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ARGUMENT

I. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. PEDEN POSSESSED HEROIN.

When the prosecution presents insufficient evidence at a criminal trial, the conviction must be reversed and the case dismissed with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986). Here, the state presented insufficient evidence to prove Mr. Peden possessed heroin. Although he was found near heroin, there was no evidence that he had dominion and control over it, and mere proximity is insufficient to prove constructive possession. *See* Instruction No. 10, CP 32; *State v. George*, 146 Wn. App. 906, 193 P.3d 693 (2008). Indeed, the facts here may not even be sufficient to establish probable cause, much less proof beyond a reasonable doubt. *See State v. Chavez*, 138 Wn. App. 29, 31, 156 P.3d 246 (2007).

Respondent incorrectly argues that “[c]onstructive possession occurs when a person has dominion and control over either the drugs *or the premises upon which the drugs are found.*” Brief of Respondent, p. 3. In fact, “[i]t is not a crime to have dominion and control over the premises where [a controlled] substance is found.” *State v. Shumaker*, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007) (quoting *State v. Olivarez*, 63 Wn. App. 484, 486-487, 820 P.2d 66 (1991)).

Under these circumstances, even if Mr. Peden exercised passing control by momentarily handling the heroin (i.e. while ingesting it), the evidence was insufficient to prove that he had dominion and control over the heroin. *George*, at 920. Accordingly, the conviction for Possession of Heroin must be reversed and the charge dismissed with prejudice. *Smalis, supra*.

II. THE SENTENCE MUST BE VACATED AND REMANDED FOR SENTENCING WITH AN OFFENDER SCORE OF SEVEN.

Respondent concedes that the trial judge erred by including Mr. Peden's alleged prior Arizona convictions in his offender score. Brief of Respondent, pp. 6, 7-8. Respondent argues that the error is harmless. Addressing miscalculated offender scores (in the context of exceptional sentences), the Supreme Court has said that "remand is the remedy unless the record clearly indicates the sentencing court would have imposed the same sentence anyway." *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). Respondent has not addressed this standard.

If Mr. Peden had been sentenced with seven points instead of nine, the sentencing court might have chosen to sentence him to the low end of the range rather than the midpoint. Furthermore, the court could have exercised its discretion and ordered his 18-month sentence to run concurrently with Mr. Peden's other term of imprisonment.

The trial judge never said that he would impose the same sentence whether the offender score was seven or nine; instead, he only noted that the standard range would remain unchanged. RP (7/17/08) 5, 11-15. Accordingly, the record does not “clearly indicate[] the sentencing court would have imposed the same sentence anyway.” *Parker*, at 189.

Since Respondent concedes that Mr. Peden objected to inclusion of the Arizona convictions, it is held to the existing evidence on remand. Brief of Respondent, p. 8; *see, e.g., State v. Labarbera*, 128 Wn. App. 343, 350, 115 P.3d 1038 (2005). Respondent’s argument to the contrary is incorrect.

CONCLUSION

Mr. Peden's possession conviction must be reversed and the charge dismissed with prejudice. In the alternative, his sentence must be vacated and the case remanded for a new sentencing hearing with an offender score of seven.

Respectfully submitted on March 23, 2009.

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DIVISION II

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STATE OF WASHINGTON
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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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and to:

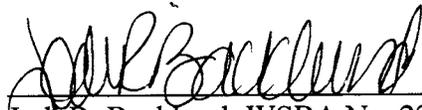
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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 23, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 23, 2009.



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