

FILED  
Court of Appeals  
Division II  
State of Washington  
11/2/2018 4:54 PM  
NO. 51540-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CHELSEA K. HAYES

Appellant.

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

The Honorable John Skinder, Judge

OPENING BRIEF OF APPELLANT (**CORRECTED**)

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Peter B. Tiller, WSBA No. 20835  
Of Attorneys for Appellant

The Tiller Law Firm  
Corner of Rock and Pine  
P. O. Box 58  
Centralia, WA 98531  
(360) 736-9301

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## **A. ASSIGNMENTS OF ERROR**

1. Appellant Chelsea Hayes was deprived of her right to effective representation of counsel under the Sixth Amendment of the Federal Constitution and article I, section 22 of the Washington Constitution.

2. Ms. Hayes was denied effective assistance of counsel that prejudiced her right to a fair trial when her attorney failed to investigate the defense theory that Ms. Hayes had a valid prescription for oxycodone.

3. Ms. Hayes was denied effective assistance of counsel when her attorney failed to familiarize himself with relevant law regarding the ability of the court to impose concurrent school bus route stop enhancements.

4. Ms. Hayes was denied effective assistance of counsel that prejudiced her right to a fair trial before an impartial jury when her attorney failed to request a limiting instruction.

5. The evidence was insufficient to sustain conviction for conspiracy to deliver a controlled substance as alleged in count I.

6. The evidence was insufficient to sustain a conviction for possession of methamphetamine with intent to deliver and possession of oxycodone as alleged in counts II and III.

7. Insufficient evidence was introduced at trial to allow the jury to have concluded Ms. Hayes conspired to distribute a controlled

substance or that she possessed a controlled substance with intent to deliver within 1000 feet of a school bus route stop as charged in counts I and II.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Was it ineffective assistance of counsel for Ms. Hayes' trial counsel to fail to investigate the defense that Ms. Hayes had a valid prescription for oxycodone? Assignments of Error 1 and 2.

2. Was it ineffective assistance of counsel for trial counsel to fail to be aware of and present relevant case law regarding the sentencing court's ability to impose concurrent school bus route stop enhancements and failure to argue for concurrent enhancements pursuant to that case law? Assignments of Error 1 and 3.

3. Was it ineffective assistance of counsel for trial counsel to fail to propose a limiting instruction regarding consideration of evidence admitted for the purpose of proving conspiracy as alleged in count I, but where the jury was free to consider the evidence when deliberating the charge of possession of methamphetamine with intent to deliver? Assignments of Error 1 and 4.

4. Where there is insufficient evidence to show that Ms. Hayes had an intent to deliver a controlled substance, a required element of conspiracy, does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3 and United States Constitution,

Fourteenth Amendment? Assignment of Error 5.

5. Did the State fail to prove that Ms. Hayes constructively possessed methamphetamine and oxycodone? Assignment of Error 6.

6. Was the jury was presented with sufficient evidence from which to conclude that Ms. Hayes possessed a controlled substance within 1000 feet of a school bus route stop? Assignment of Error 7.

**C. STATEMENT OF THE CASE**

1. Procedural facts:

Chelsea Hayes was charged in Thurston County Superior Court by amended information with one count of conspiracy to deliver a controlled substance--methamphetamine (Count I); possession of methamphetamine with intent to deliver (Count II); and possession of oxycodone (Count III). Clerk's Papers (CP) 23. The State alleged that Count I took place on May 16, 2016, and Counts II and III occurred on and May 24, 2016. CP 6-7, 23. The State alleged that Counts I and II occurred within 1,000 feet of a school bus route stop. CP 23. RCW 69.50.435(1)(c).

The matter came on for trial on February 13, 14, 15, and 16, 2018, the Honorable John Skinder presiding. 1Report of Proceedings<sup>1</sup> (RP) at 13-200; 2RP at 201-400; 3RP at 404-538.

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<sup>1</sup>The record of proceedings consists of the following transcribed hearings: IRP – April 27, 2017, February 7, 2018, February 12, 2018, and February 13, 2018 (jury trial, day 1); 2RP – February 13, 2018 (jury trial, continuation of day 1), February 14, 2018 (jury trial, day 2), February 15; and 3RP – February 15, 2018, February 16, 2018 (jury trial, day

*a. Defendant's request for new counsel*

On the morning of trial, Ms. Hayes requested appointment of new counsel. 1RP at 21. She stated to the court that she had not gone over discovery with her attorney and that she had emails she wrote to pretrial services in which she stated that showing that she had left fifteen voice messages for in an effort to contact her attorney. 1RP at 21.

The judge stated that Ms. Hayes had previously been appointed counsel and that her present attorney Mr. Foley was appointed as replacement counsel. 1RP at 22. Mr. Foley stated that she had filed a bar complaint against her previous counsel and that he had withdrawn from the case. 1RP at 22. Mr. Foley said that he had discussed motions to suppress, search warrants, and the confidential informant with Ms. Hayes, and that they had exchanged emails. 1RP at 22. He stated that he had called her directly but that her voice mail was full and that could not leave messages for her. 1RP at 22. Ms. Hayes stated that Mr. Foley had not met with her and had not gone over the discovery and other paperwork with her. 1RP at 24.

After hearing from both sides, the court stated that Ms. Hayes' counsel "has explored not only trial issues but pretrial issues" and that he has been working on the case. 1RP at 24. The court denied Ms. Hayes' request for appointment of new counsel. 1RP at 23.

Defense counsel initially reserved opening, and later rested without calling witnesses and made no opening statement. 1RP at 144, 3RP at 468.

*b. Verdict and sentencing:*

Ms. Hayes was found guilty by a jury of conspiracy to deliver a controlled substance--methamphetamine (Count I), unlawful possession of a controlled substance—methamphetamine—with the intent to deliver (Count II), and unlawful possession of a controlled substance--oxycodone (Count III) on February 16, 2018. 3RP at 536. The jury found by special verdict that Counts I and II were committed within 1000 feet of a school bus route stop as designated by a school district. 3RP at 535; CP 129, 130, 131, 132, 133.

At sentencing on March 7, 2018, defense counsel argued that the sentencing enhancements should “merge” and that they are based on the same criminal conduct. 3RP at 556. Based on an offender score of “5,” the Court imposed 12 months and 36 for counts I and II, respectively, and ordered school bus route stop enhancements of 24 months for each count, to be served consecutively. 3RP at 574. The court sentenced Ms. Hayes to 12 months for Count III, for a total of 84 months. 3RP at 574; CP 149-160. The court imposed legal financial obligations including \$500.00 victim assessment, \$200.00 in court costs, \$100.00 felony DNA fee, and \$1000.00 restitution to Thurston County for “buy funds.” 3RP at

577; CP 149-160.

Timely notice of appeal was filed March 7, 2018. CP 143. This appeal follows.

**2. Trial testimony:**

Lacey Police Department Officer Napoleon Parker testified regarding a drug investigation conducted by the Thurston County Narcotics Task Force that resulted in the arrest of John Aguero and subsequent charges filed against Ms. Hayes. 1RP at 150. Erich Readel agreed to cooperate with law enforcement as an informant in exchange for consideration of a pending felony charge. 1RP at 152.

Police began an investigation of Ms. Hayes in early May 2016. 1RP at 156. Officer Parker arranged a “controlled buy” with Mr. Readel on May 16, 2016. 1RP at 163. Exhibits 21 through 26. Police gave Mr. Readel \$1000.00 in prerecorded “buy” money to purchase approximately two ounces of methamphetamine from Ms. Hayes. 1RP at 165, 170. Mr. Readel contacted Ms. Hayes by text to arrange to meet her while wearing a police body wire. 1RP at 165, 171. Officer Parker testified that on May 16, 2016, Mr. Readel texted Ms. Hayes and set up a buy from her at a house located at 7250 14th Avenue Southeast in Lacey, Washington. 1RP at 156, 161. Mr. Readel, who had been arrested for possession of methamphetamine in Thurston County, agreed to engage in three drug buys for the police in exchange for the case not being referred to the prosecutor.

1RP at 153, 2RP at 336, 340, 395. Mr. Readel knew Ms. Hayes from a fishing lake next to her house and he gave her name to police as someone who sold methamphetamine. 2RP at 341.

The controlled buy of May 16th was surveilled by Officer Parker, Captain Johnson, Detective Johnstone, and Detective McIver. 1RP at 171-72.

Officer Parker testified that the Thurston County Narcotics Task Force expected to receive two ounces of methamphetamine from Mr. Readel. 1RP at 165.

Mr. Readel testified that he arranged to buy two ounces of methamphetamine from Ms. Hayes for \$1000.00. 2RP at 345. While under police surveillance, Mr. Readel went on his motor scooter to the house at 7250 14th Avenue Southeast at approximately 4:15 p.m. on May 16, 2016. 1RP at 171, 172, 2RP at 298. While the informant was inside the residence, Officer Parker testified that he and Detective Johnstone were in a vehicle outside the residence, and remained in contact with Mr. Readel via text messages, and Captain Johnson and Detective McIver were in a separate surveillance vehicle. 1RP at 172-73, 174, 2RP at 297-98.

Once inside the house, Mr. Readel testified that he was told by Ms. Hayes they had to wait for someone to bring the drugs. 2RP at 347. While Officer Parker observed the house after Mr. Readel went inside, a silver

BMW drove down the road and parked in the driveway of the house. 1RP at 174, 2RP at 298. Mr. Readel had been inside the house for approximately an hour when the BMW parked in the driveway of the house. 1RP at 174. Officer Parker drove by the house and saw a person he believed was Ms. Hayes outside of the house and getting into the passenger side of the BMW. 1RP at 174.

Sergeant McIver saw Ms. Hayes in the driveway of the house at 7250 14th Avenue Southeast prior to Mr. Readel arriving at the house on his scooter. 2RP at 328. After watching the house for about 40 minutes, Sergeant McIver saw a silver BMW arrive and park in the driveway. 2RP at 329. He saw the car leave ten to fifteen minutes later. 2RP at 330.

After the woman got out of the BMW, the car left the driveway and was followed by Captain Johnson and Sgt. McIver 1RP at 175. The surveillance units followed the BMW to 7522 14th Loop Northeast in Lacey. 2RP at 299-300, 330.

Officer Parker, who was in contact with Mr. Readel in the house at 7250 14<sup>th</sup> Avenue, received a text from Mr. Readel that Ms. Hayes wanted to take her son to basketball practice and that she wanted to take Mr. Readel with her. 1RP at 176. Mr. Readel testified that while in the house, Ms. Hayes told him that “her guy was here” and he gave her the money. 2RP at 348. He stated that she then left the house with the money and was gone for ten to fifteen minutes. 2RP at 349. He stated that after she

returned to the house she had a sandwich bag of what he believed to be methamphetamine, and they went what he called “her” bedroom, but stated that she said that she was having “issues” with her scale and that the scale was not weighing correctly. 2RP at 350. He stated that she attempted to weigh the substance in a McDonalds chicken McNuggets container. 2RP at 351-52. She then stated that she had to take her son to a basketball game and asked her roommate to help her with the scale. 2 RP at 352. Mr. Readel stated that she “worked” on the scale for twenty minutes to half an hour, and that it was “confusing” and “frustrating.” 2RP at 352. Mr. Readel testified that while she was having “issues with the scale,” she asked her roommate for a different scale, and eventually sent Mr. Readel to her car to retrieve another scale. 2RP at 350, 353.

Mr. Readel stated that Ms. Hayes said that she had previously lost an ounce of methamphetamine, that “her guy wants his money” and that she was stressed by this. 2RP at 354. Mr. Readel testified that he wanted to recalibrate the scale by using something with a known weight such as a water bottle so that the scale could be “zeroed out.” 2RP at 359. He went to the pantry to obtain an item of a known weight, and when he returned to the bedroom, Ms. Hayes was gone. 2RP at 359. Mr. Readel remained in the house for another twenty to thirty minutes, and then left after occupants of the house became concerned about “police at the end of the road.” 2RP at 359.

Officer Parker testified that Mr. Readel was texting them that Ms. Hayes was needing to take her son to basketball practice, that he was being pressed to leave the house by two other adults in the home, and he was beginning to feel nervous because of the length of time the controlled buy was taking. 2RP at 176. Officer Parker testified that he instructed Mr. Readel that he needed to remain inside the residence. 2RP at 176.

Officer Parker received a text from Mr. Readel that people in the house were “looking for cops” and that other people in house were driving up and down the road in a van. 1RP at 177. The police surveillance vehicles moved back to other positions and Mr. Readel was told to leave the house because “it was a safety concern.” 1RP at 177. Mr. Readel was in the house for almost three hours. 1RP at 177. He left without obtaining drugs and without the “buy” money. 1RP at 178, 2RP at 359 .

Prior to the attempted controlled buy, during the briefing between law enforcement, Sergeant McIver was shown pictures of people who might be at the 14th Avenue residence. 2RP at 332. One picture was what police described as Ms. Hayes’ boyfriend, Wayne, whom Sergeant McIver testified that he knew very well from prior arrests. 2RP at 333. Sergeant McIver testified that he believed Wayne lived at the 14th Avenue Southeast residence. 2RP at 333. After returning to the house at 14th Avenue Southeast, Sergeant McIver saw a white van driving back and forth near his location about a block and a half from the house. 2RP at 331. Sgt. McIver

notified other units that the van was probably looking for law enforcement and that he was going to leave the position. 2RP at 331. Sgt. McIver stated that one of the people in the white van was Wayne. 2RP at 333, 334.

*i. Search of 7250 14th Avenue Southeast.*

After the attempted controlled buy, police investigation of Ms. Hayes' alleged drug dealing continued through surveillance of the address at 14th Avenue Southeast. 1RP at 178-79. Officer Parker testified that he took all the information that he received from the surveillance and wrote a search warrant affidavit for the 14th Avenue Southeast residence, 14th Loop and the silver BMW. 1RP at 179. Police executed a search warrant at 7250 14th Avenue Southeast on May 24, 2016. 1RP at 182, 2RP at 301.

Officer Parker, Detective McIver, Detective Johnstone, Sergeant Didion, Captain Johnson, Detective Bogart, and Detective Clark were all involved in the search. 1RP at 180. Captain Johnson searched what was designated by police as "bedroom two." 2RP at 301. Police found a small Ziplock bag containing methamphetamine, a digital scale and three and a half grams of methamphetamine in the top drawer of a dresser located in the bedroom. 2RP at 217. Police found in a small black box found on the bed packaging material, and "pay/owe sheets," and digital scales. 1RP at 184, 185, 2RP at 302. Detective Clark testified that he

searched the bedroom labeled “bedroom 2” in the home, where he located a plastic Ziplock bag that had a crystal-type substance from the dresser inside the closet, and a large mirror that had a crystal-type substance on the surface. 3RP at 413, 415, 423. Officer Parker stated that the bedroom contained woman’s clothing, family photos and mail addressed to Ms. Hayes. 2RP at 208. Detective Clark testified that he found mail that was addressed to a Chelsea Parnell, a Little Creek Casino player’s card in the name of Chelsea Hayes, and a notebook that he opined as being indicative of drug transactions. 3RP at 416. Detective Clark further testified that he found mail in “bedroom 2” addressed to Sam Parnell. 3RP at 431.

Officer Johnstone of the Olympia Police Department testified that he found a scale and a single ten milligram oxycodone pill on the top of the dresser in “bedroom 2.” 3RP at 454.

*ii. Search of 7522 14th Loop Northeast.*

The house at 14th Loop was observed by police, which was determined to be owned by John Aguero. 1RP at 179. Police executed a search warrant at the house and BMW on May 24, 2016. 1RP at 179, 181. Police found methamphetamine in the trunk of the car, a digital scale, as well as cash. 1RP at 188, 2RP at 215, 216. Police found Ms. Hayes’ name and number entered in a cell phone found in the car. 1RP at 188. During the search of Mr. Aguero’s BMW, Officer Johnstone found a flip cellphone in the passenger compartment, a loaded .45 caliber handgun

magazine in the driver's map pocket, and 250 grams of methamphetamine along with a digital scale in the trunk of the BMW. 3RP at 458.

Defense counsel objected to testimony regarding evidence found during the search of Mr. Aguero's house and car. 2RP at 306.

The prosecutor told the court that the court in *State v. Aguero* granted the defense motion to suppress evidence obtained because of the search in part by suppressing drugs, drug paraphrenia, and notes and records in house, and denied the motion to suppress evidence of cell phone and money in the house. 2RP at 308. At the time of Ms. Hayes' trial, the issue of whether the plain view exception applied for drugs located in the house and findings and conclusion had not been entered. 2RP at 309.

The trial court reviewed the record of the court's ruling from record from the CrR 3.6 hearing. 2RP at 312-13. The judge in Mr. Aguero's case ruled that there was not probable cause to believe that there were drugs in the house to support the warrant, but denied the defense motion to suppress cash and the contents of a cell phone. 2RP at 313. The court also found there was not probable cause to search the house for ledgers related to drug sales. 2RP at 313. The court directed the parties to parse out what other items in the warrant were sufficiently connected to the money or cellphone. 2RP at 313.

After reviewing the record in *State v. Aguero*, the judge overruled defense counsel's objection to questions regarding the money and

cellphone found during the search of Mr. Agüero's house. 2RP at 313-14.

Officer Parker stated that North Thurston Public Schools notified him that a school bus stop was in front of the house at 14th Avenue Southeast in Lacey. 2RP at 219. Lisa Niendorf, dispatcher from North Thurston Public Schools, stated that in May 2016 a bus stop was located at the house at 7250 14th Avenue Southeast. 2RP at 245. Ms. Niendorf stated that the bus stop was based on "IEP" stop and used by one student. 2RP at 252.

Officer Parker stated that during execution of the search warrant at 7250 14<sup>th</sup> Avenue Southeast on May 24, 2016, a school bus stopped at the driveway of the house and dropped off Ms. Hayes' son. 2RP at 219.

The defense rested without calling witnesses. 3RP at 468, 470.

#### **D. ARGUMENT**

1. **COUNSEL WAS INEFFECTIVE IN FAILING TO INVESTIGATE MS. HAYES' ASSERTION THAT SHE HAD A VALID PRESCRIPTION FOR OXYCODONE, FAILING TO INVESTIGATE A POTENTIAL DEFENSE TO THE SENTENCE ENHANCEMENTS, FAILING TO CITE AND ARGUE RELEVANT CASE LAW REGARDING SENTENCE ENHANCEMENTS, AND FAILING TO REQUEST A LIMITING INSTRUCTION, IN VIOLATION OF MS. HAYES' RIGHT TO A FAIR TRIAL AND SENTENCING**

- a. *Ineffective assistance of counsel*

Every criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). See U.S. Const. amend. VI; Const. art. I, § 22 . a court reviews ineffective assistance of counsel claims de novo. *State v. Jones*, 183 Wn.2d 327, 338-39, 352 P.3d 776 (2015).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. *Strickland*, 466 U.S. at 687; *Thomas*, 109 Wn.2d at 225-26. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).

To establish the first prong of the *Strickland* test, the defendant must show that “counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances.” *Thomas*, 109 Wn.2d at 229-30.

To establish the second prong, the defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case” in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Only a

reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693; *Thomas*, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 226.

Performance is deficient if it falls “below an objective standard of reasonableness based on consideration of all the circumstances.” *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice exists if there is a reasonable probability that “but for counsel's deficient performance, the outcome of the proceedings would have been different.” *State v. Kylo*, 166 Wash.2d 856, 862, 215 P.3d 177 (2009); *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052. The defendant must affirmatively prove prejudice and show more than a “ ‘conceivable effect on the outcome’ ” to prevail. *State v. Crawford*, 159 Wash.2d 86, 99, 147 P.3d 1288 (2006) (quoting *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052). At the same time, a “reasonable probability” is lower than a preponderance standard. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *Jones*, 183 Wash.2d at 339, 352 P.3d 776. Rather, it is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

The court will begin its analysis with a strong presumption that counsel's performance was reasonable. *Grier*, 171 Wn.2d at 33; *Kylo*,

166 Wash.2d at 862, 215 P.3d 177. Performance is not deficient if counsel's conduct can be characterized as legitimate trial strategy or tactics. *Id.* at 863, 215 P.3d 177. To rebut this presumption, the defendant must establish the absence of any "conceivable legitimate tactic explaining counsel's performance." *Id.* (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). If defense counsel's conduct can be considered to be a legitimate trial strategy or tactic, counsel's performance is not deficient. *Grier*, 171 Wn.2d at 33, 246 P.3d 1260.

Defense counsel showed inattention to the case in numerous ways, characterized failure to consistently communicate with Ms. Hayes and remain in contact with her, failure to investigate exculpatory evidence, and failure to request a limiting instruction regarding evidence admitted pursuant to a search of John Agüero's house and car. Counsel's inattention to the case is illustrated by counsel's failure to make an opening statement, failure to return calls and emails by Ms. Hayes, and failure cross examine an officer central to the State's case.<sup>2</sup>

***b. Counsel failed to investigate a valid-prescription defense***

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<sup>2</sup>This point is included only to illustrate counsel's approach to the trial. Appellant recognizes that by itself, defense counsel's decision to waive an opening statement does not constitute deficient performance under the *Strickland* test. *State v. Stockman*, 70 Wash.2d 941, 945, 425 P.2d 898 (1967) ("[I]t would ... be a question of trial strategy when and whether an opening statement should be made.")

Ms. Hayes was charged in Count III with unlawful possession of a controlled Substance (oxycodone) in violation of RCW 69.50.4013(1). CP 23. Under RCW 69.50.4013(1), a person in possession of a controlled substance for which he or she has a prescription is in lawful possession of that substance. RCW 69.50.401 makes the possession of a controlled substance a crime and the State has the burden of proving the defendant possessed the controlled substance. RCW 69.50.4013(1) provides an affirmative defense to a person who lawfully possesses a controlled substance obtained “directly from” or “pursuant to” a valid prescription. under the exception, the defendant has the burden of coming forward with some evidence that the substance was possessed unwittingly or by means of a valid prescription. RCW 69.50.506; *State v. Yokel*, 196 Wash.App. 424, 383 P.3d 619 (2016); *State v. Cleppe*, 96 Wash.2d 373, 381, 635 P.2d 435 (1981), cert. denied, 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982).

At sentencing, Ms. Hayes told the court that she had a prescription for the oxycodone found in the house during execution of the search warrant. At sentencing, Ms. Hayes told the court that she attempted to tell her attorney that she had a valid prescription for oxycodone and had tried to give a copy of the prescription to her attorney

but she did not have a “chance to meet with him until yesterday for the first time about—to go over my case.” 3RP at 558.

Ms. Hayes repeatedly told the court that her second attorney, the attorney who ultimately represented her at trial, did not meet with her and that he did not investigate whether or not Ms. Hayes had a prescription for oxycodone. 3RP at 558. Despite her attorney’s failure to conduct an investigation, Ms. Hayes told the court that she had a prescription for oxycodone.

Counsel for Ms. Hayes failed to investigate a statutory defense to Count 3. Had counsel for Ms. Hayes investigated her claim, he would have become aware that Ms. Hayes sought to assert the defense that she had a prescription for oxycodone, a defense to Count 3.

Investigation of statutory defenses is a basic and fundamental function of defense counsel. It was not objectively reasonable nor was it a legitimate trial strategy for Ms. Hayes’ trial counsel to fail to investigate the statutory defense that Ms. Hayes had a prescription for the pill.

Ms. Hayes told the court about the prescription at sentencing, but without introduction of the evidence at trial, the jury was unaware of the potential defense. The failure of trial counsel to investigate the statutory defense resulted in Ms. Hayes’ defense being reduced to a challenge to

dominion and control of the room in which the single oxycodone pill was found. 3RP at 513-14.

Had Ms. Hayes' attorney investigated the statutory defense, such evidence could have established the affirmative defense at trial. Instead, Ms. Hayes was unable to present a full defense at trial and was convicted of the charge. The deficient performance of trial counsel clearly prejudiced Ms. Hayes in that she was convicted of unlawful possession of oxycodone where she asserted that evidence existed to establish that she had a prescription for the medication.

***c. Counsel was ineffective by not investigating whether a school bus stop was in effect at 7250 14<sup>th</sup> Avenue Southeast on May 16 and May 24, 2016.***

Ms. Hayes received enhanced sentences for imposed pursuant to RCW 69.50.435 which provides for sentence enhancement when a drug-related offense is committed within 1,000 feet of a school bus route stop.

RCW 69.50.401(a) provides a general prohibition against drug dealing. It provides that “[e]xcept as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.” RCW 69.50.435 provides for an enhancement of the penalty imposed for violating RCW 69.50.401(a), if that violation occurred within 1,000 feet of certain

places such as schools or school bus route stops. According to the lead dispatcher for North Thurston Public Schools, a school bus stop was located at Ms. Hayes' house at 7250 14<sup>th</sup> Avenue Southeast in Lacey, Washington on May 16 and May 24, 2016. 2RP at 245.

During allocution, Ms. Hayes stated that the school bus was not located at her house as late as June 3, 2016, and attempted to show documents to the court in support of her position. 3RP at 558.

On June 3<sup>rd</sup> Detective Parker asked the school district for school bus stop maps around my address. I have all the maps from June 3<sup>rd</sup> that he received. I was not on the school bus stop map. On June 14<sup>th</sup> ---and the prosecutor's the one that provided this paper--these papers. On June 14<sup>th</sup> the detective contacted the school district again one more time, and following that day on the 15<sup>th</sup> they sent the map with my bus stop --my house as a bus stop. My house was not a bus stop as of June 3<sup>rd</sup>, and I have all this right here. It came from the prosecutor, my attorney, and I never got to bring it to my attorney's attention except for a little bit of communication I had during court.

3RP at 558-59.

Ms. Hayes attempted to submit the document to the court, stating "[i]f you'd like to see the—I only highlighted the dates on the map. It shows I was not --my house was not a bus stop." 3RP at 561. In conjunction with her statement at allocution, Ms. Hayes repeatedly averred that her attorney failed to communicate with her about the case. When asking that she be appointed new counsel prior to trial, she stated

that she had provided numerous emails but had received no response from her attorney and was not able to meet with him. 1RP at 24. After conviction, she reiterated that counsel had not responded to her information regarding the school bus route stop map, stating that she “highlighted things that were important, and I emailed those to Mr. Foley because he wasn’t going over it with me, hoping that he would read them and see at least the highlighted things including the address and the school bus stop and the prescription, but he didn’t respond.” 3RP at 561.

Trial counsel failed to investigate the potential evidence and failed to investigate the documentation proffered by Ms. Hayes regarding the date the school bus stop was initiated. Trial counsel’s failure to investigate the potential claim is illustrated by counsel’s apparent unwillingness to communicate with Ms. Hayes regarding the case.

The school bus stop was created for Ms. Hayes’ son, who was on an Individualized Educational Program (IEP). Therefore, the temporary or transitory nature of the IEP supports Ms. Hayes’ contention that the bus stop was not in existence in May, 2016. Trial counsel’s failure to investigate and present this evidence constitutes ineffective assistance of counsel.

*d. Counsel was ineffective by not providing authority regarding court's ability to impose concurrent school bus route stop enhancements and arguing the same at sentencing*

Ms. Hayes was convicted of conspiracy to deliver methamphetamine and possession of methamphetamine with intent to deliver. The jury found both offenses were committed within 1,000 feet of a school bus stop, in violation of RCW 69.50.435(1)(c) (school bus stop enhancement). The trial court imposed a 36-month standard-range base sentence for possession with intent to deliver, and 12 months for the conspiracy charge, to run concurrently with each other. It also imposed two 24-month school bus stop enhancements—one for each count—and ran them consecutively to Ms. Hayes' 36-month base sentence and consecutively to each other. The total sentence was 84 months of confinement. RCW 9.94A.533 addresses sentence adjustments, and subsection (6) provides as follows:

An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

In *State v. Conover*, 183 Wn.2d 706, 355 P.3d 1093 (2015) the

Court found school bus route stop sentence enhancements on multiple counts imposed under RCW 9.94A.533(6) required the trial court to run Conover's bus stop enhancements consecutively to the base sentences for each of his three drug delivery counts, but not consecutively to each other. Accordingly, the Court reserved Conover's sentence and remanded for resentencing. *Conover*, 183 Wn.2d at 718.

Here, trial counsel did not argue for imposition of concurrent enhancements based on *Conover*, but instead argued, incorrectly, that the enhancements should “merge,” and that they were the “same criminal conduct.” 3RP at 555. The trial court referred to *Conover*, but the case was not specifically argued by defense counsel, who gave every appearance of being unenlightened regarding the case. Counsel’s failure to argue that *Conover* permitted the enhancements to be served concurrently constituted ineffective assistance of counsel.

Where an attorney is ignorant of a point of law that is fundamental to the case and fails to perform basic research on the point, his conduct is unreasonable. *In re Personal Restraint of Yung–Cheng Tsai*, 183 Wash.2d 91, 102, 351 P.3d 138 (2015). A defense lawyer must thoroughly research a case so as to be able to properly advise his or her client. See *State v. Crawford*, 159 Wash.2d 86, 99, 147 P.3d 1288

(2006) (holding defense counsel's performance was deficient where she knew her client had an extensive prior history and failed to ascertain through investigation that her client was at risk of a third strike and to advise him that, if convicted at trial, he faced a life sentence).

Counsel's failure to fully familiarize himself with the law as it pertained to the enhancements was objectively unreasonable. This record also establishes that counsel's failure to familiarize himself with the law was prejudicial. Under *Strickland*, the defendant “need not show that counsel's deficient conduct more likely than not altered the outcome of the case.” *Strickland*, 466 U.S. at 693. Instead, prejudice is established if there is a reasonable probability that the outcome would be different but for the attorney's conduct. *Id.* A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694. When counsel has failed to familiarize himself with relevant law, the question becomes whether this has caused a “breakdown in the adversary process that renders the result unreliable.” Prejudice is established by determining whether the record shows a certain line of defense was foreclosed due to counsel's ignorance of the law. *See, e.g. State v. Estes*, 193 Wash.App. 479, 372 P.3d 163 (2016). “An attorney's ignorance of a point of law that is fundamental to his case combined

with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland.” *Estes*, 193 Wn. App. at 489 (quoting *In re Pers. Restraint of Tsai*, 183 Wn.2d at 102). Here, defense counsel's failure to investigate sentencing options resulted in prejudice to Ms. Hayes and reversal is merited.

*d. Counsel's failure to propose a limiting instruction for evidence found during search of Aguero's car and house*

In addition to other evidence discovered during the each of Aguero's house, Officer Johnstone testified that 259.8 grams of methamphetamine was found in the trunk of the BMW. 3RP at 460. The officer stated that the amount was “more significant than your average dealer.” 3RP at 461. The jury was free to consider the evidence of possession of large amounts of drugs obtained in the Aguero search, ostensibly admitted to prove conspiracy alleged in Count I, as evidence that Ms. Hayes possessed methamphetamine found during the Hayes search with intent to deliver as alleged in Count II.

An attorney's failure to propose an appropriate jury instruction can constitute ineffective assistance. *State v. Cienfuegos*, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001). An attorney's failure to request a jury instruction that would have aided the defense constitutes deficient

performance. See *Thomas*, 109 Wn.2d at 226-29 (failure to propose voluntary intoxication instruction). Legitimate trial strategy or tactics generally cannot serve as the basis for a claim that the defendant received ineffective assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). Counsel was ineffective by failing to request a limiting instruction regarding the evidence obtained from the search of Mr. Ageruo's car and house and introduced against Ms. Hayes in her case. Defense counsel was deficient for failing to ensure the trial court gave a limiting instruction that would have prevented the jury from considering drugs, money, and other items found in the Aguero search for any purpose other than evidence of the conspiracy alleged in Count I. There was no legitimate reason not to insist on the limiting instruction given the prejudicial nature of this evidence. Allowing the jury to convict Ms. Hayes in Count II of possession with intent to deliver on the basis of items found in the Aguero search extensively damaged Ms. Hayes' defense.

There is no reason to believe the jury did not consider evidence of the large amount of drugs found in the Aguero search when evaluating the elements of possession with intent to deliver in Count II. Without a limiting instruction, the jurors were free to convict Ms. Hayes of

possession with intent to deliver in Count II because of evidence obtained by police that was admitted ostensibly to show the existence of a conspiracy in Count I. Trial counsel's failure to propose a limiting instruction was ineffective, and requires reversal of Ms. Hayes' conviction and corresponding enhancement in Count II.

*f. Trial counsel's performance prejudiced Ms. Hayes' right to a fair trial*

There is no record to demonstrate trial counsel was acting strategically, or exercising a particular trial tactic.

Each among the several listed of trial counsel's errors individually prejudiced Ms. Hayes. Viewed as a whole, counsel's cumulative errors are overwhelming. Trial counsel's mistakes began shortly after he was appointed to represent Ms. Hayes following replacement of her previous attorney and continued through the trial and sentencing. It is sufficiently probable that counsel's errors affected not only the trial outcome but sentencing as well. The nature of most of the errors affected substantial rights of Ms. Hayes. These errors are harmless only if the State can show that the mistakes in no way affected the final outcome of the case. The State cannot meet that burden here.

**2. THE EVIDENCE WAS INSUFFICIENT TO PROVE CONSPIRACY TO DELIVER METHAMPHETAMINE AS ALLEGED IN COUNT I AND TO PROVE VIOLATION OF THE SCHOOL BUS ROUTE STOP ENHANCEMENTS**

The conviction for conspiracy to deliver a controlled substance in Count I must be reversed because the State failed to prove beyond a reasonable doubt the essential elements of conspiracy, specifically an intent that a controlled substance be delivered.

- a. *The State bears the burden to prove every element of the offense beyond a reasonable doubt.*

A challenge to the sufficiency of the evidence may be raised for the first time on appeal as a due process violation. *State v. Hickman*, 135 Wn.2d 97, 954 P. 2d 900 (1998); *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972).

The due process clauses of the federal and state constitutions require the prosecution prove every element of a crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amends. 6, 14; Wash. Const. art. 1, §§ 3, 21, 22. The critical inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the elements of the

crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). Further, when the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the prosecution and interpreted against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

*b. To prove conspiracy to deliver a controlled substance, the State had to prove that Ms. Hayes intended to deliver methamphetamine to the police informant*

To affirm the conviction for conspiracy to deliver a controlled substance, the Court must determine whether a rational trier of fact could have found beyond a reasonable doubt that Mr. Aguero agreed with Ms. Hayes to deliver methamphetamine to the informant, and that Ms. Hayes intended that drugs to be delivered to the informant.

To convict Ms. Hayes of conspiracy to commit possession of a controlled substance with intent to deliver, the State had to prove that (1) the appellant agreed with one or more persons to engage in or cause the performance of conduct constituting the crime of possession of a controlled substance with intent to deliver, (2) the appellant made the agreement with the intent that such conduct be performed, and (3) any one of the persons

involved in the agreement took a substantial step in pursuance of the agreement. RCW 9A.28.040. RCW 9A.28.040(1) provides:

A person is guilty of criminal conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them takes a substantial step in the pursuance of such agreement.

Conspiracy to deliver a controlled substance, unlike conspiracy in general, necessarily requires the involvement of at least three people because the crime of delivery itself necessarily involves two people. *State v. Valdobinos*, 122 Wash.2d 270, 280, 858 P.2d 199 (1993); *State v. Miller*, 131 Wash.2d 78, 91, 929 P.2d 372 (1997).

Here the jury found Ms. Hayes guilty of violating RCW 69.50.407, conspiracy to deliver a controlled substance, which prohibits any person from conspiring to commit an offense under the Uniform Controlled Substances Act. Subsection 401 of the Act prohibits delivery of a controlled substance. RCW 69.50.101(f) defines “delivery” as an actual transfer of a controlled substance from one person to another.

The State also had to prove that Ms. Hayes intended to deliver methamphetamine to the informant to convict her of conspiracy to deliver a controlled substance. “Intent” is defined as action “with the objective or purpose to accomplish a result which constitutes a crime.” RCW 9A.08.010(1)(a). There can be no conviction for conspiracy to deliver a

controlled substance unless there is evidence of delivery or intent to deliver to a third person. *Miller*, 131 Wash.2d at 91. The record in this case does not support a conclusion beyond a reasonable doubt that Ms. Hayes intended to deliver methamphetamine or that methamphetamine was actually delivered to a third person.

Here, there is no evidence of an intent by Ms. Hayes to deliver methamphetamine to Mr. Readel. Instead, the evidence shows that Ms. Hayes' intent was to take the \$1000.00 and not provide methamphetamine to Mr. Readel. Her motive for not wanting to provide methamphetamine to Mr. Readel is that she had "lost an ounce" provided by her supplier and that she was in debt to him. This topic came up several times during Mr. Readel's attempt to buy drugs from Ms. Hayes. After Mr. Aguero's BMW arrived at the house, she took the money from Mr. Readel and then after returning from the driveway with what Mr. Readel stated was a bag of methamphetamine, feigned over a long period of time that the digital scale would not operate correctly. When Mr. Readel went into another room to get something to use to calibrate the scale, Ms. Hayes left with the money. Even viewed in a light most favorable to the State, there is insufficient evidence to believe that Ms. Hayes had an intent to sell drugs to Mr. Readel, a necessary element of the conspiracy allegation.

*c. The State bears the burden to prove every element of the school bus route stop enhancements beyond a reasonable doubt.*

Ms. Hayes was found guilty of conspiracy to deliver methamphetamine and possession with intent to deliver a controlled substance—methamphetamine. The jury found by special verdict that both offenses occurred within 1000 feet of a school bus route stop. Ms. Hayes appeals the jury's verdicts regarding the school bus route stop enhancements and argues that the State failed to prove that the identified school bus route stop in front of the house was actually a school bus route stop based on definitions within the Washington Administrative Code.

As noted above, a court reviews sufficiency of the evidence claims for whether, when viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A sufficiency challenge admits the truth of the State's evidence and all reasonable inferences reasonably drawn therefrom. *Salinas*, 119 Wn.2d at 201. Statutory interpretation is an issue of law that a court reviews *de novo*. *State v. Conover*, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015). The standard of review is the same for enhancements as well as actual elements. See *State v. Clayton*, 84 Wn. App. 318, 320 (1996).

In interpretation of a statute, the court's primary objective is to carry out the legislature's intent. *State v. Young*, 125 Wn.2d 688, 694, 888

P.2d 142 (1995). Legislative intent is determined by looking at the statutory language. *Young*, 125 Wn.2d at 694.

In this cases, the State failed to present sufficient evidence to prove the sentencing enhancement for being within 1,000 feet of a school bus route stop. RCW 69.50.435(1)(c) imposes additional penalties on any person who possesses, delivers, manufactures, or sells a controlled substance “within one thousand feet of a school bus route stop designated by the school district.” The statute provides in relevant part:

Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 [:]

(c) Within one thousand feet of a school bus route stop designated by the school district[.]

RCW 69.50.435(6)(c) defines “school bus route stop” as “a school bus stop as designated by a school district.” RCW 69.55.435(6)(b) defines “school bus” as “a school bus as defined by the superintendent of public instruction by rule.” The plain language defining school bus route stop contained in RCW 69.50.435(6)(c) does not define school bus route stop as a place where a school bus stops, but instead defines it as a school bus stop designated by a school district. The plain language of the statute, however, necessarily includes within that meaning that a school bus stop is not only a stop designed by the superintendent, but that it is a stop used by a “school bus.”

Turning to the Washington Administrative Code, WAC 392–143–010(1) states that the superintendent has defined a “school bus” as “every vehicle with a seating capacity of more than ten persons including the driver *regularly* used to transport students to and from school or in connection with school activities.” WAC 392–143–010(1) (emphasis added). The term “regular” is undefined in the Washington Administrative Code. Webster's Unabridged Dictionary 1624 (Random House 2d ed.1998) defines “regular” as “usual; normal; customary.”

Lisa Niendorf, the lead dispatcher for North Thurston County Schools, testified that there was a school bus route stop at 7250 14<sup>th</sup> Avenue Southeast and that the stop was in existence on May 16 and May 25, 2016 and was specifically for a student on an Individualized Educational Program (IEP). 2RP at 243, 250. She stated that the bus used for the stop is small and can seat up to 21 persons. 2RP at 245, 252. Exhibits 31 and 32. The challenged “bus stop” in this case was for Ms. Hayes’ son, who was on an IEP. An IEP is not permanent in nature and is enacted for students requiring an IEP program at the beginning of each school year. WAC 392-172A-03105(1). An IEP is tailored to a student’s individual educational needs by an IEP team and therefore may not necessarily take place on a regular basis. See WAC 392-172A-03090, WAC 392-172A-03095. Here, the State failed to produce evidence that the IEP bus stop for Ms. Hayes’ son occurred regularly, or

if the bus stopped at her house on an irregular or infrequent basis. Under WAC 392-143-010(1), a “school bus” is a “vehicle . . . regularly used to transport students to and from school or in connection with school activities.” In this case, the State produced no evidence that use of the bus to transport the student to that particular stop was done “regularly” under the terms of the IEP.

*d. Reversal and dismissal is the appropriate remedy.*

The State failed to prove every element of the charges and corresponding enhancements. Accordingly, this Court should reverse Ms. Hayes’ convictions in counts I and II, and dismiss the charges and sentencing enhancements. See *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (remedy for insufficiency of evidence is reversal with no possibility of retrial).

**3. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MS. HAYES OF UNLAWFUL POSSESSION OF METHAMPHETAMINE AND OXYCODONE BECAUSE THE STATE FAILED TO PROVE CONSTRUCTIVE POSSESSION.**

*a. The prosecution bears the burden of proving all essential elements of an offense beyond a reasonable doubt.*

The State has the burden of proving each element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cronin*, 142 Wn.2d 568, 580, 14

P.3d 752 (2000). This allocation of the burden of proof to the prosecutor derives from the guarantees of due process of law contained in article I, section 3 of the Washington Constitution and the 14th Amendment of the federal constitution. *Sandstrom v. Montana*, 442 U.S. 510, 520, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *State v. Acosta*, 101 Wn.2d 612, 615, 683 P.2d 1069 (1984). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the State, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

In a claim of insufficiency, the reviewing court presumes the truth of the State's evidence as well as all inferences that can be reasonably drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *affd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Possession of property can be either actual or constructive. Actual possession occurs when the goods at issue are in the personal custody of the person charged with possession. On the other hand, constructive possession can be shown if the person charged has dominion and control over the goods in question or of the premises in which they are located. *State v. Amezola*, 49 Wash.App. 78, 741 P.2d 1024 (1987). Constructive possession is defined as the exercise of dominion and control over an item. *State v. Callahan*, 77

Wn.2d. 27, 29-30, 459 P.2d 400 (1969). Constructive possession is established by viewing the totality of the circumstances, including proximity to the property and ownership of the premises in which the contraband is found. *State v. Turner*, 103 Wn. App. 515, 523, 13 P.3d 234 (2000); *State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996). The circumstances must provide substantial evidence for the fact finder to reasonably infer the defendant had dominion and control. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). Close proximity alone is never enough to infer constructive possession. *Id.*

Although exclusive control is not a prerequisite to establishing constructive possession, mere proximity is insufficient to show dominion and control. Temporary residence, personal possessions on the premises, or knowledge of the presence of the drug, without more, are also insufficient. *State v. Hystad*, 36 Wash.App. 42, 671 P.2d 793 (1983). Whether an individual has dominion and control over a controlled substance is determined by considering the various indicia of dominion and control and their cumulative effect—that is, the totality of the situation. *State v. Partin*, 88 Wash.2d 899, 567 P.2d 1136 (1977) overruled on other grounds *State v. Lyons*, 174 Wn.2d 354, 275 P.3d 314 (2012).

*b. In order to prove that Ms. Hayes was guilty of unlawful possession of methamphetamine with intent to deliver and oxycodone, the prosecution was required to show constructive possession.*

In establishing dominion and control over the premises, the totality of the circumstances must be considered. No single factor is dispositive. *State v. Collins*, 76 Wash.App. 496, 501, 886 P.2d 243 (1995). Evidence of temporary residence or the mere presence of personal possessions on the premises is not enough. *Partin*, 88 Wash.2d at 906, 567 P.2d 1136; *Collins*, 76 Wash.App. at 501, 886 P.2d 243. In *Partin*, a finding of occupancy was based on photographs and articles featuring the defendant, a payment book for the purchase of the premises with Partin's paycheck stubs inside, three letters addressed to him, and his unemployment documents. Partin gave out the address as his own and had acted as if he owned the place on a previous police visit. *Partin*, 88 Wash.2d at 907–08. The phone rang repeatedly with callers asking for Partin. *Id.* at 907.

In contrast, in *Callahan, supra*, two books, two guns and a broken scale belonging to the defendant, plus evidence the defendant had been staying on the premises for two or three days was not enough to support dominion and control. Even evidence that a person received some mail at a residence and lived there off and on was not sufficient to show constructive possession. *State v. Hagen*, 55 Wash.App. 494, 500, 781 P.2d 892 (1989). Some evidence of participation in paying rent is generally required. *Callahan*, 77 Wash.2d at 31. “The single fact that he had personal possessions, not of the clothing or personal toilet article type, on the premises is insufficient” to support a conclusion of dominion and control. *Id.*

In *State v. Spruell*, 57 Wn. App. 383, 788 P.2d 21 (1990), the defendant was arrested in the kitchen of a home in which officers found cocaine and marijuana, along with paraphernalia associated with drug manufacturing. From outside the home, they also heard what sounded like a plate hitting the back door from inside the home. Once inside, they found cocaine along the door and doorjamb and a plate on the floor located within a few feet of the door. The defendant's fingerprint was on that plate. *Spruell*, 57 Wn. App. at 384-85. Still, the evidence - which suggested at least temporary control over the drugs - was not sufficiently substantial to support a finding of constructive possession. *Id.* at 387-89.

During a search of what was designated as "bedroom 2" at 7250 14th Avenue Southeast, police found in a dresser three and half grams of methamphetamine in a Ziplock bag, operable digital scales in a dresser drawer, an oxycodone pill on top of the a dresser, and a notebook containing names and dollar amounts entered in it found between a bed and wall in the room. 2RP at 217, 3RP at 416-17. Police found a piece of mail from Washington Department of Social and Health Services addressed to Chelsea Parnell at the address of the house and a Little Creek Casino player's card in the name Chelsea Hayes. 3RP at 418, 426. Another piece of mail was addressed to Chelsea Parnell. Police also noted the name "Chelsea" written on the dresser top. 3RP at 425. Exhibit 37. Police found a Verizon bill addressed to Sam Parnell at 7250 14<sup>th</sup> Avenue Southeast on top of the dresser

in “bedroom 2.” 3RP at 432.

While dominion and control over the contraband may establish constructive possession, without such dominion and control over the contraband constructive possession requires dominion and control over the room, space, or area where police find contraband. *State v. Alvarez*, 105 Wn. App. 215, 19 P.3d 485 (2001). Here, the evidence supports a finding that Ms. Hayes occupied the house, but does not support a contention that she had exclusive control over bedroom two or its contents. In *Alvarez*, this Court reversed the conviction for unlawful possession of a handgun discovered in a back bedroom closet during a search of a teenage hangout. *Alvarez*, 105 Wn. App. at 217-218, 223. The Court held that even though the police found Alvarez's clothes, savings deposit books, book bag and pictures inside the bedroom door, that evidence did “not meet the threshold requirement for constructive possession.” *Alvarez*, 105 Wn. app. at 217.

In this case there was less evidence of constructive possession than in *Callahan* and *Spruell*. Those cases are most analogous on the issue of dominion and control over the contraband. In each of those cases, the defendant was either next to or had admitted handling the contraband which the courts held did not establish constructive possession. In Ms. Hayes' case there were no admission of handling or being near the contraband nor was she even in the house at the time of the execution of the search warrant. There were no fingerprints, no admissions of passing control. There was

proof that even if she occupied “bedroom two,” she did not have exclusive control over the room.

*Alvarez* is also analogous on the issue of dominion and control over the premises. Here, Ms. Hayes was not the sole occupant of the house; the evidence shows several other adults were present in the house at the time of the attempted drug buy on May 16. The evidence does not show that she excluded others from “bedroom 2” and mail to another person shows indicia of other persons having access to “bedroom 2.” Following *Alvarez*, the evidence here cannot establish dominion and control over the premises in which the drugs were found

For this reason, Counts II and III should be reversed and the matter remanded for dismissal with prejudice.

**E. CONCLUSION**

For the foregoing reasons, Ms. Hayes respectfully requests this Court reverse her convictions and remand for a new trial, or alternatively, remand the convictions and order the charges be dismissed with prejudice.

DATED: November 2, 2018.

Respectfully submitted,  
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835  
[ptiller@tillerlaw.com](mailto:ptiller@tillerlaw.com)  
Of Attorneys for Chelsea Hayes

## CERTIFICATE OF SERVICE

The undersigned certifies that on November 2, 2018, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Joseph James Anthony Jackson Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

Joseph James Anthony Jackson  
Thurston County Prosecutor's Office  
2000 Lakeridge Dr. SW Bldg 2  
Olympia, WA 98502-6045  
[jacksoj@co.thurston.wa.us](mailto:jacksoj@co.thurston.wa.us)

Mr. Derek M. Byrne  
Clerk of the Court  
Court of Appeals  
950 Broadway, Ste.300  
Tacoma, WA 98402-4454

Ms. Chelsea Hayes  
DOC #364278  
Washington Corrections Center for  
Women  
9601 Bujacich Rd. NW  
Gig Harbor, WA 98332-8300  
**LEGAL MAIL/SPEICAL MAIL**

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on November 2, 2018.



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PETER B. TILLER

**THE TILLER LAW FIRM**

**November 02, 2018 - 4:54 PM**

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**Appellate Court Case Title:** State of Washington, Respondent v. Chelsea K. Hayes, Appellant  
**Superior Court Case Number:** 16-1-01652-2

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