

FILED
COURT OF APPEALS
DIVISION II

COMMISSIONER: EA
STATE OF WASHINGTON
BY: 

NO. 37248-7-II
Cowlitz County No. 07-1-00417-1

STATE OF WASHINGTON,

Respondent,

vs.

WENDY SMOTHERMAN

Appellant.

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

I. MS. SMOTHERMAN'S CONVICTION SHOULD BE REVERSED AND DISMISSED DUE TO INSUFFICIENT EVIDENCE.

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C. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

The Cowlitz County Prosecuting Attorney charged Wendy Smotherman with one count of possession of methamphetamine. CP 1. A jury trial was held in Cowlitz County Superior Court and the jury returned a verdict of guilty. CP 22. Ms. Smotherman was given a standard range sentence. CP 28. This timely appeal followed. CP 35.

2. FACTUAL HISTORY

On March 26th, 2007 Wendy Smotherman was sleeping at her boyfriend's house in Longview. RP (12-19-07), p. 91. At about 11:00 p.m. Sergeant Hartley of the Longview Police Department came to the

house in response to a noise complaint about a loud generator that was powering the house. RP (12-19-07), p. 32. When Hartley arrived he went to the back of the house where the noise was coming from and determined that a generator was running in the garage, with cords running into the house. RP (12-19-07), p. 33. He knocked on the back door and Ms. Smotherman answered. RP (12-19-07), p. 34. He asked her if he could come inside to talk and she said yes. RP (12-19-07), p. 35. He entered into the kitchen but they proceeded to the living room because there was no light in the kitchen. RP (12-19-07), p. 35. Ms. Smotherman was friendly and cooperative with Hartley. RP (12-19-07), p. 36. A few minutes later, Officer Sawyer arrived and knocked on the front door. RP (12-19-07), p. 38. Ms. Smotherman let him in and said "the other officer is over there," pointing to Hartley. RP (12-19-07), p. 39.

Ms. Smotherman sat down on the couch while Officer Hartley ran her for warrants through dispatch, having previously asked her to produce identification. RP (12-19-07), p. 37, 39. Hartley saw, prior to the return from dispatch indicating Ms. Smotherman had a warrant, some marijuana smoking pipes on the coffee table in front of the couch where Ms. Smotherman was sitting. RP (12-19-07), p. 39, 59. Sawyer also saw the pipes at that time and picked one of them up and smelled it. RP (12-19-07), p. 56. He believed the pipe smelled of burnt marijuana. RP (12-19-

07), p. 56. As he picked up the other pipe, he saw a small plastic baggie that was beside the pipes that contained a crystalline material. RP (12-19-07), p. 59.

After placing her under arrest Sawyer lifted up the blanket that was on the couch Ms. Smotherman had been sitting on and found another glass pipe. RP (12-19-07), p. 63. It was found near the game controller for the video game, which was on pause on the television. RP (12-19-07), p. 64. None of the pipes recovered were tested for fingerprints or controlled substances. RP (12-19-07), p. 71. The substance found in the baggie was methamphetamine. RP (12-19-07), p. 77. When the officers found the baggie Ms. Smotherman denied that it was hers, and said either her mother or her sister had left it there. RP (12-19-07), p. 78. According to Ms. Smotherman, she had been sleeping when the officers knocked on the door. RP (12-19-07), p. 97. She denied that she had been playing the video game and said her boyfriend often leaves it on pause. RP (12-19-07), p. 93. The State's theory of the case was that Ms. Smotherman was in constructive possession of the baggie of methamphetamine. Report of Proceedings (12-19-07).

D. ARGUMENT

I. THE EVIDENCE IS INSUFFICIENT TO PROVE MS. SMOTHERMAN HAD CONSTRUCTIVE POSSESSION OF THE METHAMPETAMINE.

Constitutional due process requires that in any criminal prosecution, every fact necessary to constitute the crime charged must be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 25 L.Ed. 2d 368 (1970). On appeal, a reviewing court should reverse a conviction for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all the elements of the crime charged were proven beyond a reasonable doubt. *State v. Salinas*, 119 Wn. 2d 192, 829 P.2d 1068 (1992); *State v. Green*, 94 Wn.2d 216, 220-2, 616 P.2d 628 (1980). When sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from. *State v. Theroff*, 25 Wn.App. 590, 593, 608 P.2d 1254, *aff'd* 95 Wn.2d 385, 622 P.2d 1240 (1980).

When contraband is not in the personal custody of an individual charged with possession, he is not in actual possession of the contraband but can be found in constructive possession provided he has dominion and control over the goods. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Dominion and control means the object can be reduced to actual

possession immediately. *State v. Turner*, 103 Wn.App 515, 521, 13 P.3d 234 (2000); *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Mere proximity to the object is not enough to establish constructive possession. *Jones*, 146 Wn.2d at 333. No single factor is dispositive of determining dominion and control but rather the totality of the circumstances must be considered. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977); *State v. Porter*, 58 Wn.App. 57, 60, 791 P.2d 905 (1990); *State v. Collins*, 76 Wn.App. 496, 501, 886 P.2d 243, review denied 126 Wn.2d 1016, 894 P.2d 565 (1995) .

The facts of this case are similar to those in *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969), and *State v. Spruell*, 57 Wn.App. 383, 788 P.2d 21 (1990). In *Callahan*, Seattle police officers went to a houseboat to serve a search warrant, finding the defendant and another man in the living room sitting at a desk. On the desk were various pills and hypodermic needles, and on the floor between the two men was a cigar box filled with drugs. Drugs also were found in the kitchen and bedroom. *Callahan*, 77 Wn. 2d at 28. The defendant denied that any of the drugs belonged to him, although he did admit to handling the drugs earlier in the day. He also admitted ownership of two guns, two books on narcotics and a measuring scale that were found in the search. *Callahan*, 77 Wn.2d at 28. The court ruled that the evidence was insufficient to

convict the defendant of either actual or constructive possession of the drugs. The court found that the only evidence that the defendant had actual physical possession of the drugs was his admission to handling the drugs earlier that day and his close proximity to them at the time of the arrest. This was insufficient to sustain a finding of actual possession, the court said, stating that “such actions are not sufficient for a charge of possession since possession entails actual control, not a passing control which is only a momentary handling.” *Callahan*, 77 Wn.2d at 29.

The court also found the evidence insufficient to sustain a finding of constructive possession because the defendant had no dominion and control over the drugs. The court held that despite evidence that the defendant had been staying on the houseboat for the preceding 2-3 days, that he owned several items found during the search that were related to drug use, that most of the drugs were found near the defendant and that he admitted to handling the drugs earlier in the day, the evidence was insufficient to show dominion and control over the drugs. *Callahan*, 77 Wn.2d at 31.

Here, Ms. Smotherman was not in actual possession of the methamphetamine. The baggie was on the coffee table. The jury was instructed that it could find Ms. Smotherman was in constructive possession if it found she had dominion and control over the substance.

CP 16. They were instructed that dominion and control need not be exclusive, but that proximity alone without proof of dominion and control over the substance is insufficient to establish constructive possession. CP 16. They were further instructed that dominion means a person has a right to or an ownership interest in the item, and that control means the person has access to the item. CP 17. Here, the evidence was insufficient to establish that Ms. Smotherman had dominion and control over the item. The State only proved that she had mere proximity to the baggie of methamphetamine, and proof of mere proximity to the substance is not enough. *Callahan*, 77 Wn. 2d at 29; *State v. Spruell*, 57 Wn.App. 383, 388, 788 P.2d 21 (1990); *State v. Turner*, 103 Wn.App. at 521.

The facts of this case are similar to the facts in *State v. Spruell*, 57 Wn.App. 383, 388, 788 P.2d 21 (1990). In *Spruell*, Seattle police served a search warrant at the home of Spruell, finding defendants McLemore and Hill in the kitchen. On the kitchen table officers found among other things, white powder which later proved to be cocaine. They also found white powder on the floor of the kitchen and white powder residue strewn throughout the kitchen. A plate found in the kitchen bore no cocaine residue but did bear a fingerprint of defendant Hill, the appellant in *Spruell*. *Spruell*, 57 Wn.App at 384.

On appeal, the court found the evidence was insufficient to establish that defendant Hill was in actual or constructive possession of any drugs. Hill was not seated at the table where the drugs were found, nor were there any drugs on the plate on which his fingerprint was found. *Spruell*, 57 Wn.App. at 386-87. The court found that Hill's fingerprint on the plate proved only that he at some point touched the plate, and said it had no more weight on the issue of actual possession than the defendant's admission in *Callahan* that he had previously handled the drugs. *Spruell*, 57 Wn.App. at 386.

Ms. Smotherman's case is similar to defendant Hill's case in *Spruell* in that the only thing the State established was mere proximity to the baggie. She admitted to possessing the marijuana pipes, and to being a marijuana smoker, but denied possessing the baggie. It was not on her person but rather on a coffee table in front of the couch that she sat on while she waited for Hartley to run her name through dispatch. The State made much at trial about the video game being on pause, and the meth pipe being near the game controller. No proof was offered, however, that she possessed those items other than assumption. Notably, neither of these items was tested for fingerprints. Assumption was not found sufficient in *Spruell*, and it is not sufficient here. Ms. Smotherman's conviction should be reversed and dismissed.

II. MS. SMOTHERMAN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HER ATTORNEY FAILED TO PROPOSE AN UNWITTING POSSESSION INSTRUCTION.

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

An attorney is deficient if his performance falls below a minimum objective standard of reasonableness. "Representation of a criminal defendant entails certain basic duties...Among those duties, defense counsel must employ 'such skill and knowledge as will render the trial a reliable adversarial testing process.'" *State v. Lopez*, 107 Wn.App. 270, 275, 27 P.3d 237(2001), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984). Here, there can be no reasonable basis for counsel not to have requested an unwitting possession instruction. The

defense in this case was a combination of lack of constructive possession and unwitting possession. That is to say, the defense was that the baggie was not Ms. Smotherman's, and she didn't know it was there. Indeed, not knowing the baggie was there was the necessary underpinning of the argument that she did not constructively possess the baggie. It was clear the jury struggled with the question of whether this baggie was really Ms. Smotherman's, as the State contended, based upon its jury question in which it asked the court to further define "ownership interest." CP 21. As such, it appears that had the jury been given further instruction on the basic tenet of Ms. Smotherman's defense, e.g. that she the meth wasn't hers and she didn't know it was hers, the result would have been different. Ms. Smotherman should be granted a new trial.

E. CONCLUSION

Ms. Smotherman's conviction should be reversed and dismissed due to insufficient evidence. Alternatively, she should be granted a new trial.

RESPECTFULLY SUBMITTED this 26th day of August, 2008.


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DEPUTY

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_____)
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Court of Appeals No. 37248-7-II
Cowlitz County No. 07-1-00417-1
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