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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 08/31/2010  
RUTH WILLINGHAM,  
ACTING CLERK  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 09-0664  
)  
Appellee, ) Department C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
DANUIEL DWIGHT ELLINGER, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
)  
)

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Appeal from the Superior Court in Mohave County

Cause No. CR-2005-0882

The Honorable Steven F. Conn, Judge

**AFFIRMED**

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Terry Goddard, Attorney General Phoenix  
By Michael J. Mitchell, Assistant Attorney General  
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender Kingman  
Attorney for Appellant

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S W A N N, Judge

¶1 Danuiel Dwight Ellinger appeals the superior court's revocation of his probation and imposition of a prison sentence. For the reasons set forth below, we affirm.

*FACTS AND PROCEDURAL HISTORY*

¶2 In 2005, Ellinger pled guilty to attempted sexual conduct with a minor, a class 3 felony and a dangerous crime against children. The court suspended the imposition of sentence and placed Ellinger on supervised probation for a term of ten years. The conditions of his probation included: "1. Obey all laws" ("Condition 1"), and "6. Not possess or control any firearms, ammunition, or prohibited weapons as defined in A.R.S. § 13-3101" ("Condition 6").

¶3 In May 2009, a probation officer petitioned the superior court to revoke Ellinger's probation based on violations of Conditions 1 and 6. The petition alleged that on May 6, 2009, drug paraphernalia and firearms were found at Ellinger's residence.

¶4 After a series of uncontested continuances, a probation violation hearing was held in July 2009. At the violation hearing, the State presented evidence of the following facts. In January 2009, Ellinger notified his probation officer that he had moved into an R.V. at 3501 Magna Road, Golden Valley, Arizona. A probation officer, a sheriff's deputy, and a surveillance officer visited the Magna Road property on May 6,

2009. They observed an R.V. parked behind a double-wide trailer home. They located Ernestina Sanchez in the double-wide, and she informed them that she and Ellinger were residing in the R.V.

¶15 The officers proceeded to search the R.V. Ellinger was not present. At some point, Sanchez entered the R.V. and showed the officers a .40-caliber pistol, which she said belonged to her, stored in a lock-box underneath a table. In addition to the pistol, the officers found a .22-caliber rifle in a back closet and one .40-caliber round in a kitchen closet. In the oven, they found a spoon with white residue that field-tested positive for methamphetamine. The probation officer testified that the spoon was probably used to dissolve methamphetamine so that it could be injected.

¶16 Ellinger was interviewed approximately a week after the search. He told the sheriff's deputy that he and Sanchez were in the process of moving from the R.V. to the double-wide, and there had been a transfer of items between the two structures. He stated that the rifle belonged to John Sherdahl, the person who allowed Ellinger and Sanchez to stay on the Magna Road property, but explained he did not know that the rifle was kept inside the residence.

¶17 At the conclusion of the State's presentation of evidence, Ellinger presented the testimony of Sherdahl and

Sanchez. Sherdahl testified that he had allowed Ellinger and Sanchez to live at the Magna Road property while Sherdahl was in the process of buying it. Sherdahl lived in the double-wide off and on until moving away in late April or early May 2009. Before Sherdahl moved away, Ellinger and Sanchez slept in the R.V. but used the double-wide's kitchen and living room because the R.V. was not hooked up to water or electricity. After he moved away, Sherdahl gave Ellinger and Sanchez permission to move into the double-wide. He also asked Sanchez to move his .22-caliber rifle from a closet in the double-wide to a safe place.

¶18 Sanchez testified that she and Ellinger moved from the R.V. to the double-wide three days before the search, and that she had told the searching officers that they were living in the double-wide. She had moved her pistol and Sherdahl's rifle from the double-wide to the R.V. at the time of the move because she knew that Ellinger was not allowed to possess firearms. She did not show or tell Ellinger the location of the firearms. Sanchez acknowledged that some personal belongings remained in the R.V., and testified that "we were getting some things, our personal clothing into the house." Sanchez finally testified that she had never seen Ellinger use methamphetamine and had never seen the spoon that was recovered from the R.V., but had allowed a

friend to spend a night in the R.V. after she and Ellinger moved out.

¶9 After hearing argument from counsel and considering the evidence, the court made multiple findings. The court found that Sanchez's and Sherdahl's testimony was credible, but nevertheless concluded that the State had proved by a preponderance of the evidence that Ellinger constructively possessed the firearms and the spoon, and thereby violated Conditions 1 and 6 of his probation.

¶10 The matter proceeded to a disposition hearing in August 2008. The court revoked Ellinger's probation and sentenced him to a mitigated sentence of six years of imprisonment, with credit for presentence incarceration.

¶11 Ellinger timely appeals. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A).

#### *DISCUSSION*

¶12 A probation violation must be shown by a preponderance of the evidence. Ariz. R. Crim. P. 27.8(b)(3). We will uphold the superior court's finding of a violation unless the finding is arbitrary or unsupported by any theory of the evidence. *State v. Thomas*, 196 Ariz. 312, 313, ¶ 3, 996 P.2d 113, 114 (App. 1999).

¶13 Ellinger contends only that there was insufficient evidence to show that he possessed the firearms and the spoon. Possession of contraband requires either actual or constructive possession. Constructive possession exists when the defendant has dominion and control (whether exclusive or non-exclusive) over the place where the contraband is found, and the circumstances are such that it can reasonably be inferred that he has actual knowledge of the contraband's presence. *State v. Villavicencio*, 108 Ariz. 518, 520, 502 P.2d 1337, 1339 (1972). Circumstantial evidence may be sufficient to prove constructive possession. *State v. Villalobos Alvarez*, 155 Ariz. 244, 245, 745 P.2d 991, 992 (App. 1987).

¶14 Here, there was sufficient evidence to show that Ellinger had non-exclusive dominion and control over the places where the contraband was found. The court found that Sanchez's and Sherdahl's testimony was credible. But even accepting as true the testimony that Ellinger had stopped sleeping in the R.V. three days before the search, it was reasonable for the court to find that Ellinger retained dominion and control over the R.V.'s common areas. There was evidence that the R.V. remained on the property, and there was no evidence that Ellinger could not access it -- in fact, there was evidence that he and Sanchez were in the process of removing their personal belongings from it. And though Sanchez may have hoped to

separate Ellinger from the firearms by placing them in the R.V., no evidence was presented to show that the firearms were stored in areas of the R.V. over which Ellinger lacked dominion and control, or that the firearms were stored in a manner that physically prevented him from exercising dominion and control.<sup>1</sup> Likewise, no evidence was presented to show that Ellinger lacked dominion and control over the kitchen area where the spoon was found.

¶15 Further, there was sufficient evidence from which the court could reasonably infer that Ellinger knew of the contraband's presence in the R.V. Even accepting Sanchez's testimony as true, there was evidence that at the time of the search, Ellinger was using the R.V. in some residential capacity. Though the firearms were not out in the open, they were in common areas that were reasonably accessible in a very small residence. Further, the court could reasonably infer that the spoon, for which no explanation had been provided, was within Ellinger's constructive possession.

¶16 We conclude, therefore, that there was sufficient evidence to support the court's findings that Ellinger constructively possessed the firearms and the spoon. By

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<sup>1</sup> Though the pistol was stored in a lock-box, no evidence was presented to show that the lock-box was locked or that Ellinger did not have access to it.

possessing the firearms, Ellinger violated Condition 6 of his probation. And by possessing the spoon, he violated Condition 1 of his probation -- there was sufficient evidence from which the court could find that the spoon was drug paraphernalia that he had used or intended to use in violation of A.R.S. § 13-3415(A). The court did not err by revoking Ellinger's probation and imposing a prison sentence.

*CONCLUSION*

¶17 For the reasons set forth above, we affirm.

/s/

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PETER B. SWANN, Judge

CONCURRING:

/s/

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MARGARET H. DOWNIE, Presiding Judge

/s/

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DONN KESSLER, Judge