

No. SC96341

In the
Supreme Court of Missouri

STATE OF MISSOURI,

Respondent,

v.

VICKI LEANN GILMORE,

Appellant.

Appeal from Circuit Court of St. Clair County
27th Judicial Circuit
The Honorable James K. Journey, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Appellant, Vicki Gilmore, was charged in the Circuit Court of St. Clair County with possession of a controlled substance (L.F. 10, 50). The information alleged that appellant was a prior drug offender (L.F. 50, Tr. 7-8). On September 15, 2015, appellant was tried before a jury, the Honorable James K. Journey presiding (Tr. 144-290). Viewed in the light most favorable to the verdict, the following evidence was adduced at trial:

In September 2014, St. Clair County Sheriff's Office investigated drug activities involving appellant and Josh Foley at a trailer on 413 West First Street in Appleton City (Tr. 154-155, 184). Deputy Alec Lawson conducted "trash pulls" between 1:00 a.m. and 3:30 a.m., looking for items associated with the use and sale of drugs (Tr. 155). Deputy Lawson found plastic bags with cut out corners (Tr. 156). The corners were typically used for sale of controlled substances (Tr. 184). For a period of three or four weeks, Deputy Lawson visited the residence a total of six times either to conduct "trash pulls" or to observe the residence at night (Tr. 156-157). Appellant's vehicle was always parked in the driveway or behind the residence (Tr. 159). Once Deputy Lawson was conducting a "trash pull" at 2:30 a.m., and appellant come out of the house (Tr. 158).

Trent Beebe owned the trailer on 413 West First Street (Tr. 170). He described the trailer as having "Two bedrooms, living room, bathroom" (Tr.

178). Mr. Beebe testified that he rented the trailer to Josh Foley and Ashley Mitchell (Tr. 170). Mr. Beebe testified he never saw Ashley Mitchell at the residence (Tr. 177). Mr. Beebe testified that he saw appellant's car at the trailer approximately 10 times over a two-month period (Tr. 173-174). Mr. Beebe testified that once he jump-started appellant's vehicle and that once, when he looking for Mr. Foley, appellant answered the door and said that Mr. Foley was not at home (Tr. 172-173, 176-177).

On October 1, 2014, the police went to the residence to serve an arrest warrant on Mr. Foley (Tr. 185, 215). Mr. Foley fled from the back door of the residence and was apprehended (Tr. 216). Appellant was inside the residence (Tr. 217). Detective Kevin Schoenfeld spoke with appellant (Tr. 187-188). Detective Schoenfeld asked appellant if there was anything illegal in the residence, and appellant said that there was drug paraphernalia (Tr. 188). Detective Schoenfeld told appellant that the police were applying for a search warrant for the residence and that the residence had to be secured (Tr. 188). Appellant asked whether she could leave, and Detective Schoenfeld told her that she could leave, but that he would have to detain her property (Tr. 188). Appellant ultimately consented to the search of her person, her vehicle, and her purse (Tr. 188).

During the search, Detective Schoenfeld found a text message on appellant's cellular phone from someone inquiring about a "20 bag," which

was a common term for a \$20 bag of marijuana (Tr. 189-190). Detective Schoenfeld asked appellant about the message, and she said that she and Mr. Foley were selling marijuana but that they were out of it because they smoked the rest that they had on the previous night (Tr. 190).

The police obtained a search warrant and searched the residence (Tr. 190). In the living room, the officers saw a large console stereo (Tr. 191). Inside the cabinet there was a glass pipe with a large bowl commonly used to smoke methamphetamine (Tr. 191, 193-194). There was a white residue in the pipe consistent with methamphetamine (Tr. 194).

In plain view on the kitchen counter was a plastic bag placed in an ashtray (Tr. 195, State's exhibit 9). There was a small amount of white powder in the bag consistent with methamphetamine (Tr. 195). Drug users would rip the bag open and would lick the remaining small amount of methamphetamine (Tr. 228).

In a kitchen cabinet above the stove, the police found a marijuana bong and a smaller marijuana pipe (Tr. 199-200). On the refrigerator, there was a magnetic picture of appellant and Mr. Foley (Tr. 212).

In a medicine cabinet in the bathroom, there were a set of digital scales and a cut-off corner of a Ziploc bag containing .275 grams of methamphetamine (Tr. 203, 208, 211, 221). The scales and drugs were on the middle shelf of the cabinet (Tr. 204). On the bottom shelf, the police found an

eyelash roller used by women to curl their eyelashes, a razor, and a “tube of cream” (Tr. 212). Appellant’s purse was in a very short hallway leading to the bathroom (Tr. 230-231).

In a bedroom next to the bathroom, the police found another digital scale (Tr. 209-210). Scales are commonly used to weigh controlled substances (Tr. 205). On a pile of trash next to the back door of the residence, the police found a Ziploc bag with cut off corners (Tr. 210). The methamphetamine in the medicine cabinet was found in a corner bag similar to the Ziploc bag that had its corners cut off (Tr. 211).

Appellant called five witnesses in her defense (Tr. 242-281). Appellant’s witnesses testified that in 2014, appellant lived at 641 North 7 Highway in Clinton, Missouri (Tr. 241-242, 251-252).

At the close of all the evidence, the jury found appellant guilty of possession of a controlled substance (Tr. 290). The court sentenced appellant, as a prior drug offender, to 7 years in the Missouri Department of Corrections (L.F. 103-104, Sent Tr. 9). The court suspended the execution of appellant’s sentence and placed her on probation for 5 years (L.F. 103-106, Sent Tr. 9).

On March 30, 2017, the Court of Appeals, Sothern District, affirmed appellant’s conviction and sentence. *State v. Gilmore*, No. SD34309 (Mo. App. S.D. March 30, 2017). On May 30, 2017, this Court granted appellant’s application for transfer.

ARGUMENT

There was sufficient evidence to support appellant's conviction for possession of methamphetamine.

Appellant claims that the evidence was insufficient to support her conviction for possession of methamphetamine because there was no evidence connecting appellant to the drugs found in the medicine cabinet (App. Br. 12-21).

Appellate review of a challenge to sufficiency of the evidence is limited to a determination of whether the state introduced sufficient evidence at trial from which a reasonable trier of fact could have found each element of the offense to have been established beyond a reasonable doubt. *State v. McCall*, 412 S.W.3d 370, 373 (Mo. App. E.D. 2013). The Court of Appeals accepts as true all evidence and reasonable inferences favorable to the verdict, disregarding contrary evidence and inferences. *Id.*

“To convict a person of possessing a controlled substance, the state must prove that the person had conscious and intentional possession of the substance, either actual or constructive, and was aware of the substance’s presence and nature.” *State v. McLane*, 136 S.W.3d 170, 173 (Mo. App. S.D. 2004). A person has actual possession if he has the substance on his person or within easy reach and convenient control. *Id.* “A person has constructive possession if one has the power and the intention at a given time to exercise

dominion or control over the object either directly or through another person or persons.” *State v. Whites*, 402 S.W.3d 140, 142 (Mo. App. W.D. 2013). Constructive possession requires proof that a defendant had access to and control over the premises where the drugs were found. *State v. Tones*, 329 S.W.3d 400, 403 (Mo. App. E.D. 2010). The Court considers the totality of the circumstances, including routine access to the area where the substances are kept; the presence of large quantities of the substance at the arrest scene; admissions by the accused; close proximity to the substances or drug paraphernalia in plain view of the law enforcement officers; the mixing of defendant’s personal belongings with the drugs; or flight by a defendant upon realizing the presence of law enforcement officials. *Id.*; *State v. Gonzalez*, 235 S.W.3d 20, 26-27 (Mo. App. S.D. 2007).

Here, the evidence supported an inference that appellant had routine access to and control over the premises where the methamphetamine was found. Appellant was present at the trailer at all times during the nights when the police investigated the residence, and she was always there when Trent Beebe came to the property (Tr. 156-158, 173-177). Once appellant was in the trailer when Mr. Foley was not there (Tr. 176-177). A magnetic picture of appellant and Mr. Foley was on the refrigerator (Tr. 212). When the police arrived, they found appellant’s purse in a very short hallway leading to the bathroom where the police found methamphetamine in the medicine cabinet

(Tr. 208, 211, 221, 230-231). On the bottom shelf of the medicine cabinet was an eyelash roller used by women (Tr. 212, State's exhibits 13 and 14). Appellant was the only woman that the police and Mr. Beebe saw at the trailer during the investigation (Tr. 177). A defendant's knowledge and control of a controlled substance may be inferred from evidence that the defendant likely had routine or superior access to areas where the controlled substance was kept. *State v. Woods*, 284 S.W.3d 630, 640 (Mo. App. W.D. 2009); *State v. Richardson*, 296 S.W.3d 21, 24 (Mo. App. S.D. 2009); *State v. Bremenkamp*, 190 S.W.3d 487, 493-494 (Mo. App. S.D. 2006). Here, the evidence supported a reasonable inference that appellant had a routine access to the bathroom cabinet where the drugs were located.

Additionally, the police found a bag with methamphetamine residue in plain view on the kitchen counter (Tr. 195-196, State's exhibit 9). Drug users would rip the bag open and would lick the remaining small amount of methamphetamine (Tr. 228). The presence of drugs in plain view constitutes additional evidence connecting a defendant to the contraband. *State v. Riley*, 440 S.W.3d 561, 565 (Mo. App. E.D. 2014).

Moreover, appellant admitted that she knew about the drug paraphernalia on the premises (Tr. 188). Drug paraphernalia was found in a console in the living room, in a kitchen cabinet, and in the medicine cabinet where the bag of methamphetamine was found (Tr. 191-194, State's exhibit

15). A glass pipe with a large bowl found in the console had a white residue consistent with methamphetamine (Tr. 191-194). Appellant's cellular phone contained messages indicating drug activities and she admitted to have been selling and using marijuana with Mr. Foley (Tr. 189-190). Contemporaneous possession of other drugs or paraphernalia is relevant to demonstrate knowing and intentional possession of the controlled substance for which one is charged. *State v. Richardson*, 296 S.W.3d 21, 24 (Mo. App. S.D. 2009). Appellant's admission to the sale and use of marijuana with Mr. Foley and her knowledge of the presence of drug paraphernalia in the trailer provided additional incriminating evidence connecting appellant to the drugs.

Appellant argues that the police did not find appellant in the bedroom and that there was no evidence showing that the "eyelash roller" was appellant's (App.Br. 19). But both knowledge and possession may be proven by reasonable inferences drawn from circumstantial evidence, which need not be conclusive of guilt nor show the impossibility of innocence. *State v. Richardson*, 296 S.W.3d at 24; *State v. Hernandez*, 880 S.W.2d 338, 339 (Mo. App. W.D. 1994). As discussed above, the evidence supported an inference that appellant lived in the trailer or spent considerable time in it. Appellant was in the trailer during the night hours, she exited the trailer at 2:30 a.m., and she answered the door when Josh Foley was absent (Tr. 158, 173, 177). Another woman's name was on the lease, but she had not been seen at the

trailer (Tr. 177). The trailer had “Two bedrooms, living room, bathroom,” and appellant’s purse was in a very short hallway leading to the bathroom (Tr. 178, 230-231). It was reasonable for the jury to conclude that the eyelash roller in the bathroom was appellant’s, especially in light of the fact that appellant’s purse was near the bathroom when the police arrived and there was no evidence that any other woman was ever physically there.

In a similar case, *State v. Langdon*, 110 S.W.3d 807, 813 (Mo. 2003), the police found a stolen gun in a dresser drawer containing men’s clothing in the master bedroom. The defendant lived in the house with his wife, teenage daughter, and step-son. *Id.* at 810. This Court held that this evidence supported a reasonable inference that the defendant possessed the gun. *Id.* at 814. The Court stated: “The evidence as to the types of clothes and furniture in the bedroom in which the gun was found was sufficient to permit the jury to infer that the room belonged to Mr. Langdon and that the dresser, containing only men’s clothing, was his dresser, and so that he at least constructively possessed the gun.” *Id.*

Similarly, in the present case, the jury could reasonably infer that the eyelash roller found in the medicine cabinet belonged to appellant—the only woman seen on the premises in the time leading to the discovery of the drugs.

Appellant primarily relies on *State v. Clark*, 490 S.W.3d 704 (Mo .banc 2016), to argue that the evidence was insufficient to connect appellant to the

drugs (App.Br. 17-18). *Clark* is distinguishable. In *Clark* the police responded to a call of domestic violence, and they found the defendant sitting on the bed in a small bedroom. *Id.* at 706. Large men's shoes were next to the bed and a cellular phone was on the night stand next to the defendant. *Id.* The police saw no drugs in plain view. *Id.* The police arrested and searched the defendant, and they found money in his pocket. *Id.* They also searched the bedroom and found drugs in two pouches, scales, and drug paraphernalia. *Id.*

On appeal, this Court found that the only evidence connecting the defendant to the drugs were a pair of shoes near the controlled substance, and concluded that this evidence alone was not sufficient to support his conviction. *Id.* at 712. The Court observed that there was nothing to show that the cellular phone on the night stand belonged to the defendant and that the money found in the defendant's pocket was not in small denominations typical for drug transactions. *Id.*

Unlike in *Clark*, there were drugs in plain view and appellant admitted that there was drug paraphernalia in the home. Scales were found in the medicine cabinet next to the drugs. Appellant was seen at the residence during night and day hours, and her car was parked there at all times during the investigation. Appellant was at the trailer when the police executed the search warrant and her purse was near the bathroom, supporting an inference that the "eyelash roller" belonged to her -- the only woman on the

premises. Compare *State v. Tomes*, 329 S.W.3d 400, 403 (Mo. App. E.D. 2010) (the defendant was not connected to a manicure case containing methamphetamine where there was no identifying characteristics showing that the case belonged to a man or a woman). Additionally, unlike in *Clark*, appellant admitted using and selling drugs with Mr. Foley. These facts connected appellant to the drugs. See *State v. Riley*, 440 S.W.3d 561, 565 (Mo. App. E.D. 2014) (the evidence was sufficient to support the defendant's conviction for possession of methamphetamine where the defendant, a guest in another person's home, was in close proximity to drugs in plain view and admitted having used the drugs).

Appellant's claim should be denied.

CONCLUSION

For the foregoing reasons, respondent submits that appellant's conviction and sentence should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify:

That the attached brief complies with the limitations contained in Supreme Court Rule 84.0, and contains 2,590 words as determined by Microsoft Word 2010 software.

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