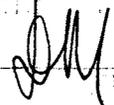


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IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON  
BY  CLERK

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STATE OF WASHINGTON,

Respondent,

v.

LISSA ANN LATHROP

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR LEWIS COUNTY

The Honorable H. John Hall, Judge  
Cause No. 05-1-00447-3

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BRIEF OF RESPONDENT

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## I. ISSUES PRESENTED

- A. A defendant may only be convicted when a unanimous jury concludes the criminal acts charged in the information have been committed. The State made an election through its closing argument. Did the State's fleeting reference to the fact that Lathrop constructively possessed everything in the vehicle require that the trial court instruct the jury on unanimity?
- B. A sentencing court includes out-of-state convictions in the offender score where it finds their existence by a preponderance of the evidence. Lathrop's prior Oregon felony conviction was acknowledged by Lathrop at her sentencing hearing. Did the lower court err in including this conviction in her offender score?
- C. *Blakely v. Washington* does not require that prior convictions be proven beyond a reasonable doubt to a jury. Lathrop's prior conviction was found by the trial court. Was she denied a constitutional right?

## II. STATEMENT OF THE CASE

Respondent accepts as adequate, for purposes of this Response, the "Statement of Facts and Prior Proceedings" appearing in the Opening Brief of Appellant, with additions and/or clarifications as appear hereinafter in the body of this Brief of Respondent, and as follows:

Ara Pugsley testified that he and Lathrop were moving from Portland to Ashford, and that they both had been living in Portland prior to the incident.<sup>1</sup>

Lathrop testified that she lived in Portland, that she had been in Lewis County once before, and that she was on her way to Ashford with Pugsley.<sup>2</sup> Pugsley had purchased drugs in Portland just before they left<sup>3</sup>.

In closing argument, the State first argued the evidence that Lathrop possessed methamphetamine. The deputy prosecutor clearly argued that the methamphetamine relating to Count I was the methamphetamine in the methamphetamine pipe.<sup>4</sup> When he argued about Lathrop's possession of the pipe, he did so in the context of her possessing the methamphetamine within—not that the pipe containing the methamphetamine was drug paraphernalia.<sup>5</sup>

At sentencing, the court considered a certified copy of Lathrop's Oregon conviction for Possession of a Controlled Substance Schedule II.<sup>6</sup> Lathrop's counsel did not contest the prior conviction, but rather stated, "Ms. Lathrop does have a prior conviction..."<sup>7</sup> The court found that

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<sup>1</sup> 10/20/05 RP 82-3.

<sup>2</sup> 10/20/05 RP 92-3, 103.

<sup>3</sup> 10/20/05 RP 94.

<sup>4</sup> 10/21/05 RP 7-8.

<sup>5</sup> 10/21/05 RP 17-18.

<sup>6</sup> 11/16/05 RP 3-4; 11/16/05 EX 1.

<sup>7</sup> 11/16/05 RP 4-5.

Lathrop was convicted and served time for a felony offense in Multnomah County, Oregon.<sup>8</sup>

### III. ARGUMENT

- A. A DEFENDANT MAY ONLY BE CONVICTED WHEN A UNANIMOUS JURY CONCLUDES THE CRIMINAL ACTS CHARGED IN THE INFORMATION HAVE BEEN COMMITTED. THE STATE MADE AN ELECTION THROUGH IT'S CLOSING ARGUMENT. DID THE STATE'S FLEETING REFERENCE TO THE FACT THAT LATHROP CONSTRUCTIVELY POSSESSED EVERYTHING IN THE VEHICLE REQUIRE THAT THE TRIAL COURT INSTRUCT THE JURY ON UNANIMITY?

Lathrop first asserts that her convictions for Possession of a controlled substance and misdemeanor use of paraphernalia should be reversed because the lower court did not give a unanimity instruction. Her counsel below neither offered one, nor did he take exception that one was not given.<sup>9</sup> Her argument seems to be premised on the fact that during closing argument, the deputy prosecutor mentioned that due to the small size of the vehicle in which she and Pugsley rode, they both had constructive possession over all items inside.

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<sup>8</sup> 11/16/05 RP 6; CP 6.

<sup>9</sup> 10/21/05 RP 5.

Under Washington law, a defendant may only be convicted when a unanimous jury concludes the criminal acts charged in the information have been committed. When the State presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act. The rationale for this protection in multiple act cases stems from possible confusion as to which of the acts a jury has used to determine a defendant's guilt, where the evidence tends to show two separate commissions of a crime.<sup>10</sup> Lathrop mischaracterizes the State's closing argument. The State did not argue that Lathrop committed the crime of using paraphernalia in smoking methamphetamine, but rather that she *possessed* the methamphetamine when she smoked it with the pipe<sup>11</sup>. Although the deputy prosecutor fleetingly mentioned that both Pugsley and Lathrop possessed everything in the small car in which they rode, the clear thrust of his closing argument was that Lathrop possessed the methamphetamine in the pipe which she concealed in the sweatshirt next to her at Pugsley's request, and used the paraphernalia—i.e., the marijuana pipe found in her brassiere. The

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<sup>10</sup> *State v. King*, 75 Wn.App. 899, 902, 878 P.2d 466 (1994), citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980) and *State v. Petrich*, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984).

reference to Lathrop's proximity to all of the belongings in the vehicle—taken in its clear context—was only to strengthen the argument that she (constructively) possessed the methamphetamine pipe even though it was not on her person. In that he argued clearly that the methamphetamine in the pipe was the basis of the charge, he made an election, and no unanimity instruction was necessary. Further, Lathrop's contention that some jurors could have convicted her of possessing methamphetamine based on her act of smoking it from the pipe earlier in the trip must also fail. The State need not make an election and the trial court need not give a unanimity instruction if the evidence shows the defendant was engaged in a "continuing course of conduct."<sup>12</sup> Appellate courts review the facts in a commonsense manner to decide whether criminal conduct constitutes one continuing act.<sup>13</sup>

Here, Lathrop's possession of the methamphetamine pipe during the ride was continuous throughout the ride from Portland to where she and Pugsley were stopped just outside of Morton. There was no need for a unanimity instruction.

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<sup>11</sup> 10/21/05 RP 18.

<sup>12</sup> *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989); *State v. Craven*, 69 Wn.App. 581, 587, 849 P.2d 681, *review denied*, 122 Wn.2d 1019, 863 P.2d 1353 (1993).

B. A SENTENCING COURT INCLUDES OUT-OF-STATE CONVICTIONS IN THE OFFENDER SCORE WHERE IT FINDS THEIR EXISTENCE BY A PREPONDERANCE OF THE EVIDENCE. LATHROP'S PRIOR OREGON FELONY CONVICTION WAS ACKNOWLEDGED BY LATHROP AT HER SENTENCING HEARING. DID THE LOWER COURT ERR IN INCLUDING THIS CONVICTION IN HER OFFENDER SCORE?

Lathrop next assigns error the lower court's calculation of her offender score. She did not raise this issue below. Indeed, at the sentencing hearing, she agreed that she had the criminal history. Although she represents that she did not admit her prior conviction, the record indicates otherwise. Her counsel stated, "Ms. Lathrop does have a prior conviction...."<sup>14</sup> He had a copy of the Oregon judgment, and was clearly in a position to determine its validity and applicability. It is well established that "A sentencing court may rely on a stipulation or acknowledgment of prior convictions without further proof."<sup>15</sup> "The best evidence of a prior conviction is a certified copy of the judgment."<sup>16</sup> Further, a sentencing judge does not commit legal error or otherwise abuse his or her discretion by imposing a sentence based upon an agreed

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<sup>13</sup> *Handran*, 113 Wn.2d at 17, 775 P.2d 453; *Craven*, 69 Wn..App. at 588, 849 P.2d 681.

<sup>14</sup> 11/16/05 RP 4-5.

<sup>15</sup> *In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 873, 123 P.3d 456 (2005).

<sup>16</sup> *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002).

offender score unless the offender score is wrong as a matter of law.<sup>17</sup> Lathrop does not allege that the lower court committed an error of law, but rather that the record below was insufficient to establish the Oregon conviction.

In short, there was no dispute that Lathrop had been convicted of a felony drug offense in Oregon. Although the State has the burden of proving prior convictions by a preponderance of the evidence, Lathrop had the opportunity to simply state that she was not the “Lisa Lathrop” who was convicted in Oregon. She did not so state, and her counsel acknowledged that she had the prior conviction. There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions in the exercise of reasonable professional judgment.<sup>18</sup> Lathrop’s attempt to now state that the record below was insufficient should be rejected.

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<sup>17</sup> *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874-76, 50 P.3d 618 (2002); *State v. Nitsch*, 100 Wn.App. 512, 524-25, 997 P.2d 1000 (2000).

<sup>18</sup> *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

C. *BLAKELY V. WASHINGTON* DOES NOT REQUIRE THAT PRIOR CONVICTIONS BE PROVEN BEYOND A REASONABLE DOUBT TO A JURY. LATHROP'S PRIOR CONVICTION WAS FOUND BY THE TRIAL COURT. WAS SHE DENIED A CONSTITUTIONAL RIGHT?

Finally, Lathrop argues that she has a constitutional right to have a jury find her criminal history. But in *Blakely v. Washington*,<sup>19</sup> the Court specifically excluded a defendant's prior convictions from those sentence-increasing facts that a jury must find.<sup>20</sup>

Washington courts have followed suit, and consistently rejected the contention that the prior conviction exception is no longer good law due to Justice Thomas's concurring opinion in *Shepard v. United States*.<sup>21,22</sup>

Because well-settled law controls this issue, Lathrop's claim must fail.

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<sup>19</sup> 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

<sup>20</sup> See also *State v. Ball*, 127 Wn. App. 956, 959-60, 113 P.3d 520 (2005) (no jury trial right under *Blakely* to finding of strikes under POAA), review denied, 156 Wn.2d 1018 (2006).

<sup>21</sup> 544 U.S. 13, 27-28, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005).

<sup>22</sup> See *State v. Rivers*, 130 Wn. App. 689, 692-93 & n.3, 695-96, 128 P.3d 608 (2005); *State v. Jackson*, 129 Wn. App. 95, 105 & n.10, 117 P.3d 1182 (2005), review denied, 156 Wn.2d 1029, 133 P.3d 474 (2006); *State v. Hunt*, 128 Wn. App. 535, 542, 116 P.3d 450 (2005); *State v. Jones*, 126 Wn. App. 136, 142, 107 P.3d 755, review granted in part, 124 P.3d 659 (2005); *State v. Alkire*, 124 Wn. App. 169, 176-77, 100 P.3d 837 (2004), review granted in part, remanded, 154 Wn.2d 1032 (2005).

#### IV. CONCLUSION

The deputy prosecutor's fleeting reference to the fact that Lathrop and Pugsley each had dominion and control over all items in their car did not affect the State's election as to which items of contraband constituted the basis of the charges. Lathrop's counsel acknowledged that her Oregon drug conviction should be counted in her offender score, and she was not entitled to have a jury determine the existence of her prior conviction beyond a reasonable doubt. Her claims should be denied.

#### V. REQUEST FOR COSTS

Should this Court determine that the State substantially prevails in this matter, the State requests that Lathrop be required to pay all taxable costs of this appeal, pursuant to RAP Title 14.

Respectfully submitted this <sup>20<sup>th</sup></sup> ~~19<sup>th</sup>~~ day of June, 2006. 111

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By:

  
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CERTIFICATE

I certify that on 6/20/06, I mailed a copy of the foregoing response by depositing same in the United States Mail, postage pre-paid, to the following parties at the addresses indicated:

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