

FILED
Court of Appeals
Division II
State of Washington
3/27/2019 1:21 PM
No. 52244-6-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TAMMY LEE BRICK,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

TABLE OF CONTENTS

TABLE OF AUTHORITES ii

I. ISSUES.....1

II. STATEMENT OF THE CASE1

III. ARGUMENT5

 A. BRICK RECEIVED EFFECTIVE ASSISTANCE FROM
 HER ATTORNEY THROUGHOUT THE TRIAL
 PROCEEDINGS5

 1. Standard Of Review.....6

 2. Brick’s Attorney Was Not Ineffective During His
 Representation Of Brick Throughout The Bench
 Trial.....6

 B. THE STATE PRESENTED SUFFICIENT EVIDENCE
 TO SUSTAIN THE TRIAL COURT’S FINDING THAT
 BRICK COMMITTED THE CRIME, POSSESSION OF
 A CONTROLLED SUBSTANCE –
 METHAMPHETAMINE.....13

 1. Standard Of Review.....14

 2. The Trial Court’s Conclusion That Brick
 Constructively Possessed Methamphetamine Is
 Supported By Substantial Evidence14

 C. THE RECORD SUPPORTS BRICK’S ASSERTION SHE
 IS INDIGENT PER SE, THEREFORE, THE STATE
 CONCEDES THE LEGAL FINANCIAL OBLIGATIONS
 WERE IMPPROPERLY IMPOSED.....23

IV. CONCLUSION.....26

TABLE OF AUTHORITIES

Washington Cases

<i>Sate v. Alvarez</i> , 105 Wn. App. 215, 19 P.3d 485 (2001)	17, 18, 19, 20, 21, 22
<i>State v. Callahan</i> , 77 Wn.2d 27, 459 P.2d 400 (1969)	9, 16, 17, 18, 21, 22
<i>State v. Colquitt</i> , 133 Wn. App. 789, 137 P.3d 893 (2006)	14
<i>State v. Cote</i> , 123 Wn. App. 546, 96 P.3d 410 (2004).....	9, 16, 22
<i>State v. Davis</i> , 182 Wn.2d 222, 340 P.3d 820 (2014).....	9, 10, 16
<i>State v. Delmarter</i> , 94 Wn.2d 634, 618 P.2d 99 (1980)	15
<i>State v. Goodman</i> , 150 Wn.2d 774, 83 P.2d 410 (2004) ...	14-15, 21
<i>State v. Grier</i> , 171 Wn.2d 17, 246 P.3d 1260 (2011).....	8
<i>State v. Horton</i> , 116 Wn. App. 909, 68 P.3d 1145 (2003).....	7
<i>State v. Lohr</i> , 164 Wn. App. 414, 263 P.3d 1287 (2011)	14
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	6
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977)	10
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	6, 7
<i>State v. Smith</i> , 185 Wn. App. 945, 344 P.3d 1244 (2015)	14, 15
<i>State v. Spruell</i> , 57 Wn. App. 383, 788 P.2d 21 (1990)	17, 18, 21, 22
<i>State v. Tadeo-Mares</i> , 86 Wn. App. 813, 939 P.2d 220 (1997)	10
<i>State v. Thomas</i> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	15

Federal Cases

In re Winship, 397 U.S. 358, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970) 14

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) 19

Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) 8

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984) 6, 7

Washington Statutes

RCW 10.01.160(3) 23, 25

RCW 10.101.010 23, 24, 25

RCW 36.18.020(h) 24

RCW 43.43.7541 23

RCW 69.50.204(b)(11) 16

RCW 69.50.4013 16

RCW 74.09.035 25

Constitutional Provisions

U.S. Constitution, Amendment XIV, § 1 14

Other Rules or Authorities

WPIC 50.03 10

Engrossed Second Substitute House Bill 1783 23

Laws of 2018, ch. 269 §§ 1, 2, 3, 4, 5, 17, 18, 20 23

I. ISSUES

- A. Did Brick receive effective assistance from her trial counsel?
- B. Did the State present sufficient evidence to sustain the trial court's finding Brick committed Possession of a Controlled Substance – Methamphetamine?
- C. Did the trial court improperly impose discretionary legal financial obligations on an indigent defendant due to the retroactivity of the 2018 legislative amendments to the legal financial obligations statutes?

II. STATEMENT OF THE CASE

Lewis County Sheriff's Office Deputy Rodgers contacted Brick on November 5, 2017 regarding a complaint someone had broken into her residence and sprayed fire retardant everywhere. RP 10-11.¹ Deputy Rodgers, accompanied by Deputy Ferguson, contacted Brick and Dennis Chrisman at the 76 gas station. RP 11, 35, 59. The deputies spoke to Brick and Mr. Chrisman who explained Mr. Chrisman had gone to Vancouver to pick Brick up and when they returned they discovered someone had entered Brick's residence and sprayed the fire retardant throughout. RP 12.

It was the early morning hours, Brick was speaking in a hyper or accelerated state. RP 12. Brick's eyes were droopy with bags

¹ There is a continually paginated verbatim report of proceeding containing multiple proceedings dated 4/30/18, 5/7/18, 6/18/18, 6/21/18, and 7/11/18, the State will cite to this volume as RP.

underneath them, which was indicative to Deputy Rodgers of someone who had been up for quite some time without any sleep. RP 12. Based upon Deputy Rodgers training and experience it appeared Brick was under the influence of a stimulant. RP 12-13. Brick admitted to snorting methamphetamine earlier in the day while in Vancouver. RP 24, 56; CP 43.

The deputies went to Brick's residence to investigate the burglary. RP 13. Brick's residence is on Mr. Chrisman's property. RP 39-40. Mr. Chrisman lives on 18 acres and has an agreement with Brick regarding a small home on the property. *Id.* Mr. Chrisman and Brick have a verbal agreement, whereby Brick works on the property, cleans up the residence she lives at, and checks on Mr. Chrisman's mother when he is at work. RP 40-41, 52, 61-62; 43.

The residence looks like a much older residence or a shack, it had one bedroom, a living room, and a storage area. RP 13-14. Deputies looked for footprints at the back door, which Brick indicated was the point of entry into her residence. RP 14. The deputies could not locate anything outside. RP 15. The deputies then went inside the residence to further investigate the burglary from inside. RP 15. Once the deputies entered the residence they saw what appeared to

be fire retardant sprayed all over the floor of the living room and spreading into the back bedroom. RP 15.

The deputies walked into the residence with Brick. RP 17. Once inside, the deputies met Jessica Booth who was in the process of cleaning up the fire retardant. RP 17-18. The back door was a solid door, deadbolt was intact, did not show any signs of forced entry. RP 18.

Deputy Rodgers asked Brick some more questions about the burglary, if Brick had any idea who could have done it. RP 23. Brick believed it was her ex-boyfriend, Mr. Gallagher. RP 23. Mr. Gallagher apparently had a history of undocumented incidents, such as throwing roofing nails and paint in the driveway. RP 23. Deputy Rodgers confirmed there were nails thrown in the driveway. RP 36.

Brick told Deputy Rodgers the bedroom belonged to her. RP 24. Deputy Rodgers observed, in plain view, a loaded syringe with some type of drug on a shelf above the bed in the bedroom. RP 21-22; CP 43. The shelf was open when Deputy Rodgers looked at it, the needle had fire retardant sprayed on it, and when the syringe was removed there was an outline of where the needle. RP 22, 26; CP 43.

Deputy Rodgers inquired about the needle and Brick stated the syringe belonged to her roommate who moved out two weeks ago. RP 24. Brick was clear at times she resided at that particular home, but Brick changed her story a couple times. RP 37. When asked about the syringe, Brick claimed she had not been home for several days. RP 34. Yet, earlier when Deputy Rodgers had been speaking to Brick about returning from Vancouver, she had said she had been at the residence “on the last previous nights.” RP 34.

The brown liquid in the syringe was tested by the Washington State Patrol Crime Laboratory. RP 30-33. The substance contained methamphetamine. CP 42.

The State charged Brick with Possession of a Controlled Substance – Methamphetamine. CP 1-2. Brick elected to have her case tried to a judge without a jury. CP 26. At trial Mr. Chrisman said he picked up two syringes he saw on the counter, by the stove. RP 48. Mr. Chrisman said he did not tell the police about the syringes because they were full of drugs. RP 48-49. Mr. Chrisman also said he had seen Brick use drugs, but never intravenously. RP 45.

Brick testified, explaining she came home, the house was fine, stepped outside, came back inside to find the inside of her home covered with fire retardant. RP 53-54. Brick was scared because she

believed the person was still in the area. *Id.* Brick's friend Jessica remained at the residence while Brick and Mr. Chrisman left to call the police. RP 59. Brick also explained she used drugs earlier that day, she usually smokes but she snorted a line. RP 56. Brick said she does not use hypodermic needles. RP 56-57.

Ultimately, the judge found Brick guilty as charged. CP 44. The trial court sentenced Brick to 30 days in jail. CP 50-52. Brick was ordered to pay legal financial obligations, including a victim assessment, a crime lab fee, and a DNA collection fee. CP 54. Brick timely appeals her conviction and sentence. CP 49-68.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. BRICK RECEIVED EFFECTIVE ASSISTANCE FROM HER ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

Brick's attorney provided competent and effective legal counsel throughout the course of his representation. Brick argues her trial counsel was ineffective for conceding the only contested element, Brick's constructive possession of the syringe of methamphetamine. Brief of Appellant 11-18. Brick asserts she was prejudiced by her attorney's deficient performance. *Id.* at 18. Brick's attorney made a tactical decision to argue the affirmative defense

only, as the evidence of constructive possession was overwhelming. Brick's trial counsel was effective and this Court should affirm her conviction.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Brick's Attorney Was Not Ineffective During His Representation Of Brick Throughout The Bench Trial.

To prevail on an ineffective assistance of counsel claim Brick must show (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The Court must evaluate

whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

Brick argues her counsel was deficient in his representation of her by conceding the State had proven Brick was in construction of possession, thereby requiring Brick to assume the burden to prove unwitting possession. Brief of Appellant at 16-18. Brick asserts there was no legitimate trial tactic for this concession, her attorney could have presented additional testimony regarding who else had access to Brick's residence, merely arguing Brick's credibility was not a sufficient tactic, and the State had minimum indicia of possession, including Brick's dominion and control. *Id.* Brick insists she was

prejudiced by her attorney's deficient conduct and this Court must reverse her conviction. Brick's attorney's conduct falls within the category of legitimate trial tactics, therefore it was not deficient.

An attorney's conduct that can be characterized as legitimate trial tactics or strategy is not deficient. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (internal citations and quotations omitted). Defense counsel is not immune from all attacks regarding the tactics or strategies employed. *Grier*, 171 Wn.2d at 33-34. "The relevant question is not whether counsel's choices were strategic, but whether they were reasonable." *Id.* at 34, *citing*, *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

In *Grier* the question posed by the Court was if Grier's counsel was deficient by employing an "all or nothing" strategy and foregoing a jury instructed for a lesser included offense. *Id.* at 34-45. The Supreme Court concluded it was reasonable for the defendant and her trial counsel to believe an all or nothing strategy was the best option for seeking an outright acquittal to the charges. *Id.* at 41. "That this strategy ultimately proved unsuccessful is immaterial to an assessment of defense counsel's initial calculus; hindsight has no place in an ineffective assistance of counsel analysis." *Id.*

The State had to prove Brick possessed the controlled substance, methamphetamine. Possession of a controlled substance may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). A person is in actual possession when a controlled substance is in the personal custody of the person. *Callahan*, 77 Wn.2d at 29.

The possession in this matter was constructive, as Brick did not have the methamphetamine on her person, but in her bedroom. Therefore, it was State's burden to prove beyond a reasonable doubt Brick was in constructive possession of methamphetamine.

When a person does not have actual possession but has dominion or control over the controlled substance or the premises, the person is in constructive possession of the controlled substance. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004) (citation omitted). A person is not required to have exclusive control for the State to establish constructive possession. *Cote*, 123 Wn. App. at 549. A person who is in mere proximity of a controlled substance, without more, is not in constructive possession of the controlled substance. *Id.*

Determinations regarding dominion and control are made looking at the totality of the circumstances. *State v. Davis*, 182 Wn.2d

222, 234, 340 P.3d 820 (2014), citing *State v. Partin*, 88 Wn.2d 899, 906 567 P.2d 1136 (1977). The ability to take actual possession of the controlled substance and exclude others from possession can be considered when determining whether a person had dominion and control over a controlled substance. *Davis*, 182 Wn.2d at 234; WPIC 50.03. “Factors supporting dominion and control include ownership of the item and, in some circumstances, ownership of the premises. But, having dominion and control over the premises containing the item does not, by itself, prove constructive possession.” *Id.* Dominion and control does raise a rebuttable inference over the contraband found within the premises. *State v. Tadeo-Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997).

The facts of the case were the syringe was found in Brick’s residence. RP 13-22. The syringe was found in a bedroom Brick identified as her bedroom. RP 22-24. The syringe was not just in the bedroom, but on a shelf right above Brick’s bed. RP 22. The syringe had been in the bedroom prior to fire retardant being sprayed. RP 26. The syringe contained methamphetamine. RP 28-33; CP 42. These facts easily prove Brick had constructive possession of the syringe with the methamphetamine. Brick only changed her story

about the bedroom being hers when asked about the needle, after deputies investigated the burglary. RP 24.

Brick's theory of the case and strategy was, she would not have reported a burglary and invited police into her home if she had known there were drugs in her bedroom, and therefore her possession was unwitting. Brick's attorney presented evidence from Brick about the events of the day and evening. Brick's attorney then argued during his closing about credibility, because it was key to the unwitting possession defense. RP 75-76.

Well, it's odd that the state wants to argue that she is not credible when everything she's told law enforcement had been confirmed. Clearly, somebody had been in the residence and sprayed fire extinguisher obviously. It's confirmed. Clearly, somebody had been sabotaging her, throwing nails and such in the driveway. That's confirmed. But when she says, I didn't know that needle was there, well, she's not credible on that. I don't think you can pick and choose. Mr. Chrisman backed her up right down the line. People have been harassing her almost daily.

RP 75. Brick's attorney argued how Mr. Chrisman had never seen a needle in the residence before. *Id.* Brick's attorney then argued:

And I keep coming back to this: 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 76. Finally, Brick's attorney alerted the trial court to the testimony regarding how Brick historically had ingested drugs, by smoking them, she was not an intravenous drug user. *Id.*

Brick now argues her counsel could have presented additional testimony showing who else had access to the house. Brief of Appellant 16. Yet, there was evidence presented about who else had access to the residence. RP 41-42, 63. Brick's own testimony does not alert the trial court to anyone else who had access, therefore, what other testimony could there be regarding others who had access to her residence? *See*, RP 52-65.

Brick's attorney's trial strategy was reasonable given the evidence presented in her case. It was a tactical decision to argue Brick was credible and her credibility is less suspect if she does not deny the obvious, that Brick was in constructive possession of the syringe found on the shelf, above Brick's bed, in her bedroom, in her residence. That others may come and go, and Brick would lose her house key and rely on two other people to unlock the door, does not negate Brick's constructive possession of the syringe. Brick's attorney understood this, and devised the best strategy to combat

the charge levied against Brick, the affirmative defense of unwitting possession.

Brick's attorney attacked the State's case by questioning why anyone would invite the police into their home, knowing they had drugs sitting in the open. Brick's attorney noted how Mr. Chrisman and Brick's testimony tracked. RP 75. Brick's attorney's strategy to present the unwitting possession defense, attacking the State's theory of the case, and arguing Brick and Mr. Chrisman's credibility was a reasonable trial tactic. The fact Brick's attorney's trial tactic failed does not make it unreasonable. Brick's attorney's performance was not deficient, and therefore, she received effective assistance from her trial counsel. This Court should affirm Brick's conviction.

B. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE TRIAL COURT'S FINDING THAT BRICK COMMITTED THE CRIME, POSSESSION OF A CONTROLLED SUBSTANCE – METHAMPHETAMINE.

Contrary to Brick's assertion, the State presented sufficient evidence of Brick's constructive possession of the methamphetamine. Brick argues the State did not present sufficient evidence to sustain the trial court's finding of guilty for her conviction for Possession of a Controlled Substance – Methamphetamine because the State failed to present evidence Brick had dominion and control of the premises or the methamphetamine, and therefore

constructive possession of the methamphetamine. Brief of Appellant 21-23. This Court should find the State presented sufficient evidence to sustain the trial court's finding of guilty for Possession of a Controlled Substance – Methamphetamine and affirm the conviction.

1. Standard Of Review.

Sufficiency of evidence following a bench trial is reviewed for “whether substantial evidence supports the challenged findings of fact and whether the findings support the trial court’s conclusions of law.” *State v. Smith*, 185 Wn. App. 945, 956, 344 P.3d 1244 (2015) (citation omitted). Unchallenged findings are verities on appeal. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011).

2. The Trial Court’s Conclusion That Brick Constructively Possessed Methamphetamine Is Supported By Substantial Evidence.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150

Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

“Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that the findings are true.” *Smith*, 185 Wn. App. at 956 (citation omitted). The reviewing court defers to the trier of fact on issues regarding witness credibility, conflicting testimony, and persuasiveness of the evidence presented. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Brick assigned error to Finding of Fact 10 and Conclusion of Law 2. Brief of Appellant at 1. Finding of Fact 10 states, “The Court finds that the defendant was in constructive possession of the syringe containing methamphetamine.” CP 43. Conclusion of Law 2 states, “The State has proven to the Court beyond a reasonable doubt that the Defendant possessed (constructively) methamphetamine on November 5, 2017, in Lewis County, Washington, as charged in the original information.” CP 44. There was substantial evidence to persuade a rational and fair minded person Finding of Fact 10 is true, as the State will establish below in its argument. Conclusion of Law 2 naturally flows from Finding of

Fact 10, therefore once the State establishes the finding of fact was proper, the conclusion of law should also be affirmed.

The State charged Brick with Possession of a Controlled Substance – Methamphetamine. CP 1-2. The State was required to prove, on or about November 5, 2017, Brick possessed a controlled substance, to-wit: methamphetamine, and this occurred in Lewis County, Washington. CP 1, *citing*, RCW 69.50.4013; RCW 69.50.204(b)(11). As stated in the above section, possession of a controlled substance may be actual or constructive. *Callahan*, 77 Wn.2d at 29. At issue here is constructive possession and considerations of dominion and control. *Cote*, 123 Wn. App. at 549. Dominion and control may be over the substance or the premises where the controlled substance is located. *Callahan*, 77 Wn.2d at 29; *Cote*, 123 Wn. App. at 549. Yet, mere proximity to the controlled substances is not sufficient to establish constructive possession. *Id.*

The courts employ a totality of the circumstance evaluation when making determinations regarding dominion and control. *Davis*, 182 Wn.2d at 234. Brick asserts there was less evidence of constructive possession in her case than in other cases the appellate courts have held are not sufficient. Brief of Appellant 22-23. Brick asserts the facts in her matter regarding dominion and control over

the methamphetamine are most analogous to *Callahan* and *State v. Spruell*, 57 Wn. App. 383, 788 P.2d 21 (1990). Whereas *Sate v. Alvarez*, 105 Wn. App. 215, 19 P.3d 485 (2001) is most analogous regarding dominion and control over the premises. None of these cases support Brick's position she lacked dominion and control given the facts testified to during Brick's trial.

In *Callahan* Hutchinson was found sitting at a desk that had various pills and syringes on it. *Callahan*, 77 Wn.2d at 28. There was a cigar box filled with various drugs sitting between Hutchinson and Donlan. *Id.* There were also other drugs found in the houseboat. *Id.* Hutchinson had been a guest at the houseboat for two or three days and admitted to handling the drugs earlier in the day. *Id.* There was also two guns, two books about drugs, and a set of broken scales all of which Hutchinson admitted were his. *Id.* 31.

The Supreme Court held the evidence was insufficient to find Hutchinson guilty of possession of a controlled substance. *Id.* The Court remarked that although Hutchinson had been staying at the houseboat for a couple of days there was no evidence he maintained it as a residence or paid rent. *Id.* There was no evidence presented Hutchinson had dominion or control over the houseboat. *Id.* The Court also noted there must be consideration given to ownership of

the drugs located near Hutchinson. *Id.* Weaver testified at the trial the drugs belonged to him. *Id.* Weaver explained he had brought them onto the houseboat, he had not given or sold the drugs to anybody else, and he had sole control over the drugs. *Id.*

In *Spruell*, the Court of Appeals discussed Luther Hill's dominion and control over the cocaine discovered in the kitchen by the officers. *Spruell*, 57 Wn. App. at 388-89. The evidence presented was Hill had been in the kitchen when the officers made entry into the residence. *Id.* at 388. There was no evidence regarding whether Hill had previously been at the residence, his activity at the residence, how long Hill had been at the residence, or why Hill was there. *Id.* The Court of Appeals noted the State had not presented any evidence Hill had a connection with the residence with the exception of "being present and having a fingerprint on a dish which appeared to have contained cocaine immediately prior to the forced entry of the police." *Id.* There was no testimony presented inconsistent with Hill merely being a visitor at the residence. *Id.* This evidence was insufficient to establish dominion and control over the cocaine, as mere proximity is insufficient. *Id.* at 388-89.

In *Alvarez*, officers conducted a search warrant on an apartment and located Alvarez and five other juveniles, brought them

into the front room, read all them *Miranda*,² and attempted to identify the juveniles who did not reside at the apartment and allow them to leave. *Alvarez*, 105 Wn. App. at 218. Alvarez was not one of the juveniles released by police. *Id.* During the search of the residence the police located a loaded .38 revolver in a back bedroom closet. *Id.* There were photographs of Alvarez taped to the wall of the closet, Alvarez had clothes in the room along with some savings account deposit books in a shoe box. *Id.* Alvarez was charged with unlawful possession of the firearm. *Id.*

The Court of Appeals discussed the lack of evidence regarding Alvarez's dominion and control of the bedroom. *Id.* at 221-23. The Court noted the trial court failed to make a definitive finding regarding who had dominion and control of the bedroom, only stating Alvarez was the most likely candidate if anyone did. *Id.* at 223. The Court indicated while there were items belonging to Alvarez, they only consisted of "savings account deposit books, some books, and some pictures and newspaper articles featuring him or people he was connected with." *Id.* The Court noted evidence was also presented that Alvarez resided elsewhere. *Id.* The Court found the evidence above insufficient, even in the light most favorable to the

² *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)

State, to conclude Alvarez had dominion and control over the premises. *Id.*

The evidence presented in Brick's matter is distinct from the three cases she cites. In regards to dominion and control of the premises, there was evidence Brick resided at the premises and had a landlord tenant relationship with Mr. Chrisman. RP 35, 37-39, 52-53. This relationship was shown through testimony explaining Brick performed labor in exchange for her tenancy of the residence. RP 40-41, 61-62. Brick had lived at the residence for approximately one month. RP 41, 52, 62.

Dominion and control, both of the premises and the substance, was also established through evidence presented by the State and Brick's own testimony. Brick told Deputy Rodgers she had been at the residence the previous evening. RP 34. Brick told Deputy Rodger the bedroom belonged to her, that she lived there and slept in the bedroom. RP 24. Only when Brick was confronted with the syringe, located on the shelf, directly above the bed, did she state anyone else slept in the bedroom. *Id.* Brick admitted during the trial it was her bed. RP 61. The syringe had been in the residence prior to the fire retardant being sprayed. 26. The syringe also contained methamphetamine. RP 28-33; CP 42.

Brick also claimed during her testimony Deputy Rodgers blamed her for spraying the fire retardant throughout the house. RP 65. Deputy Rodgers refuted Brick's allegation. RP 69.

Brick, in asserting a claim of insufficiency of evidence claim, admits the truth of the State's evidence and all rational inferences that can be reasonable drawn from that evidence. *Goodman*, 150 Wn.2d at 781. This Court defers to the trial court regarding witness credibility and conflicting testimony, such as presented regarding Brick's and Deputy Rodgers' recollection of the events. The evidence submitted to the trial court sufficiently establish Brick was in constructive possession of the methamphetamine.

The State presented evidence Brick, unlike the defendant in *Alvarez*, was a resident of the house, and not only the bedroom, but the bed where the methamphetamine was located belonged to Brick. Similarly, in *Spruell* and *Callahan*, a large part of the analysis by the courts consisted of the lack of evidence presented by the State regarding why the person was at the residence or their lack of connection to the residence. The *Callahan* and *Spruell* defendants were mere visitors, in *Callahan* another person claimed the drugs, and in *Spruell* there was a complete lack of explanation for the defendant's connection to the residence.

Callahan, Spruell, and Alvarez are distinct from Brick's. Brick lived at the residence where the methamphetamine was found. The methamphetamine was found in Brick's bedroom, on a shelf above her bed. The methamphetamine was inside a syringe, located on the shelf, where it was clearly sitting prior to the person breaking into the residence and discharging the fire extinguisher. Brick had been in the residence, at a minimum, the previous evening. While other people may have been able to access the residence, dominion and control does not need be exclusive. *Cote*, 123 WN. App. at 549. Brick not only had dominion and control over the residence, but dominion and control over the methamphetamine.

There was substantial evidence presented by the State to support Finding of Fact 10. The State's evidence supports the trial courts finding that Brick was in constructive possession of the syringe containing methamphetamine. There was sufficient evidence of dominion of control of the premises and the controlled substance. The State sufficiently proved the elements of Possession of a Controlled Substance – Methamphetamine, supporting Conclusion of Law 2. This Court should affirm the trial court's finding of guilt.

C. THE RECORD SUPPORTS BRICK'S ASSERTION SHE IS INDIGENT PER SE, THEREFORE, THE STATE CONCEDES THE LEGAL FINANCIAL OBLIGATIONS WERE IMPROPERLY IMPOSED.

Brick asserts she was indigent at the time of sentencing and therefore this Court must, pursuant to the 2018 legislative amendments to the legal financial obligation statutes enacted under Engrossed Second Substitute House Bill 1783, eliminate all discretionary legal financial obligations and the DNA fee. Brief of Appellant 23-25. While the legal financial obligation reforms eliminate interest, the DNA fee for previously convicted defendants who have had the sample already taken, and many other useful reforms in regards to eliminating fees for indigent defendants, all indigent defendants are not created equal. Laws of 2018, ch. 269 §§ 1, 2, 3, 4, 5, 17, 18, 20; RCW 10.01.160(3); RCW 10.101.010. Only indigent defendants who fall into the category of indigent "per se" status pursuant to RCW 10.01.160(3) and RCW 10.101.010(3)(a)-(c) qualify to eliminate all discretionary legal financial obligations. The record supports, and the State concedes, Brick meets the criteria of indigent "per se."

Pursuant to RCW 43.43.7541, effective June 7, 2018, the imposition of the DNA-collection fee is required "unless the state has previously collected the offender's DNA as a result of a prior

conviction.” The State’s records show Brick’s DNA was previously collected and is on file with the Washington State Patrol Crime Lab.³ The State respectfully asks this Court to remand this case to the superior court to amend the judgment and sentence to strike the imposition of the \$100 DNA fee.

Brick is indigent because she was on public assistance when not in custody and she had no income at the time of her sentencing.

RP 96-97; CP 70-71. Income is defined as,

Salary, wages, interest, dividends, and others earnings which are reportable for federal income tax purposes, and cash payments such as reimbursements received from pensions, annuities, social security, and public assistant programs. It includes any contribution received from any family member or other person who is domiciled in the same residence as the defendant and who is helping defray the defendant’s basic living costs.

RCW 10.101.010 (2)(b).

Per the statutory amendments of 2018, the filing fee is no longer a nondiscretionary legal financial obligation if a defendant qualifies for indigency under RCW 10.101.010(3)(a)-(c). RCW 36.18.020(h). Further, only if a defendant is indigent “per se” under RCW 10.101.010(3)(a)-(c) shall the sentencing court not order a

³ The State acknowledges the record on appeal is lacking this information, but the undersigned deputy prosecutor can attest if this case is remanded to strike the fee, this information would be put into the trial record.

defendant to pay costs. RCW 10.01.160(3).

(3) "Indigent" means a person who, at any stage of a court proceeding, is:

(a) Receiving one of the following types of public assistance: Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, medicaid, or supplemental security income; or

(b) Involuntarily committed to a public mental health facility; or

(c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level;

RCW 10.101.010(3)(a)-(c).

A person in Brick's situation is therefore indigent, as she had no income at the time of her sentencing and was on public assistance. It is not clear to the State what legal financial obligations Brick is asserting, beyond the DNA fee, she is entitled to have the trial court strike from her judgment and sentence. Brief of Appellant 25. There is no requirement of an inquiry regarding Brick's ability to pay her legal financial obligations, as pursuant to the statute she is indigent per se. The State concedes this Court should remand this matter back to the trial court to strike the DNA fee.

IV. CONCLUSION

Brick received effective assistance from her trial counsel. Brick's attorney employed a strategy or trial tactic, although unsuccessful, given the evidence presented by the State and the theory of Brick's case, was reasonable. There was sufficient evidence presented to sustain Brick's conviction for Possession of a Controlled Substance – Methamphetamine. Finally, Brick is indigent per se, therefore, the DNA fee was improperly imposed. This Court should affirm Brick's conviction and remand the matter back to the trial court to strike the DNA fee from the judgment and sentence.

RESPECTFULLY submitted this 27th day of March, 2019.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

March 27, 2019 - 1:21 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52244-6
Appellate Court Case Title: State of Washington, Respondent v. Tammy L. Brick, Appellant
Superior Court Case Number: 17-1-00933-9

The following documents have been uploaded:

- 522446_Briefs_20190327132057D2427748_5582.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Brick.tam Response 52244-6.pdf

A copy of the uploaded files will be sent to:

- appeals@lewiscountywa.gov
- bleigh@tillerlaw.com
- ptiller@tillerlaw.com

Comments:

Sender Name: Teri Bryant - Email: teri.bryant@lewiscountywa.gov

Filing on Behalf of: Sara I Beigh - Email: sara.beigh@lewiscountywa.gov (Alternate Email: teri.bryant@lewiscountywa.gov)

Address:
345 W. Main Street
2nd Floor
Chehalis, WA, 98532
Phone: (360) 740-1240

Note: The Filing Id is 20190327132057D2427748