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NO. 67733-1-I

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

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STATE OF WASHINGTON,

Respondent,

v.

BRYAN KEITH McCORD,

Appellant.

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

The Honorable Alan R. Hancock, Judge  
Superior Court Cause No. 11-1-00022-3

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BRIEF OF RESPONDENT

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**I. STATEMENT OF THE ISSUES**

A. Whether the appellant's conviction should be upheld when the evidence produced at trial was sufficient to allow a reasonable trier of fact to find he was in possession of controlled substances.

**II. STATEMENT OF THE CASE**

On the evening of February 6, 2011, the appellant was driving a Chevrolet Blazer in Oak Harbor, Washington. RP 147. As part of his patrol duties, Oak Harbor Police Officer Mike Clements observed the appellant's vehicle did not have operable tail lights. RP 39-40. Officer Clements accelerated to catch up with the appellant's vehicle, intending to initiate a traffic stop. RP 40, 42.

Although Officer Clements activated his overhead lights, signal, and air horn, the appellant did not pull over. RP 48. Instead, he turned onto another street, then into an unpaved parking lot. RP 40-41. From the parking lot, the appellant continued driving into a field. RP 41. It was raining heavily that night, and the field was extremely wet and muddy, with puddles of ankle-deep standing water. RP 90. The appellant's vehicle travelled fifty to sixty feet into the field before becoming stuck in the mud. RP 42.

Once his vehicle became stuck, the appellant climbed out through the driver's side window without opening the driver's door RP 49, 151. Once he jumped out of the vehicle, the appellant fell to the ground, and attempted to flee on foot. RP 49. Officer Clements pursued the appellant on foot for approximately five minutes. RP 53. When the appellant was eventually captured, he was in possession of \$1,538 in cash. RP 57, 61.

During the appellant's flight from Officer Clements and the subsequent investigation, the appellant's passenger, Carl Kleffel, remained in the vehicle. RP 88, 151. Mr. Kleffel only brought his cell phone and wallet into the vehicle, and never had possession of a camera case, or any drugs or paraphernalia. RP 148-49. He remained in the passenger seat and did not throw anything out of the vehicle. RP 152.

While Officer Clements was engaged with the appellant, Sergeant Jerry Baker arrived at the field and searched the area around the truck. RP 89. During his search, Sgt. Baker found a black camera case a few feet from the vehicle's driver's door. RP 89. The bag was partially in a water puddle, with the top half leaning against a clump of grass. RP 90. At the time Baker recovered the bag, the bottom third of the bag was dripping water, but, despite the rain, the remainder of the bag, and all of its contents, were still dry. RP 92.

After placing the appellant under arrest, Officer Clements returned to the field, and Sgt. Baker turned over the camera bag. RP 64, 92. Officer Clements examined the bag and found it contained a glass pipe, two baggies containing methamphetamine, a digital scale, and another bag containing additional empty baggies. RP 64. After completing his work at the scene, Officer Clements transported the bag to the police department and re-examined it. RP 66. By that time, the bag was fully wet, as were its contents. RP 75. In fact, Officer Clements had to squeeze water out of the bag with paper towels before placing it into evidence. RP 70. While wringing out the bag, Officer Clements discovered an additional pocket which contained two bags of heroin. RP 70.

Detective Carl Seim, a drug enforcement officer for the Oak Harbor Police Department, testified at trial that a person involved in selling controlled substances usually is found in possession of digital scales, a large amount of controlled substances, empty baggies, and a large amount of cash. RP 194-95. Specifically, a person distributing controlled substances would be likely to have between seven and twenty-eight grams of the substances and several hundred to several thousand dollars in his possession. RP 195.

The appellant was charged with four criminal violations, including possession of heroin and methamphetamine with intent to distribute. CP

122-125. He was convicted on all counts and timely appeals. CP 28-31, 1-15.

### **III. ARGUMENT**

#### **A. Standard of Review**

A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In determining the sufficiency of evidence, circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Appellant courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992). Therefore, in determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case. *State v. Fiser*, 99 Wn.App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). Thus, evidence is sufficient to support a conviction where, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.

*Salinas*, 119 Wn.2d at 201 (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)).

**B. The appellant's conviction should be upheld because the evidence in this case allowed a reasonable juror to find defendant was in possession of controlled substances with intent to distribute.**

The appellant's convictions should be upheld because the evidence produced at trial established his possession of controlled substances. Possession may be either actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Actual possession occurs when a person has personal custody of the item. *Id.* Constructive possession means that the item was not in actual, physical possession, but that the person had dominion and control over the goods. *Id.* The evidence produced at trial, when viewed in the light most favorable to the State, established the appellant had both actual and constructive possession of the camera case and its contents.

1. *The evidence produced at trial allowed a reasonable trier of fact to find the appellant had constructive possession of controlled substances.*

The appellant's conviction should be upheld because the evidence at trial showed he had constructive possession of controlled substances. Constructive possession occurs when a person has dominion and control over an item. *Id.* Because various factors determine dominion and control, a court must consider all the evidence tending to establish constructive

possession. *State v. Partin*, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). The evidence in this case showed the appellant had dominion and control over the camera case and controlled substances.

Evidence that a defendant was near a recently dropped package of drugs, with some additional connection to the package, is sufficient to show dominion and control. *See State v. Ibarra-Raya*, 145 Wn.App. 516, 525, 187 P.3d 301 (Div. 3, 2008), *reversed on other grounds*, 172 Wn.2d 880 (2011). In *Ibarra-Raya*, the court found sufficient evidence to support a finding of dominion and control over a bindle of cocaine found on the ground next to the defendant. *Id.* The defendant had called and inquired about his brother who was in custody and being investigated for delivery of controlled substances. *Id.* The bindle was found, fresh looking and without dust on it, on the ground next to the defendant. *Id.* The defendant also offered to admit ownership if the officer saw him drop the bindle. *Id.* That evidence was found to be sufficient to allow a reasonable jury to infer the defendant had dominion and control over the cocaine. *Id.*

Similarly, the evidence in this case showed the appellant was in control of a dropped package of drugs. Like *Ibarra-Raya's* phone call about his brother, the large amount of cash found on the appellant, which was consistent with the amount of drugs and paraphernalia found inside the camera case, allowed an inference that he was involved in the sale of

controlled substances. Also like Ibarra-Raya, who was contacted next to a fresh bindle of drugs, the camera case was found, only partially damp despite being dropped in a large puddle on a rainy night, at the same location the defendant stumbled and fell. RP 65. Finally, like Ibarra-Raya, the appellant was the only likely source of the camera case. See RP 96 (no one walked through the scene during investigation, and the field did not appear to be normal path for travel), RP 151 (the driver's door of the vehicle was not opened), RP 153 (the passenger denied knowledge of the case).

Constructive possession occurs when a defendant has dominion or control over contraband. Evidence that the appellant was in possession of an amount of cash consistent with the drugs and paraphernalia in the case, that the case was recently dropped, and that the appellant was the only likely source of the case was sufficient to allow a reasonable trier of fact to find the appellant was in dominion and control of the drugs.

2. *The evidence produced at trial allowed a reasonable trier of fact to find the appellant had actual possession of controlled substances.*

The appellant's conviction should be upheld because the evidence at trial showed he had actual possession of controlled substances. A person has actual possession of an item when he or she has physical custody of an item. *Callahan*, 77 Wn.2d at 29. Possession of an item is determined by

the totality of the circumstances. *State v. Staley*, 123 Wn.2d 794, 802, 872 P.2d 502 (1994). While momentary handling, alone, is not sufficient to establish possession, the duration of handling is only one factor to be considered in determining whether possession has been established. *Id.* at 801. Instead, the focus should more properly be on the quality and nature of possession. *State v. Summers*, 107 Wn.App. 373, 386, 28 P.3d 780 (Div. 2, 2001), *review granted, cause remanded*, 145 Wn.2d 1015, 37 P.3d 289 (2002), and *opinion modified on reconsideration*, 43 P.3d 526 (Wash. Ct. App. 2002).

In fact, even a defendant's momentary handling of an item, along with other indicia of control, can support a finding of possession. *Id.* For example, a guest at a house was in actual possession of a bag of drugs he briefly grabbed and tried to hide when police arrived at the house. *State v. Werry*, 6 Wn.App. 540, 548, 494 P.2d 1002 (Div. 2, 1972). Although the defendant in *Werry* only had the bag in his hand "for a fleeting second and got rid of it," *id.* at 542, his possession was more than passing control because he seized the bag of drugs with the intent to secrete it from police. *Id.* at 548.

More specifically, evidence that a defendant had possession of contraband before dropping it is sufficient to show actual possession. *See State v. DuPont*, 14 Wn.App. 22, 25, 538 P.2d 823, *review denied*, 86

Wn.2d 1005 (1975); *State v. Bowman*, 8 Wn.App. 148, 152-53, 504 P.2d 1148 (Div. 2, 1972). For example, a house guest seen sliding drugs onto the floor when the police arrived was in actual possession of those drugs. *Bowman*, 8 Wn.App. at 152-53. Although he was not in physical possession when the baggie was seized, the defendant in *Bowman* was in actual control of the baggie as well as in constructive possession while it lay at his feet. *Id.* at 153. Similarly, in *DuPont*, an officer speaking with the defendant heard keys drop and saw a piece of paper, which contained money, heroin, and cocaine, fall to the ground at the defendant's feet. *DuPont*, 14 Wn.App. at 23. The trial court and Court of Appeals agreed that evidence presented a question of actual possession. *Id.* at 25 (“We agree with the trial court.... ‘The issue is really very simple in this case; that is, either he dropped it or he didn’t’”).

Like *DuPont*, the evidence in this case showed the appellant was in actual possession of the camera case and drugs before he dropped them in the muddy field. In *DuPont*, keys, a piece of white paper, and \$20 bill containing cocaine and heroin were lying on the floor close to the defendant's feet. *Id.* at 23. Similarly, the appellant's camera case was found where he stumbled and fell. RP 49, 52, 90.

Additionally, in both *DuPont* and this case, there were no other likely sources of the contraband. In *DuPont*, no person was in close

proximity to defendant. *DuPont*, 14 Wn.App. at 23. Likewise, the evidence in this case showed the camera case did not come from a passerby. The case had clearly not been in the field for any significant length of time, as it was mostly dry when found by Sgt. Baker, even though it was found in a large puddle. RP 65. No one walked through the field during the investigation, and, given the extremely wet condition of the field, it was very unlikely that anyone walked through the field prior to the appellant's arrival. RP 96.

The case also did not come from the vehicle's passenger or the vehicle itself. The passenger brought only his cell phone and a wallet, but no drugs or paraphernalia, into the truck. RP 148-49. He did not see the camera case during his brief contact with the appellant and did not throw anything out of the vehicle. RP 153. The camera case also did not come directly from the appellant's vehicle. Rather than opening the driver's door to exit the vehicle, the appellant jumped out the window. RP 49, 52, 151. With the driver's door remaining closed, there was no opportunity for the case to fall out into the field. Also, the passenger did not throw anything out the vehicle. RP 152.

Finally, like *DuPont*, additional evidence links the appellant to the recovered drugs. In *DuPont*, the recovered keys fit the defendant's car. *DuPont*, 14 Wn.App. at 23. In this case, the appellant's repeated flight

from Officer Clements showed his consciousness that he was engaged in criminal activity. The cash found in the appellant's possession also tied him to the camera case. The presence of a digital scale with a large amount of a controlled substance and several hundred to several thousand dollars is consistent with distribution of controlled substance. RP 194-95. The camera case contained more than twenty grams of heroin and more than twenty grams of methamphetamine, plus empty baggies and a digital scale. RP 54, 166-77. The appellant was in possession of \$1,538 in case when he was apprehended. RP 61.

The evidence presented in this case was sufficient to allow a reasonable finder of fact to find the appellant was in actual possession of controlled substances. Facts that show a defendant was in possession of a controlled substance before dropping or discarding it are sufficient to establish actual possession. As in *DuPont*, this case presented a simple question of, "either he dropped it or he didn't." The evidence in this case certainly allowed a reasonable trier of fact to believe the appellant was in possession of a camera case containing drug paraphernalia and controlled substances before dropping it when he stumbled and fell in a muddy field. The appellant's convictions should, therefore, be upheld.

#### IV. CONCLUSION

The evidence produced in this case showed the appellant was in possession of controlled substances. A camera case containing drugs and paraphernalia consistent with drug sales was found at the same location the appellant had stumbled and fell. The appellant was in possession with a large amount of cash, consistent with the contents of the camera case, when he was arrested. Because he jumped out his vehicle's window and no other people had walked through the field, there were no other reasonable sources of the camera case. That evidence was sufficient to allow a reasonable trier of fact to find the appellant had dominion and control over the camera case and its contents. That evidence was also sufficient to allow any rational trier of fact to find the appellant was in actual possession of the camera case before he dropped it. The appellant's convictions, therefore, should be upheld.

Respectfully submitted this 24th day of February, 2012.

GREGORY M. BANKS  
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COURT OF APPEALS FOR THE STATE OF WASHINGTON  
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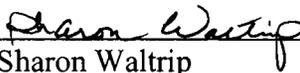
DECLARATION OF SERVICE

I, Sharon Waltrip, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 27th day of February, 2012, a copy of Brief of Respondent and Declaration of Service was served on the parties designated below by depositing said documents in the United States Mail, postage prepaid, addressed as follows:

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Signed in Coupeville, Washington, this 27<sup>th</sup> day of February, 2012.

  
Sharon Waltrip

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