

NO. 50237-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD DOUGLAS PETERO,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 16-1-01346-3

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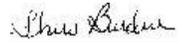
BRIEF OF RESPONDENT

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<b>SERVICE</b>	John A. Hays 1402 Broadway Longview, Wa 98632 Email: jahays@3equitycourt.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, <i>or, if an email address appears to the left, electronically.</i> I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  DATED September 12, 2017, Port Orchard, WA  <b>Original e-filed at the Court of Appeals; Copy to counsel listed at left.</b> <b>Office ID #91103 kcpa@co.kitsap.wa.us</b>
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether substantial evidence supported the element of possession in this drug possession prosecution?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Richard Douglas Petero was charged by information filed in Kitsap County Superior Court with possession of a controlled substance, methamphetamine. CP1. The matter proceeded to trial on that charge.

Pretrial procedures were unremarkable and no assignment of error comes from those procedures. Petero stipulated to the admissibility of his statements under CrR 3.5.

Petero was convicted as charged. CP 70. A standard range sentence was ordered. CP 85. Only mandatory legal financial obligations were imposed. CP 90. Petero timely filed a notice of appeal. CP 76.

### **B. FACTS**

Petero was initially seen on foot by a police officer. RP 31. At that time, he had a warrant for his arrest. RP 31. An hour later, the officer again saw Petero walking and the officer moved to contact him. RP 31-32. The officer found him in the yard of a residence talking to the home owner. RP 32, 35.

The officer advised Petero that he was under arrest for the warrant and ordered him to get on the ground. RP 35. Petero was slow to comply, waiving his hands in the air (“a lot of arm flailing,” RP 55) and asking what was going on. RP 35-36. He back-pedaled and fell backward over a planter. RP 36. His arm flew up as he fell. RP 39. The officer did not see Petero throw anything out of his hand. RP 48-49. He stayed down after falling and the officer detained him. RP 36. No drugs were discovered in a search incident to arrest of Petero. RP 51.

After detaining Petero, the officer asked the homeowner if he, Petero, had dropped anything in the yard. RP 37. In the yard, the officer found a ziplock baggie containing methamphetamine that weighed 6.4 grams with the packaging. RP 37. The officer noted that the package was not “weathered,” there being no dirt or moisture on it. RP 40. No other “trash” was seen in the yard; leaves, grass, and a white bag were seen. RP 41.

The home owner also described Petero as swinging his arms around when the officer first approached. RP 65. While this was happening, the home owner saw “something white left his left hand when he’s facing Sydney [the street in front of the house], and it flew in the air into my side yard.” RP 66. The home owner told the officer that Petero had thrown a piece of paper into his side yard. RP 79. He saw the item

clearly and noted where it landed. RP 81.

Scientific analysis of the material in the baggie found in the yard found that it was methamphetamine. RP 89. Petero denied that he had any drugs on the day of the incident. RP 98. He denied that he threw anything during the incident. RP 99.

### III. ARGUMENT

#### A. THE EVIDENCE WAS SUFFICIENT WHERE UNREBUTTED TESTIMONY ESTABLISHED THAT PETERO TRIED TO DISCARD THE DRUGS BEFORE BEING ARRESTED.

Petero argues that the evidence was insufficient to establish that he possessed the drugs. This claim is without merit because the record is clear that the recovered drugs were thrown away when Petero saw the police approaching.

“The sufficiency of the evidence is a question of constitutional law that we review de novo.” *State v. Rich*, 184 Wash.2d 897, 903, 365 P.3d 746 (2016).

It is well settled that evidence is sufficient if, taken in a light most favorable to the state, it permits a rational trier of fact to find each element of the crime beyond a reasonable doubt. *State v. Pirtle*, 127 Wn.2d 628, 643, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026 (1996); *State v.*

*Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the state’s evidence and all reasonable inferences that can be drawn therefrom. *State v. Moles*, 130 Wn. App. 461, 465, 123 P.3d 132 (2005), citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A reviewing court defers 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, 415-16, 824 P.2d 533 (1992). Thus the relevant inquiry is “whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Scoby*, 117 Wn.2d 55, 61, 810 P.2d 1358 (1991).

At trial of this case, the jury was instructed that “possession means having a substance in one’s custody or control.” CP 65 (instruction #8). This is a paired-down version of WPIC 50.03, which includes in its full form the principle of constructive possession. The state acquiesced to the defense argument that the facts of the case do not include constructive possession. RP 112-13. The instruction frames the present issue: Did the state prove beyond a reasonable doubt that Petero had “custody or control” over the methamphetamine? When viewed through the lense of the

standards recited above, the answer is decidedly yes.

Analysis of this case turns on application of the standards for insufficient evidence. It is not simply a matter of reviewing the direct facts elicited by testimony and exhibits. Petero neither cites to nor addresses the rule that this insufficiency claim admits the truth of the state's evidence and *all inferences that can be drawn therefrom*. *State v. Moles, supra* (emphasis added).

The evidence herein, taken as true and with reasonable inferences therefrom, show that Petero was present in the home owner's yard. It is shown that Petero knew the police officer was approaching and had ordered him to remain still and then to get on the ground. It was established that Petero was waiving his hands around. The home owner saw a white object fly from Petero's hand.<sup>1</sup> The officer retrieved the baggy of methamphetamine from right where the home owner said it landed. These facts sufficiently establish the reasonable inference that Petero had the drugs and was aware he was about to be arrested. He exercised control over the drugs by attempting to discard them before being physically contacted by the officer.

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<sup>1</sup> Petero asserts that the home owner was "certain" that Petero had thrown a piece of paper. Brief at 11. The home owner on direct said "*something* white flew out of his left hand" and he "thought" it looked like tissue paper. RP 66 (emphasis added). On cross examination, the home owner said again that he "thought" it was paper but in any event "just something white flew out of his hand." RP 79. It is clear that the home owner really did not know what the white object was when it was thrown.

On insufficiency claims such as this, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt. *See State v. Summers*, 107 Wn. App. 373, 388, 28 P.3d 780 (2002) (reviewed at 145 Wn.2d 1015 and opinion modified as to the offender points issue at 43 P.3d 526) (citation omitted). The reviewing court need find only that the evidence would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed; that there is substantial evidence. 107 Wn. App. at 388.

Moreover, this Court's holding in *State v. Werry*, 6 Wn. App. 540, 494 P.2d 1002 (1972), applies to the question whether the evidence in this case proves Petero's control over the drugs. There, the defendants argued against conviction for drug possession by claiming that their contact with the drugs was but passing. 6 Wn. App. at 546. Finding it undisputed that one defendant had tried to secrete a bag of drugs from the police, the Court held that "when [the defendant] threw the drugs under the bathtub, he did not terminate his control." 6 Wn. App. at 548. His control terminated when the police found the drugs. *Id.*

The same is true in the present case. Petero essentially demonstrated his control over the baggy of methamphetamine when he cast it away from his person in order to avoid discovery by the police. If he had not been arrested, had the home owner not seen the baggy fly from

his hand, Petero could have exercised his control and regained actual possession. But here, as in *Werry*, the officer terminated his control when she recovered the drugs from where he had thrown them.

It is completely un rebutted in this case that the civilian witness saw Petero throw something white into the civilian's side yard. It is similarly undisputed that the officer found the baggy right where the civilian said it would be. The evidence was sufficient to support the jury's verdict.

#### IV. CONCLUSION

For the foregoing reasons, Petero's conviction and sentence should be affirmed.

DATED September 12, 2017.

Respectfully submitted,

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