

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

No. 28876-5-III

Respondent,

)

)

) **Division Three**

v.

)

)

RHONDA LYNN BERG,

) **UNPUBLISHED OPINION**

)

Appellant.

)

)

Kulik, C.J. — Rhonda Berg appeals her conviction for possession of a controlled substance, methamphetamine. She contends the evidence was insufficient to support her conviction. We disagree and affirm.

FACTS

Based on a search warrant, Spokane police officers knocked on the door of a house, announced their presence, and then entered the house. The house was dirty and cluttered. Rhonda Berg and several other people were inside. Ms. Berg was not a resident of the house. She had been visiting a friend the day before and had stayed the night.

Ms. Berg was standing behind a wing chair in the living room of the house when the police entered. The only other person in the living room was sitting approximately 10 feet from where Ms. Berg was standing. Detective Alan Quist ordered Ms. Berg to show her hands when he entered the room because he could only see one of her hands. Ms. Berg did not comply immediately. Then, Detective Quist observed Ms. Berg make a throwing motion with her hidden hand before displaying her hand to the officers.

After securing the other individuals present in the house, Detective Quist searched around the chair and where he had seen Ms. Berg make the throwing motion. He found a pack of cigarettes behind the chair. Inside the pack, he found a glass pipe containing residue. There were no other items behind the chair or in the general area. Detective Quist field tested the residue, which tested positive for methamphetamine. Laboratory testing verified that the substance in the pipe was methamphetamine.

The State charged Ms. Berg with one count of possession of a controlled substance, methamphetamine. A judge found her guilty and sentenced her to one day in jail.

ANALYSIS

Evidence is sufficient if it permits a rational trier of fact to find that the State established the essential elements of the crime beyond a reasonable doubt. *State v.*

No. 28876-5-III
State v. Berg

Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A defendant who challenges the sufficiency of the evidence admits the truth of the evidence, and all inferences are drawn in favor of the State. *Id.* An appellate court defers to the fact finder on any issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Here the court found Detective Quist credible and found Ms. Berg's testimony not credible.

Ms. Berg was convicted under RCW 69.50.4013(1):

It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner.

An essential element of the crime is possession, either actual possession or constructive possession. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994).

Actual possession "means that the goods are in the personal custody of the person charged with possession." *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

Here, Ms. Berg may not have had actual possession of a controlled substance. The police did not find the methamphetamine on Ms. Berg's person or in her personal custody.

Instead, Ms. Berg's conviction was based on her constructive possession of the methamphetamine residue inside the glass pipe found within the cigarette pack.

Constructive possession means that "the person charged with possession has dominion

and control over the goods,” but does not actually possess them. *Id.*

We look to the totality of the situation and whether there is substantial evidence establishing circumstances from which the trier of fact can reasonably infer the defendant had dominion and control over the contraband. *State v. Morgan*, 78 Wn. App. 208, 212, 896 P.2d 731 (1995). The State need not prove knowledge or intent to possess, but must establish actual control, “not a passing control which is only a momentary handling.” *Staley*, 123 Wn.2d at 798 (quoting *Callahan*, 77 Wn.2d at 29).

Ms. Berg was a visitor, not a resident of the house, and had been at the house for one night. As a result, she was not in control of the premises and “mere proximity” to the controlled substance does not constitute constructive possession. *Id.* at 800-01. Factors showing dominion and control for constructive possession include the ability to reduce the object to actual possession and proximity to the contraband. *State v. Hagen*, 55 Wn. App. 494, 499, 781 P.2d 892 (1989). The State may use circumstantial evidence to show physical proximity and constructive possession. *State v. Gutierrez*, 50 Wn. App. 583, 592, 749 P.2d 213 (1988).

Here, Ms. Berg was a visitor in the house, and the drugs were not found on her, but were found near where she was standing. If that had been the extent of the factual basis for her conviction, there would not be sufficient evidence for constructive

possession. However, the additional circumstantial evidence of a furtive response, Ms. Berg's refusal to show both of her hands when told to do so by the police, along with her throwing motion, and the discovery of the cigarette pack containing an illegal substance near where she was standing constitute sufficient evidence of constructive possession. *See State v. Porter*, 58 Wn. App. 57, 62, 791 P.2d 905 (1990). Ms. Berg's actions created a strong inference that she knew that she had drugs, that those drugs were illegal, and that she was trying to dispose of them. Her actions when the police entered the house have a cumulative effect of showing constructive possession sufficient to sustain her conviction. Accordingly, we affirm the conviction for possession of a controlled substance, methamphetamine.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Kulik, C.J.

WE CONCUR:

Sweeney, J.

Korsmo, J.