

**FILED**

AUG 2 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

NO. 288765

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

RHONDA BERG,

Appellant.

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

The Honorable Ellen Kalama Clark, Judge

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OPENING BRIEF OF APPELLANT

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DAVID B. KOCH  
Attorney for Appellant

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A. ASSIGNMENT OF ERROR

There is insufficient evidence to support appellant's conviction for possessing a controlled substance.

Issue Pertaining to Assignment of Error

Appellant was convicted of possessing methamphetamine based on a momentary handling of an object that contained residue of that substance. Where case law prohibits a finding of possession under these circumstances, is there sufficient evidence to support her conviction?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Spokane County Prosecutor's Office charged Rhonda Berg with one count of possession of a controlled substance (methamphetamine). CP 1. Berg waived her right to trial by jury and proceeded by way of a bench trial before the Honorable Ellen Clark. CP 5; RP 4-5.<sup>1</sup> Judge Clark found Berg guilty and imposed one day in jail. CP 13, 16; RP 46-47, 54. Berg timely filed her Notice of Appeal. CP 24-36.

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<sup>1</sup> "RP" refers to the verbatim report of proceedings dated March 1 and March 11, 2010.

## 2. Substantive Facts

On the morning of July 16, 2009, Spokane Police Officers executed a search warrant at a home located at 1307 West Dalton. RP 7-8. After knocking on the front door and announcing their presence, officers entered the home. RP 8-9, 19. There were several individuals inside the home, which was dirty and cluttered. RP 10-11, 19-20, 31-32, 34, 36. One of these individuals was Rhonda Berg. Detective Alan Quist saw her standing behind a wingback chair in the living room. RP 9-12, 19.

Detective Quist could only see one of Berg's hands and ordered her to show him both. According to Quist, Berg leaned toward the ground and made "a throwing motion" before displaying both of her hands. RP 11, 22. Quist assisted with securing everyone in the home and then returned his attention to the area behind the chair. RP 11-12. He found a pack of cigarettes on the floor with a glass pipe inside. A preliminary test revealed the presence of methamphetamine residue on the pipe, which was later confirmed in the lab. RP 12-14; exhibit 2. Although it is possible to obtain fingerprints from a glass pipe and cigarette pack, apparently no such testing was done in this case. RP 21-22.

Berg was merely a guest at the home. She was visiting a friend and had stayed there the previous night. She did not know the others in the house. RP 26, 31. Berg testified she had been sitting in the chair when officers pounded on the door. She was in the process of getting up to answer the door when they entered. RP 27-28. Berg smokes Camel cigarettes, whereas the package found behind the chair was Marlboro. RP 28-29. She denied ever holding the Marlboro package or tossing it on the floor behind the chair. RP 29, 32.

The State argued that Berg was guilty because she had constructive possession of the methamphetamine when she exercised control over the cigarette package. RP 38-40. The defense focused on the fact that nobody had seen Berg holding the package and she denied doing so. RP 40-44. Judge Clark found Berg's denial not credible and concluded that she had been in constructive possession of the methamphetamine residue. RP 46-47. She entered writing findings and conclusions that are consistent with her oral decision.<sup>2</sup> CP 8-10.

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<sup>2</sup> The court's written findings and conclusions are attached to this brief as an appendix.

C. ARGUMENT

THE EVIDENCE IS INSUFFICIENT TO SUPPORT BERG'S  
CONVICTION FOR POSSESSION OF  
METHAMPHETAMINE.

In every criminal prosecution, due process requires that the State prove every fact necessary to constitute the charged crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is, when viewing the evidence in the light most favorable to the prosecution, whether there was sufficient evidence for a rational trier of fact to find guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); State v. Green, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980).

Berg was prosecuted under RCW 69.50.4013(1), which provides that “[i]t is unlawful for any person to possess a controlled substance[.]” Possession may be either actual or constructive:

Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods.

State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969)(citing State v. Walcott, 72 Wn.2d 959, 435 P.2d 994 (1957)).

Even where the evidence demonstrates that the defendant handled the item in question, proof of possession requires more than “passing control which is only a momentary handling.” Callahan, 77 Wn.2d at 29. Stated another way, “[t]o ‘possess’ means to have actual control, care and management of, and not a passing control, fleeting and shadowy in its nature.” State v. Staley, 123 Wn.2d 794, 801, 872 P.2d 502 (1994) (quoting United States v. Landry, 257 F.2d 425, 431 (7th Cir. 1958)).

The Callahan decision best demonstrates this point. In Callahan, police executed a search warrant on a houseboat. The defendant was found sitting at a table on which police found various pills and hypodermic needles. Police also found a cigar box filled with drugs close to the defendant on the floor. The defendant admitted ownership of two books on drugs, two guns, and a set of broken scales found on the boat. He also admitted to actually handling the drugs. Callahan, 77 Wn.2d at 28.

Even though the defendant had handled the drugs prior to his arrest, he had not actually possessed them under the law. The Supreme Court held that a defendant’s momentary handling and

control cannot suffice to prove the element. Id. at 29; see also State v. Spruell, 57 Wn. App. 383, 386, 788 P.2d 21 (1990) (defendant's fingerprint on plate containing drugs shows no more than momentary possession and is insufficient to prove actual possession).

The same is true in this case. At best, the State's evidence demonstrated that Berg temporarily handled the cigarette package before placing it on the floor behind the chair. While Detective Quist discovered a pipe with residue inside the cigarette package, Berg's prior fleeting control over the item is insufficient to prove actual possession. Indeed, the State did not argue and the court did not find that Berg actually possessed the residue stained pipe.

Nor is the evidence sufficient to demonstrate constructive possession. As with actual possession, the State cannot demonstrate constructive possession with proof of passing control and momentary handling. Rather, there must be "other sufficient indicia of control." Staley, 123 Wn.2d at 802. And the evidence in this regard must be substantial. Callahan, 77 Wn.2d at 29.

Once again, Callahan is instructive. Although the defendant in that case admitted to handling the drugs in question, was in close proximity to other drugs, and admitted ownership of guns,

books on narcotics, and measuring scales, this evidence was not sufficiently substantial to support a finding of constructive possession, either. The Court noted that the defendant was not a tenant; rather, like Berg, he was merely a guest on the premises. Callahan, 77 Wn.2d at 31; compare State v. Cantrabana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996) (actual control over the premises where drugs are found establishes rebuttable presumption of dominion and control over drugs on premises).

Another instructive case is State v. Gutierrez, 50 Wn. App. 583, 585-86, 749 P.2d 213, review denied, 110 Wn.2d 1032 (1988). Police arrested the defendant after he accompanied the renter of a storage unit to the unit, which contained a trailer full of illegal drugs and equipment used to weigh and package drugs. Gutierrez stayed inside the unit for 40 minutes and, when arrested, was found to be carrying a large amount of drug money on his person. Despite these incriminating facts, the evidence was insufficient to support a finding that he constructively possessed the drugs. Gutierrez, 50 Wn. App. at 593-94.

In State v. Spruell, noted above, the defendant was arrested inside a home in which officers found cocaine and marijuana in the kitchen, along with paraphernalia associated with drug

manufacturing. From outside the home, they also heard what sounded like a plate hitting the back door from the inside. Once inside, they found cocaine along the door and doorjamb and a plate on the floor located within a few feet of the door. The defendant's fingerprint was on that plate. Spruell, 57 Wn. App. at 384-85. Still, the evidence was not sufficiently substantial to sustain the conviction based on constructive possession. Id. at 387-89.

The evidence of possession in Berg's case falls short of what was presented even in Callahan, Gutierrez, and Spruell. Although the trial court found that Berg held the cigarette package containing the pipe and placed it on the floor, even if true, Berg exercised nothing but momentary control over the package and its contents. Even when viewed in the light most favorable to the State, Berg did not possess the methamphetamine residue. Because the State failed to prove this essential element of the charged offense, her conviction must be reversed and dismissed. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998) (dismissal with prejudice only remedy for failure of proof).

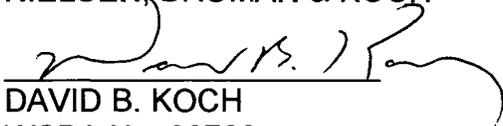
D. CONCLUSION

The State failed to prove that Berg is guilty of possessing a controlled substance. There is insufficient evidence of actual or constructive possession. Her conviction should be reversed and dismissed.

DATED this 30<sup>th</sup> day of July, 2010.

Respectfully submitted,

NIELSEN, BROMAN & KOCH

  
\_\_\_\_\_  
DAVID B. KOCH  
WSBA No. 23789  
Attorneys for Appellant

## **APPENDIX**

FILED

MAR 12 2010

THOMAS R FALLQUIST  
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

STATE OF WASHINGTON )

Plaintiff, )

v. )

RHONDA LYNN BERG )  
WF 01/25/61 )

Defendant(s). )

No. 09-1-02752-9

PA# 09-9-37310-3

RPT# 002-09-0805434

RCW 69.50.4013(1)-F (#56640)

FINDINGS OF FACT AND

CONCLUSIONS OF LAW

THIS MATTER came before the court for trial on March 1, 2010. The defendant, Rhonda Lynn Berg, was present and was represented by Thomas J. Krzyminski. The State of Washington was represented by Mary Ann Brady, Deputy Prosecuting Attorney. The defendant waived the right to a jury trial. The parties stipulated to the chain of custody of Exhibit 1 and to the admissibility of Exhibit 2, the crime lab report, in lieu of testimony. The court admitted both exhibits. The court heard the testimony of Detective Alan Quist of the Spokane Police Department and Ms. Berg. The court, having heard the testimony and the argument of counsel, now makes the following:

FINDINGS OF FACT

1. On July 16, 2009 Spokane Police Officers executed a search warrant at 1307 West Dalton, Spokane, Washington.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Page 1

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Dated: March 11, 2010

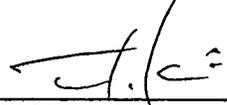
  
\_\_\_\_\_  
JUDGE

**ELLEN KALAMA CLARK**

Presented by:

Approved as to Form Only:

  
\_\_\_\_\_  
MARY ANN BRADY  
Deputy Prosecuting Attorney  
WSBA # 12447

  
\_\_\_\_\_  
THOMAS J. KRZYMINSKI  
Attorney for Defendant  
WSBA # 19576

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
vs.	)	COA NO. 28876-5-III
	)	
RHONDA BERG,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30<sup>TH</sup> DAY OF JULY 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] MARK LINDSEY  
SPOKANE COUNTY PROSECUTING ATTORNEY'S OFFICE  
PUBLIC SAFETY BUILDING, 1<sup>ST</sup> FLOOR  
1100 WEST MALLON  
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- [X] RHONDA BERG  
P.O. BOX 280  
ELK, WA 99009

**SIGNED** IN SEATTLE WASHINGTON, THIS 30<sup>TH</sup> DAY OF JULY 2010.

x *Patrick Mayovsky*