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STATE OF WASHINGTON
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NO. 399086-5-II
Cowlitz County Cause No. 09-1-00212-3

COURT OF APPEALS,
DIVISION II

STATE OF WASHINGTON
Respondent,

v

RUBY ROELLA REED
Appellant

BRIEF OF APPELLANT

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FIRST ASSIGNMENT OF ERROR

Appellant assigns as error the decision of the trial court denying the appellant's motion for suppression of evidence. The appellant specifically assigns error to what is denominated as conclusion of law number 4 in the findings of fact and conclusions of law for hearing under Cr 3.6, (CP- 48).

ISSUE PERTAINING TO FIRST ASSIGNMENT OF ERROR

On December 26, 2008, Sgt. Neves of the Castle Rock Police Department and Deputy Shelton of the Cowlitz County Sheriff's Department came to the residence of Pierre Carpenter in Castle Rock, Washington to serve a warrant of arrest on Mr. Carpenter. The appellant, who resides in Kelso, Washington, was visiting Mr. Carpenter at the time. After removing Carpenter from the residence and placing him in a police car, the police, who had observed a sawed off shotgun inside a vehicle outside the residence, obtained Mr. Carpenter's consent to retrieve that item. The police were also aware that Pierre Carpenter had a felony conviction, and his possession of any firearms was a felony offense. According to the report of the Deputy Sheriff, when he went back with Sgt. Neves to speak with the appellant inside the residence, Sgt. Neves was asking her if there were any other firearms in the residence and she said she didn't know, but she didn't think so. No Ferrier warnings were given to the appellant before the police re-entered the residence. The police obtained

the appellant's consent to search the premises, resulting in the seizure of a number of firearms, and also the discovery and seizure of a pipe containing methamphetamine residue in a hallway closet inside the residence. Was the consent to search provided by the appellant invalid in the absence of Ferrier warnings, rendering the evidence subsequently seized by the police subject to suppression?

SECOND ASSIGNMENT OF ERROR

Appellant assigns as error the decision of the trial court pursuant to a bench trial to convict the appellant on the charge of violation of the uniform controlled substance act, possession of methamphetamine. The appellant specifically assigns error to finding of fact number 3 and conclusion of law number 2 in the findings of fact, conclusions of law, and verdict following a bench trial, CP 35.

ISSUE PERTAINING TO SECOND ASSIGNMENT OF ERROR

The appellant was charged with possession of methamphetamine based on the police discovery of a water pipe in a hallway closet of Mr. Carpenter's residence, which contained methamphetamine residue. The court decided at the close of the bench trial that the evidence did not establish beyond a reasonable doubt that the appellant had dominion and control over the residence, but he did conclude that she was in actual possession and constructive possession, not of the premises, but of the water

pipe and its contents. The evidence was that the appellant maintained her own separate residence in Kelso, Washington. Mr. Carpenter testified in the course of the trial that he had constructed the pipe in question, and maintained exclusive control over that item inside his residence, together with the other contents of the home. There was also evidence that about three or four days prior to the police search, he had persuaded the appellant to take what he described as a toke from this pipe when he was smoking methamphetamine. Did the trial court err in finding that the appellant was in both actual and constructive possession of the pipe containing methamphetamine?

STATEMENT OF THE CASE

On March 18, 2009, the appellant was charged with one count of violation of controlled substances act and one count of unlawful possession of a firearm in the second degree. (CP 1). These charges arose out of an incident which occurred on December 26, 2008, at the residence of Pierre Carpenter, in Castle Rock, Washington. Attached to the defendant's motion for suppression for suppression of evidence (CP 11), is an affidavit setting forth the relevant facts regarding the incident that occurred at that residence on that date. According to the narrative report of Deputy Shelton, he responded to that residence on that date to serve a warrant of arrest on Pierre Carpenter. They contacted him at the residence, obtained entry into the residence, and executed

the warrant of arrest on Mr. Carpenter. He later gave consent for a search of his vehicle where an illegal weapon was seized, and he was later transported to the Cowlitz County Jail. Deputy Shelton's report then indicates that at that time, "I went back to the residence with Sgt. Neves to speak further with Ruby. She allowed us to go back inside. Sgt. Neves was asking her if there were any other firearms in the residence and she said she didn't know, but she didn't think so." The report indicates that at that time, the power was out in the residence, and while Neves was talking to Reed, Shelton was shining his flashlight around, and observed a gun cabinet in the corner of the living room, containing four guns and two axes. According to the report, the appellant indicated she didn't want herself or Pierre to get in trouble for the guns, because both she and Pierre Carpenter were both convicted felons. The report indicated that she was advised of her constitutional rights, and Shelton asked her to sign for consent to search the residence so they could take any weapons out of the premises. Shelton's narrative report indicates that Ruby said she did not want to give consent because this was Pierre's place, not hers. He gave her the Ferrier warning and she did eventually sign consent to search the residence. The report then indicates that the officers also found a large glass smoking device in a closet hallway, some gun parts in a back bedroom, and a sawed off shotgun in what appeared to be Pierre Carpenter's bedroom closet

The appellant's argument in support of the motion for suppression of evidence was that when the police returned to the residence after the arrest of Mr. Carpenter, it was clearly their intent to conduct a search as evidenced by their inquiry about the weapons, and thus they were required to provide Ferrier warnings before their re-entry into the premises (CP 12). The argument was that although the police had a limited ability under the arrest warrant to enter the residence, find Mr. Carpenter, arrest him and leave, any re-entry into the premises had to be conducted either pursuant to a valid search warrant, or pursuant to proper advise of Ferrier warnings to the appellant prior to re-entering. The appellant also argued that under the circumstances, the appellant did not have the authority to grant entry into the premises or to give the police permission to search the premises.

On July 16, 2009, the trial court denied the defendant's motion for suppression of evidence. The court determined that Sgt. Neves' intent was to interview the defendant, not to conduct a search of the residence and so it was not necessary to provide Ferrier warnings to the appellant prior to obtaining her consent to enter. (CP-48) The court also held that the appellant could not argue that her consent to the search was invalid on the basis that she did not have the capacity to provide such consent.

This matter proceeded to a bench trial before Judge James Stonier of the Cowlitz County Superior Court on October 19 and October 20, 2009. Deputy Shelton provided testimony, regarding a

rough diagram of the residence, the various rooms and the furniture that he recalled observing inside the residence. (RP 22–23). In response to direct questioning by the prosecutor, he testified that when he was inside that residence with Sgt. Neves, he recalled Sgt. Neves asking Ms. Reed a question regarding firearms. Deputy Shelton testified that they had found a firearm in Mr. Carpenter's truck and Neves asked if there were any more firearms inside the residence; the defendant's response was that she didn't know, but she didn't think so. (RP 24, Lines 20-25, RP25, Lines 1-12). He then testified that he shined his flashlight around the room and observed a gun cabinet in the corner of the living room with some rifles in it and broken glass. (RP25, Lines17-25). He also testified about a small glass pipe broken on one end with some residue on the other end that he found at the residence located at 130 Carpenter Road. (RP 67, Lines 1-12). He testified that he found this item in the closet in the hallway, and that it had been attached to a larger glass device, a tube bend which was exhibit #17. He testified that after he found the pipe he showed it to Ms. Reed and asked her what she knew about this item. (RP 69, Lines 16-25). He testified that she indicated that she and Pierre [Carpenter] had smoked methamphetamine out of it about three days prior. (RP 70, Lines 7-12). The state also called Kathryn Dunn a forensic scientist with the Washington State Patrol Crime Laboratory to testify about her examination of the pipe (RP 101). She described it as a partially broken, glass smoking device bearing residue inside

of it. (RP 108, Lines 20-21). She testified that she took some scrapings from the interior of the pipe and conducted two different tests. (RP 109). She testified that in her opinion, based on the results of the tests, the test result was positive for the presence of methamphetamine, a controlled substance. (RP 110, Lines 16-25).

Subsequently, Pierre Carpenter was called to testify at the trial of this matter. He testified that Ms. Reed was his girlfriend and that they had been dating for about seven or eight years. (RP 134, Lines 1-5). He testified that he had previously resided at 130 Carpenter Road in Castle Rock (RP 134, Lines 7-10), and that Ms. Reed had previously resided with him at that address from about 2002 until about 2005, at which time she got her own house in Kelso. (RP 135, Lines 3-17). He testified at that time Ms. Reed moved her stuff and resided at the residence in Kelso. (RP 135, Lines 18-21). He testified that after she had her own house she only stayed with him at the house on Carpenter Road part of the time. (RP 137, Lines 11-14). He indicated that they would get together and she would spend the night and this happened maybe 2 or 3 times a week. (RP 138, Lines 1-5). He testified that she kept a couple changes of clothes at his house, and her own kind of soap. (RP 138, Lines 21-25). He also testified that she would come to his residence and check on his dog and he left her a key for the sliding door to the residence. (RP 139, Lines 11-19). He also testified about exhibit #9, which was the pipe (RP 142). He testified that it was something that he had put together about three

weeks before the police came and seized this device, which he described as a bong. He testified that he constructed it for his own use. (RP 143). He testified that he used it to smoke methamphetamine. (RP 144, Lines 1-5). He also testified that he talked Ms. Reed into trying it one time, about a week or five days before the police came to serve the warrant on him. (RP 144, Lines 7-18). He testified that he convinced her to try it out. (RP 144, Lines 23-25). He testified that he observed her “just taking a toke off of it from the hose there” (RP 145, Lines 16-17). He indicated that the thing was too heavy to be held in someone’s hand so the pipe would be placed on a table or on the floor. (RP 145, Lines 17-22). On cross-examination Mr. Carpenter clarified that she received the house in Kelso, which was located at 908 S. Pacific in Kelso from her step-dad in late 2005 or early 2006. (RP 156, Lines 14-24). He indicated that when she received that house, she moved from his residence to that residence in Kelso, probably in mid 2006, and continued to reside there during the following years. (RP 157, Lines 2-17). He testified that they would occasionally stay over night at each other’s residence, but that there was an understanding between them that he was the one who had control over the premises at Carpenter Road when she visited there, and she exerted the same type of control at her place in Kelso when he visited at her residence. (RP 158, Lines 14-24). He also testified that although he had given her a key so she could stop in and check on his dog, that was the only purpose for which she had the

key. (RP 159, Lines 16-25, RP 160, Line 1). With regard to the pipe, he testified that he had used it about 10 or 12 times before he got arrested, but that he had talked Ms. Reed into using it on one occasion about 5 days before he was arrested and that was the only time that she had used the pipe. (RP 161, Lines 15-25). He indicated that after he would use the pipe, he would take it apart and clean it and put it away. He testified that he probably used it by himself about 3 or 4 times after that one occasion when he and Ms. Reed had used it together (RP 162, Lines 15-25). He testified that he would put it away in a closet and that he maintained the pipe for his own exclusive use with the exception of the one time that he talked Ms. Reed into using it. (RP 163, Lines 1-18).

At the conclusion of the state's presentation of evidence, the defense moved to dismiss both charges against Ms. Reed. Counsel argued that there was no actual possession on the part of Ms. Reed of the guns and the pipe, that the single occasion when she used this pipe hardly even qualified as momentary handling and that momentary handling would not qualify as actual possession according to the case law. (RP 172). It was also argued that there was no constructive possession of these items, since there was no evidence that the defendant had dominion and control over the items in question. Counsel cited a number of cases, one of which indicated that the fact of temporary residence, personal possessions on the premises, or knowledge of the presence of the drug without more is insufficient to show dominion

and control necessary to establish constructive possession of the drug. The defense also argued that her lack of dominion and control was also evidenced by the fact that when the officers asked her for permission, she informed them that she had her own place in Kelso and essentially didn't have the authority to give them permission to search. (RP 176, Lines 4-14). The court indicated that viewing the evidence in the light most favorable to the state the motions to dismiss the drug charge was denied. The defense also made a motion for suppression of the unlawful firearm charge, which was also denied. (RP 186, 187, 188, and 189).

The defense then proceeded with presentation of its evidence, which included the testimony of Jeremy Reed, the defendant's son, who confirmed testimony of some of the defendant's other friends previously presented by the state to the effect that the defendant had taken up residence in the house at 908 S. Pacific in the later part of 2006. (RP 207). The defendant also testified, reiterating the evidence presented by her son, Mr. Carpenter, and other witnesses regarding her living arrangements. She confirmed that when the police asked her for consent to search the premises, that she informed them that it was not her place it was Pierre's place. (RP 263, Lines 1-3). She also confirmed that when they found the pipe, she had indicated that she had smoked out of the device about 3-4 days prior. (RP 269, Lines 14-22). She indicated that Pierre Carpenter's testimony previously in the course of the trial describing her taking a toke on that thing as being

accurate, and that she had never used it before or since that time. (RP 270, Lines 1-12).

After closing arguments of counsel, the court proceeded with its ruling by indicating that with regard to the issue of dominion and control over the residence, he certainly could not find beyond a reasonable doubt that she had dominion and control, but with regard to the charges, he reached different results for different reasons. With regard to the charge of possession of methamphetamine, count 1, he found that she was in actual possession and constructive possession, not of the premises, but the pipe and the bong. (RP 306, Lines 14-25). He concluded his decision on that count by saying he was satisfied that she actually possessed the pipe, and that she also had constructive possession of the pipe, either one would serve as a basis for a finding of guilty as to count 1. (RP 307, Lines 13-17). The court then proceeded to rule on count 2 and found that she was not guilty on the charge of unlawful possession of firearms; he did not find that she had the kind of dominion and control over the premises that the statute requires. (RP 308, Lines 1-7). He also noted that the guns appeared to be in a locked cabinet, so he could not say that she was in possession of the firearms beyond a reasonable doubt. (RP 308, Lines 13-15). The court concluded by saying that it was satisfied that Ms. Reed was in actual possession of a controlled substance in Cowlitz County but was not satisfied beyond a reasonable doubt that she was in possession of the firearms, and

so found Ms. Reed guilty as to count 1 and not guilty as to count 2. (RP 308, Lines 16-20). Thereafter, on November 25, 2009, the court entered Findings of Fact, Conclusions of Law and Verdict following bench trial, reiterating its oral ruling at the conclusion of the trial. (CP 35).

ARGUMENT

I. THE POLICE OFFICER'S RE-ENTRY INTO THE RESIDENCE WAS ILLEGAL IN THE ABSENCE OF FERRIER WARNINGS, AND THE EVIDENCE OBTAINED AS A RESULT OF THIS ILLEGAL ENTRY SHOULD HAVE BEEN SUPPRESSED.

After the police executed the warrant of arrest on Mr. Carpenter and removed him from the residence, they no longer had any authority to remain on the premises. Consequently, when they returned to the residence clearly intending to search for additional weapons, they were required to advise appellant of the Ferrier warnings before they gained entry into the premises. In State v Hatchie, 161 W2d 390, 166 P3d 698 (2002), deputies entered a residence to serve an arrest warrant, found the individual they were seeking, and in the process, observed items commonly used in the manufacture of methamphetamine. They removed the individual, and then obtained a search warrant for the duplex. Hatchie moved to suppress the evidence subsequently obtained by the police, claiming that a misdemeanor arrest warrant did not authorize the police to enter a private residence. The court held that a judicial

determination to issue a warrant provides authority under law that justifies an intrusion into the suspect's home to execute the arrest under limited circumstances. The court also stated that there was potential for the abuse of this authority by the police. The court stated that "therefore we taken pains to point out that an arrest warrant does not allow for a general search of the premises. Rather it allows the police only the limited ability to enter the residence, find the suspect, arrest him and leave. Police action that deviates from the narrow bounds of this authority has no authority of law." The court went on to hold that "similarly, the police cannot use an arrest warrant-misdemeanor or otherwise- as a pretext for conducting a search or other investigation of someone's home." The court concluded that after the police obtain a valid warrant they had lawful authority for a limited intrusion to enter a residence, execute the arrest, then promptly leave.

In the present case, according to the ruling in the above case, once the officers removed Carpenter from the residence, they had no right pursuant to that warrant to then re-enter the premises to conduct a search, or for any other purpose. According to the ruling in the above case, the limited authority that the police possess to enter the residence to execute the warrant of arrest was extinguished once Carpenter was removed from the premises. Consequently, in the absence of a search warrant, in order to obtain a valid consent to enter and search the premises, they needed to comply with the requirements set forth in State v Ferrier,

136 W2d 103, 116, 960 P2d 927 (1998), prior to their entry into the residence. It is perfectly obvious that the intent of the police officers in getting back into the house was to search for evidence of criminal activity. When the police arrested Carpenter and removed him from the residence and placed him in the police vehicle, they noticed that there was a sawed off shotgun in his vehicle. They knew he was a convicted felon, and so they immediately recognized that the shotgun was evidence of criminal activity. Furthermore, according to Deputy Shelton's narrative report, when he and Sgt. Neves went back to the residence, Neves was asking Ms. Reed about the presence of any other firearms in the residence. In State v Freepons, 147 W.App. 689, 197 P3d 682 (2008), the court held that it is the intent of the police officers when they approach a residence that controls whether they are required to provide Ferrier warnings before they enter the residence. In that case, the police were investigating a one-car accident and found the 19-year-old owner of the vehicle lying on the side of the road about a mile away. He smelled of intoxicants and was arrested for MIP and the officers then interrogated him regarding his vehicle. He denied any involvement with the vehicle at the time of the accident, and indicated that his brother Brian could have been the driver at the time of the accident. He also indicated he had attended a party the previous night at Mr. Freepons' residence, whereupon the police went to that residence and observed dozens of empty beer cans in the yard, and also observed stolen property inside the

home, through a window. The deputies contacted the occupants and informed them that they were looking for Brian, whereupon the occupants agreed to allow the deputies into the house to look for Brian. In the course of the search of the residence they found a marijuana grow inside the house. On appeal, the issue was whether the evidence should be suppressed since the officers had not provided the two men their Ferrier warnings before entry into the home, rendering the consent to enter and search to be involuntary under the law. The appellate court agreed, on the basis that the deputies intent in entering the home was for the purpose of searching for evidence of criminal activity. The court indicated that there was nothing to indicate that the officers were motivated by anything other than searching for evidence of a crime; the court held that the deputies intended to search the defendant's residence for evidence of a crime and look for the perpetrator, rather than simply searching for a missing person. Consequently, they were required to give the defendant's Ferrier warnings before entering the premises, and their failure resulted in the court reversing the convictions of the defendants.

In State v Ferrier, supra, the court adopted the following rule: "that when police officers conduct a knock and talk with the purpose of obtaining consent to search a home, and thereby avoid the necessity of obtaining a warrant, they must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can

revoke at anytime the consent that they give, and can limit the scope of the consent to certain areas of the home. The failure to provide these warnings, prior to entering the home, vitiates any consent given thereafter.” 136 W2d at 118, 119.

Consequently, the failure of the police to provide Ferrier warnings prior to their re-entry of the home vitiates the consent which they eventually extracted from the appellant, and rendered any and all evidence that they subsequently obtained in the search of the residence subject to suppression.

II. THE EVIDENCE WAS NOT SUFFICIENT TO SUPPORT THE APPELLANT’S CONVICTION FOR VIOLATION OF THE UNIFORM CONTROLLED SUBSTANCES ACT.

At the conclusion of the bench trial of this matter, the court determined that the appellant was in actual possession of the pipe as well as constructive possession of the pipe, which contained methamphetamine residue. In the seminal case of State v Callahan, 77 W2d 27, 459 P2d 400 (1969), the court addressed the concepts of actual possession and constructive possession in the context of a fact pattern fairly similar to the facts in this case. In that case, the police executed a search warrant on a houseboat and served the warrant on the tenant of the houseboat, Cheryl Callahan. The officers upon entry found the defendant, Michael Anthony Hutchinson and Larry Donalan sitting at a desk on which were pills and hypodermic syringes, and a cigar box filled with

various drugs was on the floor between the two men. Hutchinson admitted to ownership of two guns, two books on narcotics, and a set of broken scales which could have been used for measuring drugs if operable which were found in the houseboat by the police. He also acknowledged that he had actually handled the drugs earlier that day. He also stated that he had been staying on the houseboat for two or three days prior to the time of the execution of the search warrant. On appeal, Hutchinson assigned error to the trial court's failure to dismiss the charge for insufficiency of the evidence. The Court of Appeals began by providing an analysis of the possession of property, which it indicated could be either actual or constructive. The court stated that "actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods." 77 W2d at 29. The court also noted that in order for the jury to find the defendant guilty of actual possession of the drugs, they would be required to find that the drugs were in his personal custody; the court noted that in that fact pattern, there was no evidence introduced that the defendant was in actual physical possession of the drugs other than his close proximity to them, and the fact that he had handled the drugs earlier. The court held that "since the drugs were not found on the defendant, the only basis on which the jury could find that the defendant had actual possession

would be the fact that he had handled the drugs earlier and such actions are not sufficient for a charge of possession since possession entails actual control, not a passing control which is only a momentary handling. See United States v Landry, 257 F2d 425, 431 (7th Cir 1958)". 77 W2d at 29.

The court then proceeded with an analysis of whether the evidence was sufficient for a jury to find beyond a reasonable doubt that the defendant had constructive possession of the drugs, noting that there must be substantial evidence to show that he had dominion and control over the drugs. The court's review of the case law regarding constructive possession of drugs reflected that in each instance it depended on whether there was evidence that the defendant was in dominion and control of either the drugs, or the premises on which the drugs were found. The court then turned to the evidence in that case which consisted of items of personal property belonging to the defendant found on the houseboat, the fact that the defendant had been staying there for two or three days, but was not a tenant or a co-tenant, most of the drugs were found near the defendant, and he admitted he had handled the drugs earlier in the day. The court concluded that this was not sufficient evidence to establish dominion and control and thus make the issue of constructive possession a question for the jury. The court also noted that consideration must be given to the ownership of the drugs, as ownership can carry with it the right of dominion and control. In that case, an individual named Charles

Weaver had testified that the drugs belonged to him and that he had brought them onto the boat, and that he had sole control over these drugs; this testimony was not contradicted by the state. The court stated that it was not within the rule of a 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.

In our case, with regard to the issue of actual possession, the drugs were not found on the appellant. She was not in actual physical custody of the pipe, which was actually located by the police in the course of their search inside a closet in Mr. Carpenter's residence. Consequently, the ruling of the trial court that she was in actual physical possession of the pipe is not substantiated by the evidence in this case. With regard to the question of whether she had constructive possession of this pipe, it should be noted that the trial court actually decided that she did not have dominion and control over the premises. Furthermore, while the appellant may have had a few articles of possessions in the residence, this factor alone certainly was not a persuasive factor to the court in Callahan. In that case, the defendant was not a tenant or co-tenant, and the evidence was overwhelmingly to the effect that in this case, the appellant had her own separate residence, and was simply a visitor at the Carpenter residence. In Callahan, supra, most of the drugs were found near the defendant; in this case, there were no drugs found near the defendant, but rather the

pipe was found in a closet, where Mr. Carpenter testified he had placed it. In this case, the appellant had acknowledged handling the pipe three or four days earlier, but again, the court in Callahan did not consider momentary handling to rise to the level of constructive possession. Finally, just as Charles Weaver testified that the drugs belonged to him, and that he had total exclusive control over those drugs in the Callahan case, Pierre Carpenter testified in the present case that the pipe and its contents belonged to him, that he had constructed the pipe, acquired the substance that he smoked in it, and that although he had persuaded the appellant to take a puff out of a tube attached to the pipe three or four days earlier, this pipe and its contents were within his sole and exclusive control. Again, this testimony was not contradicted by the state. Just as the court held in Callahan, supra, that proof of possession by a defendant cannot be established by circumstantial evidence, when undisputed direct proof places exclusive possession in another individual, the same conclusion must be drawn in this case, under the same or very similar circumstances.

The following cases provide additional support for the appellant's position that the evidence in this case was insufficient to establish either actual or constructive possession of the pipe by the appellant. In State v Hystad, 36 W.App. 42, 671 P2d 793 (1983), the court stated the rule that actual possession requires that the accused is in actual, physical custody of the controlled substance. The court also reiterated the rule that mere proximity to the drugs is

not enough to establish constructive possession, and the fact of temporary residence, personal possessions on the premises, or knowledge of the presence of the drug without more is insufficient to show dominion and control necessary to establish constructive possession of the drug, citing State v Davis, 16 W.App. 657, 558 P2d 263 (1977).

In State v Cote, 123 W.App. 546, 96 P3d 410 (2004), Cote appealed his conviction for possession of ephedrine with intent to manufacture, claiming the evidence was insufficient to support the conviction. In that case, the police had information that Cote and another person had arrived at a residence in a vehicle that had been reported stolen. Cote was arrested on an outstanding warrant, and a search of the vehicle revealed a syringe and components of a meth lab, including two mason jars containing various chemicals; Cote's fingerprints were found on the mason jars. There was also evidence that Cote arrived at the residence as a passenger in the stolen truck. The court reiterated the rules that actual possession requires physical custody of the contraband, and that constructive possession requires dominion and control over the contraband or the premises containing the contraband. The court discussed the ruling of the court in State v Callahan, supra, and State v Spruell, 57 W.App. 383, 788 P2d 21 (1990), where the defendant was arrested in close proximity to drugs found in a house, and they found the defendant's fingerprints on a plate containing cocaine residue. In that case, the court refused to find

that the defendant was in actual or constructive possession of the drugs and paraphernalia. After reviewing the various cases, the court in State v Cote, supra, concluded that “the evidence establishes that Mr. Cote was at one point in proximity to the contraband and touched it. But under Callahan and Spruell this is insufficient to establish dominion and control. Accordingly, there was no evidence of constructive possession.” 123 W.App at 550.

In State v Enlow, 143 W.App. 463, 178 P3d 366 (2008), the defendant appealed from his conviction following a bench trial, of manufacture of methamphetamine. Since the case was tried to the court without a jury, the court in that case indicated it was engaging in a three-part inquiry. First, the court was required to determine whether the evidence supported the findings of fact. Second, the court was required to determine whether the findings of fact supported the conclusions of law. Third, the court was required to decide whether the conclusions of law supported the judgment. In that case, Mr. Enlow was found hiding under a blanket in a canopy section of a truck by the police during the course of their search of the truck. He indicated he was just hiding there and that he did not own the truck. His fingerprints were found on a pint jar with residue which was untested, a quart jar, and another bottle, all of which had no contents listed; these items were all found in the bed of the truck. The court in State v Enlow discussed the rulings in State v Callahan, State v Spruell, and State v Cote, supra. The trial court concluded that the trial court’s findings did not support the

court's conclusion that Enlow was guilty of manufacture of methamphetamine and reversed his conviction.

In State v George, 146 W.App. 906, 193 P3d 693 (2008), George contended on appeal that his convictions for misdemeanor possession of marijuana and misdemeanor possession of drug paraphernalia should be reversed for insufficiency of the evidence. In that case, the state contended that George had actual and constructive possession of contraband, but the court noted that actual possession requires physical custody; because George did not have physical custody of the pipe, he did not have actual possession of that item. The question then became whether the state had proved that he had constructive possession of the pipe and its contents. The court found there was insufficient evidence to support a finding that George exercised dominion and control over the vehicle where the contraband was located; he was a mere backseat passenger and the fact that the contraband was found near his feet did not support his conviction. The court reiterated the rule that a defendant's mere proximity to drugs is insufficient to prove constructive possession, which is true even where there is evidence that the defendant handled the drugs, and cited the rule established by State v Callahan, supra, that "where the evidence is insufficient to establish dominion and control of the premises, mere proximity to the drugs and evidence of momentary handling is not enough to support a finding of constructive possession", also citing

State v Spruell, supra, and State v Cote, supra. 146 W.App. at 920.

Consequently, it is clear that according to the above authorities, that the evidence cannot support the court's finding or its conclusion that the appellant herein was in actual control of the contraband. It was not found in her actual physical custody, but was located inside a closet in Mr. Carpenter's residence where it had been placed by Mr. Carpenter. With regard to constructive possession, the trial court correctly concluded that she did not have dominion and control over the premises. However, as indicated by the authorities cited above, evidence that the appellant engaged in momentary handling of this item three or four days prior to the search is not enough to support a finding of constructive possession. Consequently, her conviction should be reversed.

CONCLUSION

Based on the rulings set forth and the authorities cited above, the evidence in this case does not support the conclusion that the appellant was in actual possession of methamphetamine and also in constructive possession of that controlled substance, and thus her conviction of possession of a controlled substance should be reversed and the case dismissed.

Dated this 12 day of May 2010.

Respectfully Submitted,



JAMES K. MORGAN, WSB #9127

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COURT OF APPEALS, DIVISION II, STATE OF WASHINGTON

STATE OF WASHINGTON,)
Respondent,)
)
)
)
v)
RUBY ROELLA REED,)
Petitioner)

No. 39986-5-II
Cowlitz County No. 09-1-00212-3

CERTIFICATE OF MAILING

FILED
COURT OF APPEALS
DIVISION II
MAY 13 AM 10:14
STATE OF WASHINGTON
BY [Signature]

I, Jeanne Struthers, certify and declare:

That on the 12th day of May 2010, I deposited in the mails of the United States of America, next day service, a properly stamped and addressed envelope, containing Brief of Appellant addressed to:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

And in the mails of the United States of America, a properly stamped and addressed envelope containing Brief of Appellant addressed to:

James Smith
Deputy Prosecuting Attorney
Hall of Justice
312 SW First
Kelso, WA 98626

Ruby Roella Reed
908 S Pacific
Kelso, WA 98626

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of May 2010.

[Signature]
Jeanne Struthers

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