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Washington State
Court of Appeals
Division Two

March 10, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TAMMY LEE BRICK, Appellant.	No. 52244-6-II UNPUBLISHED OPINION

SUTTON, J. — Tammy L. Brick appeals her conviction for possession of a controlled substance—methamphetamine and the judgment and sentence. Brick argues that (1) she received ineffective assistance of counsel because her counsel focused on the defense of unwitting possession rather than the issue of constructive possession, (2) there is insufficient evidence to support her conviction because the State did not prove beyond a reasonable doubt that she constructively possessed the methamphetamine, and (3) the trial court erred by imposing a $100 DNA[1] collection fee because she has previously provided a DNA sample.

The State argues that (1) Brick did not receive ineffective assistance of counsel because her counsel made a reasonable and strategic decision to focus his arguments on the affirmative defense of unwitting possession, and (2) there was sufficient evidence to support her conviction because the State proved beyond a reasonable doubt that she constructively possessed

[1] Deoxyribonucleic acid.

methamphetamine. The State agrees that (3) a remand is necessary for the trial court to strike the DNA fee and amend the judgment and sentence accordingly.

We hold that Brick did not receive ineffective assistance of counsel, and there was sufficient evidence to support Brick's conviction, and thus, we affirm the conviction. We remand to the trial court for the State to demonstrate whether Brick previously provided a DNA sample, and if so, for the court to strike the $100 DNA collection fee and amend Brick's judgment and sentence.

FACTS

On November 5, 2017, Brick contacted law enforcement to report that her house had been broken into and vandalized. Brick testified that she had returned from a trip to Vancouver, and her friend, Jessica Booth, let her into her house because she forgot her key. Brick testified that she went to the back step of the house to feed her cats, and she saw a syringe laying there which had not been there before. She realized somebody had broken into and "fire extinguished" her house. Verbatim Report of Proceedings (VRP) (Apr. 30, 2018) at 53.

Deputy Justin Rodgers contacted Brick, along with Dennis Chrisman, down the street from the house early in the morning. Chrisman owns the building Brick lives in, and he lives on the same property as her. Brick lives on the property for free because she does work for Chrisman, and she acts as a caretaker for Chrisman's mother when he is at work. Brick moved onto the property in October 2017.

Chrisman and Brick were together the day of the incident because Chrisman had driven to Vancouver to pick Brick up. Brick told Deputy Rodgers that she had been at the house the previous evenings before the incident.

Brick appeared to be under the influence of a stimulant because

> [s]he was speaking in an accelerated or hyper state. At times when she would speak so fast, she was hard to understand[,] repeat[ed] things several times. Her bags were—she had bags underneath her eyes. They were droopy.

VRP (Apr. 30, 2018) at 12-13.

Brick allowed Deputy Rodgers to enter the house to investigate the break-in. Brick's friend, Booth, was at the house cleaning up. Deputy Rodgers testified that inside the residence, fire retardant was "spread out all over the floor and the main living room and going back into the back bedroom." VRP (Apr. 30, 2018) at 15. Brick's bedroom is toward the back of the house, and it included a twin-size bed and a shelf above the bed. Once inside the bedroom, Deputy Rodgers observed a syringe loaded with some type of drug on the shelf above Brick's bed, covered in fire retardant.

Although Brick had previously told Deputy Rodgers the bedroom belonged to her, she then told him that a roommate had lived in the room until two weeks prior and that the syringe belonged to her. Brick then told Deputy Rodgers that she uses methamphetamine, and that she had used earlier in the day, but that the syringe was not hers. Brick testified that the syringe had not been there when she had left for Vancouver, and that she did not use syringes. When Deputy Rodgers seized the syringe, it left an outline in its shape from the fire retardant.

Brick's home was not secure because multiple people had keys to it, and Brick frequently lost her key. Brick testified that she would keep her possessions in the house, "if the house didn't keep getting broke into." VRP (Apr. 30, 2018) at 66.

The State charged Brick with one count of possession of a controlled substance—methamphetamine.

Brick waived her right to a jury trial, and the case proceeded to a bench trial. At trial, the State presented testimony from Deputy Rodgers and Chrisman. Brick testified on her behalf. During closing argument, Brick's counsel argued that Brick would not have called the police and invited Deputy Rodgers into her home if she knew that the syringe was readily visible in her bedroom:

> If [Brick] had had a loaded hypodermic needle right above her bed, would she really have gone and called law enforcement and invited them into her home to investigate? I think it just backs her up even more. She wouldn't have done that if she knew that she was going to be found in possession of a needle. I think it just proves beyond a preponderance that she did not know that needle was there.

VRP (Apr. 30, 2018) at 76. He also argued that Brick and Chrisman were credible:

> Well, it's odd that the state wants to argue that [Brick] is not credible when everything she's told law enforcement has been confirmed. Clearly, somebody had been in the residence and sprayed fire extinguisher obviously. It's confirmed. Clearly, somebody had been sabotaging her, throwing nails and such in the driveway. That's confirmed. But when she says, I didn't know that needle was there, well, she's not credible on that. I don't think you can pick and choose. Mr. Chrisman backed [Brick] up right down the line.
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> . . . .
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> Mr. Chrisman testified that he knew [Brick] to be a drug user, but she smokes. Never been around hypodermic needles before. Doesn't ingest that way, and he had known her for about ten years.

VRP (Apr. 30, 2018) at 75-76.

Following the trial, the court found that Chrisman and Brick were not credible witnesses because Chrisman had picked up and disposed of other syringes in the house while Deputy Rodgers was investigating, Brick had admitted to being high on methamphetamine, and Brick had not told Deputy Rodgers about another syringe she found on the back porch. The trial court also found that there was evidence that Brick lived in the home where the methamphetamine was found,

satisfying the constructive possession requirement of the charge. The trial court concluded that the State had met its burden of proof and that Brick was guilty of possession of methamphetamine. The trial court's written findings of fact and conclusions of law reflected its oral ruling.

At sentencing, the trial court found that Brick is indigent under RCW 10.101.010(3)(a) - (c) because she receives food stamps and is unemployed. Based on it finding that Brick is indigent, the trial court waived the discretionary LFOs. The court imposed a $100 DNA collection fee[2] and sentenced Brick to 30 days in jail and 12 months in community custody.

Brick appeals her conviction and the imposition of the $100 DNA collection fee in the judgment and sentence.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Brick argues that she received ineffective assistance of counsel because her counsel focused on the defense of unwitting possession rather than the issue of constructive possession of the syringe. We disagree and hold that defense counsel's performance was not deficient, and therefore, Brick did not receive ineffective assistance of counsel.

A. LEGAL PRINCIPLES

Unchallenged findings of fact are verities on appeal, and we review conclusions of law de novo. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003); *State v. Merritt*, 200 Wn. App. 398, 408, 402 P.3d 862 (2017), *affirmed*, 193 Wn.2d 70, 434 P.3d 1016 (2019).

[2] The court imposed other mandatory LFOs, including a $100 crime laboratory fee and a $500 victim assessment fee, which are not at issue.

A claim that counsel was ineffective is a mixed question of law and fact that we review de novo. *State v. Jones*, 183 Wn.2d 327, 338, 352 P.3d 776 (2015). The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In *Strickland*, the United States Supreme Court set forth a two-prong inquiry for reversal of a criminal conviction based on ineffective assistance of counsel. *Strickland*, 466 U.S. at 687. Under the *Strickland* test, the defendant bears the burden to show that (1) counsel's performance was deficient and (2) the attorney's deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. In other words, "but for counsel's deficient performance, the outcome of the proceedings would have been different." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "Failure to make the required showing of either deficient performance or sufficient prejudice defeats an ineffectiveness claim." *Strickland*, 466 U.S. at 700.

We review de novo whether counsel's performance was deficient. *See Jones*, 183 Wn.2d at 338. Representation is deficient if it falls "below an objective standard of reasonableness," given all of the circumstances. *Strickland*, 466 U.S. at 688. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight and to evaluate the conduct from counsel's perspective at the time. *Strickland*, 466 U.S. at 689. There is a strong presumption that counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

Because there is a strong presumption that counsel is effective, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Counsel's

conduct is not deficient if it can be characterized as a legitimate trial strategy, but the relevant question is not whether counsel's choices were strategic, but whether they were reasonable. *Grier*, 171 Wn.2d at 33-34. However, when the record does not show what counsel's reasons were based on when making a particular choice at trial, we may not determine that the decision *was* strategic. *State v. Linville*, 191 Wn.2d 513, 525-26, 423 P.3d 842 (2018). "[W]hen 'the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record.'" *Linville*, 191 Wn.2d at 525 (quoting *McFarland*, 127 Wn.2d at 335).

"Possession" of an item may be "actual or constructive to support a criminal charge." *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Actual possession is where the defendant "has physical custody of the item," where constructive possession is where the defendant "has dominion and control over the item." *Jones*, 146 Wn.2d at 333.

A person's dominion and control over the premises where drugs are found is one of the circumstances from which a factfinder can infer constructive possession of the drugs. *State v. Shumaker*, 142 Wn. App. 330, 334, 174 P.3d 1214 (2007). However, having dominion and control over the premises containing the item dose not, by itself, prove constructive possession. *State v. Tadeo-Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997).

In *State v. Reichert*, the State charged the defendant with unlawful possession of marijuana with intent to manufacture or deliver. 158 Wn. App. 374, 378, 242 P.3d 44 (2010). The State presented evidence that the defendant resided in the home where the police found marijuana. *Reichert*, 158 Wn. App. at 390. After a jury convicted him, the defendant appealed, arguing that insufficient evidence supported the finding that he had constructive possession of the marijuana. *Reichert*, 158 Wn. App. at 390-91.

We disagreed. We stated that residing on the premises where the marijuana was found is one circumstance from which a jury can infer constructive possession. *Reichert*, 158 Wn. App. at 390. We recognized that this evidence, alone, was not enough, but noted that additional evidence supported the constructive possession inference, including a strong smell of marijuana from a safe in the defendant's room. *Reichert*, 158 Wn. App. at 391. Therefore, we concluded that sufficient evidence supported the conviction.

B. DEFICIENT PERFORMANCE

Here, the State chose to argue that Brick had constructive possession over the methamphetamine rather than actual possession because she had it in her bedroom, not on her person. Thus, the State was required to prove beyond a reasonable doubt that Brick had constructive possession of the methamphetamine in her bedroom. Brick's counsel chose to focus on arguing the affirmative defense of unwitting possession.

Brick only challenges finding of fact 10 and conclusion of law 2.[3] Finding of fact 10 states, "The [c]ourt finds that the defendant was in constructive possession of the syringe containing methamphetamine," and conclusion of law 2 states, "The State has proven to the [c]ourt beyond a reasonable doubt that the Defendant possessed (constructively) methamphetamine on November 5, 2017, in Lewis County, Washington, as charged in the original information." Clerk's Papers (CP) at 43-44. At trial, Brick's counsel did not make any arguments regarding constructive possession. He focused his argument on unwitting possession—that Brick did not know the syringe was in her house and that she did not use syringes to ingest methamphetamine.

[3] The unchallenged findings of fact are treated as verities on appeal. *O'Neill*, 148 Wn.2d at 571.

There was overwhelming evidence that Brick had constructive possession of the syringe because she had dominion and control over the area the syringe was located. The State established that Brick lives at the house, and that the syringe was found in her room on a shelf above her bed. The syringe had already been in the bedroom before the fire retardant was sprayed—as shown by Deputy Rodgers' testimony that there was an outline of the syringe when he picked the syringe up. The syringe contained methamphetamine. The State established Brick has a key to the house although she testified that she lost it. And the State established that Brick keeps her possessions in the house.[4] Brick originally told Deputy Rodgers she slept in the bedroom, but she changed her story once Deputy Rodgers asked her about the syringe. Brick then told Deputy Rodgers that the syringe belonged to a roommate who had moved out two weeks prior.

In closing argument, Brick's counsel argued that Brick would not have called the police and invited Deputy Rodgers into her home if she knew the syringe was readily visible in her bedroom:

> If [Brick] had had a loaded hypodermic needle right above her bed, would she really have gone and called law enforcement and invited them into her home to investigate? I think it just backs her up even more. She wouldn't have done that if she knew that she was going to be found in possession of a needle. I think it just proves beyond a preponderance that she did not know that needle was there.

VRP (Apr. 30, 2018) at 76. He also argued that Brick and Chrisman were credible:

> Well, it's odd that the state wants to argue that [Brick] is not credible when everything she's told law enforcement has been confirmed. Clearly, somebody had been in the residence and sprayed fire extinguisher obviously. It's confirmed. Clearly, somebody had been sabotaging her, throwing nails and such in the driveway. That's confirmed. But when [Brick] says, I didn't know that needle was

[4] Brick testified that she would keep her possessions in the house if the house "didn't keep getting broke into." VRP (Apr. 30, 2018) at 66.

> there, well, she's not credible on that. I don't think you can pick and choose. Mr. Chrisman backed her up right down the line.
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VRP (Apr. 30, 2018) at 75-76.

On appeal, Brick argues that her counsel could have further argued the issue of constructive possession during closing argument. She argues that her counsel was ineffective because he did not further the argument that she did not have dominion and control over the house since others freely entered the house.

It was a legitimate strategic or tactical decision for Brick's counsel to focus his arguments on unwitting possession rather than constructive possession. *McFarland*, 127 Wn.2d at 335. While there was overwhelming evidence of constructive possession, Brick had a feasible defense of unwitting possession because she had not been in the house for at least one day, and her house had been broken into and "fire extinguished." VRP (Apr. 30, 2018) at 53. Further, her counsel never made an explicit concession regarding constructive possession—he merely focused the majority of his argument on unwitting possession. Given the substantial evidence showing constructive possession, defense counsel's performance did not fall below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687.

We hold that Brick's counsel's performance was not deficient. Because defense counsel's performance was not deficient, we do not reach the prejudice prong.

II. SUFFICIENCY OF THE EVIDENCE

Brick argues that there was insufficient evidence to convict her of unlawful possession of methamphetamine because the State failed to prove that she had dominion and control of the premises or the methamphetamine, and thus, constructive possession of the methamphetamine. Thus, the State failed to meet its burden of proving all the essential elements of the crime because it failed to prove constructive possession. We hold that there was sufficient evidence to support Brick's conviction.

A. LEGAL PRINCIPLES

In a criminal case, the State must prove each element of a crime beyond a reasonable doubt to satisfy the due process demands of article 1, section 3 of the Washington Constitution and the Fourteenth Amendment of the United States Constitution. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). To satisfy this burden, the State must present substantial evidence supporting a finding that the State has proved each of the crime's elements beyond a reasonable doubt. *State v. Green*, 91 Wn.2d 431, 442-43, 588 P.2d 1370 (1979); *Hudson v. Louisiana*, 450 U.S. 40, 44, 101 S. Ct. 970, 67 L. Ed. 2d 30 (1981).

The test for determining sufficiency of the evidence is whether, 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. *State v. Cardenas-Flores*, 189 Wn.2d 243, 265, 401 P.3d 19 (2017). In a sufficiency of the evidence claim, the defendant admits the truth of the evidence and the court views the evidence and all reasonable inferences drawn from that evidence in the light most favorable to the State. *Cardenas-Flores*, 189 Wn.2d at 265-66. Credibility determinations are

made by the trier of fact and are not subject to review. *Cardenas-Flores*, 189 Wn.2d at 266. Circumstantial and direct evidence are equally reliable. *Cardenas-Flores*, 189 Wn.2d at 266. Following a bench trial, this court's review is "limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law." *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014), *modified on remand*, 191 Wn. App. 759 (2015).

To determine whether sufficient evidence proves that a defendant has dominion and control over an item, we examine the totality of the circumstances. *State v. Lakotiy*, 151 Wn. App. 699, 714, 214 P.3d 181 (2009). Aspects of dominion and control include whether the defendant could immediately convert the item to his or her actual possession, the defendant's physical proximity to the item, and whether the defendant had dominion and control over the premises where the item was located. *State v. Chouinard*, 169 Wn. App. 895, 899-903, 282 P.3d 117 (2012).

However, the defendant's proximity to an item is not enough to establish constructive possession. *Chouinard*, 169 Wn. App. at 899. Similarly, the defendant's knowledge of the item's presence alone is insufficient to show constructive possession. *Chouinard*, 169 Wn. App. at 899. And even proximity plus knowledge of an item's presence may not be sufficient to establish dominion and control over the item. *See State v. George*, 146 Wn. App. 906, 923, 193 P.3d 693 (2008). A person's dominion and control over a premises "creates a rebuttable presumption that the person has dominion and control over items on the premises." *Reichert*, 158 Wn. App. at 390.

B. CONSTRUCTIVE POSSESSION

The totality of the circumstances establishes that there was sufficient evidence for the trial court to conclude that Brick was in constructive possession of the methamphetamine, and there

was substantial evidence to support the trial court's findings of fact. To prove unlawful possession of a controlled substance, the State was required to prove the following: (1) on or about the 5th day of November, 2017, (2) in Lewis County, (3) Brick possessed methamphetamine. RCW 69.50.4013.

Deputy Rodgers found methamphetamine inside a syringe located in plain view on a shelf in Brick's bedroom in her home, located in Lewis County, Washington. Brick told Deputy Rodgers that she had been at the house the previous evenings before the incident. The door to the cupboard where the syringe was located was open. The syringe had been laying on the shelf before the fire retardant had been sprayed. VRP (Apr. 30, 2018) at 26. The syringe contained methamphetamine. Brick keeps her personal belongings in the home. Brick has a tenancy agreement with Chrisman whereby she provides work for him in exchange for staying in his house. Brick testified that she is a methamphetamine user, and that she knows what methamphetamine is and the various ways one can ingest it into one's body.

The trial court's finding of fact 10 is supported by substantial evidence. The trial court found that neither Brick nor Chrisman were credible because Chrisman admitted that he had picked up and disposed of other syringes in the house in order to hide them from Deputy Rodgers, Brick testified that she was high on methamphetamine the day of the incident, and Brick had not told Deputy Rodgers about another syringe she had discovered on the back porch. The fact that others had access to Brick's house and her bedroom does not mean that she did not have dominion and control. *George*, 146 Wn. App. at 920. While these things, taken alone, may not have been enough evidence to show constructive possession, when looking at the totality of the circumstances, there is substantial evidence to support the trial court's finding that Brick was in constructive possession

of the syringe containing methamphetamine. *Lakotiy*, 151 Wn. App. at 714. This finding supports the trial court's conclusion of law 2 that the State proved beyond a reasonable doubt that Brick constructively possessed methamphetamine on November 5, 2017, in Lewis County because the finding is supported by substantial evidence.

We hold that there was substantial evidence to support the trial court's findings of fact, and the findings supported the conclusions of law. Therefore, there was sufficient evidence for a rational trier of fact to find beyond a reasonable doubt that Brick had constructive possession of the syringe containing methamphetamine, and thus, we affirm her conviction.

III. LFOs-DNA COLLECTION FEE

Brick argues that under RCW 43.43.7541 (2018), the trial court erred by imposing a $100 DNA collection fee when she had previously provided a DNA sample based on her prior felony convictions in 2013 and 2006. Thus, Brick claims that this fee should be stricken. The State agrees that under the current law, the DNA collection fee should be stricken from Brick's judgment and sentence. We remand for the State to demonstrate whether Brick has previously provided a DNA sample, and if so, for the trial court to strike the DNA collection fee and amend the judgment and sentence.

In 2018, the legislature amended RCW 43.43.7541 to authorize the imposition of a DNA collection fee only if the State has not "previously collected the offender's DNA as a result of a prior conviction." LAWS OF 2018, ch. 269, § 18. This statutory amendment applies here because Brick's case was pending on review when the new legislation came into effect. *State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018). A defendant is required to submit a DNA sample for

any adult or juvenile felonies. RCW 43.43.754(1)(a). A defendant is not required to submit a DNA sample if the Washington State Patrol crime laboratory already has one. RCW 43.43.754(4).

Because Brick has prior felony convictions in Washington, there is a presumption that the State has previously collected her DNA as statutorily required. *State v. Houck*, 9 Wn. App. 2d 636, 651, 446 P.3d 646 (2019). On remand, the State has the burden to prove that Brick has previously provided a DNA sample. *Houck*, 9 Wn. App. at 651 (for defendants with prior felony convictions, the State bears the burden of proving that it has not previously collected the defendant's DNA).

CONCLUSION

We affirm Brick's conviction, but remand the DNA collection fee. On remand, the State must demonstrate whether Brick previously provided a DNA sample, and if so, the trial court must strike the DNA collection fee and amend the judgment and sentence accordingly.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Sutton, J.

SUTTON, J.

We concur:

Maxa, C.J.

MAXA, C.J.

Melnick, J.

MELNICK, J.