

COURT OF APPEALS
DIVISION II

03 OCT 23 PM 12:01

No. 37650-4-II

STATE OF WASHINGTON

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MARLYS B. SAMOY,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James B. Sawyer

BRIEF OF APPELLANT

THOMAS M. KUMMEROW
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A. ASSIGNMENT OF ERROR

The jury's verdict that Marlys Samoy possessed methamphetamine with the intent to distribute was not supported by substantial evidence.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Due process requires that the State prove each essential element of the charged offense beyond a reasonable doubt. Where a defendant is charged with possession of a controlled substance, the State bears the burden of proving the defendant actually or constructively possessed the substance. Proof that the defendant had dominion and control over a residence is only one factor in determining whether the defendant possessed the controlled substance found in the residence. Here the State proved only that Ms. Samoy had dominion and control over the trailer in which the methamphetamine was discovered but failed to prove anything further to establish that she constructively possessed it. Is Ms. Samoy entitled to reversal of the conviction with instructions to dismiss?

C. STATEMENT OF THE CASE

On November 6, 2007, members of the Mason County Sheriff's Office executed a search warrant on property on NE Beitzel Drive outside the town of Belfair. RP 23-25. On the property were a silver-sided travel trailer and a motorhome located a distance from the trailer. RP 28. When the police first arrived, Marlys Samoy was asleep in the motorhome. RP 98, 102. Ms. Samoy and her boyfriend, Gerald Spears, were the only people living on the Beitzel Drive property and both lived in the trailer and the motorhome at different times. RP 96-97.

When the officers entered the trailer, they noted that the front portion contained a kitchen and bed. RP 53. The rear 10 to 12 feet of the trailer had collapsed and was uninhabitable. RP 53. No clothing or documents indicating dominion and control were found in this area of the trailer. RP 53. The area where the bed was found was virtually impassable due to garbage bags filled with women's clothing and several boxes. RP 54. The police described this area as very dirty and dusty, with cobwebs on the bags and boxes. RP 54. On top of these piles of bags and boxes the officers found a wooden box that was clean and dust-free. RP 54. Inside the box, the police discovered approximately 15 grams of

methamphetamine, two digital scales, ziplock baggies, and an item described by the police as a “ledger.” RP 55, 83. On this “ledger” were notations, the inference of which was the “ledger” documented methamphetamine transactions. RP 61. Nothing on this “ledger” had Ms. Samoy’s name or contained any reference to her. The police also found what they described as documents bearing Ms. Samoy’s name in the trailer. RP 52.

Ms. Samoy was subsequently charged with possession of methamphetamine with the intent to distribute. CP 45-46. Following a jury trial, Ms. Samoy was found guilty as charged. RP 22.

D. ARGUMENT

THE JURY’S VERDICT THAT MS. SAMOY POSSESSED METHAMPHETAMINE WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

1. The State bears the burden of proving each of the essential elements of the charged offense beyond a reasonable doubt. In a criminal prosecution, the State is required to prove each element of the crime charged beyond a reasonable doubt. U.S. Const. amend 14; *Apprendi v. New Jersey*, 530 U.S. 466, 471, 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); *State v. Green*, 94

Wn.2d 216, 220-21, 616 P.2d 628 (1980). The standard the reviewing court uses in analyzing a claim of insufficiency of the evidence is “[w]hether, after viewing the evidence in the light most favorable to the prosecution, any 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); *Green*, 94 Wn.2d at 221. A challenge to the sufficiency of evidence admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Here, the State was required to prove that Ms. Samoy unlawfully possessed, a controlled substance, with the intent to deliver. RCW 69.50.401(a)(1)(ii); *State v. Atsbeha*, 142 Wn.2d 904, 918, 16 P.3d 626 (2001). Ms. Samoy submits the State failed to prove she possessed the methamphetamine, thus the jury's verdict was without substantial evidence.

2. The State failed to prove Ms. Samoy constructively possessed the methamphetamine. Possession of a controlled substance may be either actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). Actual possession requires that the controlled substance be in the personal, physical

custody of the person charged with the offense. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Because there is nothing in the record to show Ms. Samoy was in physical custody of the methamphetamine, the evidence presented at trial must support a finding of constructive possession.

Constructive possession requires that the defendant have dominion and control over the drugs. *State v. Tadeo-Mares*, 86 Wn.App. 813, 816, 939 P.2d 220 (1997). In assessing a challenge to the proof of constructive possession, this Court must examine the totality of the circumstances to determine if there is substantial evidence tending to support a reasonable inference of dominion and control. *State v. Morgan*, 78 Wn.App. 208, 212, 896 P.2d 731, *review denied*, 127 Wn.2d 1026 (1995). Dominion and control over the premises where a substance is found is only one factor in considering whether the defendant had dominion and control over the substance itself. *State v. Cantabrana*, 83 Wn.App. 204, 206-07, 921 P.2d 572 (1996). Constructive possession may also be shown by proximity to the controlled substance along with other circumstances linking the defendant to the substance. *State v. Sanders*, 7 Wn.App. 891, 893, 503 P.2d 467 (1972). Temporary residence, personal possessions on the premises, or knowledge of

the presence of the drug, without more, are also insufficient. *State v. Bradford*, 60 Wn.App. 857, 862-63, 808 P.2d 174 (1991).

When the police executed their search warrant, Ms. Samoy was not present in the trailer, rather she was asleep in the motor home on the property. RP 98, 102. Further, the evidence indicated that Mr. Spears and Ms. Samoy split their time living in the motor home and the trailer. RP 97. Although the box in which the methamphetamine and other paraphernalia was found was on top of bags of women's clothing, the bags and other boxes in that area were dirty, dusty, and covered with cobwebs, while the box was clean and dust free. RP 54. This evidence indicates that although Ms. Samoy may have lived in the trailer periodically, there was no evidence that she was in present possession, actual or constructive, of the box. Further, the ledger found in the box possibly documenting drug transactions did not have Ms. Samoy's name on it or reference her in any way. RP 76. Finally, the fact there were documents with Ms. Samoy's name on them in the trailer is cumulative of other evidence and proves nothing. See *Tadeo-Mares*, 86 Wn.App. at 816; *State v. Olivarez*, 63 Wn.App. 484, 486, 820 P.2d 66 (1991) (it is not a crime to have dominion

and control over the premises where controlled substances are found).

The State's evidence failed to prove Ms. Samoy possessed the box containing the methamphetamine and other paraphernalia. As a result, the conviction for possession of methamphetamine with the intent to distribute cannot stand.

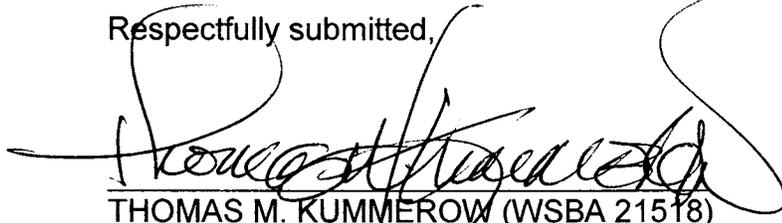
3. This Court must reverse and remand with instructions to dismiss the conviction. Since the State failed to prove Ms. Samoy possessed the methamphetamine with the intent to deliver, there was insufficient evidence to support the conviction. This Court must reverse the conviction with instructions to dismiss. To do otherwise would violate double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 760-61, 927 P.2d 1129 (1996) (the Double Jeopardy Clause of the United States Constitution "forbids a second trial for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding."), quoting *Burks v. United States*, 437 U.S. 1, 9, 98 S. Ct. 2141, 57 L. Ed.2d 1 (1978).

E. CONCLUSION

For the reasons stated, Ms. Samoy submits this Court must reverse the conviction for possession of methamphetamine with the intent to deliver with instructions to dismiss.

DATED this 22nd day of October 2008.

Respectfully submitted,



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