

**IN THE
MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT**

STATE OF MISSOURI)	
)	
Respondent,)	
)	
Vs.)	SD34309
)	
VICKI LEANN GILMORE,)	
Appellant.)	

**APPEAL TO THE MISSOURI COURT OF APPEALS
SOUTHERN DISTRICT
FROM THE CIRCUIT COURT OF ST CLAIR COUNTY, MISSOURI
TWENTY-SEVENTH JUDICIAL CIRCUIT
THE HONORABLE JAMES K. JOURNEY, JUDGE**

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

After a jury trial in St. Clair County, Missouri, Vicky L. Gilmore appeals her conviction for the class C felony of possession of a controlled substance, §195.202 (RSMo 2011). (LF 103-104). St. Clair County is within the jurisdiction of the Southern District of Appeals, §477.060. On September 15, 2015, in the Circuit Court of St. Clair County, Missouri, the defendant was found guilty following a jury trial as a prior drug offender. (LF 61). This appeal does not involve any issue specifically reserved for the exclusive appellate jurisdiction of the Missouri Supreme Court, and jurisdiction therefore lies in the Missouri Court of Appeals, Southern District. Article V, § 3, Mo. Const.

STATEMENT OF FACTS

Vicky L. Gilmore was charged by an amended felony information, of committing the Class C Felony of possession of a controlled substance and was further alleged to have been a prior drug offender. (LF 50-51). The Amended Information alleged that [Vicky Gilmore]... “on or about October 1, 2014, in the County of St. Clair, State of Missouri, ... possessed methamphetamine, a controlled substance, knowing of its presence and nature.” (LF 50-51). At a jury trial held on September 15, 2015, the jury found the defendant guilty of the Class C felony of possession of a controlled substance on Verdict Form A. (LF 66). The following evidence was presented which is relevant to the issues taken up on appeal:

Deputy Alec Lawson of the St. Clair County Sheriff’s Department testified that he had conducted “trash pulls” as a result of an investigation regarding drug activity at a trailer in Appleton City, St. Clair County, Missouri during September of 2014. (TR 154-155). He identified Vicky Gilmore, the appellant in court, and as a female that was at the residence at approximately 2:30 a.m. during September of 2014. (TR 158). He further testified that he did not see her at the residence during any of the other six trash pulls and visitations to the residence. (TR 159). He did however, testify that a vehicle belonging to the defendant was located outside the residence on each of the “trash pulls.” (TR 159-160).

Deputy Lawson never saw Vicky Gilmore at the residence without Mr. Josh Foley being present, nor did he observe the individual that drove the vehicles claimed to be Ms. Gilmore’s to the residence. (TR 160-161). Deputy Lawson was unaware of whether the

vehicle was broke down or whether someone else had driven the vehicle to the residence. (TR 161). On October 1, 2014, Deputy Lawson along with other officers went to the residence and observed Josh Foley running out of the back of the trailer. (TR 164). Ms. Gilmore and another individual were inside the trailer and were asked to step outside. (TR 164). Ms. Gilmore did not attempt to flee the residence, but was asked to consent to search of her person, which she granted. (TR 164-165). Deputy Lawson did not observe anything that would indicate that Ms. Gilmore was under the influence of anything. (TR 166).

Trent Beebe then testified that he owned the residence at [412] West First Street, Appleton City, Missouri, and that he rented the property to Mr. Foley and Ashley Mitchell. (TR 170 and 175). He testified that he had met Appellant maybe twice, however he was unaware of the time period that he saw the defendant at the residence. (TR 171-175).

The State then called Detective Kevin Schoenfeld, a member of the Mid-Missouri Drug Task Force to the stand. (TR 179). During the investigation, he received information that Josh Foley had warrants for his arrest. (TR 185). On October 1, 2104, Det. Schoenfeld along with other officers went to the residence at 412 West First Street and made contact with the Appellant. (TR 187). He indicated that Appellant told him that there was drug paraphernalia in the residence. (TR 188). Appellant, then asked to leave, but was told that her property would be detained and then she consented to a search of herself, her vehicle and her cellular phone. (TR 188). Upon searching the Appellant and her property, the detective did not find anything illegal, but found text

messages that were concerning. (TR 189). One concerning text message involved an inquiry about a “20 bag”, which the detective indicated was common term for \$20 worth of marijuana. (TR 189-190). Detective Schoenfeld then testified that the Appellant admitted to selling marijuana with Foley, but that they were currently out because they had smoked the rest that they had the previous night. (TR 190).

A search warrant was later issued and executed upon the property. (TR 190). During the search, the officer found a glass pipe with white powder inside a stereo cabinet after opening the top cabinet. (TR 191). The officer also located a small plastic Ziploc-type bag in an ashtray in the kitchen. (TR 195). The bag was not tested and no lab report existed identifying the substance that was alleged to be methamphetamine over Appellant’s objection. (TR 195). Later the officer located another small marijuana pipe and a marijuana water bong in a kitchen cabinet. (TR 199). Also located inside a medicine cabinet in the bathroom was digital scale and a corner bag – corner of a plastic bag that contained a crystalline substance. (TR 203). Another digital scale was located in the rear bedroom right next to the bathroom. (TR 209).

During cross examination, detective Schoenfeld testified that he observed Ms. Gilmore inside the residence, but she did not attempt to flee. (TR 216). He then searched Ms. Gilmore’s person, her automobile and did not find any contraband. (TR 217-218). He searched the entire trailer and did not find any female clothes, but did find evidence of Josh Foley living there. (TR 218). He further testified that the pipe located inside the stereo console was not in plain view and could not be observed until after it was opened up. (TR 219). He did not observe anyone possess the pipe, nor did anyone admit to

knowledge or ownership of the pipe. (TR 219-220). Detective Schoenfeld further testified that he did not smell any marijuana odor, nor any chemicals of methamphetamine, nor did he smell anything that would smell of controlled substance on the Appellant or inside the residence. (TR 220). Appellant did not make any admissions about knowledge of methamphetamine or ever using methamphetamine. (TR 221).

The lab report indicated that there was methamphetamine in the bag found inside the medicine cabinet in the bathroom which weighed .275 grams (+/- .05grams). (TR 221). Detective Schoenfeld indicated that the baggie that tested positive for methamphetamine was inside the third shelf, tucked up against the left wall, and was not visible when he first came into the bathroom. (TR 225). He further testified that he did not observe Appellant possess methamphetamine, did not observe Appellant in the bathroom or in the back bedroom. (TR 226-227).

The State then rested and Appellant filed a Motion for Judgment of Acquittal. (TR 232-233). Appellant argued that the State failed to make a submissible case in that there was no actual possession by the Appellant of the methamphetamine and further that there was no constructive possession of the methamphetamine by Appellant. (TR. 233-236). Appellant argued that there was no evidence that the Appellant had knowledge of the methamphetamine, ever possessed the methamphetamine, nor was there evidence that Appellant was ever in the bathroom where the only controlled substance was located. (TR 233-236). The trial court overruled the Motion for Judgment of Acquittal at the close of state's evidence.

Appellant then put on evidence of her residence which was located in Henry County, Missouri, through Ronnie McGlade, Trella Storey, Brad Bayless, Eric Bayless and Britney Bayless. (TR. 242-256). The defense then rested. (TR 256).

Appellant filed an additional Motion for Judgment of Acquittal at the Close of All evidence and renewed her previous arguments regarding the insufficiency of the evidence and the uncontroverted evidence that the Appellant resided in Clinton, Henry County, Missouri. (TR 256-257). The State's attorney responded to the Motion by indicating that "...it's not the State's allegation that she ever lived in the trailer or resided there." (TR 257). The Court took that Motion with the case, which was later overruled when the Court accepted the Jury Verdict of Guilty and spread it upon the record that evening. (LF 61). Following a Sentencing Assessment Report, and arguments for Judgment Notwithstanding the Verdict, the Court sentenced the Appellant to Seven (7) years in the Missouri Department of Corrections (Execution of the Sentence Suspended) and this appeal follows. (TR 103).

POINT RELIED ON

The trial court erred in overruling Ms. Gilmore's Motion for Judgment of Acquittal at the close of all evidence and entering judgment and sentence for possession of a controlled substance because this violated Ms. Gilmore's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that there was not sufficient evidence to prove beyond a reasonable doubt that the Appellant, Ms. Gilmore, had knowledge about the methamphetamine found in the bathroom or that she ever exercised control over it, as it was located inside a bathroom medicine cabinet out of plain view and there was no evidence presented that she was ever in the bathroom, nor any evidence connecting her to the methamphetamine.

ARGUMENT

The trial court erred in overruling Ms. Gilmore’s Motion for Judgment of Acquittal at the close of all evidence and entering judgment and sentence for possession of a controlled substance because this violated Ms. Gilmore’s right to due process guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, § 10 of the Missouri Constitution, in that there was not sufficient evidence to prove beyond a reasonable doubt that the Appellant, Ms. Gilmore, had knowledge about the methamphetamine found in the bathroom or that she ever exercised control over it, as it was located inside a bathroom medicine cabinet out of plain view and there was no evidence presented that she was ever in the bathroom, nor any evidence connecting her to the methamphetamine.

A. STANDARD OF REVIEW

“To determine whether the evidence presented was sufficient to support a conviction and to withstand a motion for judgment of acquittal, the Court does not weigh the evidence but rather accept[s] as true all evidence tending to prove guilt together with all reasonable inferences that support the verdict, and ignore[s] all contrary evidence and inferences.” *State v. Ess*, S.W.3d 196, 206 (Mo. banc 2015) (internal quotations omitted). *see also State v. Clark*, SC94959 (Mo. banc 2016) (now final but publication cite is not available as of the date of this brief filing). The Court may not “supply missing evidence, or give the [state] the benefit of unreasonable, speculative or forced inferences.” *State v. Whalen*, 49 S.W.3d 181, 184 (Mo. banc 2001). (internal quotations omitted). *see also State v. Clark*, SC94959 (Mo. banc 2016) (now final but publication

cite is not available as of the date of this brief filing). If there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt, then the evidence is sufficient to support a conviction. *State v. Coleman*, 463 S.W.3d 353, 354 (Mo. banc 2015); see also *Musacchio v. United States*, 136 S. Ct. 709, 715 (2016). There must be more than a “mere modicum” of evidence, because it could not be seriously argued that such a modicum of evidence could by itself rationally support a conviction beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). “The relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Bateman*, 318 S.W.3d 681, 687 (Mo. banc 2010).

Ms. Gilmore filed a motion for Judgment of Acquittal at the Close of State’s Evidence, a Motion for Judgment of Acquittal at the Close of All Evidence and a Motion for Judgment Notwithstanding the Verdict all in a timely fashion. (LF 62-65; 83-85). Ms. Gilmore’s counsel fully argued those motions to the trial court indicating that the State failed to present sufficient evidence of the defendant’s possession of methamphetamine, actual or constructive, and the State’s failure to present evidence of the defendant’s knowledge and intent to exhibit control over the methamphetamine. (TR 233-238; 256-257). This issue is preserved for appellate review.

B. Insufficient Evidence of Possession of a Controlled Substance

Ms. Gilmore contends that the State failed to present sufficient evidence beyond a reasonable doubt that she possessed the methamphetamine found tucked into the left side

of the bathroom medicine cabinet. Revised Statute of Missouri § 195.202.1 makes it “unlawful for any person to possess or have under his control a controlled substance.”

Possession or possessing is defined by our legislature under RSMo § 195.010(34) as:

[A] person, with the knowledge of the presence and nature of a substance, has actual or constructive possession of the substance. A person has actual possession if he has the substance on his person or within easy reach and convenient control. A person who, although not in actual possession, has the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or persons is in constructive possession of it. Possession may also be sole or joint. If one person alone has possession of a substance possession is sole. If two or more persons share possession of a substance, possession is joint.

The Supreme Court of Missouri, has stated that, “[w]hen interpreting a statute, the primary goal is to give effect to legislative intent as reflected in the plain language of the statute.” *Stiers v. Dir. Of Revenue*, 477 S.W.3d 611, 615 (Mo. banc 2016). The statute in its plainest form requires that Ms. Gilmore would have to have knowledge of the presence and nature of the substance to have actual or constructive possession. RSMo § 195.010(34). The Supreme Court of Missouri has long held that possession itself requires a defendant to have “conscious and intentional possession of the substance, either actual or constructive...” *State v. Zetina-Torres*, 482 S.W.3d 801, 807 (Mo. banc 2016).

Without knowledge of the controlled substance the defendant cannot be in legal possession of it. “Possession without knowledge of such possession is not possession in the legal sense of the word. Knowledge of the existence of the object is essential to physical control thereof with the intent to exercise such control and such knowledge must necessarily precede the intent to exercise or the exercise of such control.” *State v. Burns*, 457 S.W.2d 721, 724 (Mo. 1970). Under the statute, a person has actual possession of a controlled substance if the person has knowledge of its presence and nature and it is on his or her person and within easy reach and convenient control of the person. RSMo § 195.010(34).

In order to find Ms. Gilmore guilty of possession of a controlled substance, the State was required to prove not only that Ms. Gilmore knew or was aware of the methamphetamine tucked into the bathroom medicine cabinet, but further that she did or intended to exercise dominion or control over that substance. *State v. Ingram*, 249 S.W.3d 892, 895 (Mo. App. W.D. 2008).

There was no evidence that Ms. Gilmore actually possessed the methamphetamine in the bathroom because she did not have exclusive possession of the premises and the methamphetamine was found tucked inside the corner of a closed medicine cabinet in the bathroom where no one had ever observed her. (TR 226-227). *See State v. Driskell*, 167 S.W.3d 267, 269 (Mo. App W.D. 2005). In *Driskell*, the defendant’s conviction was reversed for possessing a controlled substance that was in the console next to the driver’s seat that was owned by the defendant, even though the defendant was an owner of the vehicle. *Id.* Although Ms. Gilmore was located inside the residence, there was no

evidence that she lived there, and the State even admitted that "...it's not the State's allegation that she ever lived in the trailer or resided there." (TR 257).

Since there is no actual possession by Ms. Gilmore the State is left only with constructive possession as proof of her possession. *State v. Purlee*, 839 S.W.2d 584, 587 (Mo. banc 1992). A person has constructive possession of a controlled substance, if "...a person who, although not in actual possession, has the power and the intention at a given time to exercise dominion or control over the substance either directly or through another person or persons is in constructive possession of it." RSMo § 195.010(34). Knowledge of the existence of a controlled substance is not sufficient proof of constructive possession in a "joint possession" case, which requires proof of knowledge and intent to exercise control over that controlled substance. *State v. Barber*, 635 S.W.2d 342, 344-45 (Mo. 1982). *State v. Morris*, 41 S.W.3d 494, 498 (Mo. App. E.D. 2000).

In the case at hand, there were two other individuals besides Ms. Gilmore, inside the residence when the officers arrived on October 1, 2014, and therefore no exclusive possession of the residence by Appellant. (TR 164). Since there is not exclusive possession of the premises by Ms. Gilmore, the state is required to present additional evidence to connect Ms. Gilmore to the methamphetamine found inside the medicine cabinet. *State v. Withrow*, 8 S.W.3d 75, 80 (Mo. banc 1999).

Josh Foley fled the residence out the back door, while Ms. Gilmore and another unidentified individual walked out the front door and stood on the porch. (TR 164). Officers would not let Ms. Gilmore leave without her consenting to the search of her person and property, and after consenting, there was nothing illegal found on her person

or in her property. (TR 188-189). In addition, Ms. Gilmore was no evidence that Ms. Gilmore was under the influence of any controlled substance, nor were any odors consistent with controlled substances smelled by law enforcement. (TR 166; 220). Finally, there were no admissions by Appellant regarding any knowledge of methamphetamine inside the residence or any use of the same by her. (TR 221). There was no evidence presented by the State that would connect Ms. Gilmore to the methamphetamine, nor any evidence presented that would prove knowledge or intent to exercise dominion or control over the methamphetamine. The mere presence of Ms. Gilmore on the premises is not sufficient evidence for a conviction of possession. *State v. Bowyer*, 693 S.W.2d 845, 847 (Mo. App. W.D. 1985). The State is required to present evidence of some incriminating circumstance that raised the inference of Ms. Gilmore's knowledge of the methamphetamine and her intent to control or possess the substance in order for her to be found guilty. *State v. West*, 21 S.W.3d 59, 63 (Mo. App. 2000). "Such evidence may include statements or actions indicating consciousness of guilt, routine access to the place where the drugs were found, commingling of the drugs with the defendant's personal belongings, a large quantity of drugs, or the drugs were in plain view." *State v. Driskell*, 167 S.W.3d at 269.

Although all of the cases cited by Appellant are indicative of legal reasons for the Court to reverse the conviction of Ms. Gilmore, the most relevant case is *State v. Clark*, SC94959 (Mo. banc 2016) (now final but publication cite is not available as of the date of this brief filing). In *Clark*, the Supreme Court of Missouri, plainly stated, "...a person cannot control a substance if he or she is not conscious of its existence." *Id.* Mr. Clark

was found on a bed in the residence's small east bedroom which also appeared to be the residence's main living area. *Id.* Next to him on a nightstand was located a black pouch and another pouch hanging on the wall, both of which concealed methamphetamine, scales, and numerous items of drug paraphernalia. *Id.*

The Supreme Court in *Clark* indicated that the State had the burden to prove constructive possession, and "...absent proof of actual possession, constructive possession may be shown when other facts buttress an inference of defendant's knowledge of the presence of the controlled substance." *State v. Purlee*, 839 S.W.2d at 588. Proof of constructive possession requires:

[A]t a minimum, evidence that the defendant had access to and control over the premises where the [controlled substances] were found. Exclusive possession of the premises containing the [controlled substances] raises an inference of possession and control. When the accused shares control over the premises, as here, further evidence is needed to connect [the defendant] to the [controlled substances]. The mere fact that a defendant is present on the premises where the [controlled substances were found] does not by itself make a submissible case. Moreover, proximity to the contraband alone fails to prove ownership. There must be some incriminating evidence implying that the defendant knew of the presence of the [controlled substances], and that the [controlled substances] were under his control.

State v. Withrow, 8 S.W.3d at 80 (internal quotations and citations omitted); see also *State v. Stover*, 388 S.W.3d 138, 147 (Mo. banc 2012); *Glover v. State*, 225 S.W.3d 425, 428 (Mo. banc 2007). The is required to prove beyond a reasonable doubt that a defendant that does not have exclusive control over the premises has constructive possession of a controlled substance, and additional facts are necessary that “buttress the inference of the defendant’s requisite mental state.” *Withrow*, 8 S.W.3d at 80.

The evidence showed that Ms. Gilmore did not have exclusive control over the residence, and the State’s own witness testified that it was rented to Josh Foley, who actually fled the residence upon the arrival of officers. Officers did not find Ms. Gilmore near the bathroom where the small amount of methamphetamine was located inside a closed medicine cabinet. Because the premises were shared, the state was required to present additional evidence of an incriminating nature, to support the inference that Ms. Gilmore had knowledge and control over the methamphetamine found in the medicine cabinet. *Id.* The State’s only evidence was the defendant was inside the residence upon their arrival; and that she admitted to smoking marijuana and that there was paraphernalia inside the residence. The State asserts that her presence inside the residence is sufficient to prove “constructive possession”, but that clearly is not the law in Missouri, as our Supreme Court has repeatedly held, that neither the presence on/in the premises nor proximity to the contraband alone proves constructive possession. *Id.* Both Supreme Court decisions in *Withrow* and now *Clark* provide guidance on this point.

Defendant’s flight upon realizing the presence of police can constitute additional evidence of guilt, buttressing the inference of constructive possession. *State v. Morris*,

41 S.W.3d at 497; citing *State v. Keeper*, 787 S.W.2d 887, 880 (Mo. App. E.D. 1990). In this case, Detective Schoenfeld testified that he saw Ms. Gilmore inside the residence, but she did not attempt to flee. (TR 216). He then searched Ms. Gilmore, along with her personal belongings and automobile, finding no contraband. (TR 217-218).

In *Glover*, the Court stated that “presence of a defendant’s personal belongings in close proximity to the drugs may support an inference that [s]he possessed drugs.” *Glover v. State*, 225 S.W.3d at 428. Detective Schoenfeld further testified that he did not observe any of Ms. Gilmore’s personal belongings inside the residence, except that her purse was beside the door in the hallway near the bathroom, and there was evidence of an eyelash curler in the medicine cabinet. (TR 212 and 230). It would be mere speculation that the eyelash curler belonged to Ms. Gilmore as there was no evidence presented that it belonged to her, and the evidence did indicate that the residence was rented to Josh Foley and Ashely Mitchell. “Speculative inferences, may not be used to support a verdict.” *State v. Whalen*, 49 S.W.3d at 184. There is just not any evidence presented by the State that would buttress the inference of constructive possession by Ms. Gilmore.

In *State v. Tomes*, an open manicure case that contained a small baggie of methamphetamine could not be inferred to belong to a woman who shared her bedroom with her ex-husband when the state did not present evidence of the manicure case indicating whom it belonged to. *State v. Tomes*, 329 S.W.3d 400, 404 (Mo. App. 2010). As in *Tomes*, the State did not present evidence that supports a reasonable inference that the items located in the medicine cabinet near the methamphetamine belonged to Ms. Gilmore. *Id.* at 403-404. In the case at hand, there was no evidence that the eyelash

curler belonged to Ms. Gilmore, nor that she had ever been in the bathroom.

Accordingly, the Court cannot give the State the benefit of speculative inference that the items in the medicine cabinet belonged to Ms. Gilmore. See *State v. Whalen*, 49 S.W.3d at 184.

The totality of the facts presented by the State, and the reasonable inferences that can be drawn from the facts, fail to show that Ms. Gilmore had constructive possession over the methamphetamine inside the closed medicine cabinet. Accordingly, no rational trier of fact could have found that the State proved beyond a reasonable doubt the essential elements of possession of a controlled substance. See *State v. Withrow*, 8 S.W.3d at 81. A criminal conviction cannot be based upon probabilities and speculation. *State v. Gonzalez*, 235 S.W.3d 20, 27 (Mo. App. S.D. 2007), quoting *State v. McMullin*, 136 S.W.3d 566, 573 (Mo. App. S.D. 2004). Here the State failed to present additional incriminating evidence necessary to establish that Ms. Gilmore had knowledge of the methamphetamine and intent to exercise dominion or control over the controlled substance, and thus the conviction should be reversed.

CONCLUSION

Because the State failed to present sufficient evidence of Ms. Gilmore's knowledge of the methamphetamine located inside a closed medicine cabinet or that she had or intended to exercise dominion or control over the controlled substance, her conviction for possession must be reversed and she should be discharged.

ORAL ARGUMENT IS REQUESTED BY THE APPELLANT

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CERTIFICATE OF COMPLIANCE

I hereby certify:

That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06 and contains 4903 words, as determined by Microsoft Word 2003 software.

CERTIFICATE OF SERVICE

I hereby certify:

That a copy of this brief was electronically filed with the Southern District of Missouri Court of Appeals and Shawn Mackelprang, Missouri Attorney General's Office on this 30th day of August, 2016.

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