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COURT OF APPEALS
DIVISION III

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STATE OF WASHINGTON

NO. 40715-9-II

BY _____



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

TERRELL BOOKER,

Appellant.

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

The Honorable Lila Mills, Judge

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
There was insufficient evidence to establish that appellant constructively possessed a firearm.	
<u>Issue Presented on Appeal</u>	1
Did the state fail to prove all of the essential elements of the crime of unlawful possession of a firearm?	
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS.....	1
2. SUBSTANTIVE FACTS	1
C. <u>ARGUMENT</u>	3
THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH BEYOND A REASONABLE DOUBT, CONSTRUCTIVE POSSESSION OF CONTRABAND.	
D. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Alvarez, 105 Wn. App. 215, 19 P.3d 485 (2001).....7,8, 9

State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969).....5,7,9

State v Delmarter, 94 Wn.2d 634, 619 P.2d 99 (1980).....3

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980)).....3

State v. Mathews, 4 Wn. App. 653, 484 P.2d 942 (1971).....7

State v. O’Neal, 126 Wn. App. 395, 109 P.3d 429 (2005).....3

State v. Partin, 88 Wn.2d 988, 567 P.2d 1136 (1977).....4

State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990).....6

State v. Turner, 103 Wn. App. 515, 13 P.3d 234 (2000).....3, 4, 6, 7

State v. Warfield, 119 Wn. App. 871, 80 P.3d 625 (2004)... 1, 3-5, 9

STATUTES, RULES AND OTHERS

RCW 9.41.040(1)(a).....3

A. ASSIGNMENT OF ERROR

There was insufficient evidence to establish that appellant constructively possessed a firearm.

Issue Presented on Appeal

Did the state fail to prove all of the essential elements of the crime of unlawful possession of a firearm?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Terrell Booker was charged by amended information with unlawful possession of a firearm in the first degree. CP 21. Mr. Booker made a half time motion to dismiss for failure to present sufficient evidence that Mr. Booker wither knew that there was a gun in Mr. Hopkins' purse or that he had constructive possession of the gun. RP 101. The judge reluctantly denied the motion citing to State v. Warfield, 119 Wn. App. 871, 80 P.3d 625 (2004). RP 112. Mr. Booker was convicted as charged. CP 44. This timely appeal follows. CP 47.

1. SUBSTANTIVE FACTS

On January 7, 2010, deputy Todd Byers contacted a woman by cell phone in her apartment and asked her to have herself and the four occupants of the apartment exit the premises. RP 46-47, 49.

Terrell Booker was one of the occupants to leave the apartment. RP 48. Everyone was cooperative. RP 49. The police executed a search warrant and inside a bedroom closet found a gun in a woman's polka-dot purse with other feminine products and a wallet with Megan Hopkins' identification. The purse was inside one of the bedroom closets under clothing and other debris. RP 53-65, 68, 75.

The closet was described as having large male clothing on one side and female clothing on the other side. RP 53. The woman's bag with the gun was found somewhere in between the woman's side of the closet and the other side. RP 53. Mr. Booker's wallet was found outside the closet on a computer desk. RP 73-74.

The police also found a safe in the bedroom that contained a holster for a different type of gun and some ammunition, some of which fit the gun that was found inside the woman's purse. RP 52, 75, 87-88, 91.

The police did fingerprint analysis on the gun but were unable to find anything usable. RP 98. Mr. Booker stipulated to having a previous serious felony. RP 99. There was no evidence that Mr. Booker had knowledge of the gun or permission to use Megan Hopkins' purse that contained her wallet and feminine products inside.

C. ARGUMENT

THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH BEYOND A REASONABLE DOUBT, CONSTRUCTIVE POSSESSION OF A FIREARM.

Evidence is sufficient when viewed in the light most favorable to the State, a rational jury could find the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980); State v. Turner, 103 Wn. App. 525, 520, 13 P.3d 234 (2000). The appellate courts have determined that circumstantial and direct evidence are entitled to the same consideration. State v. Delmarter, 94 Wn.2d 634, 638, 619 P.2d 99 (1980).

To convict Booker of first-degree unlawful possession of a firearm, the State had to prove beyond a reasonable doubt that he knowingly possessed a firearm and that he had previously been convicted of a serious felony. State v. O'Neal, 126 Wn. App. 395, 414, 109 P.3d 429 (2005), citing, Warfield, 119 Wn. App. at 883. RCW 9.41.040(1)(a); Turner, 103 Wn. App. at 520. Because Booker stipulated that he had been convicted of a serious felony, the State was limited to proving knowing possession of the firearm.

Possession may be actual or constructive and need not be exclusive. State v. Turner, 103 Wn. App. at 520-21. Constructive possession of an object can be based on evidence of dominion and control over the place where it was found. Turner, 103 Wn. App. at 520-21. Proximity to an object may support dominion and control, but proximity alone does not establish constructive possession. Turner, 103 Wn. App. at 521.

The Court's look to the totality of the circumstances to determine whether there is substantial evidence from which the jury could reasonably infer constructive possession. State v. Partin, 88 Wn.2d 988, 906, 567 P.2d 1136 (1977); Turner, 103 Wn. App. at 521.

Warfield, the case relied on by the state and trial court is distinguishable. In Warfield, the defendant had exclusive dominion and control over the apartment and bedroom where a gun was found. No one else had access or dominion and control of the apartment or bedroom. Under those circumstances, the Court held that it was reasonable to infer constructive possession. Warfield, 119 Wn. App. at 883.

In Mr. Booker's case, there was no testimony that he lived in the apartment. The bedroom closet where the gun was found

contained women's clothing on one side and men's clothing on the other side. The gun was inside a woman's purse inside the closet. These facts indicate that a man and a woman had access to the closet. Moreover, the evidence established that the apartment was shared with other people. These facts distinguish Warfield and defeat the state's attempt to establish constructive possession.

There are several other cases, which discuss the quantum of proof necessary to establish constructive possession of contraband through dominion and control over the premises where it is found. In State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969), police found drugs near the defendant on a houseboat where he had been staying for two or three days. Police also found Callahan's belongings, including two guns, two books on narcotics, and scales that could be used for measuring drugs. Callahan admitted handling the drugs earlier in the day but denied any dominion and control over the houseboat. Callahan, 77 Wn.2d at 28, 31. Another man claimed ownership and sole control of the drugs. Callahan, 77 Wn.2d at 31.

The Supreme Court held that the circumstantial evidence presented of Callahan's dominion and control over the premises was insufficient to prove constructive possession where the evidence

established that another person had control of the premises, that Callahan owned some property on the premises, that Callahan was near the drugs when the officers executed the search warrant, and that Callahan had handled the drugs earlier in the day. Callahan, 77 Wn.2d at 31-32.

Callahan holds 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. State v. Spruell, 57 Wn. App. 383, 388, 788 P.2d 21 (1990). In Mr. Booker's case the state did not establish proximity, rather it merely established joint access.

In Turner, the defendant had dominion and control over the vehicle where the contraband (rifle) was found, he knew of the contraband, had access to it but denied that it was his. The Court, emphasizing the fact that Turner owned the car and admitted to knowing of the rifle under the car seat, held that these facts were sufficient to find dominion and control over the vehicle and constructive possession of the rifle. Turner, 524.

Turner is distinguishable on the grounds that Turner, unlike Booker admitted to knowing the rifle was in his car in plain view, and

admitted dominion and control over the car. In Booker's case the rifle was inside a woman's purse under a pile of clothes in a closet in a room that Mr. Booker may or may not have shared with the woman who owned the purse. Unlike in Turner, there were no admissions and insufficient proof of knowledge of the gun or constructive possession of the gun.

In Mathews, 4 Wn. App. 653, 484 P.2d 942 (1971), a case relied on by Turner, the Court held that mere proximity when coupled with other supporting circumstances linking the defendant to the contraband may be sufficient to establish constructive possession. Mathews, 4 Wn. App. at 658. In Mathews, the passenger who was in close proximity to the drugs and had dominion and control over the back seat where the contraband was located, was determined to have constructive possession of the drugs. The Court applied the totality of the circumstances standard and limited its ruling to the facts presented in that case. Mathews, 4 Wn. App. at 658. Mathews, is also distinguishable, on grounds that Mathews unlike Booker, had exclusive dominion and control over the back seat of the car where the contraband was located.

In State v. Alvarez, 105 Wn. App. 215, 19 P.3d 485 (2001), the

Court held that the defendant did not constructively possess contraband (guns) that was found in a room that contained some of his clothing, bank books and other books and articles featuring himself and others. The Court held that the evidence presented including testimony that others had possession of the premises defeated the state's attempt to prove Alvarez's constructive possession notwithstanding his personal possessions in the room. Alvarez, 105 Wn. App. at 222-223.

Alvarez is most closely on point. In Booker's case as in Alvarez, the state established that Mr. Booker's wallet was inside the room and that large size male clothing were inside the closet along side women's clothing. The only item identified as being Mr. Booker's was the wallet, which was in the bedroom on a desk. The state argued that the clothing was Mr. Booker's but did not establish Mr. Booker's size or the size of the clothing. RP 53; 65, 68, 75, 91, 96. RP 96. The state also located a safe inside the closet that contained ammunition and a holster for some other type of gun. RP 52-54, 67, 81-85, 88-89.

As in Alvarez, in Booker's case the evidence that others, a woman named Megan Hopkins had possession of the room and

closet where the gun was found, and the evidence that others shared the apartment, defeated the state's attempt to prove Mr. Booker's constructive possession notwithstanding his personal possessions in the room. Alvarez, 105 Wn. App. at 222-223.

As in Callahan, and Alvarez, there were others who had equal or better access to the premises where the contraband was located. The state argued that the fact that a safe was found inside the closet with ammunition proved that "Mr. Booker probably knew that knew that the gun was in the bedroom". RP 102. The state may have been correct that Mr. Booker might have known of the existence of the gun, but the standard is not a mere possibility or even a probability; it is proof beyond a reasonable doubt..RP 102. Warfield, 119 Wn. App. at 883.

Megan Hopkins owned the purse, she had dominion and control over the purse in her closet, not Mr. Booker. As in Callahan, and Alvarez, the evidence of joint access to the bedroom and exclusive ownership of the purse by Ms. Hopkins was insufficient to prove constructive possession of the gun by Booker. Callahan, 77 Wn.2d at 31-32; Alvarez, 105 Wn. App. at 222-223.

D. CONCLUSION

Mr. Booker respectfully requests this Court reverse his conviction for insufficient evidence of constructive possession of, and knowledge of a firearm in the charge of unlawful possession of a firearm in the first degree and dismiss with prejudice.

DATED this 9th day of September 2010.

Respectfully submitted,



LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County Prosecutor 930 Tacoma Ave S. Rm. 946 Tacoma, WA 98492 and Terrell Booker Terrell Booker DOC# 301729 Olympic Corrections Center 11235 Hoh Mainline Forks, WA 98331 , a true copy of the document to which this certificate is affixed, on September 9, 2009. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature

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