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Division II  
State of Washington  
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NO. 52244-6-II

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

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STATE OF WASHINGTON,

Respondent,

v.

TAMMY BRICK

Appellant.

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

The Honorable Joely A. O'Rourke, Judge

BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. Appellant Tammy Brick 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. The State presented insufficient evidence to convict Ms. Brick of possession of a controlled substance, in that the prosecutor failed to prove that Ms. Brick had constructive possession of a syringe containing methamphetamine.

3. The trial court erred by entering Finding of Fact 10:

The Court finds that the defendant was in constructive possession of the syringe containing methamphetamine.

Clerk's Papers (CP) 43.

4. The trial court erred by entering Conclusion of Law 2 that the State proved beyond a reasonable doubt that Ms. Brick was in constructive possession of the syringe containing methamphetamine. CP 44.

5. The discretionary legal financial obligations imposed at sentencing should be stricken under the Supreme Court's decision in *State v. Ramirez*.<sup>1</sup>

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<sup>1</sup>191 Wn.2d 732, 426 P.3d 714 (2018).

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

1. Where defense counsel conceded the only contested element of the only charged offense, did counsel fail to subject the prosecution's case to meaningful adversarial testing and was Ms. Brick denied her right to effective assistance of counsel requiring reversal? Assignment of Error 1.

2. Did trial counsel provide prejudicially ineffective assistance by conceding the issue of constructive possession of a syringe containing methamphetamine? Assignment of Error 1.

3. To prove constructive possession, the State must prove beyond a reasonable doubt that the defendant exercised dominion and control over an item. Must Ms. Brick's conviction for possession of methamphetamine be reversed and dismissed where the State failed to prove beyond a reasonable doubt that she exercised dominion and control over the syringe seized in this case? Assignments of Error 2, 3, and 4.

4. The sentencing court found that Ms. Brick is indigent. Under the state Supreme Court's decision in *Ramirez*, should the discretionary legal financial obligations, including the \$100 DNA fee, be reversed? Assignment Error 5.

**C. STATEMENT OF THE CASE**

1. Procedural facts:

Tammy Brick was charged by information filed on January 2, 2018 in Lewis County Superior Court with one count of possession of

methamphetamine, contrary to RCW 69.50.4013. Clerk's Papers (CP) 1-2.

Ms. Brick waived jury trial on April 26, 2018, and the case came on for bench trial on April 30, 2018, the Honorable Joely A. O'Rourke presiding. Report of Proceedings<sup>2</sup> (RP) (4/30/18) at 1-81.

During omnibus hearing Ms. Brick's counsel asserted an unwitting possession defense. RP (3/8/18) at 8; CP 19-20.

*a. Arguments of counsel:*

During closing argument, the State asserted that that Ms. Brick constructively possessed methamphetamine. RP (4/30/18) at 70, 72. The prosecutor acknowledged that Ms. Brick did not have actual possession of the syringe, but argued she had constructive possession because she had dominion and control over the premises. RP (4/30/18) at 70. The prosecutor argued that the unwitting possession defense should not be accepted by the court

because it's her place, and she can exclude others from it. She keeps losing her keys, but she has to have friends help her in, which means the place can be locked, and it can exclude others, and this was her home. It's the place where she resided. She lived there for a reason, and that is to help the neighbor. So you have a loose landlord-tenant act, all of which goes to show that constructive possession of this, everything inside of here, including that syringe, belonged to Ms. Brick.

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<sup>2</sup>The record of proceedings consists of the following transcribed volumes: RP – January 30, 2018, February 8, 2018, March 8, 2018, and July 26, 2018; RP – April 26, 2018; RP – April 30, 2018 (non-jury trial); May 7, 2018, June 18, 2018 (entry of findings of fact and conclusions of law); June 21, 2018; and July 11, 2018 (sentencing).

RP (4/30/18) at 72.

The prosecutor continued his argument by stating:

[s]o this is a constructive possession case. This was her home. She could exclude other people from it.

RP (4/30/18) at 73.

Defense counsel argued that the evidence showed that someone else had been in the house to discharge the fire extinguisher, “[c]learly, somebody had been in the residence and sprayed fire extinguisher obviously.” RP (4/30/18) at 75. Counsel argued that Ms. Brick knew who entered the house and discharged the fire extinguisher and who put nails in the driveway. RP (4/30/18) at 75. Defense counsel did not contest the element of constructive possession, and essentially conceded that Ms. Brick client had dominion and control. Defense counsel argued the only issue was to prove “that she did not know that needle was there.”

RP (4/30/18) at 76. Defense counsel argued:

If Tammy had had a loaded hypodermic needle right above her bed, would she really have gone and called law enforcement and invited them into her home to investigate? I think it just backs her up even more. She wouldn’t have done that if she knew that she was going to be found in possession of a needle. I think it just proves beyond a preponderance that she did not know that needle was there.

RP (4/30/18) at 76.

By failing to argue that she did not have exclusive control over who entered the house, defense counsel conceded that she had constructive possession of the syringe.

***b. Verdict and sentencing:***

The court found Ms. Brick guilty of possession of methamphetamine as charged. RP (4/30/18) at 78-80. During oral ruling, the trial court stated:

The element that's left is possession, and as Mr. Meagher pointed out, this is a constructive possession case with an affirmative defense of unwitting possession, a defense which requires the defense to prove by a preponderance of the evidence that either she didn't know that she possessed it or she didn't know what the substance was. So in looking at the evidence in regards to that element, first, the evidence---there was evidence that the defendant lived in the home where the meth was discovered. Mr. Chrisman testified that they had an agreement and that she was living there. It was discovered in her bedroom. She said that was her bedroom. She had belongings in that room.

Deputy Rodgers described defendant on the day in question as being under the influence of a stimulant based on his training and experience. This was corroborated by defendant's own testimony that she that she used meth that day and admitted that she was a meth user. The fact that both defendant and Mr. Chrisman discovered loaded needles in the house but then hid this from law enforcement puts their credibility in serious question. Actually, concealing evidence is a crime. It's a gross misdemeanor, so this puts both of their credibility in serious question for the court.

For these reasons I find that the state has met its burden that the defendant possessed meth and that the defense has not met its burden in regards to unwitting possession. I find the defendant guilty of possession of methamphetamine

beyond a reasonable doubt.

RP (4/30/18) at 79-80.

Findings of fact and conclusions of law were entered June 18, 2018. CP 42-44. The court found that Ms. Brick was in constructive possession of the syringe containing methamphetamine, and that the syringe was found by the deputy in plain view. CP 43 (Findings of Fact 4, 10). The court concluded that the State proved beyond a reasonable doubt all the elements of possession of controlled substance – methamphetamine. CP 44 (Conclusion of Law 2) The court also concluded that the defense proved failed to meet its burden to prove by a preponderance of the evidence that the constructive possession was unwitting. CP 44 (Conclusion of Law 3).

Based on an offender score of “2,” the court sentenced Ms. Brick to 30 days followed by 12 months of community custody. RP at 97; CP 52, 52, 53. The court imposed legal financial obligations including \$500.00 crime victim penalty assessment, \$100.00 lab fee, and \$100.00 felony DNA fee. RP at 98; CP 54.

Timely notice of appeal was filed July 19, 2018. CP 59-68. This appeal follows.

## **2. Trial testimony:**

Police were dispatched to a residence located at 1381 State Route 6 in Lewis County, Washington on November 5, 2017, following a report

that someone had broken into the house and sprayed fire retardant inside the house. RP (4/30/18) at 11. Lewis County Deputy Sheriff Dustin Rodgers was advised that Tammy Brick, the reporting party, was waiting at a gas station down the road from the house. RP (4/30/18) at 11. Deputy Rodgers and another deputy contacted Ms. Brick, who was waiting with Dennis Chrisman. RP (4/30/18) at 11. They told police that earlier that day Mr. Chrisman and Ms. Brick went to Vancouver to pick up Jessica Booth, and after returning they discovered that someone had entered the house occupied by Ms. Brick and sprayed a fire extinguisher inside. RP (4/30/18) at 12, 35.

Deputy Rodgers testified that when he contacted her, Mr. Brick was “speaking in an accelerated or hyper state” and that she appeared to have been up for a long time without sleep and that “she appeared to be under the influence of a stimulant.” RP (4/30/18) at 12-13.

At the house, Deputy Rodgers looked for footprints near the back door and then went into the house with Ms. Brick. RP (4/30/18) at 15. Inside the house, Deputy Rodgers saw fire retardant on the living room floor and also in the back bedroom. RP (4/30/18) at 15-16. When he entered the house, Deputy Rodgers saw that Ms. Booth was in the process of cleaning up the contents of the fire extinguisher. RP (4/30/18) at 17.

Deputy Rodgers did not see signs of forced entry into the house. The dead bolt to the back door—which Ms. Brick told him was the point of

entry—was intact and undamaged. RP (4/30/18) at 18.

Deputy Rodgers stated that he went into the room described as Ms. Brick's bedroom and saw a hypodermic needle in an open cabinet located above the bed. RP (4/30/18) at 22. He stated that the syringe was in plain view and the cabinet door was open. RP (4/30/18) at 26. Fire retardant was sprayed on the cabinet shelves and covered the top of the syringe. RP (4/30/18) at 26.

Mr. Chrisman stated that he went to Vancouver earlier that day to pick up Ms. Booth and drove her back to the house. RP (4/30/18) at 43. He stated that he went to his house and then was told by Ms. Brick that the house was vandalized, and he went over to inspect the house. RP (4/30/18) at 43. Mr. Chrisman called 911 and also notified police that nails had been thrown on the driveway of the house. RP (4/30/18) at 44.

When asked her about the burglary by Deputy Rodgers, Ms. Brick told him that she thought her ex-boyfriend Bill Gallagher had gone into the house when she was gone and discharged the fire extinguisher, RP (4/30/18) at 23, 35. She told the deputy that there was a history of acts of vandalism such as throwing paint and roofing nails in the driveway. RP (4/30/18) at 23, 35. Deputy Rodgers stated that there were roofing nails in the driveway and that his vehicle had run over several of them when he arrived at the house to investigate. RP (4/30/18) at 36.

Ms. Brick testified that she moved into the house in October 2017.

RP (4/30/18) at 52. After returning to the house from Vancouver with Jessica Booth and Mr. Chrisman, she went into the house and then went to get cat food and when she went back into the house, she saw a needle that she said was not there when she first went into the house “one minute before.” RP (4/30/18) at 53. She stated that she realized that during the brief time that she went to get cat food that “somebody had come in and fire extinguished the house,” and that she was “kind of scared because obviously somebody was still around the house.” RP (4/30/18) at 53. She stated that a day before they went to Vancouver and someone had entered the house and “fire extinguished the room,” and that when they returned from Vancouver on November 5, the room had been vandalized a second time and that the living room was completely covered in fire extinguisher dust. RP (4/30/18) at 53. She stated that she believed that it was Bill Gallagher. RP (4/30/18) at 65.

Mr. Chrisman stated that Ms. Brick had lived in the house since October 2017. RP (4/30/18) at 41. He stated that another tenant, Kim Rice, had previously lived there who “came and went as she pleased pretty much.” RP (4/30/18) at 41. Mr. Chrisman stated that Ms. Brick was given a key but had lost it and that house “is never very secure at all” and that “[y]ou open the door and walk right in.” RP (4/30/18) at 42. He stated that another person who stayed on the property also had a key to the house. RP (4/30/18) at 42.

Mr. Chrisman stated that after law enforcement arrived at the house, he found two syringes on a counter in the house and “put them in my pocket and got rid of them while they had her in a different area.” RP (4/30/18) at 44-45, 48.

Ms. Brick told the deputy that she had a roommate but that she had moved out two weeks earlier. RP (4/30/18) at 38. When the deputy asked Ms. Brick about the syringe, she told him that it belonged to her former roommate. RP (4/30/18) at 24. He stated that Ms. Brick initially told him that she lived there and slept in there. RP (4/30/18) at 24. When asked about her drug use, Ms. Brick told him that she had used drugs earlier that day, and also told him that the syringe did not belong to her. RP (4/30/18) at 24-25. She denied that the syringe in the cabinet above the bed was there when she left the house to go to Vancouver. RP (4/30/18) at 56. She acknowledged that she had used methamphetamine when she spoke with the deputy, but denied using drugs intravenously. RP (4/30/18) at 56 57.

Mr. Chrisman testified that he has known Ms. Brick for approximately ten years and had seen Ms. Brick use marijuana but had not witnessed her using drugs intravenously. RP (4/30/18) at 45. He stated that there were problems with Mr. Gallagher “almost daily” and that he did not report the previous acts of vandalism to the police. RP (4/30/18) at 47.

The syringe contained a brown liquid which tested positive for the

presence of methamphetamine following testing by the Washington State Patrol Crime Lab. RP (4/30/18) at 30, 32, 33.

**D. ARGUMENT**

**1. MS. BRICK RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HER ATTORNEY CONCEDED THE ELEMENT OF CONSTRUCTIVE POSSESSION**

*a. Counsel was ineffective under both prongs of Strickland*

Defense counsel was ineffective when he conceded the only contested element—Ms. Brick’s constructive possession of the syringe.

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; *Kyllo*, 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.

Counsel’s concession that the State proved everything but Ms. Brick’s knowledge of the methamphetamine amounted to deficient performance in this case. Deficient performance “requires showing that

counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Grier*, 171 Wn.2d 17, 33-34, quoting, *Strickland*, 466 U.S. at 687. This standard was met here, when counsel conceded the only contested element of the only charged crime.

In a prosecution for unlawful possession under RCW 69.50.4013 the State must establish two elements: the nature of the substance and the fact of possession by the defendant. *State v. Cleppe*, 96 Wash.2d 373, 378, 635 P.2d 435 (1981), cert. denied, 456 U.S. 1006, 102 S.Ct. 2296, 73 L.Ed.2d 1300 (1982); see *State v. Morris*, 70 Wash.2d 27, 34, 422 P.2d 27 (1966) (the State's burden is to prove possession of a narcotic drug beyond a reasonable doubt).

The State may establish that possession is either actual or constructive. *State v. Walcott*, 72 Wash.2d 959, 968, 435 P.2d 994 (1967), cert. denied, 393 U.S. 890, 89 S.Ct. 211, 21 L.Ed.2d 169 (1968). “Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods.” *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). To

meet its burden on the element of possession the State must establish “actual control, not a passing control which is only a momentary handling”. *Callahan*, 77 Wn.2d at 29. The State is not required to prove either knowledge or intent to possess, nor knowledge as to the nature of the substance in a charge of simple possession. *Cleppe*, 96 Wash.2d at 380, 635 P.2d 435. See, e.g., *Walcott*, 72 Wash.2d at 968 (defendant claimed error in failure to give instruction that State must prove that he knew existence of drugs), cert. denied, 393 U.S. 890, 89 S.Ct. 211, 21 L.Ed.2d 169 (1968).

Once the State establishes prima facie evidence of possession, the defendant may, nevertheless, affirmatively assert that his possession of the drug was “unwitting, or authorized by law, or acquired by lawful means in a lawful manner, or was otherwise excusable under the statute”. *Morris*, 70 Wash.2d at 34. The defense of “unwitting” possession may be supported by a showing that the defendant did not know he or she was in possession of the controlled substance. *Cleppe*, 96 Wash.2d at 381, 635 P.2d 435. See, e.g., *State v. Bailey*, 41 Wash.App. 724, 728, 706 P.2d 229 (1985) (trial court properly instructed jury that possession not unlawful if defendant did not know drug was in his or her possession). This affirmative defense ameliorates the harshness of a strict liability

crime. *State v. Bradshaw*, 152 Wash.2d 528, 538, 98 P.3d 1190 (2004). Unwitting possession must be proved by a preponderance of the evidence. *State v. Balzer*, 91 Wash.App. 44, 67, 954 P.2d 931 (1998).

To establish Ms. Brick's possession of the syringe, the State was required to prove either actual or constructive possession. The State had not proven actual possession. Instead, it argued the facts proved constructive possession through dominion and control. RP (4/30/18) at 70, 72. Defense counsel's concession relieved the State of its burden of proof and needlessly assumed the requirement of proving unwitting possession by a preponderance of the evidence.

Defense counsel spent very little time arguing that Ms. Brick was unaware of the syringe. RP (4/30/18) at 75-76. Counsel merely argued the issue of witness credibility and that if Ms. Brick had been aware of the syringe, why did she call law enforcement in order to investigate the vandalism inside the house. RP (4/30/18) at 76.

Defense counsel did not present any evidence other than Ms. Brick's testimony that the needle was not in the cabinet when she left to go to Vancouver. RP (4/30/18) at 56. Counsel could have presented additional testimony showing who else other than Ms. Brick had access to the house. Instead, counsel merely argued that calling the police showed

Ms. Brick's credibility. RP (4/30/18) at 76.

The evidence showed very little indicia of possession or knowledge of the syringe, and of equal importance, of her ability to exclude others from the house. RP (4/30/18) at 41. Mr. Chrisman testified that Ms. Brick moved into the house in October, 2017. RP (4/30/18) at 41. When asked if she was at the house a month before the incident on November 6, he stated that there was "also another tenant in there at that same time," and that the tenant---Kim Rice---had access to the house as well as Ms. Brick. RP (4/30/18) at 41. Mr. Chrisman testified that Ms. Rice "didn't really move out, but she didn't really live there[,]'" and that "she came and went as she pleased pretty much." RP (4/30/18) at 41. Mr. Chrisman also stated that the house was "never very secure at all" and that:

[I]ocking the door was really not an option, because I had a key, then I believe that the guy in the trailer that stayed on the property also had a key. I think I did give him a key, but I forgot to mention that to the officer when he was interviewing me. Like I said, her key had been lost and the place had never really been secured. You open the door and walk right in.

RP (4/30/18) at 42.

Thus, defense counsel had a viable argument that Ms. Brick did not have the ability to exclude others from entry into the house in

contradiction to the State's assertion of constructive possession.

*b. Counsel's deficient performance was prejudicial.*

Turning to the second Strickland prong, the deficient performance prejudiced Ms. Brick. The scant evidence raised a reasonable doubt that Ms. Brick controlled who was present in the house and whether she had the ability to exclude others. The evidence shows several people had access to the house, including Ms. Kim, a male tenant who lived in a trailer on the property, and allegedly Ms. Gallagher. Therefore, the source of the syringe could have been any of those persons, rather than Ms. Brick. Therefore, there is a probability that but for counsel's error the result of the trial might have been different.

By conceding the element of constructive possession, defense counsel failed to hold the State to its heavy burden of proof and denied Ms. Brick her right to effective representation, requiring reversal.

**2. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT MS. BRICK OF UNLAWFUL POSSESSION OF METHAMPHETAMINE 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).

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).

As noted in Section 1 of this brief, 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. Brick was guilty of unlawful possession of methamphetamine, 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 *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.

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. Brick occupied the house, but does not support a contention that she had exclusive control over the house or its contents. In *Alvarez*, Division Three 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*. *Callahan* and *Spruell* are most analogous on the issue of dominion and control over the contraband. In 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. Brick's case, however, there were no admissions of handling or being near the contraband. RP (4/30/18) at 57. There were no fingerprints and no admissions of passing control. Last, there was evidence that Ms. Brick did not have exclusive control over the house. RP (4/30/18) at 41-42, 63. *Alvarez*, supra, is most analogous on the issue of dominion and control over the premises. In *Alvarez* and in Ms. Brick's case the defendants were at most

were transient occupants. As in *Alvarez*, there was indicia of occupancy because Alvarez occupied the premises at the time of the search warrant, yet the Court held the evidence failed to establish dominion and control over the premises. Here, Ms. Brick occupied the house for approximately a month before the incident in November, 2017, but did not have the ability to exclude others from the premises. Following *Alvarez*, the evidence here cannot establish dominion and control over the premises. While it is possible that Ms. Brick knew of the contraband, it is also possible that someone else placed the contraband in the cabinet. Regardless of the possibilities, the State was required to prove beyond a reasonable doubt that Ms. Brick possessed the contraband. In this case, it failed to meet that burden. For this reason, the conviction should be reversed and the matter remanded for dismissal with prejudice.

**3. THIS COURT SHOULD REVERSE ALL DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS, INCLUDING THE \$100 DNA FEE, FOLLOWING *STATE V. RAMIREZ***

Following inquiry by the court, the record shows that Ms. Brick is unemployed and receives food stamps. RP (4/30/18) at 97-98. Accordingly, the sentencing court found that she is indigent. RP (4/30/18) at 98. The court inquired into Ms. Brick's receipt of government assistance, and then made the following on-the-record assessment of Ms. Brick's ability to pay discretionary LFOs:

Given that you are not employed, you're currently on food stamps, you are indigent under the statute, so I will waive the \$2,000 VUCSA fine, the \$1400 attorney fee, and the \$200 filing fee. The other fines, fees, and assessments are mandatory. That's the \$500 victim assessment, the \$100 lab fee, and the \$100 DNA fee.

RP (4/30/18) at 98.

In *State v. Ramirez*, an appellant challenged discretionary LFOs, arguing the trial court had not engaged in an appropriate inquiry regarding his ability to pay under *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). *Rameriz*, 191 Wn.2d 732, 742, 426 P.3d 714 (2018). *Ramirez* noted that the financial statement section of a motion for indigency asks defendants questions relating to five categories: (1) employment history, (2) income, (3) assets and other financial resources, (4) monthly living expenses, and (5) other debts. *Id.* at 744. The court held that “[t]o satisfy *Blazina* and RCW 10.01.160(3)’s mandate that the State cannot collect costs from defendants who are unable to pay, the record must reflect that the trial court inquired into all five of these categories before deciding to impose discretionary costs.” *Id.* The court also held that de novo review applies to an alleged failure by the trial court to make an adequate inquiry under *Blazina*. *Id.* at 742.

The legislature recently amended RCW 43.43.7541 to direct the DNA fee not be imposed upon an individual who had previously provided a DNA sample. Under RCW 43.43.754(1)(a), a DNA sample is collected whenever an individual is convicted of a felony. Ms. Brick has felony

convictions from 2013 and 2006. CP 51. Thus, her DNA would previously have been collected. See former RCW 43.43.754 (1999) (requiring collection of DNA for adult and juvenile felonies). Therefore, pursuant to the statutory directive and Ms. Brick's criminal history, she has already provided a DNA sample.

Under *Ramirez*, the DNA fee must be considered a discretionary LFO, which may not be imposed on an indigent defendant. *Ramirez*, at 721-22. In accordance with the amendment to RCW 43.43.7541 and *Ramirez*, this Court should reverse the imposition of LFOs, including the DNA fee, and remand to the trial court for individualized inquiry into her ability to pay and to impose LFOs consistent with the recent amendments and holding in *Ramirez*.

**E. CONCLUSION**

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

DATED: January 7, 2019.

Respectfully submitted,  
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on January 7, 2019, that this Appellant's 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 Sara Beigh Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

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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 January 7, 2019.



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