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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 307166

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

CELERINO MOJICA-PULIDO,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii-iii
I. <u>ASSIGNMENTS OF ERROR</u>	1
A. <u>ISSUES PRESENTED BY ASSIGNMENTS OF ERROR</u>	1
B. <u>ANSWERS TO ASSIGNMENTS OF ERROR</u>	1
II. <u>STATEMENT OF THE CASE</u>	2
III. <u>ARGUMENT</u>	2
1. <u>There was a sufficient nexus between no prosecutorial misconduct, and the court did not err in overruling the defense objection</u>	2
2. <u>Sufficient evidence supported the conviction for first degree unlawful possession of a firearm</u>	7
IV. <u>CONCLUSION</u>	9

TABLE OF AUTHORITIES

PAGE

Cases

State v. Atchley, 142 Wn.App. 147, 173 P.3d 323 (2007) 3

State v. Collins, 76 Wn.App. 496, 886 P.2d 243,
review denied, 126 Wn.2d 1016, 894 P.2d 565 (1995)..... 9

State v. Dalton, 73 Wn.App. 132, 868 P.2d 873 (1994)..... 5

State v. Delmarter, 94 Wn.2d 634, 618 P.2d 99 (1980)..... 7

State v. Echeverria, 85 Wn.App. 777, 934 P.2d 1214 (1997)..... 8, 9

State v. Frye, 26 Wn.App. 276, 613 P.2d 152 (1980)..... 4

State v. Goble, 88 Wn.App. 503, 945 P.2d 263 (1997) 3

State v. Gross, 57 Wn.app. 549, 789 P.2d 317 (1990)..... 4

State v. Harris, 12 Wn.App. 481, 530 P.2d 646,
review denied, 85 Wn.2d 1010 (1975)..... 4

State v. Hystad, 36 Wn.App. 42, 671 P.2d 793 (1983)..... 9

State v. Jackson, 150 Wn.2d 251, 76 P.3d 217 (2003) 2, 3

State v. Kelley, 52 Wn.App. 581, 762 P.2d 20 (1988) 6

State v. Klinger, 96 Wn.App. 619, 980 P.2d 282 (1999)..... 4

State v. Larson, 29 Wn.App. 669, 630 P.2d 485 (1981)..... 4

State v. Maddox, 152 Wn.2d 499, 98 P.3d 1199 (2004)..... 3

State v. McGovern, 111 Wn.App. 495, 45 P.3d 624 (2002)..... 4, 5

State v. Morgan, 78 Wn.App. 208, 896 P.2d 731,
review denied, 127 Wn.2d 1026, 904 P.2d 1158 (1995)..... 8

TABLE OF AUTHORITIES (continued)

	PAGE
<u>State v. O’Neil</u> , 74 Wn.App. 820, 879 P.2d 950 (1994).....	4
<u>State v. Perez</u> , 92 Wn.App. 11, 963 P.2d 881 (1998).....	4
<u>State v. Peterson</u> , 3 Wn.App. 946, 478 P.2d 745 (1970)	4
<u>State v. Randecker</u> , 79 Wn.2d 512, 487 P.2d 1295 (1971).....	7
<u>State v. Summers</u> , 107 Wn.App. 373, 28 P.3d 780 (2001).....	8
<u>State v. Thein</u> , 138 Wn.2d 133, 977 P.2d 582 (1999).....	3, 5-7
 Additional Case	
<u>Commonwealth v. Cline</u> , 234 Pa.Super.12, 335 A.2d 361, 364 (1975)	5
 Federal Cases	
<u>United States v. Dubrofsky</u> , 581 F.2d 208, 213 (9 th Cir.1978).....	4
<u>United States v. Pitts</u> , 6 F.3d 1366, 1369 (9 th cir.1993).....	3, 6
 Constitutional Provision	
Const. Art. I, s.7	2
 Statutes and Rules	
RCW 9.41.010(1)(b)	8
RAP 10.3(b)	2

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether a search warrant affidavit established a sufficient nexus between a residence, and controlled buys conducted by confidential sources in the residence's detached garage, such that there was probable cause to search the residence for controlled substances and evidence pertaining to the sale of illegal drugs?
2. Whether sufficient evidence supported the conviction for first degree unlawful possession of a firearm?

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. There was a sufficient nexus between the transactions conducted in the garage, and the residence, which were on the same property. Rather than relying upon generalized beliefs about the practices of drug dealers, it was reasonable to infer from the affidavit that evidence of drug trafficking would be found in both the garage and residence itself.
2. Sufficient evidence supported the jury's verdict that Mr. Mojica-Pulido unlawfully possessed the firearm found in the garage, as a trier of fact could be convinced beyond a reasonable doubt that he was in constructive possession of

the weapon, given the paperwork in his name found in the garage, his connection to the drug transactions which occurred in the garage, and statements he made about the firearm in recorded jail phone calls.

II. STATEMENT OF THE CASE

The State is satisfied with the Appellant's Statement of the Case.

RAP 10.3(b)

III. ARGUMENT.

1. **There was a sufficient nexus between no prosecutorial misconduct, and the court did not err in overruling the defense objection.**

Mr. Mojica-Pulido argues on appeal that since the affidavit in this case does not contain observations of criminal activity in the residence itself, any evidence found in the search of the residence should have been suppressed under Const. Art. I, s. 7, since there was no nexus between the transactions which occurred in the garage and house. That there was a nexus is reasonably inferred from a common sense reading of the affidavit.

It is well-established that a search warrant may issue only upon a determination of probable cause. State v. Jackson, 150 Wn.2d 251, 264, 76 P.3d 217 (2003). Probable cause exists when the application sets forth "facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the

criminal activity can be found at the place to be searched.” State v. Atchley, 142 Wn. App. 147, 161, 173 P.3d 323 (2007), *citing* State v. Thein, 138 Wn.2d 133, 140, 977 P.2d 582 (1999). The affidavit or sworn statement should be evaluated in a commonsensical manner rather than hypertechnically. Jackson, 150 Wn.2d at 265.

The issuing magistrate is entitled to make “reasonable inferences” from the facts set out in the affidavit, but the supporting affidavit must be based on more than mere suspicion or personal belief that evidence of a crime will be found on the premises to be searched. State v. Maddox, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004); Jackson, 150 Wn.2d at 265.

Probable cause requires a nexus between criminal activity and the item to be seized, as well as between the item to be seized and the place to be searched. Thein, 138 Wn.2d at 140, *citing* State v. Goble, 88 Wn. App. 503, 509, 945 P.2d 263 (1997). An officer’s generalized statements, based upon past experience, standing alone, cannot establish probable cause. Maddox, 152 Wn.2d at 505.

The Ninth Circuit has recognized that “in the case of drug dealers, evidence is likely to be found where the dealers live.” United States v. Pitts, 6 F.3d 1366, 1369 (9th Cir. 1993), *quoted in* Thein, 138 Wn.2d at 145. Indeed, Washington courts have held that “a nexus is established between a suspect and a residence if the affidavit provides probable cause

to believe the suspect is involved in drug dealing and the suspect is either living there or independent evidence exists that the suspect may be storing records, contraband, or other evidence of criminal activity at the residence.” State v. Perez, 92 Wn. App. 11, 963 P.2d 881 (1998), *citing* State v. O’Neil, 74 Wn. App. 820, 823, 879 P.2d 950 (1994).

“A warrant may be upheld when the nexus between the items to be seized and the place to be searched rests not upon direct observations, but on the type of crime, nature of the items, and normal inferences where a criminal would likely hide contraband.” State v. Klinger, 96 Wn. App. 619, 628, 980 P.2d 282 (1999), *citing* State v. Gross, 57 Wn. App. 549, 554, 789 P.2d 317 (1990), *citing* United States v. Dubrofsky, 581 F.2d 208, 213 (9th Cir. 1978).

The nexus discussed above can be met by showing additional facts from which a reasonable inference could be drawn that a suspected drug dealer probably keeps drugs and other contraband at his residence. State v. McGovern, 111 Wn. Ap. 495, 499-500, 45 P.3d 624 (2002); State v. Helmka, 86 Wn.2d 91, 93, 542 P.2d 115 (1975); State v. Larson, 29 Wn. App. 669, 671, 630 P.2d 485 (1981); State v. Frye, 26 Wn. App. 276, 281, 613 P.2d 152 (1980); State v. Harris, 12 Wn. App. 481, 483, 530 P.2d 646, *review denied*, 85 Wn.2d 1010 (1975); State v. Peterson, 3 Wn. App. 946, 947, 478 P.2d 745 (1970).

It is also well-settled that a greater nexus is required to establish probable cause than merely that a suspect is engaged in illegal activity, and that he or she resides at the place to be searched: “Probable cause to believe that a man has committed a crime . . . does not necessarily give rise to probable cause to search his home.” Thein, 138 Wn.2d at 148, *quoting* State v. Dalton, 73 Wn. App. 132, 140, 868 P.2d 873 (1994), *quoting* Commonwealth v. Cline, 234 Pa. Super. 12, 17, 335 A.2d 361, 364 (1975).

The nexus dictated by Thein can be met by showing additional facts from which it could be inferred that *this* suspect probably keeps drugs at his or her residence. McGovern, 111 Wn. App. At 500. Thein does not require definitive proof, or eyewitness testimony, but merely the existence of facts specific enough that a magistrate could draw reasonable and common sense conclusions that the controlled substances would be found at the place identified. Id.

The warrant at issue in Thein was based upon evidence discovered at a search conducted at another suspect’s home, which suggested that Thein was also dealing drugs. Thein, 138 Wn.2d at 137-38. The officers found receipts as well as packing slips for materials which the officers believed to be commonly associated with the cultivation of marijuana. Id. The officers then obtained a search warrant based upon their suspicion that

the defendant was a drug dealer, as well as the generalized conclusion that drug dealers are likely to keep evidence of illegal drugs in their homes. The Supreme Court held that those facts failed to establish the necessary nexus between evidence of illegal drug activity and Thein's residence, and that there was thus no probable cause to search the residence. Id., at 138-39.

It cannot be emphasized enough that Thein does not require some showing that contraband actually went into the place to be searched, only some nexus. Thein, 138 Wn.2d 146-48.

Mojica-Pulido relies heavily upon Division II's decision in State v. Kelley, 52 Wn. App. 581, 762 P.2d 20 (1988). It is true that the Court of Appeals affirmed the trial court's determination that there was no nexus between activities observed in outbuildings, and a residence. Id., at 586. However, the court's decision appears to rely heavily upon the fact that the State did not cite any authority "for the proposition that probable cause for a search of the house can be inferred from the fact that such materials may be found in the outbuildings." Id., at 587. Kelley predates Thein, Pitts, and the other cases cited herein, so its vitality here is in question. Further, the affidavit in question in that case pertained to indications that a grow operation was present in an outbuilding, a barn. Mr. Mojica-Pulido's case involved active drug transactions.

The affidavit here sets out that controlled buys of methamphetamine took place on two occasions in 2008, and that those buys took place within the garage located at Mr. Mojica-Pulido's residence. Unlike the warrant in Thein, based upon information developed elsewhere, the garage was on the same property as, and within some 30-70 feet away from, the main residence. The issuing judge could reasonably infer, then, that the drugs being sold, or evidence of drug trafficking, would be found in any building located at Mojica-Pulido's on the residential property. A sufficient nexus was shown here, and Mojica-Pulido's argument is without merit.

2. Sufficient evidence supported the conviction for first degree unlawful possession of a firearm.

In reviewing whether sufficient evidence supports a verdict, it is unnecessary for an appellate court to be satisfied of a defendant's guilt beyond a reasonable doubt; the court need only be "satisfied that there is substantial evidence" to support the State's case or a particular element in question. State v. Randecker, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In order to convict Mr. Mojica-Pulido, the State had only to prove that he knowingly had a firearm in his possession or his control, and that

he previously been convicted of a felony. RCW 9.41.010(1)(b). The prior conviction was stipulated to; the issue raised on appeal is whether there was sufficient evidence that Mr. Mojica-Pulido had the .380 pistol in his possession or his control.

It is well-established that possession may be actual or constructive. State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). A jury can find that a defendant constructively possessed a firearm if the defendant had dominion and control over it or over the premises where the firearm was found. Id. When a person has dominion and control over a premises, it creates a rebuttable presumption that the person has dominion and control over items on the premises. State v. Summers, 107 Wn. App. 373, 388-89, 28 P.3d 780 (2001). One can also be in constructive possession with another person. State v. Morgan, 78 Wn. App. 208, 212, 896 P.2d 731, *review denied*, 127 Wn.2d 1026, 904 P.2d 1158 (1995).

In this case, the jury could have been convinced beyond a reasonable doubt that Mr. Mojica-Pulido had control over the firearm in light of the paperwork with his name on it being found in the garage, his involvement with the drug transactions taking place there, and his concern about the pistol and the garage as evidenced in his recorded jail phone calls.

It is true that Mr. Mojica-Pulido was unable to take immediate possession of the pistol at the time the search warrant was executed, but the ability to reduce an object to actual possession is just one factor of dominion and control. Echeverria, 85 Wn. App. At 783. No single factor is dispositive in determining dominion and control, and a court takes into account the totality of the circumstances. State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243, *review denied*, 126 Wn.2d 1016, 894 P.2d 565 (1995).

Mojica-Pulido's reliance upon State v. Hystad, 36 Wn. App. 42, 671 P.2d 793 (1983) is also misplaced. The issue in that case was whether the defendant was fully informed of the factual basis for the crime with which he had been charged. Whether or not he was in possession was not an issue.

There was sufficient evidence that Mr. Mojica-Pulido was in constructive possession of the pistol at the time the search warrant was executed.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions.

Respectfully submitted this *4th* day of November, 2013.

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