

FILED

SEP 08 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

28876-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RHONDA L. BERG, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

FILED

SEP 08 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

28876-5-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RHONDA L. BERG, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Mark E. Lindsey
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

APPELLANT’S ASSIGNMENT OF ERROR.....1

ISSUE PRESENTED.....1

STATEMENT OF THE CASE.....1

ARGUMENT3

 A. THE EVIDENCE SUPPORTS THE
 CONVICTION OF DEFENDANT
 FOR UNLAWFULLY POSSESSING
 A CONTROLLED SUBSTANCE.....3

CONCLUSION.....8

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. CALLIHAN, 77 Wn.2d 27, 459 P.2d 400 (1969).....	3
STATE V. CHAVEZ, 138 Wn. App. 29, 156 P.3d 246 (2007).....	4
STATE V. GREEN, 94 Wn.2d 216, 616 P.2d 628 (1980).....	6
STATE V. HAGLER, 74 Wn. App. 232, 872 P.2d 85 (1994).....	6
STATE V. JONES, 146 Wn.2d 328, 45 P.3d 1062 (2002).....	4
STATE V. LOPEZ, 79 Wn. App. 755, 904 P.2d 1179 (1995).....	6
STATE V. MEWES, 84 Wn. App. 620, 929 P.2d 505 (1997).....	7
STATE V. PARTIN, 88 Wn.2d 899, 567 P.2d 136 (1977).....	4, 8
STATE V. SALINAS, 119 Wn.2d 192, 829 P.2d 1068 (1992).....	6
STATE V. STALEY, 123 Wn.2d 794, 872 P.2d 502 (1994).....	3, 4
STATE V. THOMPSON, 88 Wn.2d 13, 558 P.2d 202 (1977), <i>appeal dismissed</i> , 434 U.S. 898 (1977).....	6, 7

STATUTES

RCW 69.50.4013(1).....	3
------------------------	---

I.

APPELLANT'S ASSIGNMENT OF ERROR

1. The trial court erred in convicting defendant because there was insufficient evidence to support the guilty finding that she possessed a controlled substance.

II.

ISSUE PRESENTED

- A. Was the evidence sufficient to support the conviction for possession of a controlled substance?

III.

STATEMENT OF THE CASE

On July 16, 2009 at 8:47 a.m., Spokane City Police Officers executed a search warrant on the residence located at 1307 W. Dalton, Spokane, Washington. RP 7-8. Detective Quist was the second officer through the front door into the living room. RP 8. Det. Quist observed a woman, later identified as the defendant, Rhonda Berg, standing behind a wingback chair in the living room. RP 9-10. Det. Quist noted that the only other individual in the room was a man, later identified as Mr. Cannato, who was seated at least ten feet from the location of the

defendant. RP 10. When Det. Quist initially saw defendant, she was standing with one hand behind the chair and was reaching down. RP 11. Det. Quist observed defendant reach down behind the chair and make an obvious throwing motion towards the floor. RP 11. Defendant made this motion despite Det. Quist asking her several times to show him her hands. RP 11. Defendant finally displayed both her hands once she completed the throwing motion. RP 11.

Defendant was then detained while officers completed a search of the house for other residents. RP 11-12. Det. Quist searched the area behind the wingback chair and noted the area was clear of debris, clothing, or food. RP 20. Det. Quist found one item in that area, a pack of cigarettes. RP 12, 34. When Det. Quist opened the pack, he discovered a glass smoking pipe with a residue thereon. RP 12-13. The residue field-tested positive for methamphetamine which was confirmed by Washington State Crime Laboratory Forensic Chemist Jason Stenzel. RP 21.

The trial court considered defendant's testimony, yet did not find it credible. RP 47. The trial court found the testimony of Det. Quist credible. RP 47. Accordingly, the trial court concluded that the State had proved beyond a reasonable doubt that on July 16, 2009, the defendant did unlawfully possess the controlled substance methamphetamine in the State of Washington. RP 47, CP 8-10. Defendant timely appealed.

IV.

ARGUMENT

A. THE EVIDENCE SUPPORTS THE CONVICTION OF DEFENDANT FOR UNLAWFULLY POSSESSING A CONTROLLED SUBSTANCE.

Defendant was charged by Information with Unlawful Possession of a Controlled Substance, to-wit: methamphetamine pursuant to RCW 69.50.4013(1) as follows:

POSSESSION OF A CONTROLLED SUBSTANCE, committed as follows: That the defendant, RHONDA LYNN BERG,...in the State of Washington, on or about between July 16, 2009, did unlawfully possess a controlled substance, to-wit: methamphetamine,

RCW 69.50.4013(1).

Defendant argues that the conviction should be reversed for insufficient evidence that she possessed the controlled substance. Defendant claims that the evidence does not support a finding that defendant constructively possessed the methamphetamine merely by her brief handling of the cigarette pack and subsequent proximity thereto. Defendant contends that her position is supported by the decision rendered in *State v. Staley*, 123 Wn.2d 794, 872 P.2d 502 (1994).

Defendant also cites *State v. Callihan*, 77 Wn.2d 27, 459 P.2d 400 (1969) as controlling because the Court therein held that the mere handling of drugs did not constitute actual possession thereof. In

combination with *State v. Staley, supra*, defendant contends that evidence of merely passing control is insufficient to support a conviction for possession of a controlled substance. Defendant contends that the fact that she momentarily controlled the pack containing the pipe with methamphetamine residue did not support the verdict that she possessed the methamphetamine.

The State had to prove that defendant had constructive possession of the controlled substance. “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. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). To determine whether a defendant was in constructive possession of an object, the court views the totality of the circumstances of the case. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 136 (1977). Dominion and control may be shown where a defendant may take actual possession of an object immediately. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). The *Jones* court noted that “mere proximity is not enough to establish possession.” *Id.* Nevertheless, proximity combined with other circumstances from which the trier of fact can infer dominion and control is sufficient to establish constructive possession. *State v. Chavez*, 138 Wn. App. 29, 35, 156 P.3d 246 (2007).

Here, Detective Quist testified that he assisted with the execution of a search warrant on the residence at 1307 W. Dalton, Spokane, Washington, on July 16, 2009. RP 7-8. Det. Quist testified that they entered through the front door after announcing their presence with a search warrant to execute. RP 7-10. Once officers entered the front door, they found defendant and another in the living room. RP 9-10. Det. Quist observed defendant next to a chair about ten feet away from the other individual in the room. RP 10.

Det. Quist observed defendant standing by a chair with one hand behind the chair reaching. RP 11. Det. Quist ordered defendant to show him her hands, but defendant continued leaning towards the floor behind the chair and reaching, then saw an "obvious motion with that hand to the back of the chair like a throwing motion" thereafter defendant showed her hands. RP 11-12. Once everyone inside was secured, Det. Quist returned to the area where he had seen defendant make the obvious throwing movement behind the chair. RP 12. The only item Det. Quist found in that area was the cigarette pack with a smoking pipe inside that had a residue thereon. RP 12-13. Det. Quist noted that there was no debris or anything else in that area behind the chair except the lone cigarette pack. RP 20, 33-34. Det, Quist field-tested the residue on the pipe which returned positive for methamphetamine. RP 21.

The standard for adjudging the sufficiency of the evidence to support a verdict is well established. The test is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could find that each element of the offense has been proved beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221-222, 616 P.2d 628 (1980). In reviewing the sufficiency of the evidence in a criminal case, the reviewing court must draw all reasonable inferences from the evidence in favor of the State and interpret those inferences most strongly against the defendant. *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995); *State v. Hagler*, 74 Wn. App. 232, 235, 872 P.2d 85 (1994). The elements of an offense can be established by both direct and circumstantial evidence. *State v. Thompson*, 88 Wn.2d 13, 16, 558 P.2d 202 (1977), *appeal dismissed*, 434 U.S. 898 (1977). Application of that standard requires that this conviction be affirmed.

Defendant admits the truth of the State's evidence and *all reasonable inferences that reasonably can be drawn therefrom* by her claim of insufficient evidence to support the conviction. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Accordingly, defendant concedes that she was: at the subject address the date at issue; at least ten feet from the only other individual in the room when law enforcement entered to execute the search warrant; observed throwing an item away

from her location behind the chair prior to being secured. Defendant concedes that the only item found in the area where she was observed throwing an object was the cigarette pack with the glass pipe inside. Defendant's contention that she neither actually nor constructively possessed the controlled substance fails under the circumstances. The reasonable inference from the circumstantial evidence is that defendant *knew* that the cigarette pack contained the glass pipe with the controlled substance; otherwise, she would have no reason to distance herself from the pack when law enforcement entered the front door.

As noted, the elements of an offense can be established by both direct and circumstantial evidence. *State v. Thompson, supra*. There is sufficient evidence to support a conviction if a rational trier of fact could find each element of the charged crime proven beyond a reasonable doubt. A trial court's factual findings entered following a bench trial are upheld where supported by substantial evidence. *See State v. Mewes*, 84 Wn. App. 620, 929 P.2d 505 (1997). As previously noted, proximity coupled with other circumstances which link defendant to the contraband constitutes sufficient evidence for a trier of fact to find constructive possession.

The appellate court reviews the "totality of the situation to determine if there is substantial evidence tending to establish circumstances

from which the jury can reasonably infer that the defendant had dominion and control of the drugs and thus was in constructive possession of them.” *State v. Partin*, 88 Wn.2d at 907. Here, the trial court’s factual findings reflect there is substantial evidence that defendant constructively possessed methamphetamine, a controlled substance. RP 46-47, CP 8-10. Based upon the evidence before the trial court this was the only permissible conclusion, it was the most logical conclusion. Viewing the evidence in a light most favorable to the State, the evidence was sufficient to support the verdict of the trial court. The conviction should be affirmed.

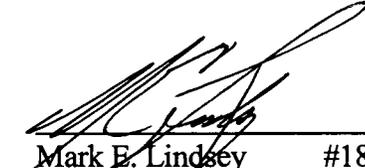
V.

CONCLUSION

For the reasons stated, the conviction should be affirmed.

Respectfully submitted this 8TH day of September 2010.

STEVEN J. TUCKER
Prosecuting Attorney



Mark E. Lindsey #18272
Deputy Prosecuting Attorney
Attorney for Respondent

FILED

SEP 08 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 28876-5-III
v.)	
)	CERTIFICATE OF MAILING
RHONDA L. BERG,)	
)	
Appellant,)	

I certify under penalty of perjury under the laws of the State of Washington, that on September 8, 2010, I mailed a copy of the Respondent's Brief in this matter, addressed to:

Eric J. Nielsen
Attorney at Law
1908 East Madison St
Seattle, WA 98122

and to:

Rhonda L. Berg
PO Box 280
Elk, WA 99009

9/8/2010
(Date)

Spokane, WA
(Place)

Yathleen H. Owen
(Signature)