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Division II
State of Washington
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NO. 51299-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JAMES E. OVERSTAKE,

Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iii
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	1
C. STATEMENT OF THE CASE	2
D. ARGUMENT	
SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT’S CONVICTION FOR POSSESSION OF LESS THAN A HUNDREDTH OF A GRAM OF METHAMPHETAMINE BECAUSE THE DEFENDANT HAD NO ABILITY TO EXERCISE DOMINION AND CONTROL OF SUCH A SMALL AMOUNT OF DRUGS	4
E. CONCLUSION	9
F. APPENDIX	
1. Washington Constitution, Article 1, § 3	10
2. United States Constitution, Fourteenth Amendment	10
3. WPIC 50.03	11
G. AFFIRMATION OF SERVICE	12

TABLE OF AUTHORITIES

Page

Federal Cases

In re Winship,
397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) 4

Jackson v. Virginia,
443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) 5

State Cases

State v. Baeza, 100 Wn.2d 487, 670 P.2d 646 (1983) 4

State v. Bradshaw, 152 Wn. 2d 528, 98 P.3d 1190 (2004) 5

State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981), *cert. denied*, 456 U.S. 1006, 102 S.Ct. 2296 L.Ed.2d 1300 (1982) 5

State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980) 5

State v. Hornaday, 105 Wn.2d 120, 713 P.2d 71 (1986) 6, 7

State v. Moore, 7 Wn.App. 1, 499 P.2d 16 (1972) 4

State v. Rudd, 70 Wn.App. 871, 856 P.2d 699 (1993) 7

State v. Staley, 123 Wn.2d 794, 872 P.2d 502 (1994) 6

State v. Taplin, 9 Wn.App. 545, 513 P.2d 549 (1973) 4

Constitutional Provisions

Washington Constitution, Article 1, § 3 4

United States Constitution, Fourteenth Amendment 4

Statutes and Court Rules

RCW 69.50 5

Other Authorities

WPIC 50.03 5, 6

ASSIGNMENT OF ERROR

Assignment of Error

Substantial evidence under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does not support the defendant's conviction for possession of less than a hundredth of a gram of methamphetamine because the defendant had no ability to exercise dominion and control of such a small amount of drugs.

Issues Pertaining to Assignment of Error

Does substantial evidence under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, support a defendant's conviction for possession of less than a hundredth of a gram of methamphetamine when that defendant had no ability to exercise dominion and control of such a small amount of drugs?

STATEMENT OF THE CASE

On September 2, 2017, Raymond Police Officers Eric Fuller and Byan Miskell arrested the defendant James Overstake along a bicycle trail next to the port dock in the City of Raymond. RP 25-26, 31. During a search incident to arrest, they found a small copper or tin container in the coin pocket of the defendant's jeans. RP 26-27, 31-32. Upon opening the container Officer Fuller saw what he thought might be methamphetamine residue in it. RP 26-27. Later analysis revealed the presence of about one hundredth of a gram of powder that contained methamphetamine the purity of which was not entered into evidence. RP 36-48.

The state subsequently charged the defendant with possession of methamphetamine. CP 1. The case later came on for trial before a jury with the state calling the two officers and a Washington State Patrol (WSP) forensic scientist as its only witnesses. RP 1-81. The defendant then took the stand as the only witness for the defense and testified that prior to his arrest his girlfriend had purchased the jeans he was wearing at a second hand store and that he did not know the small metal box was in the coin pocket. RP 52-55.

Following instructions and argument the jury retired for deliberation and eventually returned a verdict of guilty. CP 17-32, 33; RP 66-76. Two

and eventually returned a verdict of guilty. CP 17-32, 33; RP 66-76. Two days later the court sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 38-49, 50-51.

ARGUMENT

SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT'S CONVICTION FOR POSSESSION OF LESS THAN A HUNDREDTH OF A GRAM OF METHAMPHETAMINE BECAUSE THE DEFENDANT HAD NO ABILITY TO EXERCISE DOMINION AND CONTROL OF SUCH A SMALL AMOUNT OF DRUGS.

Due process under both the Washington Constitution, Article 1, § 3, and the United States Constitution, Fourteenth Amendment, mandates that the state prove every element of a crime charged beyond a reasonable doubt before the court will sustain a conviction. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972).

“Substantial evidence” in this context means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the 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 essential elements of the

crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

In the case at bar, the state charged the defendant with possession of methamphetamine under RCW 69.50.4013(1), which makes it a felony for “any person to possess a controlled substance” unless that possession is authorized by law. There is no *mens rea* element and the gravamen of the offense is the mere possession of a controlled substance. *State v. Bradshaw*, 152 Wn. 2d 528, 534, 98 P.3d 1190, 1193 (2004) Thus, the state need not prove “knowing possession.” *Id.* Rather, a claim of “unwitting possession” is an affirmative defense that the defendant has the burden of proving by a preponderance of the evidence. *State v. Cleppe*, 96 Wn.2d 373, 381, 635 P.2d 435 (1981), *cert. denied*, 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982).

The legislature has not defined the term “possession” as it is used in RCW 69.50. However, WPIC 50.03 defines this term as follows:

Possession means having a substance in one’s custody or control. [It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.]

[Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.]

[In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include [whether the defendant had the [immediate] ability to take actual possession of the substance,] [whether the defendant had the capacity to exclude others from possession of the substance,] [and] [whether the defendant had dominion and control over the premises where the substance was located]. No single one of these factors necessarily controls your decision.]

WPIC 50.03; *see also State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994) (Constructive possession is established if a person has dominion and control over the drugs in question).

The definition for the term “possession” is also addressed in those cases involving the crime of illegal possession of alcohol, particularly in the context of possession after ingestion. In *State v. Hornaday*, 105 Wn.2d 120, 713 P.2d 71 (1986), the Washington Supreme Court stated the following about this issues:

The statute does not define the term “possession.” However, the language “possession of intoxicating liquor” is “clear, plain and unambiguous.” *State v. Johnson*, 129 Wn. 62, 66, 224 P. 602 (1924). A defendant “possesses” a controlled substance when the defendant knows of the substance’s presence, the substance is immediately accessible, and the defendant exercises “dominion or control” over the substance. *In re R.B.*, 108 Wis.2d 494, 496, 322 N.W.2d 502 (Ct.App.1982). The term “possession” includes

constructive as well as actual possession. Constructive possession of liquor denotes control of the substance. *Cf. State v. Bostock*, 147 Wn. 402, 404, 266 P. 173 (1928); *State v. Davis*, 16 Wn.App. 657, 659, 558 P.2d 263 (1977) (constructive possession of marijuana requires a showing of dominion and control over the premises.)

State v. Hornaday, 105 Wn.2d at 125.

In *Hornaday* the court went on to hold that one no longer “possessed” alcohol once it was ingested because one no longer had the capacity to exercise dominion and control over it. The same principle holds for the possession of a controlled substance that is assimilated into the body through use as opposed to concealed on or in a body for later retrieval. In *State v. Rudd*, 70 Wn.App. 871, 856 P.2d 699 (1993), the court noted as follows on this issue:

Cases involving an illegal substance inside the body can be divided into two categories. The first involves assimilation; the second involves concealment.

In an assimilation case, the defendant ingests or injects the substance directly into the body. The substance is assimilated into the bloodstream, and the defendant loses dominion and control over it. Necessarily, the defendant also ceases to possess it, for dominion and control are the key features of possession. Thus, evidence showing assimilation is generally insufficient to support a conviction for possession after ingestion.

State v. Rudd, 70 Wn.App. at 872.

The legal principle underlying these cases is that unless a person can exercise dominion and control over a substance, he or she is not in

possession of that substance. Under this rule there would be a number of other scenarios under which a controlled substance might well be present near or on a person and yet not possessed by that person. Thus, in the context of possession of alcohol, one who had an alcoholic drink spilled on his or her person or clothing would not be in "possession" of that alcohol because there is no ability to exercise dominion and control over it.

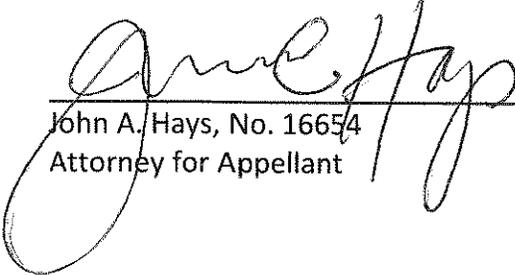
Similarly, if one had possession of an item with a very small amount of a controlled substance on it, there would be no legal "possession" because there would be no ability to exercise dominion and control over that substance. This is precisely what happened in the case at bar. The officer in this case described what the defendant possessed as "residue." The WSP forensic scientist stated that the amount of the "residue" was probably under one-hundredth of a gram in weight, an amount that she described as about one-hundredth of an individual packet of artificial sweetener. This amount is so small that one can no longer exercise dominion and control over it. Thus, there was no "possession" of this substance even though substantial evidence supports the conclusion that it was methamphetamine. As a result this court should reverse the defendant's conviction and remand for dismissal with prejudice.

CONCLUSION

Substantial evidence does not support the defendant's conviction for possess of less than one hundredth of a gram of methamphetamine because the defendant could not exercise dominion and control over so small an amount of drugs. As a result, this court should vacate the defendant's conviction and remand with instructions to dismiss.

DATED this 17th day of May, 2018.

Respectfully submitted,



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APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

WPIC 50.03
Definition of Possession

Possession means having a substance in one's custody or control. [It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.]

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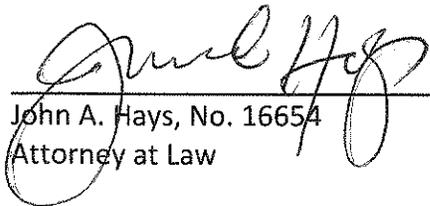
AFFIRMATION
OF SERVICE

JAMES E. OVERSTAKE,
Appellant.

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 17th day of May, 2018, at Longview, WA.



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