states, and the model Uniform Controlled Substances Act.[3] This is strong evidence that the drug possession law "has shifted the burden of proof as to what is an inherent element of the offense." *Schad v. Arizona*, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality). By not requiring the prosecution to prove knowledge, Washington's drug possession law has a "freakish definition of the elements" unlike "the criminal law of other jurisdictions." *Id.*

That Washington permits defendants to avoid guilt if they prove "unwitting" possession further shows that knowledge is an "inherent" element of the offense of drug possession. If what the law was genuinely concerned with is mere possession regardless of knowledge,

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[3] *State v. Adkins*, 96 So. 3d 412, 424 n.1 (Fla. 2012) (Pariente, J., concurring); Bradshaw, 152 Wn.2d at 534; *State v. Bell*, 649 N.W.2d 243, 252 (2002); *Dawkins v. State*, 313 Md. 638, 547 A.2d 1041, 1045 n.7 (1988); 21U.S.C. § 844(a); Unif. Controlled Substances Act 1970 § 401(c).

it makes no sense to have an unwitting possession defense. See *Cleppe*, 96 Wn.2d at 380 (recognizing the defense "may seem anomalous"). Instead, unwitting possession is the critical issue. It is the "tail which wags the dog of the substantive offense" of drug possession. *Apprendi*, 530 U.S. at 495 (internal quotation omitted).

"For a transfer of the burden, experience must teach that the evidence held to be inculpatory has at least a sinister significance." *Morrison v. California*, 291 U.S. 82, 90, 54 S. Ct. 281, 78 L. Ed. 664 (1934). Stripped of the traditional mental element of knowledge, there is nothing inherently "wrongful" or "sinister" about possessing a controlled substance. For example, if a person rents or buys a car, and drugs are hidden inside the vehicle, there is nothing blameworthy about the person's conduct. The same is true if a person is asked to hold their friend's coin purse, and drugs are hidden inside a small pocket. These people have done nothing other than innocently possess property. Unlike other conduct that may result in strict criminal liability—like driving a car while voluntarily intoxicated,[4] giving legal advice in exchange for money without a license to practice law,[5] or having sex

[4] See *Kaiser v. Suburban Transp. Sys.*, 65 Wn.2d 461, 401 P.2d 350 (1965).
[5] See *State v. Yishmael*, 195 Wn.2d 155, 172, 456 P.3d 1172 (2020).

with a person who is below the age of consent[6]—people who unknowingly possess drugs were not put on notice that their conduct of possessing property might expose them to criminal prosecution. Making defendants disprove knowledge unconstitutionally shifts the burden of proof.

To be sure, Washington has a recent history of interpreting its drug possession laws not to require guilty knowledge. In 1951, Washington adopted the Uniform Narcotic Drug Act, the predecessor to the Uniform Controlled Substances Act.[7] Because the language of the provision outlawing drug possession omitted the words "intent to sell," which had existed in the previous unlawful possession statute, this Court reasoned the legislature had not "intended to retain guilty knowledge or intent as an element of the crime of possession." *State v. Henker*, 50 Wn.2d 809, 812, 314 P.2d 645 (1957). Unwitting possession was then construed to be an affirmative defense. *State v. Morris*, 70 Wn.2d 27, 34, 422 P.2d 27 (1966). This Court interpreted the current drug possession statute similarly. *Cleppe*, 96 Wn.2d 378-79.

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[6] See *State v. Deer*, 175 Wn.2d 725, 731, 287 P.3d 539 (2012).
[7] Laws of 1951, 2nd Ex. Sess., chapter 22.

This way of defining drug possession does not constitute "a long history." *Schad*, 501 U.S. at 640 (plurality). And in any event, history is not dispositive. *Id*. at 642-43; see, e.g., *State v. Roberts*, 88 Wn.2d 337, 341-43, 562 P.2d 1259 (1977) (longstanding statutory presumption that any homicide constituted second-degree murder held to violate due process). Thus, history does not save the statute.

It might also be argued that defendants are better positioned to explain what they know. But this does not justify shifting the burden of proof. *Mullaney*, 421 U.S. at 702; *Tot v. United States*, 319 U.S. 463, 469, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943).

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." *Winship*, 397 U.S. at 364. As this case and others illustrate, shifting the burden to defendants to disprove knowledge creates an unacceptable risk of condemning the innocent. See *A.M.*, 194 Wn.2d at 64-65 (Gordon McCloud, J., concurring). Ms. Greenhaw testified she did not know the substance recovered from her was a controlled substance. RP 161. Nevertheless, the court did not require the government to prove knowledge, instead giving the jury an instruction on unwitting possession. CP 20. This is inadequate. Before

a person is branded a felon based on the innocent and unavoidable conduct of possessing property, due process requires proof of guilty knowledge.

3. *Unless the drug possession statute is interpreted to require proof of knowledge, it should be declared unconstitutional because strict liability for drug possession violates due process.*

The constitutionality of the drug possession statute is doubtful. Consistent with the constitutional-doubt canon of statutory construction, this Court should interpret the drug possession statute to require knowledge. If not, the statute should be declared unconstitutional.

The constitutional-doubt canon instructs that statutes are interpreted to avoid constitutional doubts when statutory language reasonably permits. *Gomez v. United States*, 490 U.S. 858, 864, 109 S. Ct. 2237, 104 L. Ed. 2d 923 (1989); *Utter v. Bldg. Indus. Ass'n of Washington*, 182 Wn.2d 398, 434, 341 P.3d 953 (2015). Interpreting the drug possession statute to require proof of knowledge "avoids a confrontation with the constitution." *A.M.*, 194 Wn.2d at 49 (Gordon McCloud, J., concurring).

In concluding that drug possession is a strict liability crime, *Cleppe* and Bradshaw overlooked this canon of construction and did

not consider the due process argument presented here.[8] Thus, these decisions do not control and stare decisis does not apply:

> Where the literal words of a court opinion appear to control an issue, but where the court did not in fact address or consider the issue, the ruling is not dispositive and may be reexamined without violating stare decisis in the same court or without violating an intermediate appellate court's duty to accept the rulings of the Supreme Court. An opinion is not authority for what is not mentioned therein and what does not appear to have been suggested to the court by which the opinion was rendered.

In re Pers. Restraint of Stockwell, 179 Wn.2d 588, 600, 316 P.3d 1007 (2014) (internal quotation omitted).

Moreover, as two justices of this Court have recently recognized, Cleppe and Bradshaw were "grievously wrong." *A.M.*, 194 Wn.2d at 45 (Gordon McCloud, J., concurring). The Court failed to apply the mens rea canon of statutory interpretation properly. *Id*. at 46-51. Rather than follow the rules of statutory interpretation, the decisions in *Cleppe* and *Bradshaw* purported to divine the meaning of the drug possession statute through legislative history. *Id*. at 50-52. This now vogue methodology is highly disfavored. See A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts*, at 369-96

[8] In *Bradshaw*, the Court stated that the defendant's constitutional arguments were insufficiently briefed. *Bradshaw*, 152 Wn.2d at 539.

(2012). As Justice Elana Kagan remarked, "we're all textualists now."[9] This Court has also recognized that legislative history should only be consulted, if at all, when a statute's meaning remains ambiguous after applying a plain meaning analysis. *A.M.*, 194 Wn.2d at 45 (Gordon McCloud, J., concurring) (citing *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 12, 43 P.3d 4 (2002)). Further, when a criminal statute is ambiguous, the proper tool is the rule of lenity, not legislative history. *A.M.*, 194 Wn.2d at 51 (Gordon McCloud, J., concurring). Under the rule of lenity, ambiguous criminal statutes are resolved in the defendant's favor. *Id.*; *United States v. Davis*, __ U.S. __, 139 S. Ct. 2319, 2333, 204 L. Ed. 2d 757 (2019).

Under these principles, the reasonable reading of the drug possession statute is that the prosecution must prove knowledge.

Based on a theory of legislative acquiescence, the concurrence in A.M. reasoned that the drug possession statute could not now be properly read to include a knowledge element. *A.M.*, 194 Wn.2d at 54-58 (Gordon McCloud, J., concurring) at 54-58. The concurrence reasoned the legislature could have changed the law, and its failure to

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[9] *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, HARVARD LAW TODAY 8:28 (Nov. 17, 2015), available at https://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutoryinterpretation.

do so meant the statute had to be read as a strict liability crime. The concurrence, however, expressed doubts about whether it was constitutionally permissible to use legislative silence to construe the statute in this manner. *Id*.

These doubts were sound. As the United States Supreme Court has long recognized, "[t]he verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible." *Zuber v. Allen*, 396 U.S. 168, 90 S. Ct. 314, 324, 24 L. Ed. 2d 345 (1969). This principle makes sense because "[l]egislative silence is a poor beacon to follow in discerning the proper statutory route." *Id*. at 185 n.21; accord *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, __ U.S. __, 137 S. Ct. 1002, 1015, 197 L. Ed. 2d 354 (2017) ("congressional inaction lacks persuasive significance in most circumstances") (internal quotation and brackets omitted). "[T]he search for significance in the silence of Congress is too often the pursuit of a mirage." *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4, 11, 62 S. Ct. 875, 86 L. Ed. 1229 (1942). Thus, "evidence of legislative acquiescence is not conclusive, but is merely one factor to consider." *Fast v. Kennewick Pub. Hosp. Dist.*, 187 Wn.2d 27, 39, 384 P.3d 232 (2016).

The theory of legislative acquiescence or inaction is just another form of legislative history and a highly disfavored form at that. The theory is based on "the patently false premise that the correctness of statutory construction is to be measured by what the current Congress desires, rather than by what the law as enacted meant." *Johnson v. Transp. Agency, Santa Clara Cty., Cal.*, 480 U.S. 616, 671, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987) (Scalia, J., dissenting); see *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998) ("It is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed"). Moreover, rather than "approval of the status quo," the failure to enact legislation may represent an "inability to agree upon how to alter the status quo," "unawareness of the status quo," "indifference to the status quo," or "political cowardice." *Johnson*, 480 U.S at 672 (Scalia, J., dissenting). Put bluntly, "vindication by congressional inaction is a canard" that "should be put to rest." *Id*. at 671-72.

That the legislature has not enacted legislation to overrule *Cleppe* or *Bradshaw* is not a barrier to the proper interpretation of the drug possession statute. Properly interpreted, the drug possession

statute requires proof of guilty knowledge. If not so interpreted, then the statute should be declared unconstitutional. Knowledge is an inherent element of the offense, and due process does not permit shifting the burden to the defendant to disprove knowledge. See *Patterson*, 432 U.S. at 210; *Schad*, 501 U.S. at 640 (plurality). And as the concurring opinion in *A.M.* reasons, the legislature exceeds its power by creating a strict liability offense that lacks a public welfare rationale, has draconian consequences, and criminalizes innocent conduct. *A.M.,* 194 Wn.2d at 59-67 (Gordon McCloud, J., concurring); accord *State v. Brown*, 389 So. 2d 48, 51 (La. 1980) (striking down a drug possession statute that made a person's unknowing possession a crime).

4. *After accepting review, this Court should reverse Ms. Greenhaw's conviction.*

If the drug possession statute is declared unconstitutional, Ms. Greenhaw's conviction must be reversed because unconstitutional statutes are void. *City of Seattle v. Grundy*, 86 Wn.2d 49, 50, 541 P.2d 994 (1975).

If interpreted to require proof of knowledge, however, the trial court erred by failing to require the prosecution to prove beyond a reasonable doubt this essential element. The trier-of-fact's failure to

consider an essential element of an offense is subject to constitutional harmless error analysis. *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999); *State v. Banks*, 149 Wn.2d 38, 44, 65 P.3d 1198 (2003). Prejudice is presumed, and the prosecution must prove the error harmless beyond a reasonable doubt. *A.M.*, 194 Wn.2d at 41-42. If the missing element is supported by uncontroverted evidence, this standard may be satisfied. *Neder*, 527 U.S. at 18; *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

The prosecution cannot meet its burden. There is not uncontroverted evidence Ms. Greenhaw knew the substance the police found was a controlled substance. Ms. Greenhaw testified she did not know what the substance was. RP 161. She had been given it by her boyfriend to hold. RP 124. She had not used it. This testimony should have been sufficient to call into doubt whether she knew the substance found on her was illegal to possess.

The error was more than the omission of an essential element. The burden of proof regarding knowledge was improperly allocated to Ms. Greenhaw, rather than the government. In misallocating the burden of proof, this Court "cannot overlook the fact that the trial judge, in making his credibility determinations, acted within the incorrect

framework." *State v. W.R., Jr.*, 181 Wn.2d 757, 770, 336 P.3d 1134 (2014). "Creating a reasonable doubt for the defense is far easier than proving the defense by a preponderance of the evidence." *Id.* at 770. The government cannot show that, but for the misapplication in the burden of proof, the result would have been the same. See *id.* (error in placing the burden of proof on the defendant to prove consent could not be found harmless).

F. CONCLUSION

To prove possession of a controlled substance, the government must prove the person accused of the crime had knowledge they possessed an illegal controlled substance. Because Ms. Greenhaw was not accorded the right to have this essential element proved beyond a reasonable doubt, she asks this Court to take review, per RAP 13.4 (b).

DATED this 11th day of June 2020.

Respectfully submitted,

TRAVIS STEARNS (WSBA 29335)
Washington Appellate Project (91052)
Attorneys for Appellant

APPENDIX

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Division Two

May 12, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MEAGAN ELIZABETH GREENHAW, Appellant.	No. 52519-4-II UNPUBLISHED OPINION

SUTTON, J. — Meagan E. Greenhaw appeals her judgment and sentence for possession of a controlled substance—methamphetamine. The trial court's to-convict instruction for the possession charge did not contain a knowledge element. Following the guilty verdict, the trial court found that Greenhaw had a chemical dependency which contributed to her crime, and based on that finding, imposed 12 months of community custody.

Greenhaw argues that (1) the trial court erred by failing to instruct the jury that to find her guilty, it must find that she knowingly possessed a controlled substance, (2) RCW 69.50.4013 violates due process because it imposes strict liability without a mens rea requirement, and (3) a remand for resentencing is required for the trial court to amend the community custody supervision provision of the judgment and sentence.

We hold that (1) the trial court did not err when it failed to include a knowledge element in the to-convict instruction, (2) RCW 69.50.4013 does not violate due process, and (3) because Greenhaw is not subject to the Department of Correction's (DOC's) supervision, her argument

regarding community custody supervision is moot. Thus, we affirm the trial court's judgment and sentence.

FACTS

Meagan Greenhaw was arrested after shoplifting in a Walmart. An asset protection associate at Walmart stopped Greenhaw and found that Greenhaw had attempted to steal merchandise from the store.

Chehalis Police Sergeant Mathew McKnight responded to the call and arrested Greenhaw. Sergeant McKnight searched Greenhaw incident to arrest. While searching her, he discovered a small baggie in her front right coin pocket with a substance in it, which was later tested and found to be methamphetamine. Greenhaw told Sergeant McKnight it was methamphetamine, but that she was holding onto it for her boyfriend. The State charged Greenhaw with one count of possession of a controlled substance—methamphetamine, and one count of theft in the third degree.

The State presented testimony from the asset protection associate, Sergeant McKnight, and the forensic scientist who determined that the substance was methamphetamine. Greenhaw testified on her own behalf. Greenhaw testified that she told Sergeant McKnight that the substance was methamphetamine; she thought that it was, but she did not actually know whether it was. She testified that to definitively know whether it was methamphetamine, she "would have had to try it." Verbatim Report of Proceedings (VRP) at 160. The jury found Greenhaw guilty on both counts.

At the sentencing hearing, the State requested the trial court find that Greenhaw had a chemical dependency which contributed to the crime and impose 12 months of community custody

in addition to confinement. The trial court agreed, and after finding that Greenhaw had a chemical dependency, the court sentenced her to a period of confinement plus 12 months of community supervision.

Approximately one month later, the DOC filed a document titled "Court-Special Supervision Closure" with the superior court. Clerk's Papers (CP) at 54. In this document, the DOC stated, "The above cause has been screened and is not eligible for supervision by DOC. Therefore, DOC has closed supervision interest in this cause." CP at 54.

Greenhaw appeals the judgment and sentence.

ANALYSIS

I. KNOWLEDGE REQUIREMENT

Greenhaw argues that the trial court erred by failing to instruct the jury that to find her guilty of possession of a controlled substance, it must find that she knowingly possessed a controlled substance. We disagree and hold that the trial court did not err by failing to instruct the jury on a knowledge element.

Here, the trial court's to-convict jury instruction stated, in relevant part:

> To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about June 25, 2018, the defendant possessed a controlled substance, to wit: methamphetamine; and
>
> (2) That this act occurred in the State of Washington.

CP at 20.

As we noted in *State v. Schmeling*, our Supreme Court has twice addressed the issue of whether RCW 69.50.4013 contains a mens rea element, and in both cases, it has held that "the legislature deliberately omitted knowledge and intent as elements of the crime and that it would not imply the existence of those elements." 191 Wn. App. 795, 801, 365 P.3d 202 (2015) (citing *State v. Bradshaw*, 152 Wn.2d 528, 534-38, 98 P.3d 1190 (2004); *State v. Cleppe*, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981)). "The court did not express any concerns in either *Bradshaw* or *Cleppe* that allowing a conviction for the possession of a controlled substance without showing intent or knowledge somehow was improper." *Schmeling*, 191 Wn. App. at 801.

We are bound by our Supreme Court's explicit holding that RCW 69.50.4013 properly has no mens rea requirement. *State v. Hairston,* 133 Wn.2d 534, 539, 946 P.2d 397 (1997); *State v. Gore,* 101 Wn.2d 481, 486–87, 681 P.2d 227 (1984) (Court of Appeals is bound by decisions of the Washington Supreme Court). Thus, we hold that under the principles of stare decisis, the trial court did not err by failing to give a jury instruction that included a knowledge element.

II. RCW 69.50.4013–Due Process

Greenhaw argues that RCW 69.50.4013 violates due process because it does not require a mens rea element. We disagree based on principles of stare decisis.

The Fourteenth Amendment to the United States Constitution provides that no state may deprive a person of liberty without due process of law. *State v. Beaver*, 184 Wn.2d 321, 332, 358 P.3d 385 (2015); U.S. Const. amend XIV, § 1. We review constitutional issues de novo. *State v. Bassett*, 192 Wn.2d 67, 77, 428 P.3d 343 (2018). Statutes are presumed constitutional, and the challenger bears the heavy burden of convincing the court otherwise beyond a reasonable doubt. *Bassett*, 192 Wn.2d at 77.

In *Schmeling*, relying on our Supreme Court's holding in *Bradshaw*, we rejected the same argument Greenhaw raises and held that "RCW 69.50.4013 does not violate due process even though it does not require the State to prove intent or knowledge to convict an offender of possession of a small amount of a controlled substance." 191 Wn. App. at 802. We noted that "[i]n *Bradshaw,* the defendant argued that the possession statute violated due process because it criminalized innocent behavior." *Schmeling*, 191 Wn. App. at 802 (citing *Bradshaw*, 152 Wn.2d at 539). "The [*Bradshaw*] court summarily rejected the argument without discussion, noting that the defendant had offered little analysis in support of the argument and had failed to cite any relevant authority to show how the statute violated substantive due process." *Schmeling*, 191 Wn. App. at 802 (citing *Bradshaw*, 152 Wn.2d at 539). Thus, we adhere to this reasoning, and hold that RCW 69.50.4013 does not violate due process.

III. Community Custody Supervision

Greenhaw argues that a remand is required for resentencing because the trial court erred by improperly finding that she had a chemical dependency which contributed to the crime and ordering 12 months of community supervision. Because Greenhaw is not under supervision by the DOC, we hold that this argument is moot.

An appeal is moot if we lack the ability to provide an effective remedy. *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012). And a challenge to a sentence becomes moot if the defendant has already served that sentence. *Hunley*, 175 Wn.2d at 907.

Here, there is no effective remedy this court can provide. The trial court imposed a term of confinement, plus 12 months of community custody supervision. One month later, the DOC notified the superior court that the case was not eligible for the DOC supervision, and DOC closed

the case. Greenhaw has since been released from custody for well over one year, and she was never under the DOC's supervision. Because we can provide no effective remedy, Greenhaw's argument related to community custody supervision is moot.

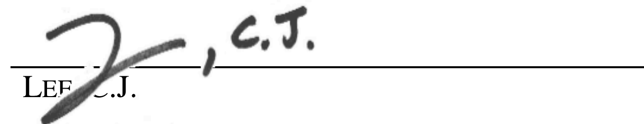
CONCLUSION

We affirm the trial court's judgment and sentence.

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.

We concur:



LEE, C.J.

WORSWICK, J.

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 **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 52519-4-II**, 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 or residence address as listed on ACORDS:

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☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: June 11, 2020
Washington Appellate Project

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