IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RICHARD THOMAS LONG, Appellant.	No. 41613-1-II UNPUBLISHED OPINION

Johanson, J. — Richard Thomas Long appeals his conviction and sentence for unlawful possession of methamphetamine. He argues that (1) the trial court's failure to hold a CrR3.5 hearing violated the criminal rule and his constitutional rights; (2) insufficient evidence supports his conviction for constructive possession of methamphetamine; (3) he received ineffective assistance of counsel because (a) counsel failed to present specific legal authority, and (b) counsel failed to object to prejudicial irrelevant evidence; and (4) the trial court erred by denying him a sentence below the standard range. We affirm his conviction and sentence because there are no reversible errors.

FACTS

I. Unlawful Possession

Department of Corrections (DOC) Specialist John Tulloch had a DOC arrest warrant for Richard Long. Based on a tip that Long was staying at a local address, Officer Tulloch, Community Corrections Officer (CCO) Michael Boone and Thurston County Deputy Sheriff Brian Cassidy visited the address. Looking into the yard, Deputy Cassidy saw someone running towards the back of the property. The homeowner told Officer Tulloch that Long was staying on the property and that Officer Tulloch should look for him in the trailer at the back of the property.

Officer Tulloch and CCO Boone approached the trailer, identifying themselves and their intent. After receiving no response, they entered the trailer and found Long squatting on a bed in the corner, such that a bulkhead wall concealed him from direct observation. They did not see anyone else in or around the trailer. Officer Tulloch saw a black backpack on the bed, immediately next to where Long was squatting. He asked Long if the backpack belonged to him and Long said, "yes." 1 Report of Proceedings (RP) at 36. When Officer Tulloch lifted the backpack to bring it with him as he left, he saw two pipes, side by side, where the bag had been—a thicker stone pipe and a thinner, clear glass pipe with burnt residue on the bowl. Officer Tulloch asked Long if the pipes were his; Long replied that the marijuana pipe (thicker pipe) was his and that he did not know to whom the other pipe belonged. The Washington State Patrol laboratory identified methamphetamine residue in the glass pipe and marijuana residue in both the stone pipe and in a tin container found in Long's possession.

II. Procedure

The State charged Long with one count of unlawful possession of a controlled substance—methamphetamine, contrary to RCW 69.50.4013(1). The parties signed an ex parte

consolidated omnibus order providing, "Defendant's statements may be admitted into evidence without hearing by stipulation of the parties." Clerk's Papers (CP) at 8.

Officer Tulloch testified that Long told him that the backpack belonged to him. Long did not object. There were no questions or answers regarding a *Miranda* warning.[1] Officer Tulloch also testified that Long told him that the marijuana pipe belonged to him and that he did not know to whom the other pipe belonged. Long did not object.

CCO Boone testified that he and Officer Tulloch restrained Long. As with Officer Tulloch's testimony, there were no questions or answers regarding a *Miranda* warning. During *cross-examination*, CCO Boone testified that after restraining Long, he searched him and found a small container with marijuana residue. Long asked CCO Boone if he found any controlled substances other than the marijuana in that container and CCO Boone stated that he did not.

Deputy Cassidy testified that he assisted the other officers. He testified that he asked them whether the backpack actually belonged to Long, and Officer Tulloch told him that it did. Long did not object.

During closing argument, the State told the jury:

> [W]e all sat through voir dire and listened to the number of people in the panel that said I don't think marijuana is a big deal, I think pot is no big deal. So it's not surprising that he would claim ownership of the marijuana pipe but . . . he would not claim ownership of that [methamphetamine] pipe.

1 RP at 180-81.

During Long's closing argument, he told the jury that when police arrested him, he did not

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

give a false name, or try to resist or run away. Long told the jury, that he readily admitted that the backpack belonged to him. He further argued that when police asked, "Whose stuff is this?" He replied, "Marijuana pipe is mine, but that's [the other pipe] not mine." 1 RP at 187. Long emphasized that he was cooperative and displayed no signs of using methamphetamine. Long reminded the jury that he was not on trial for possessing paraphernalia or for possessing marijuana residue and argued that the State had not proven his actual charges. The jury found Long guilty of one count of unlawful possession of a controlled substance—methamphetamine.

At sentencing, Long requested an exceptional sentence downward based on the de minimis amount of methamphetamine involved, the lack of evidence of his actual methamphetamine use, credit for time served, and because some jurors did not like that the State brought charges on residue cases.

The State argued that an exceptional sentence downward was not justified and instead requested a standard range sentence of 21 months. The sentencing court imposed an 18-month sentence, stating, "I did not find any exceptional sentence" and telling Long's counsel, "Mitigating factors, I could not do that." 2 RP at 229.

ANALYSIS

Long alleges several errors on appeal and we address each alleged error in turn.

A. CrR 3.5

Long argues that the trial court erred in admitting his statements to the police without holding a CrR 3.5 hearing. But Long stipulated to the admission of his statements and thereby waived any requirement to hold a CrR 3.5 hearing. Although a CrR 3.5[2] hearing is mandatory,

under proper circumstances, a defendant can waive a voluntariness hearing and the formal entry of written findings. *State v. Nogueira*, 32 Wn. App. 954, 957, 650 P.2d 1145 (1982). CrR 3.5 hearings are procedural devices designed to protect constitutional rights, thus, "[a]n attorney is impliedly authorized to stipulate to and to waive procedural matters" including a CrR 3.5 hearing. *State v. Fanger*, 34 Wn. App. 635, 637, 663 P.2d 120 (1983). A CrR 3.5 hearing "may be waived if done so knowingly and intentionally." *Fanger*, 34 Wn. App. at 637. Where counsel waives the CrR 3.5 hearing, he may not assail the court's failure to conduct one. *State v. Ralph*, 41 Wn. App. 770, 776, 706 P.2d 641, *review denied*, 104 Wn.2d 1027 (1985).

In *Fanger*, the defense filed a handwritten notation, stipulating waiver of a pretrial omnibus hearing. *Fanger*, 34 Wn. App. at 636. Someone acting in the name of Fanger's trial counsel signed the document. *Fanger*, 34 Wn. App. at 636. Fanger's trial court did not hold a CrR 3.5 confession hearing; at his trial, the interviewing officer and the detective testified to Fanger's statements without objection. *Fanger*, 34 Wn. App. at 636. On appeal, we held that based on the pretrial document, signed by his attorney's agent, and filed with the court, Fanger knowingly and intelligently waived the hearing. *Fanger*, 34 Wn. App. at 636.

Additionally, we held that Fanger also impliedly waived his rights under CrR 3.5 by failing at trial to raise the issue of invalid express waiver and by failing to object to the officers' testimony. *Fanger*, 34 Wn. App. at 638. We reasoned that a voluntariness hearing is not

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[2] CrR 3.5(a) provides:

> When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

required "'absent some contemporaneous challenge to the use of the confession.'" *Fanger*, 34 Wn. App. at 638 (quoting *State v. Rice*, 24 Wn. App. 562, 566, 603 P.2d 835 (1979)).

At trial, Long and the State signed an ex parte consolidated omnibus order providing, "Defendant's statements may be admitted into evidence without hearing by stipulation of the parties." CP at 8. In addition, Long did not object to the officers' testimony at trial. Here, as in *Fanger*, Long's counsel stipulated to the admission of his custodial statements and Long did not object to the officers' statements at trial. We conclude that Long expressly and impliedly waived his CrR 3.5 hearing.

B. Sufficient Evidence

Long argues that insufficient evidence supports his conviction for methamphetamine possession because the State did not show that he resides in the trailer or that he otherwise had dominion and control over the trailer. We conclude that sufficient evidence supports Long's constructive possession of methamphetamine conviction. We test the evidence's sufficiency by asking whether, 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. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). When a defendant challenges the evidence's sufficiency in a criminal case, we draw all reasonable inferences from the evidence in the State's favor. *State v. Partin*, 88 Wn.2d 899, 906–07, 567 P.2d 1136 (1977), *overruled on other grounds by State v Lyons*, ___ Wn.2d ___, 275 P.3d 314, 320 (2012). We defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the evidence's persuasiveness. *State v. Raleigh*, 157 Wn. App. 728, 736-37, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029 (2011).

To convict Long of possession of a controlled substance, the State needed to prove beyond a reasonable doubt that Long actually or constructively possessed methamphetamine. RCW 69.50.4013, .206(d)(2). Possession of a controlled substance is a strict liability crime. *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008). Possession may be actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). To establish constructive possession, the State had to show that Long had "dominion and control over either the drugs or the premises upon which the drugs were found." *George*, 146 Wn. App. at 920 (quoting *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971)). "Dominion and control" means that Long may reduce the item to actual possession immediately. *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Control need not be exclusive, but the State must show more than mere proximity. *Raleigh*, 157 Wn. App. at 737. We examine the "totality of the situation" to ascertain if substantial evidence exists that tends to establish circumstances from which the trier of fact can reasonably infer the defendant had dominion and control over the contraband. *Partin*, 88 Wn.2d at 906. Constructive possession may be proved by circumstantial evidence. *State v. Sanders*, 7 Wn. App. 891, 893, 503 P.2d 467 (1972).

Long argues that the State did not show he resided in or had dominion and control of the trailer. But the State did not need to show that Long resided in the trailer or had control over the trailer; instead the State needed to show that Long had dominion and control over the controlled substance.

In *Mathews*, we held that the defendant, who was a passenger in an automobile, "exercised dominion and control of the area in which the heroin was found." *Mathews*, 4 Wn.

App. at 658. We emphasized that proximity to concealed narcotics was insufficient unless there were "other circumstances" linking the defendant to the drugs. *Mathews*, 4 Wn. App. at 658. Constructive possession cases are fact sensitive and comparisons to other cases are useful. *George*, 146 Wn. App. at 920.

In *George*, police stopped a car carrying three people, none of whom admitted owning the marijuana pipe lying next to George. *George*, 146 Wn. App. at 912. In that case, no other circumstances linked the defendant to the drugs. For example, there was no "testimony tending to rule out the other occupants . . . as having possession," no evidence relating to why and for how long defendant was in the area where police found drugs, and the defendant did not make "statements or admissions probative of guilt." *George*, 146 Wn. App. at 922. These circumstances are similar to those in *State v. Spruell*, where Police merely found defendant present, amongst a group of people, in a location where the police also found drugs. *State v. Spruell*, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990). In *Spruell*, there was no evidence relating to why the defendant was in the house or showing that he was anything more than a mere visitor. *Spruell*, 57 Wn. App. at 388-89.

In this case, the State presented evidence from which a jury could reasonably conclude that Long had dominion and control over the drugs. Unlike *Spruell* and *George*, where the defendants were among a group of people and just happened to be present at the location when police found drugs; here, police specifically searched for Long and found him alone in the trailer. Long appeared to be hiding, crouching on a bed in the corner behind a bulkhead wall. No one else was in or around the trailer at this time. Long's backpack covered a pair of pipes; he

admitted to owning the stone pipe, and denied owning the thin glass methamphetamine pipe, laying immediately next to it. Also, the homeowner told Officer Tulloch that Long was staying on the property and that Officer Tulloch should look for him in the trailer at the back of the property.

Here, viewing the evidence in the light most favorable to the State, sufficient evidence supports the jury's finding that Long constructively possessed the controlled substance. In addition to Long's proximity, the State also proved other circumstances linking Long to the controlled substances. *Mathews*, 4 Wn. App. at 658.

D. Effective Assistance of Counsel

Long argues that he received ineffective assistance of counsel because (1) counsel failed to present controlling legal authority at sentencing, and (2) counsel failed to object to prejudicial irrelevant evidence at trial. We conclude that Long received effective assistance from counsel.

Washington follows the ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984). In order to show that he received ineffective assistance of counsel, Long must show (1) that defense counsel's conduct was deficient, and (2) that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Because the defendant must meet both prongs, a failure to show either prong will end the inquiry. *See State v. Fredrick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1986). Deficient performance is that which falls below an objective standard of reasonableness. *In re Det. of Moore*, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009). Prejudice occurs where there is a reasonable probability that, but for the deficient performance, the proceeding's outcome would have been different. *State v. McFarland*, 127 Wn.2d 322, 335, 899

P.2d 1251 (1995).

We strongly presume that counsel provided effective assistance and "made all significant decisions in the exercise of reasonably professional judgment." *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992). If we can characterize defense counsel's conduct as a legitimate trial strategy or tactic, that conduct does not constitute deficient performance. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Long bears the burden of establishing there were no legitimate strategic or tactical reasons behind his attorney's choices. *State v. Rainey*, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001), *review denied*, 145 Wn.2d 1028 (2002). We evaluate the reasonableness of counsel's performance in light of all the circumstances. *In re Pers Restraint of Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

1. Failure to present specific legal authority

Long first argues that he received ineffective assistance of counsel because his counsel failed to present *State v. Alexander*, 125 Wn.2d 717, 888 P.2d 1169 (1995), which he argues, is controlling legal authority supporting a downward departure from the standard sentence range.

For Long to prevail, he has to show that counsel's performance was deficient and that this deficient performance prejudiced his defense. In *Alexander*, our Supreme Court held that a trial court may consider the fact of an extraordinary small amount of a controlled substance as a reason supporting a downward departure from the standard sentence range in a delivery case. *Alexander*, 125 Wn.2d at 723-24. Although Long's counsel did not reference *Alexander* as authority, Long's counsel did tell the sentencing court that the Sentencing Reform Act provides a nonexclusive list of reasons entitling a defendant to an exceptional sentence downward and that

his de minimis amount of methamphetamine was a reason for such a exceptional sentence downward. There is a strong presumption that counsel's representation was effective. *McFarland*, 127 Wn.2d at 335. Long can rebut this presumption if he proves that his attorney's representation "'was unreasonable under prevailing professional norms.'" *Davis*, 152 Wn.2d at 673 (quoting *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed 2d 305 (1986)). Here, Long does not show that prevailing professional norms require a reasonable attorney to name specific case law authority when making an argument supported by that case law. *See Davis*, 152 Wn.2d at 673. Because Long does not show that his attorney's representation was deficient our inquiry into his first argument ends. *See Fredrick*, 45 Wn. App. at 923.

2. Failure to object to marijuana testimony

Long next argues that he received ineffective assistance of counsel because his counsel failed to object to police testimony that they found a pipe with marijuana residue and also that they found a small tin container with marijuana residue.

If we can characterize defense counsel's conduct as a legitimate trial strategy or tactic, it does not constitute deficient performance. *Garrett*, 124 Wn.2d at 520. Long bears the burden of establishing there were no legitimate strategic or tactical reasons behind his attorney's choices. *Rainey*, 107 Wn. App. at 135-36. We evaluate the reasonableness of counsel's performance in light of all the circumstances. *Davis*, 152 Wn.2d at 673.

Here, the parties knew that several jurors were frustrated with the prosecutor's charging decisions and sympathetic to Long's uncharged marijuana possession ("[W]e all sat through voir

dire and listened to the number of people in the panel that said I don't think marijuana is a big deal, I think pot is no big deal."). 1 RP at 180-81. Long used his admission of owning the marijuana pipe to emphasize his candor and cooperativeness with police and the record shows that Long's counsel zealously advocated for his client by frequently objecting and by vigorously cross-examining the witnesses. Long does not meet his burden to establish that there were no legitimate strategic or tactical reasons behind his attorney's choices not to object to police testimony that they found a pipe with marijuana residue and also that they found a small tin container with marijuana residue. *Rainey*, 107 Wn. App. at 135-36.

Because Long's counsel "made all significant decisions in the exercise of reasonably professional judgment," Long does not meet his burden to show that his counsel's conduct was deficient. Thus, we conclude that Long's counsel provided effective assistance. *Lord*, 117 Wn.2d at 883.

D. Exceptional Sentence

Long finally argues that the trial court erred by denying him a sentence below the standard range. We conclude that the trial court properly weighed the merits of exceptional sentencing before declining to grant it. Generally, a court must impose a sentence within the standard sentence range. RCW 9.94A.505(1). But, it may impose a sentence above or below the standard range for reasons that are "substantial and compelling." RCW 9.94A.535; *State v. Fowler*, 145 Wn.2d 400, 404, 38 P.3d 335 (2002). A trial court may treat an "extraordinarily small amount" of a controlled substance as a substantial and compelling reason for downward departure from the standard sentence range. *Alexander*, 125 Wn.2d at 727. Where a defendant has requested an

exceptional sentence below the standard range, review is limited to circumstances where the court has (1) refused to exercise discretion at all or (2) has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997), *review denied*, 136 Wn.2d 1002 (1998). When a court refuses to impose an exceptional sentence, below the standard range under *any* circumstances, it refuses to exercise its discretion. *Garcia-Martinez*, 88 Wn. App. at 330. But, when a trial court has considered the facts and has concluded that there is no basis for an exceptional sentence, it has exercised its discretion, and the defendant may not appeal that ruling. *Garcia-Martinez*, 88 Wn. App. at 330.

The State requested a standard range sentence of 21 months. The trial court listened to Long's argument that he should receive an exceptional sentence downward because of the de minimis amount of methamphetamine involved, the fact that there was no evidence of his actual methamphetamine use, for credit for time served, and because some jurors did not like that the State brought charges on residue cases. The sentencing court imposed an 18-month sentence, stating, "I did not find any exceptional sentence." 2 RP at 229. The sentencing court told Long's counsel, "Mitigating factors, I could not do that." 2 RP at 229.

Here, the trial court considered the facts and arguments and declined to impose a sentence below the standard range despite its expressed concern about the prosecutor's charging residue cases. This is not a circumstance of the trial court failing to exercise its sentencing discretion, thus Long may not appeal this ruling. *Garcia-Martinez*, 88 Wn. App. at 330.

We affirm Long's conviction and sentence because there are no reversible errors.

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.

Johanson, A.C.J.

I concur:

Penoyar, J.

ARMSTRONG, J. (dissenting) – Because insufficient evidence supports a finding that Richard Long constructively possessed the methamphetamine in the travel trailer, I dissent.

The State can prove constructive possession by showing that the defendant has "'dominion and control over either the drugs or the premises upon which the drugs were found.'" *State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008) (quoting *State v. Mathews*, 4 Wn. App. 653, 656, 484 P.2d 942 (1971)). "'Mere proximity to the drugs and evidence of momentary handling'" of the drugs "'is not enough to support a finding of constructive possession.'" *George*, 146 Wn. App. at 920 (quoting *State v. Spruell*, 57 Wn. App. 383, 388, 788 P.2d 21 (1990)).

In *State v. Callahan*, 77 Wn.2d 27, 28, 459 P.2d 400 (1969), one of the defendants, Hutchinson, was on Callahan's houseboat when police boarded the boat and saw Hutchinson and another man sitting at a desk with various pills and hypodermic syringes. The evidence showed that Hutchinson (1) had possessions including two guns and broken scales on the houseboat, (2) had been staying on the houseboat for two to three days, (3) was near the drugs, and (4) had handled the drugs earlier in the day. *Callahan*, 77 Wn.2d at 31. The Court held this evidence insufficient to prove Hutchinson possessed the drugs because the State failed to prove he "had dominion or control over the houseboat." *Callahan*, 77 Wn.2d at 31.

Similarly, in *Spruell*, 57 Wn. App. at 384, Division One of this court held the evidence insufficient to prove constructive possession of cocaine where Hill, the defendant, was present at Spruell's home when police entered. The police saw Hill and another individual near a table on which there was cocaine residue, a scale, vials, and a razor blade. *Spruell*, 57 Wn. App. at 384.

The police found Hill's fingerprint on a plate that held an insufficient amount of residue to test for cocaine. *Spruell*, 57 Wn. App. at 384. The court held that there was "no basis for finding that Hill had dominion and control over the drugs" because there was "no evidence relating to why Hill was in the house, how long he had been there, or whether he had ever been there on days previous to his arrest." *Spruell*, 57 Wn. App. at 388-89.

Like in *Callahan* and *Spruell*, the State failed to connect Long to the premises where the police found drugs. Although Long was in the trailer by himself, there is no evidence showing that he had dominion or control of the premises. At most, the evidence shows that Long was near the methamphetamine pipe when he was arrested. But, mere proximity is not enough. *George*, 146 Wn. App. at 920. The police did not find any of Long's belongings other than the backpack in the trailer. Even though the homeowner told the police that Long was staying on the property and that the officers should look for him in the trailer, the State did not prove that Long had been staying in the trailer or, if so, for how long. The State also failed to connect Long to the methamphetamine pipe; Long's fingerprints were not found on the pipe. Thus, the evidence here is even less persuasive than in *Callahan* where the defendant handled the drugs. *Callahan*, 77 Wn.2d at 31. Here, at most we could infer that Long knew the methamphetamine pipe was under his backpack. But knowledge that the drugs were under Long's backpack is insufficient to prove constructive possession. *State v. Davis*, 16 Wn. App. 657, 659, 558 P.2d 263 (1977) (temporary residence, the existence of personal possessions on the premises, or knowledge of the presence of drugs do not prove constructive possession).

The majority dismisses Long's argument that there is no evidence showing that he resided

in or otherwise had dominion and control over the trailer. Instead, the majority focuses on Long's "constructive possession" of the drugs, pointing to his presence alone in the trailer, his apparent attempt to hide, his backpack laying over the pipes, and his admission that he owned the marijuana pipe. Majority at 8. But Long's presence without showing that he had been staying in the trailer for some substantial period of time is not persuasive. *See Spruell*, 57 Wn. App. at 388-89. And his attempt to hide and possibly to cover the pipes shows at most knowledge, also not persuasive. *Davis*, 16 Wn. App. at 659. In short, the State proved no more than it proved in *Spruell* and *Callahan*.

Because the State failed to prove that Long had dominion and control of the travel trailer or the methamphetamine pipe, there is no evidence that Long constructively possessed methamphetamine. I would reverse Long's conviction for unlawful possession of methamphetamine.

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Armstrong, J.