

Supreme Court No. 93253-1  
COA No. 47020-9-II

**FILED** 

JUN 15 2016

WASHINGTON STATE  
SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JAMIE A. HESLEN,

Petitioner.

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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Jamie A. Heslen requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Heslen, No. 47020-9-II, filed May 3, 2016. A copy of the opinion is attached as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. To prove the charged crime of possession of methamphetamine, the State was required to prove beyond a reasonable doubt that Ms. Heslen actually or constructively possessed methamphetamine. The Court of Appeals affirmed, holding the evidence of possession was “substantial.” Does the Court of Appeals opinion conflict with State v. Vasquez, 178 Wn.2d 1, 7, 309 P.3d 318 (2013), which made clear the evidence must be more than “substantial” to sustain a conviction on appeal? Was the evidence insufficient when the correct standard of review—that the evidence must be sufficient to prove the element *beyond a reasonable doubt*—is applied? RAP 13.4(b)(1), (4).

2. A sentencing court may impose conditions of community custody only as authorized by statute. The controlling statute does not authorize a court to prohibit an offender from possessing or using a

legal quantity of marijuana during community custody if there is no showing that marijuana contributed to the offense. Here, the trial court imposed a condition of community custody that prohibits Ms. Heslen from possessing or using marijuana but there is no showing that marijuana contributed to the offense. Does the condition violate the controlling statute and present an issue of substantial public interest warranting review? RAP 13.4(b)(4).

C. STATEMENT OF THE CASE

One evening around 9 p.m., South Bend Police Officer Garrett Spencer stopped a pickup truck near Highway 101 in South Bend for having no mud flaps and a defective windshield. 8/06/14RP 11. The truck belonged to James Heslen, who was driving it. 8/06/14RP 11. His daughter, petitioner Jamie Heslen, was in the passenger seat. 8/06/14RP 12-13.

Officer Spencer determined that James Heslen's insurance policy had been cancelled and the insurance card he provided was invalid. 8/06/14RP 19. The officer arrested Mr. Heslen for providing false proof of insurance and, during a search incident to arrest, found a small baggie of suspected methamphetamine in Mr. Heslen's jeans pocket. 8/06/14RP 12.

While still at the scene, Officer Spencer contacted Ryan Tully, a deputy with the Pacific County Sheriff Drug Task Force. 8/06/14RP 12. Officer Spencer contacts Deputy Tully any time he finds drugs on a person during an arrest, to see if the deputy has any interest in the case. 8/06/14RP 12. Officer Spencer, who knew Jamie Heslen from prior contacts, informed Deputy Tully that she was at the scene. 8/06/14RP 12-13. Deputy Tully told Officer Spencer he had probable cause to arrest Ms. Heslen for a prior delivery of a controlled substance, and asked Officer Spencer to arrest her. 8/06/14RP 14. Officer Spencer arrested Ms. Heslen and read her Miranda<sup>1</sup> rights. 8/06/14RP 14. Ms. Heslen said she understood her rights and was willing to talk. 8/06/14RP 14. Officer Spencer did not ask her any questions, however, but simply waited for Deputy Tully to arrive. 8/06/14RP 15.

Deputy Tully arrived about 30 to 45 minutes later. 8/06/14RP 15. He said he spoke to Ms. Heslen, who told him "there was a backpack in the passenger seat that was hers." 8/06/14RP 32. Deputy Tully asked Officer Spencer to secure the truck and then he applied for

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<sup>1</sup> Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

a search warrant. 8/06/14RP 32. Officer Spencer moved some items that looked like they might have some value from the bed of the truck to the cab and then closed up the cab and secured it with evidence tape. 8/06/14RP 16. The truck was towed to an impound lot. 8/06/14RP 17. Officer Spencer took Ms. Heslen to jail. 8/06/14RP 14-15.

The next morning, Officer Spencer, Deputy Tully, and Pacific County Sheriff Lieutenant James Bergstrom executed the search warrant at the impound lot. 8/06/14RP 18. Officer Spencer found nothing of evidentiary value in the truck. 8/06/14RP 18. Lieutenant Bergstrom searched the passenger area of the truck and found a backpack there. 8/06/14RP 24. He said he found three "health cards" inside the backpack that had Ms. Heslen's name on them, but no such cards were ever produced at trial. 8/06/14RP 24. He also found a laptop computer and some writings in the backpack. 8/06/14RP 25. He did not find anything incriminating inside the backpack, however. 8/06/14RP 25-27. The backpack itself was not produced at trial.

Deputy Tully said he searched the backpack after Lieutenant Bergstrom did and, although Bergstrom had not found any drugs or paraphernalia, Deputy Tully happened to find a pouch inside the backpack that contained a pipe with a suspicious-looking white residue.

8/06/14RP 34-35. Deputy Tully said he took photographs of the search but no photographs were ever produced at trial. 8/06/14RP 39. He sent the pipe to the Washington State Patrol crime lab for analysis.

8/06/14RP 37. The residue in the pipe tested positive for methamphetamine. 8/06/14RP 43-44.

Ms. Heslen was charged with one count of possession of a controlled substance, methamphetamine. CP 9-12; RCW 69.50.4013. She waived her right to a jury trial and proceeded to a bench trial. CP 13; 2/28/14RP 2-6. The court found her guilty of possession of methamphetamine as charged. CP 25-26.

At sentencing, the court imposed 12 months of community custody. CP 31. The court ordered that Ms. Heslen "shall not possess or consume alcohol or marijuana during the term of community custody." CP 37.

Ms. Heslen appealed, arguing the evidence was insufficient to prove beyond a reasonable doubt that she possessed the methamphetamine, and the trial court did not have statutory authority to prohibit her from possessing or consuming marijuana during community custody. The Court of Appeals affirmed.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. **The Court of Appeals applied the incorrect standard, in conflict with State v. Vasquez and the Due Process Clause, in concluding the evidence was sufficient to prove possession beyond a reasonable doubt.**

The Court of Appeals held the evidence was sufficient to prove the essential element of possession because there was evidence that a pipe containing methamphetamine was found within a pouch located in a backpack that, according to Deputy Tully, Ms. Helsen said was hers. Slip Op. at 3. The Court of Appeals reasoned, “[t]he totality of the circumstances provides *substantial evidence* for the fact finder to reasonably infer that Helsen [sic] had constructive possession of the backpack and that she possessed the pipe containing methamphetamine.” Slip Op. at 3 (emphasis added).

The Court of Appeals applied the incorrect standard for determining whether the evidence was sufficient to prove an essential element of the crime.

Constitutional due process required the State to prove every element of the charged offense beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 477, 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. amend. XIV; Const. art. I, § 3.

In reviewing the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the essential elements of the crime *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).

The Court of Appeals violated these principles by affirming the conviction based only on its assessment that the evidence of possession was “substantial.” Slip Op. at 3. In State v. Vasquez, 178 Wn.2d 1, 7, 309 P.3d 318 (2013), this Court made plain the standard of review requires the Court to conclude the evidence was more than “substantial.” The Court declared, “[w]e have rejected a substantial evidence standard in determining the sufficiency of the evidence because it does not require proof beyond a reasonable doubt.” Id. (citing Green, 94 Wn.2d at 221-22). Because the Court of Appeals apparently did not learn the lesson from Vasquez and Green, this Court should grant review.

When the correct standard of review is applied, and the evidence is assessed to determine whether it was sufficient to prove possession *beyond a reasonable doubt*, it is apparent the conviction must be reversed.

The State was required to prove beyond a reasonable doubt that Ms. Heslen possessed the methamphetamine found in the pipe. CP 9-12; RCW 69.50.4013(1). Possession can be actual or constructive. State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Actual possession requires the controlled substance be in the personal, physical custody of the person charged with the crime. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Constructive possession involves “dominion and control” over the drugs in question or the premises in which they are discovered. Id. Mere proximity to a controlled substance alone is insufficient to show dominion and control. State v. Bradford, 60 Wn. App. 857, 862, 808 P.2d 174 (1991).

The State did not show Ms. Heslen had a backpack, pipe, or methamphetamine in her actual physical control at the time of her arrest. The State also did not prove she had constructive possession of the pipe.

The truck in which the backpack was supposedly found was not Ms. Heslen's but instead belonged to her father. 8/06/14RP 11. Lieutenant Bergstrom said he found "health cards" inside the backpack that had Ms. Heslen's name on them, but no health cards—or any other kind of identification found in the backpack—were ever produced at trial. 8/06/14RP 24. Moreover, the backpack itself was not produced at trial.

Lieutenant Bergstrom searched the backpack but did not find a pipe, a controlled substance, or anything else incriminating inside. 8/06/14RP 25-27. Only Deputy Tully said he found something incriminating inside the backpack. But he searched the backpack *after* Lieutenant Bergstrom did. 8/06/14RP 34-35. Deputy Tully said he took photographs of the search, but no photographs were ever admitted into evidence. 8/06/14RP 39.

This conflicting and meager evidence was not sufficient to prove *beyond a reasonable doubt* that Ms. Heslen had actual or constructive possession of the backpack or the pipe. Therefore, this Court should grant review and reverse.

**2. Whether the sentencing statute authorized the court to prohibit Ms. Heslen from possessing or consuming marijuana—a lawful substance—during community custody is an issue of substantial public interest, warranting review.**

The Court of Appeals held the prohibition against possessing and consuming marijuana was crime-related because the trial court found Ms. Heslen had a chemical dependency that contributed to the offense. Slip Op. at 5. But there was no evidence that Ms. Heslen’s use of *marijuana* contributed to the offense. Therefore, the condition is not crime-related and must be stricken.

A trial court’s authority to impose sentencing conditions is derived wholly from statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). A sentencing court imposing conditions of community custody must comply with RCW 9.94A.703. See RCW 9.94A.703 (“When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section.”). Subsection (3) of the statute sets forth six “discretionary conditions” a court may impose when sentencing an offender to community custody. RCW 9.94A.703(3).

Generally, a court may not order an offender to refrain from engaging in otherwise lawful behavior during community custody

unless the prohibition is "crime-related." RCW 9.94A.703(3)(f) ("As part of any term of community custody, the court may order an offender to . . . [c]omply with any crime-related prohibitions."). A "crime-related prohibition" is "an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). In order to justify a crime-related prohibition, the court must find and the record must show that the conduct to be prohibited "contributed to the offense." State v. Julian, 102 Wn. App. 296, 305, 9 P.3d 851 (2000).

The philosophy underlying the "crime-related" provision is that offenders may be punished for their crimes and may be prohibited from doing things that are directly related to their crimes, but they may not be coerced into doing things that are believed to rehabilitate them. State v. Riley, 121 Wn.2d 22, 36-37, 846 P.2d 1365 (1993); David Boerner, Sentencing in Washington, §4.5, at 4-7 (1985).

The Legislature has carved out a single exception to the general rule regarding crime-related prohibitions, pertaining to the consumption of alcohol. The statute specifically provides a court with authority to order an offender to "[r]efrain from consuming alcohol" during community custody, even if alcohol did not contribute to the offense.

RCW 9.94A.703(3)(e); State v. Jones, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003). But that is the only “discretionary condition” set forth in RCW 9.94A.703(3) that a court is authorized to impose that is not inherently crime-related. State v. Riles, 135 Wn.2d 326, 349-50, 957 P.2d 65 (1998), overruled in part on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). There is no such provision pertaining to the consumption of marijuana.

The consumption of marijuana is lawful in Washington State. Initiative 502, passed in November 2012, legalized possession of small amounts of marijuana for individuals over 21 years of age. See RCW 69.50.4013 (possession, by person twenty-one years of age or older, of useable marijuana in amounts not exceeding those set forth in RCW 69.50.360(3) is not a violation of any provision of Washington state law). Thus, a court may not prohibit an offender on community custody from possessing or consuming a legal quantity of marijuana unless the prohibition is “crime-related.” RCW 9.94A.703(3)(f).

Here, as a condition of community custody, the court ordered that Ms. Heslen “shall not possess or consume alcohol or marijuana during the term of community custody.” CP 37. But the court did not find that marijuana had contributed to the offense. Ms. Heslen was

convicted of possession of *methamphetamine*, not marijuana. CP 25-26. Although the court found Ms. Heslen “has a chemical dependency that has contributed to the offense,” CP 28, there is no evidence that Ms. Heslen’s use of marijuana contributed to the offense.

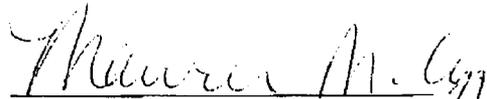
There is no evidence in the record that Ms. Heslen was in possession of, or under the influence of, marijuana at the time of the offense. There is no showing that marijuana played any part at all in the crime. Thus, the court acted without statutory authority in imposing a condition of community custody that prohibits her from consuming marijuana because the prohibition is not “crime-related.” RCW 9.94A.030(10); RCW 9.94A.703(3)(f); Riley, 121 Wn.2d at 36-37; Julian, 102 Wn. App. at 305.

E. CONCLUSION

The Court of Appeals applied the incorrect standard of review in determining whether the evidence was sufficient to prove an essential element of the crime beyond a reasonable doubt. Also, now that possession of marijuana is legal in Washington State, a trial court’s statutory authority to prohibit an offender from possessing or consuming marijuana during community custody presents an issue of

substantial public interest that this Court should address. For these reasons, this Court should grant review.

Respectfully submitted this 25th day of May, 2016.

  
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## **APPENDIX**

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Washington Appellate Project

May 3, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JAMIE A. HESLEN,

Appellant.

No. 47020-9-II

UNPUBLISHED OPINION

SUTTON, J. — Jamie A. Heslen appeals her conviction for unlawful possession of a controlled substance (methamphetamine) and the imposition of a community custody provision. We hold that the State provided sufficient evidence to show that Heslen had actual or constructive possession of methamphetamine and the trial court did not err when it imposed a community custody condition prohibiting her from possessing or consuming marijuana. Accordingly, we affirm Heslen's conviction and sentence.

FACTS

On January 17, 2014, Officer Garrett Spencer stopped a pickup truck and arrested the driver. During a search incident to arrest, he found a small baggie of suspected methamphetamine in the driver's pocket. Heslen was a passenger in the truck.

Officer Spencer contacted Deputy Ryan Tully, who advised that he had probable cause to arrest Heslen for delivery of a controlled substance. Officer Spencer arrested Heslen and read her

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*Miranda*<sup>1</sup> warnings. Deputy Tully arrived at the scene and spoke with Heslen. Heslen told Deputy Tully that the backpack in the passenger seat belonged to her and that there was “possibly some marijuana in it.” Verbatim Report of Proceedings (Aug. 6, 2014) at 32.

The following morning Deputy Tully, Officer Spencer, and Lieutenant Jim Bergstrom executed the search warrant for the truck. While searching the truck, Lieutenant Bergstrom located the only backpack found in the truck and found three cards that he believed to be health cards with Heslen’s name on them. Deputy Tully assisted in searching the backpack and located a pipe containing methamphetamine within a pouch inside the backpack.

After a bench trial, the trial court found Heslen guilty of unlawful possession of a controlled substance (methamphetamine). At sentencing, the trial court found that Heslen had a chemical dependency that contributed to the offense unlawful possession of a controlled substance (methamphetamine), ordered her to submit to a drug evaluation, ordered her to comply with recommended services and treatment, and prohibited her from possessing or consuming marijuana during her community custody term. Heslen appeals her conviction and the community custody prohibition related to possessing or consuming marijuana.

## ANALYSIS

### I. UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE

Heslen argues that the State did not show that she physically controlled a backpack, pipe, or methamphetamine at the time of her arrest or that she had constructive possession of the methamphetamine. We disagree.

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Berg* 181 Wn.2d 857, 867, 337 P.3d 310 (2014). A claim of insufficiency admits the truth of the State's evidence, and all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Andy*, 182 Wn.2d 294, 303, 340 P.3d 840 (2014). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Andy*, 182 Wn.2d at 303.

Possession may be actual or constructive. *State v. Chouinard*, 169 Wn. App. 895, 899, 282 P.3d 117 (2012). Constructive possession is the exercise of dominion and control over an item. *State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). Constructive possession is established by viewing the totality of the circumstances, including the proximity of the property and ownership of the premises where the contraband was found. *Davis*, 182 Wn.2d at 234. However, mere proximity is insufficient to show dominion and control. *Davis*, 182 Wn.2d at 234.

Here, by claiming insufficiency of the evidence, Helsen admits the State's evidence that the pipe containing methamphetamine was found within a pouch located in the backpack that she admitted belonged to her. The totality of the circumstances provides substantial evidence for the fact finder to reasonably infer that Helsen had constructive possession of the backpack and that she possessed the pipe containing methamphetamine. Accordingly, we affirm Helsen's conviction.

## II. COMMUNITY CUSTODY CONDITION

Heslen also argues that the trial court erred when it imposed a prohibition from possessing or consuming marijuana while in community custody. We disagree.

### A. RIPENESS

The State argues that the matter is not ripe for review because marijuana is a federally controlled substance and state law is preempted. We disagree.

The claim is ripe if the issues raised are primarily legal, do not require further factual development, and the challenged action is final. *State v. Cates*, 183 Wn.2d 531, 534, 354 P.3d 832 (2015). Here, the issue is primarily legal because Heslen is arguing that the trial court did not have the statutory authority to prohibit her possession or consumption of marijuana as a condition of community custody. No factual developments are required and the challenged action is final. *State v. Valencia*, 169 Wn.2d 782, 789-90, 239 P.3d 1059 (2010) (holding that sentencing conditions are final).

### B. COMMUNITY CUSTODY CONDITIONS

Heslen argues that the trial court did not have the statutory authority to impose a community custody condition prohibiting her possession or consumption of legal quantities of marijuana because it is not crime-related and it did not contribute to the offense of unlawful possession of a controlled substance (methamphetamine). We disagree.

We review a trial court's statutory authority to impose a community custody condition de novo. *State v. Acevedo*, 159 Wn. App. 221, 231, 248 P.3d 526 (2010). Where the trial court has statutory authority, we review the imposition of a condition for abuse of discretion. *State v. Polk*, 187 Wn. App. 380, 397, 348 P.3d 1255 (2015). We review the trial court's finding that the

community custody prohibition is crime-related for substantial supporting evidence. *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008).

A sentencing court has the statutory authority to impose crime-related prohibitions and community custody conditions as part of a sentence under RCW 9.94A.505(9).<sup>2</sup> RCW 9.94A.703 authorizes specific mandatory, waivable, and discretionary conditions as a part of any term of community custody. Unless waived by the court, the court shall order an offender to refrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions. RCW 9.94A.703(2)(c). Additionally, the court may order an offender to refrain from possessing or consuming controlled substances, including alcohol, or to comply with any crime-related prohibitions. RCW 9.94A.703(3)(e), (f); *see State v. Julian*, 102 Wn. App 296, 304-05, 9 P.3d 851 (2000) (“While the link between the condition imposed and the crime committed need not be causal, the condition must be related to the circumstances of the crime.”).

Here, the trial court expressly found that Heslen had a chemical dependency that contributed to her offense of unlawful possession of methamphetamine and Heslen does not challenge the trial court’s finding. Thus, the prohibition against possession and consumption of marijuana was crime-related and we hold that the trial court properly exercised its discretion by prohibiting Heslen from possessing or consuming marijuana during her community custody.

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<sup>2</sup> Former RCW 9.94A.505(8) (2010), *amended by* LAWS OF 2015, ch. 287, § 10.

CONCLUSION

We affirm Heslen's conviction and hold that the trial court did not err when it imposed a community custody condition prohibiting Heslen from possessing or consuming marijuana.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

*Sutton, J.*  
\_\_\_\_\_  
SUTTON, J.

We concur:

*Maxa, A.C.J.*  
\_\_\_\_\_  
MAXA, A.C.J.

*Melnick, J.*  
\_\_\_\_\_  
MELNICK,

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- respondent Mark McClaine  
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- petitioner
- Attorney for other party



MARIA ANA ARRANZA RILEY, Legal Assistant  
Washington Appellate Project

Date: May 25, 2016

# WASHINGTON APPELLATE PROJECT

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