

TABLE OF CONTENTS

	Page
I. IDENTITY OF THE RESPONDENT	4
II. STATEMENT OF THE CASE AND PROCEDURAL HISTORY	4
III. ISSUES PRESENTED ON APPEAL	4
1. DID THE STATE PRESENT EVIDENCE, SUFFICIENT TO CONVICT APPELLANT, BEYOND A REASONABLE DOUBT OF VIOLATION OF THE UNIFORM CONTROLLED SUBSTANCES ACT?	4
2. DID THE APPELLANT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL DURING HER TRIAL?	4
IV. SHORT ANSWERS	5
V. ANALYSIS	5
VI. APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.....	8
VII. CONCLUSION	9

TABLE OF AUTHORITIES

	Page
Cases	
<i>Seattle v. Slack</i> , 113 Wn.2d 850 (1989).....	5
<i>State v. Callihan</i> , 77 Wn.2d 27, P.2d 400 (1969).....	6, 7
<i>State v. Camarillo</i> , 115 Wn.2d 60 (1990).....	6
<i>State v. Delmarter</i> , 94 Wn.2d 634 (1980).....	6
<i>State v. Early</i> , 70 Wn.App. 452, P.2d 964 (1993)	8
<i>State v. Gentry</i> , 121 Wn.2d 570, 597 (1995)	5
<i>State v. Gilmore</i> , 76 Wn.2d 293, P.2d 344 (1969)).	8
<i>State v. Graham</i> , 78 Wn.App. 44, P.2d 704 (1995).....	8
<i>State v. Green</i> , 94 Wn.2d 216 (1980)	5
<i>State v. Luna</i> , 71 Wn.App. 755 (1993)	5
<i>State v. Matthews</i> , 4 Wash.App. 653, P.2d 942 (1971)	7
<i>State v. McFarland</i> , 127 Wn.2d 322, P.2d 1251 (1995).....	8, 9
<i>State v. Porter</i> , 58 Wn.App. 57(1990).....	5, 6
<i>State v. Salinas</i> , 119 Wn.2d 192 P.2d 1068 (1992)	5
<i>State v. Sanchez</i> , 60 Wn.App. 687(1991)	5
<i>State v. Sardinia</i> , 42 Wn.App. 533, P.2d 1302 (1978)	8
<i>State v. Spruell</i> , 57 Wn.App. 383, P.2d 21 (1990).....	7
<i>State v. Tarica</i> , 59 Wn.App. 368, P.2d 296 (1990).....	9

State v. Walton, 64 Wn.App. 410 P.2d 553 (1992)..... 6

State v. White, 81 Wn.2d 223, P.2d 1242 (1972)..... 8

Strickland v. Washington, 666 U.S. 668; 104 S.Ct. 2052; 80
L.Ed.2d 674 (1984)..... 8, 9

I. IDENTITY OF THE RESPONDENT

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office (hereinafter "Respondent") is the Respondent in this matter.

II. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The Respondent agrees in large part with the procedural history as presented by the appellant with the following clarifications and additions.

The Appellant stated the two marijuana pipes on the coffee table, located next to the bag of methamphetamine, belonged to her. RP 93. Both marijuana pipes and the bag of methamphetamine were located on the coffee table in front of the Appellant. RP 60.

III. ISSUES PRESENTED ON APPEAL

1. Did the State present evidence, sufficient to convict appellant, beyond a reasonable doubt of Violation of the Uniform Controlled Substances Act?
2. Did the appellant receive effective assistance of counsel during her trial?

IV. SHORT ANSWERS

1. Yes.
2. Yes.

V. ANALYSIS

The State Presented More Than Sufficient Evidence to Prove Appellant Committed the Crime of Violation of the Uniform Controlled Substances Act.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it is sufficient to permit any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Gentry*, 121 Wn.2d 570, 597 (1995); *State v. Luna*, 71 Wn.App. 755, 757 (1993); *Seattle v. Slack*, 113 Wn.2d 850, 859 (1989); *State v. Green*, 94 Wn.2d 216 (1980). “A claim of insufficiency admits the truth of the State’s evidence and all inferences that can be reasonably drawn therefrom.” *State v. Sanchez*, 60 Wn.App. 687, 693 (1991) (quoting *State v. Porter*, 58 Wn.App. 57, 60 (1990)). All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the Appellant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The reviewing court must give deference to the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and

generally weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 553 (1992). Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71 (1990). Circumstantial evidence is accorded equal weight with direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638 (1980).

In this case, the Appellant relies heavily on *State v. Callihan*, 77 Wn.2d 27, 459 P.2d 400 (1969); the case at hand is clearly distinctive.

Callihan states:

Consideration must be given to the ownership of the drugs as ownership can carry with it the right of dominion and control. A Charles Weaver testified that the drugs belonged to him; that he had brought them onto the boat; that he had not sold them or given them to anyone else; and that he had sole control over them. His testimony was substantiated by others who were on the boat at the time of the arrest and by persons who had seen him with the drugs earlier that day. This testimony was not contradicted by the state.

Id. at 31. The Appellant was the sole occupant of the house at the time the methamphetamine was found on the coffee table. There was no testimony in the case at hand of someone taking ownership of the methamphetamine. *Callihan* goes on to say “[I]t is true that we have held that once possession of drugs is established, the burden shifts to the defendant to explain away the possession as

unwitting, lawful, or otherwise excusable.” *Id* at 32. That distinction is where this case and *Callihan* diverge. In *Callihan* there was no proof of constructive possession, in this case there is evidence of constructive possession. There were three items of interest on the coffee table in front of the Appellant. RP 60. Sandwiched between two items the Appellant stated were hers, was a bag filled with methamphetamine, thusly crossing the hurdle the evidence in *Callihan* did not.

The Appellant also relies on *State v. Spruell*, 57 Wn.App. 383, 788 P.2d 21 (1990). Again this can be distinguished from the present case. In *Spruell*, the evidence showed no connection between the drugs and the defendant, unlike the case at hand. *Id* at 24. The court in *Spruell* cites *State v. Matthews*, 4 Wash.App. 653, 656, 484 P.2d 942 (1971) as follows: “Mere proximity to the drugs is not enough to establish constructive possession-it must be established that the defendant exercised dominion and control over either the drugs or the area in which they were found.” Clearly in the case at hand, the Appellant established dominion and control over the area in which the methamphetamine was found. There was ample evidence provided by the State to allow a jury to

determine whether the Appellant was guilty of the underlying charge and the verdict should stand.

VI. APPELLANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL

To prevail on a claim of ineffective assistance of counsel, a petitioner must show both ineffective representation and resulting prejudice. *State v. Early*, 70 Wn.App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); *State v. Graham*, 78 Wn.App. 44, 56, 896 P.2d 704 (1995).

In order to satisfy the first prong of this test, a petitioner must show that trial counsel's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 666 U.S. 668, 687-88; 104 S.Ct. 2052; 80 L.Ed.2d 674 (1984); *State v. Sardinia*, 42 Wn.App. 533, 540, 713 P.2d 1302 (1978). The second prong requires that the petitioner establish that counsel's performance was so inadequate that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland* at 694.

The competency of counsel is determined by examining the entire record below. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)(citing *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969)).

There is a strong presumption that counsel's performance was adequate and exceptional deference must be given when evaluating counsel's strategic decisions. *Strickland* at 689. A reviewing court is not required to address both prongs of the test if the Appellant makes an insufficient showing on one prong. *State v. Tarica*, 59 Wn.App. 368, 374, 768 P.2d 296 (1990) overruled on other grounds by *State v. McFarland*, 127 Wn.2d 322 (1995).

The Appellant asserts that she was denied effective assistance of counsel because her attorney failed to request an unwitting possession instruction. The Appellant is wrong.

VII. CONCLUSION

For all of the above reasons, this Court should affirm the trial court with respect to the Appellant's conviction of Violation of the Uniform Controlled Substances Act. In the light most favorable to the prosecution, admitting the truth of the evidence, and drawing all reasonable inferences therefrom, the evidence sufficiently shows the Appellant's conviction should be affirmed.

Respectfully submitted this 27th day of October, 2008.

SUSAN I. BAUR

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Representing Respondent

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DIVISION II

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DIVISION II

NOV 29 AM 11:10

STATE OF WASHINGTON,)
)
Respondent,)
v.)
WENDY SMOTHERMAN,)
)
Appellant.)

STATE OF WASHINGTON
BY [Signature]
DEPUTY

NO. 37248-7-II
07-1-00417-1
AFFIDAVIT OF MAILING

MICHELLE SASSER, being first duly sworn, on oath deposes and says: That on October 27, 2008, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the following

ANNE CRUSER
ATTORNEY AT LAW
P.O. BOX 1670
KALAMA, WA 98625

COURT OF APPEALS
950 BROADWAY, SUITE 300
TACOMA, WA 98402

each envelope containing a copy of the following documents:

- 1. BRIEF OF RESPONDENT
- 2. Affidavit of Mailing.

[Signature: Michelle Sasser]
MICHELLE SASSER

SUBSCRIBED AND SWORN to before me this October 27, 2008.



[Signature: Nancy C. Westlund]
Notary Public in and for the State
of Washington residing in Cowlitz
Co. My commission expires: 1.3.09