

FILED

DEC 14, 2015

Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 33791-0-III

STATE OF WASHINGTON, Respondent,

v.

JANETTE RAE JOHNSON, Appellant.

APPELLANT'S BRIEF

Andrea Burkhart, WSBA #38519
Burkhart & Burkhart, PLLC
6 ½ N. 2nd Avenue, Suite 200
PO Box 946
Walla Walla, WA 99362
Tel: (509) 529-0630
Fax: (509) 525-0630
Attorney for Appellant

TABLE OF CONTENTS

AUTHORITIES CITED.....ii

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....1

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR1

IV. STATEMENT OF THE CASE.....1

V. ARGUMENT.....2

VI. CONCLUSION.....5

CERTIFICATE OF SERVICE6

AUTHORITIES CITED

State Cases

| | |
|---|---|
| <i>State v. Callahan</i> , 77 Wn.2d 27, 459 P.2d 400 (1969)..... | 3 |
| <i>State v. Chavez</i> , 138 Wn. App. 29, 156 P.3d 246 (2007)..... | 4 |
| <i>State v. Cote</i> , 123 Wn. App. 546, 96 P.3d 410 (2004)..... | 3 |
| <i>State v. Jones</i> , 146 Wn.2d 328, 45 P.3d 1062 (2002)..... | 4 |
| <i>State v. Olivarez</i> , 63 Wn. App. 484, 820 P.2d 66 (1991)..... | 3 |
| <i>State v. Randecker</i> , 79 Wn.2d 512, 487 P.2d 1295 (1971)..... | 3 |
| <i>State v. Randhawa</i> , 133 Wn.2d 67, 941 P.2d 661 (1997)..... | 3 |
| <i>State v. Tadeo-Mares</i> , 86 Wn. App. 813, 939 P.2d 220 (1997)..... | 3 |

Statutes

| | |
|-----------------------|---|
| RCW 59.18.030(7)..... | 4 |
| RCW 59.18.150..... | 4 |

I. INTRODUCTION

Janette Johnson's home was abated by the City of Spokane because it had been overrun by drug users who occupied it. On the day of the abatement, police entered a basement room that had been blocked off with a metal frame and located a loaded syringe on the floor. The syringe later tested positive for methamphetamine, and Johnson was charged and convicted of possessing it even though no evidence showed that she had access to the basement where it was found. She now appeals, contending that the evidence is insufficient to support the conviction.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: Insufficient evidence supports the conviction for possessing a controlled substance.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: In the absence of evidence that Johnson had access to the basement of the home where drugs were found, can the conviction for possessing a controlled substance be sustained?

IV. STATEMENT OF THE CASE

The State charged Janette Johnson with possessing a controlled substance after officers responded to her home to enforce an abatement

order. CP 15; RP 16. Police knew that many people came and went from the property, which had been overrun by drug users. RP 50-51, 54. The officers were aware that the previous tenants of the house had been ordered to leave a week or so before, but Johnson was the only person present at the time of the abatement. RP 20-21.

After sweeping Johnson's bedroom and living quarters on the main floor, the officers entered the basement from a stairway off the kitchen. RP 23-24. The stairway was blocked by a metal frame that multiple officers had to force out of the way to get into the basement. RP 24, 55. Upon entry, they discovered a makeshift bedroom with a loaded syringe on the floor next to a mattress. RP 24-25. The area was covered with graffiti and littered with rubber tubing, syringes, bloodstained cotton and pieces of foil. RP 28. No evidence introduced at trial placed Johnson in the basement at any time or connected her with the drug paraphernalia found there, other than the fact that she owned the house.

The jury convicted Johnson, and she now appeals. CP 33, 56.

V. ARGUMENT

The sole issue on appeal is whether the State's evidence is sufficient to convict Johnson of possessing a controlled substance. In reviewing a challenge to the sufficiency of the evidence, the court

considers the evidence in the light most favorable to the State. *State v. Randecker*, 79 Wn.2d 512, 517, 487 P.2d 1295 (1971). The verdict should be reversed if, after reviewing the evidence, the court cannot conclude that any rational trier of fact could have found the essential elements of the charge beyond a reasonable doubt. *State v. Randhawa*, 133 Wn.2d 67, 73, 941 P.2d 661 (1997).

The State's theory of guilt was that Johnson constructively possessed the drugs, which requires proof of dominion and control over them. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Exclusive control need not be shown to establish possession, but proximity is insufficient. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004). While dominion and control over the premises where a controlled substance is found is one factor in determining whether the defendant has dominion and control over the substance, it is not a crime to have dominion and control over premises where drugs are found. *State v. Tadeo-Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997) (citing *State v. Olivarez*, 63 Wn. App. 484, 486, 820 P.2d 66 (1991)). In evaluating the sufficiency of the evidence to show constructive possession, the court considers the totality of the circumstances to evaluate whether the defendant may immediately reduce the object to actual possession. *State*

v. Chavez, 138 Wn. App. 29, 35, 156 P.3d 246 (2007) (citing *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002)).

Here, the evidence is insufficient to show that Johnson had dominion and control over the basement where the controlled substances were found. The law enforcement witnesses confirmed that there had been tenants in the property, which had been overrun by drug users. RP 20-21, 50-51, 54. The basement room where the syringe was found was plainly set up as a sleeping quarter, separate from Johnson's own sleeping quarters upstairs. RP 23-25. Even if Johnson owned the property, a separate sleeping space may constitute a separate dwelling unit under the Residential Landlord Tenant Act, which limits the landlord's right of entry into the unit. RCW 59.18.030(7); 59.18.150. This certainly cuts against Johnson's ability to immediately reduce the contents of the basement room to her possession – tenants have rights under Washington law, and those rights were apparently acknowledged in the abatement order itself. RP 21.

Moreover, the undisputed evidence presented at trial showed that the basement apartment was physically barricaded such that immediate access was blocked and at least two officers were required to remove the obstruction so the basement could be entered. RP 24, 55-56. Even if

Johnson's access were not blocked legally under the Residential Landlord Tenant Act, it was certainly blocked physically.

Applying the totality of the circumstances test, Johnson's ownership of premises that were overrun by drug users is insufficient to show that she had dominion and control over the syringe in the basement sleeping area into which physical access was blocked. The trial was bereft of any evidence supporting any additional factor supporting a conclusion that Johnson constructively possessed the syringe – indeed, at no point was it shown that she had any knowledge of its presence. Under these facts, the evidence is insufficient to show Johnson exercised dominion and control over the basement area where the syringe was found.

VI. CONCLUSION

For the foregoing reasons, Johnson respectfully requests that the court REVERSE her conviction and DISMISS the cause with prejudice.

RESPECTFULLY SUBMITTED this 14th day of December,
2015.



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Brian O'Brien
Spokane County Prosecuting Attorney
1100 W. Mallon Avenue
Spokane, WA 99260

Janette Johnson
1620 E. Sherman Ave.
Coeur d'Alene, ID 83814

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 14th day of December, 2015 in Walla Walla, Washington.


Breanna Eng