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COURT OF APPEALS
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BY [Signature]

NO. 34117-4-II
Cowlitz Co. Cause NO. 05-1-00675-4

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

GORDON KEITH GRASSER,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

1. **IS THERE SUFFICIENT EVIDENCE THAT THE APPELLANT KNOWINGLY POSSESSED A CONTROLLED SUBSTANCE?**
2. **IS THERE SUFFICIENT EVIDENCE THAT THE APPELLANT USED A DRUG PARAPHERNALIA TO STORE AND CONTAIN A CONTROLLED SUBSTANCE?**
3. **DID THE COURT EXCEED ITS STATUTORY AUTHORITY IN IMPOSING A 365-DAY SENTENCE FOR THE APPELLANT'S MISDEMEANOR CONVICTION OF USE OF DRUG PARAPHERNALIA?**

II. SHORT ANSWERS

1. **Yes.** When the evidence is viewed in the light most favorable to the prosecution, there clearly exists sufficient evidence to affirm the Appellant's conviction for possession of a controlled substance.
2. **Yes.** When the evidence is viewed in the light most favorable to the prosecution, there clearly exists sufficient evidence to affirm the Appellant's conviction for use of drug paraphernalia.
3. **Yes.** The court did exceed its statutory authority in imposing a 365 day sentence for the Appellant's misdemeanor conviction of use of drug paraphernalia.

III. FACTS

Christian Larson manages several properties and is responsible for renting apartments, moving people out of apartments, and dealing with unlawful retainers. RPI¹ 6-7. One of the properties that Mr. Larson

¹ RPI refers to the Verbatim transcript of Proceedings of a Trial held on November 2, 2005.

manages is located at 114 Niechelle Lane in the City of Lexington, County of Cowlitz, State of Washington. RPI 8. The Appellant, Gordon Grasser, was the lone tenant of 114 Niechelle Lane and was served with an eviction notice on June 1, 2005. RPI 8-9 & 35-36.

On June 3, 2005, the Appellant moved out of 114 Niechelle Lane and Mr. Larson went to retrieve keys to the property. RPI 9-10. Mr. Larson met a couple moving things out of the residence and retrieved the keys from the woman because the Appellant was not present. The couple told Mr. Larson that the Appellant went to put things away in storage and that the property would be completely vacated later that evening. RPI 9-10. Mr. Larson twice drove by the property on June 4, 2005, and June 5, 2005. Each time, Mr. Larson noted the same vehicles parked in the front yard of the residence. RPI 11-12.

On June 6, 2005, the owner of the property requested Mr. Larson meet sheriffs at the residence to remove the Appellant. RPI 11. When Mr. Larson arrived at the residence, he saw the same vehicles from the previous two days still parked on the property. RPI 11-12. Deputy Schallert and Deputy Handy of the Cowlitz County Sheriff's Office met Mr. Larson at the residence. RPI 12, 33. The front door was locked, the garage door was down, and the residence was secured. RPI 12. Deputies

knocked on the front door for five minutes and received no answer before getting keys from Mr. Larson and entering the residence. RPI 14.

Mr. Larson followed both deputies into the residence. The Appellant stood facing the front door and was standing in between the kitchen and the bathroom. RPI 14-16 & 55. The Appellant appeared to have just woken up, was not wearing any shoes, and was wearing sweatpants and possibly a t-shirt. RPI 16. Appellant was read his rights, voluntarily waived his rights, and agreed to speak with the deputies. RPI 71. Appellant stated that he was sleeping upstairs and was just at the residence to get his belongings. RPI 40-41 & 56. Deputy Schallert searched the Appellant and found no keys, weapons, or contrabands on his person. RPI 71-72. Deputies removed the Appellant and secured the residence. RPI 16-17. The main level was vacant, had no signs of any forced entry, and did not have anything to indicate that people were still living at the residence. RPI 17, 37, & 41.

After deputies left the residence, Mr. Larson inspected the second level of the residence. RPI 18. The second level has a bathroom and two bedrooms, a master bedroom and a second bedroom. RPI 19. Both the bathroom and the second bedroom were vacant and had nothing to indicate that people were living in the residence. RPI 19-20. In the master bedroom, Mr. Larson found some personal items indicating that someone

was recently there. The items included a sleeping bag on the floor, a fanny pack next to the sleeping bag, a pair of men's shoes, and various men's clothing on the floor. RPI 21-22 & 26-27. Mr. Larson looked into the unzipped fanny pack to inventory and store the items. RPI 18 & 25. In the fanny pack, Mr. Larson found an altoid container, a baggy, and a one hundred dollar bill. RPI 25. Inside the altoid container, Mr. Larson saw a crystal substance that appeared to be methamphetamine. RPI 23-24.

Mr. Larson contacted Deputy Handy who proceeded to take possession and pictures of the items. RPI 26. No one contacted Mr. Larson prior to and after June 6, 2005, to retrieve the items from the residence. RPI 28-29. Deputy Schallert transported the Appellant to the jail and told him about the suspected drugs found at the residence. RPI 58-59. Appellant said, "Yeah," and nodded his head in response to Deputy Schallert telling him of the drugs. RPI 59-60. Deputy Handy later confronted the Appellant about the drugs and he did not appear surprised or angry about drugs being found in the fanny pack. RPI 46. On June 7, 2005, the Appellant indicated that the drugs were not his and gave several conflicting stories about Deputy Handy planting the drugs on him, not sleeping in the residence, and only being at the residence to get his belongings. RPI 47-48.

Deputy Schallert inventoried the fanny pack and found a one hundred dollar bill, a twenty dollar bill, a dime, a nickel, a set of keys, a pair of pliers, a padlock, a lock type pick, couple of jackknives, a light with a wire attached, a Barclays can, a measurement scoop or cup, two little plastic baggies with white crystal substance, scales, empty plastic baggies, and a Qwest card with no monetary value belonging to Sandra McKenna. RPI 60-68 & 72. No other keys were found in the residence. RPI 120-121. The crime laboratory tested the white crystal substance and found one bag contained 4.5 grams of methamphetamine and the other bag contained 3.9 grams of methamphetamine. RPI 66. People normally do not forget or leave behind that amount of methamphetamine and that amount has a street value between two hundred twenty dollars and two hundred fifty dollars. RPI 74.

At trial, Carrie Weber testified to being Appellant's friend for 20 years and being with Sandy McKenna as they moved his belongings on June 5, 2005. RPI 83. Ms. Weber knows of Ms. McKenna for a couple of years and has known Ms. McKenna to use methamphetamine, but she did not know what drugs Ms. McKenna had on June 5, whether Ms. McKenna was in treatment, or whether Ms. McKenna still had a drug addiction. RPI 84 & 91-92. Ms. Weber was the last person to leave the residence on June 5th and saw beer cans and a sleeping bag in the upstairs bedroom. Ms.

Weber did not see any other personal items or male clothing left behind in the upstairs bedroom. RPI 84 & 87.

Appellant testified that he returned to the residence on the night of June 5th with keys left behind by Ms. Weber. Appellant proceeded to install a stereo in his car and fell asleep in his car that was parked in the garage. RPI 98-99 & 101. The next morning, the Appellant awoke to deputies knocking on the door, entered the residence from the garage, and met the deputies standing inside the front door. RPI 99. Appellant denied owning the fanny pack, knowing that there were drugs in the residence, and telling the deputies that he had slept upstairs. RPI 100.

The court denied the Appellant's motion to dismiss for insufficient evidence on the basis of *State v. Partin*, 88 Wash.2d 899 (1977). RPI 81-82. The jury found the defendant guilty of criminal trespass in the first degree, possession of a controlled substance, and use of drug paraphernalia. RPI² 148-149.

IV. STANDARD OF REVIEW

The standard of review for sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the necessary facts to be proven

² RPII refers to Verbatim Transcript of Proceedings of a trial held on November 3, 2005.

beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

A reviewing court need not itself be convinced beyond a reasonable doubt, *State v. Jones*, 63 Wn.App. 703, 708, 821 P.2d 543, *review denied*, 118 Wn.2d 1028, 828 P.2d 563 (1992), and must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-416, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

For purposes of a challenge to the sufficiency of the evidence, the Appellant admits the truth of the State's evidence. *Jones*, 63 Wn.App. at 707-708. All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant. *State v. Joy*, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993).

V. ARGUMENTS

1. **THE APPELLANT'S CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE SHOULD BE AFFIRMED AS HE KNOWINGLY POSSESSED A CONTROLLED SUBSTANCE.**

The evidence indicates beyond a reasonable doubt that the Appellant knowingly possessed a controlled substance. The State concedes that knowledge became an element necessary to convict the

Appellant as it was included in the jury instructions and proposed by the State. *State v. Hickman*, 135 Wn.2d 97, 99 (1998).

Possession of a controlled substance may be actual or constructive. Constructive possession arises when a person has dominion and control over the premises where the controlled substance is located. *State v. Staley*, 123 Wash.2d 794, 798 (1994); *State v. Huff*, 64 Wash.App. 641, 653 (1992); *State v. Bradford*, 60 Wash.App. 857, 862 (1991). More than mere proximity to the controlled substance must be proved; the court must look at the totality of the circumstances to determine whether the jury could reasonably infer dominion and control. *State v. Robinson*, 79 Wash.App. 386, 391 (1995), *State v. Partin*, 88 Wash.2d 899, 906 (1977).

In *Partin*, the defendant was found to have constructive possession of marijuana found inside a house of which he was not a resident and not inside of because there were men's clothing and boots found in the residence, and the defendant was seen numerous times on the premises, had his motorcycle chained on several occasions there, told several people to look for him at the premise, had people calling him there, and had a photograph of himself and three letters addressed to him at the premise. 88 Wash.2d at 901 & 907.

In *Bradford*, the court found constructive possession based on receipts, utility and telephone bills all addressed to the defendant together

with his presence at the address with two small children. 60 Wash.App. at 864. In *State v. Dobyms*, 55 Wash.App. 609, 616 (1989), defendant was found to have constructive possession based on a witness' observation of the defendant's car parked near the residence, a bill addressed to the defendant found in the residence, and his business card with a telephone number matching that of the residence. .

In *State v. Collins*, 76 Wash.App. 496, 501 (1995), the court found constructive possession base on evidence of residence, personal possessions on the premises, knowledge of the presence of drugs, several callers asking for the defendant, defendant's admission to periodically staying at the premise, and lack of evidence showing defendant had another residence. In *State v. Tadeo-Mares*, 86 Wash.App. 813, 816 (1997), the court found constructive possession because the evidence established that the defendant leased the apartment, shared rent, and resided there.

Viewing the totality of the evidence in the light most favorable to the State, the trial court correctly denied the Appellant's motion to dismiss for insufficient evidence and the jury correctly found defendant to have possessed a controlled substance. It is undisputed that the Appellant was the lone tenant of the residence who had keys to, access to, and exclusive dominion and control of the premise on June 6, 2005. Appellant testified

to using keys to enter the residence to collect his belongings. Appellant had sole dominion and control of the residence as he was the lone person in the secured residence.

When first contacted, the Appellant was bare-footed and stated he slept upstairs. The personal belongings found upstairs corroborated his statement as there were a sleeping bag, men's clothing, a pair of men's shoes, a fanny pack, and a set of keys. It is reasonable to infer that these items belonged to the Appellant and were brought to the residence by the Appellant because Ms. Weber was the last person to leave the residence on June 5th and did not see any personal items or male clothing upstairs prior to her leaving the residence. Appellant entered the residence with the keys left by Ms. Weber; thus, anything found in the residence that was not seen by Ms. Weber can be attributed to the Appellant. When confronted with news of drugs being found, the Appellant was not angry or surprised and responded by saying, "yeah," and nodding his head. This further establishes his constructive possession as he had knowledge about the presence of the drugs in the residence.

The Appellant's version of the events also proves that he had dominion and control of the premise. Appellant admitted to using keys to enter the residence; thus, he was alone and had dominion and control of the residence as he was able to move from the garage to the residence.

Appellant stated he was in the residence to gather his belongings. It is reasonable to infer that any items in the residence belonged to the Appellant because he was the sole tenant and had hired Ms. Weber to move his belongings. The residence was devoid of anything of value except for the personal items found upstairs which included men's clothing, a pair of men's shoes, over two hundred dollars worth of drugs, and over one hundred dollar in cash. Therefore, it is reasonable to find that he was at the residence to collect the items found upstairs as they belonged to him and were the only things of value in the residence.

It is also reasonable to find that the Appellant knew there was methamphetamine in the fanny pack because he was the owner of the fanny pack. The State's position was that all the items upstairs such as a set of keys, a fanny pack, men's clothing, a pair of men's shoes, a sleeping bag, and over one hundred dollars in cash were those of the Appellant because they corroborated the Appellant's admission to sleeping upstairs, using keys to enter the residence, and being bare footed. Appellant argued that the items upstairs did not belong to him and were those of Ms. McKenna. After considering the evidence and weighing the witnesses' credibility, the jury convicted the Appellant based on the State's theory of the case because the evidence clearly showed that the items belonged to the Appellant. The Appellant had knowledge of the drugs in his fanny

pack as demonstrated by his reaction to deputies confronting him about drugs being found at the residence. The Appellant was not angry or surprised and responded by saying, “yeah,” and nodding his head.

The Appellant’s reliance on *State v. Davis*, 16 Wash.App. 657 (1977), and *State v Callahan*, 77 Wn.2d 27 (1969), is unpersuasive. In *Davis*, dominion and control was not proven because the defendant was a temporary visitor, one of many people in the residence, and not a resident of the premises. 16 Wash.App. at 658-659. In *Callahan*, constructive possession was not found despite the defendant having property on the premises, being near the drugs, and having previously handled the drugs because there was an uncontradicted statement from another person other than the defendant that the drugs belonged to him, that he had not sold them or given them to anyone else, and that he had sole control over the drugs. 77 Wn.2d at 31-32. In *Callahan*, the court concluded that “it is not within the rule of reasonable hypothesis to hold that proof of possession by the defendant may be established by circumstantial evidence when undisputed direct proof places exclusive possession in some other person.” *Id.*

Davis and *Callahan* are distinguishable because the Appellant was the lone tenant of the residence and the only person on the premises on June 6, 2005; thus, he had exclusive dominion and control of the premises

where the drugs were located. More importantly, unlike Callahan, there was no uncontradicted statement from a person other than the defendant that the drugs belonged to him, that he had not sold them or given them to anyone else, and that he had sole control over them. 77 Wn.2d at 31. There is no direct and uncontradicted testimony of ownership by another person to overcome evidence of the defendant's constructive possession of the drugs and the premises where the drugs were located. *State v Stringer*, 4 Wash.App. 485, 489 (1971). Therefore, the Appellant's conviction for possession of a controlled substance should be affirmed because the evidence proves beyond a reasonable doubt that he knowingly possessed a control substance.

2. THE APPELLANT'S CONVICTION FOR USE OF DRUG PARAPHERNALIA SHOULD BE AFFIRMED AS HE USED A DRUG PARAPHERNALIA TO STORE AND CONTAIN A CONTROLLED SUBSTANCE.

The evidence indicates beyond a reasonable doubt that the Appellant used a drug paraphernalia. To convict the Appellant of use of drug paraphernalia, the State must prove beyond a reasonable doubt that Appellant used a drug paraphernalia to contain or store a controlled substance. RCW 69.50.412(1). Drug paraphernalia means all equipment, products, and materials of any kind which are used in packaging, repackaging, storing, containing, or concealing a controlled substance. It

includes, but is not limited to capsules, balloons, envelopes, and other containers used in packaging small quantities of controlled substances and containers and other objects used in storing or concealing controlled substances. RCW 69.50.102.

The jury found the Appellant guilty of use of drug paraphernalia based on the State's theory that the items found upstairs, including the methamphetamine, belonged to the Appellant. Among the items were two plastic baggies used to contain the methamphetamine. The two baggies were found in the Appellant's fanny pack. It is reasonable for the jury to find that the Appellant had used the plastic baggies to store and contain the methamphetamine in his fanny pack. Therefore, the Appellant's conviction for use of drug paraphernalia should be affirmed because the evidence proves beyond a reasonable doubt that he used the plastic baggies to store and contain the methamphetamine.

3. THE COURT EXCEEDED ITS STATUTORY AUTHORITY IN IMPOSING A 365 DAY SENTENCE FOR THE APPELLANT'S MISDEMEANOR CONVICTION OF USE OF DRUG PARAPHERNALIA.

The State concedes that the court exceeded its statutory authority in imposing a 365-day sentence for the Appellant's misdemeanor conviction of use of drug paraphernalia. Therefore, the case should be

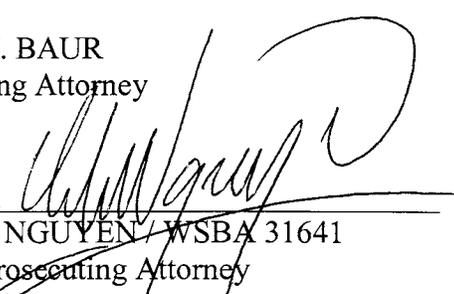
remanded for resentencing with regards to the use of drug paraphernalia conviction.

VI. CONCLUSION

The Appellant's convictions for possession of a controlled substance and use of drug paraphernalia should be affirmed as the evidence proves beyond a reasonable doubt that he knowingly possessed methamphetamine and used plastic baggies to store and contain the methamphetamine. The trial court exceeded its statutory authority in imposing a 365-day sentence for the Appellant's use of drug paraphernalia conviction and the case should be remanded for resentencing with regards to that count.

Respectfully submitted this 13 day of July 2006.

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| |) | 05-1-00675-4 |
| GORDON KEITH GRASSER, |) | AFFIDAVIT OF MAILING |
| |) | |
| Appellant. |) | |

AUDREY J. GILLIAM, being first duly sworn, on oath deposes and says: That on July 13, 2006, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the following

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1. BRIEF OF RESPONDENT
2. Affidavit of Mailing.

Audrey J. Gilliam

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of Washington residing in Cowlitz
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