

No. 1-10-3070

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

SIXTH DIVISION  
JUNE 30, 2011

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 8094
	)	
JOSE SUAREZ,	)	Honorable
	)	Evelyn Clay,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE ROBERT E. GORDON delivered the judgment of the court.  
Justices Cahill and McBride concurred in the judgment.

**ORDER**

*Held:* Where the State established that defendant was holding a box containing 930.8 grams of cocaine, it was proven beyond a reasonable doubt that defendant had actual possession of the cocaine and the amount of the drugs implied the intent to deliver.

The defendant Jose Suarez was indicted by a grand jury for one count of possession of 900 or more grams of cocaine with intent to deliver, in violation of 720 ILCS 570/401(a)(2)(D).

Following a bench trial, defendant was found guilty of possessing 900 grams or more of cocaine with intent to deliver, and his posttrial motion was denied. After hearing aggravation and mitigation, defendant was sentenced to 15 years in the Illinois Department of Corrections.

No. 1-10-3070

Defendant subsequently filed a notice of appeal. Defendant argues on appeal that the State failed to prove him guilty of the offense beyond a reasonable doubt. We affirm.

#### BACKGROUND

At trial, Officer Gonzales testified to the following information. On April 7, 2010, Officers Gonzales, Turcinovic, and Sergeant Cascone of the Chicago Police Department responded to a call on the police radio of an Hispanic male in dark clothes, on foot, suspected of carrying a firearm. The officers arrived at the location in question, in uniform, driving a marked squad car.

After circling the block, Officer Gonzales drove into an alley, where the officers observed two men sitting inside a parked Kia minivan in a driveway. Officer Gonzales pulled the squad car up to the automobile. One of the men, later identified as co-defendant Luis Sanchez, exited the van from the driver's-side door and then fled the area. Officer Turcinovic pursued Sanchez, while Officer Gonzales approached the passenger side of the vehicle, where the defendant was sitting. Officer Gonzales observed defendant holding a box in his lap. The sides of the box were opaque, but its top flaps were folded in such a way that, according to the testimony of Officer Gonzales, the officer had an unobstructed view of its contents and was able to observe a clear Ziploc bag full of a chunky white substance, which he suspected to be cocaine. Officer Gonzales testified that he was able to detect an odor of acetone emanating from the Ziploc bag.

At trial, Officer Gonzales testified that he had been a Chicago police officer for over seven and a half years, had made hundreds of narcotics arrests, and, having observed cocaine over one hundred times in his capacity as a police officer, was familiar with its appearance.

No. 1-10-3070

Officer Gonzales testified that he did not observe any exchange between the passengers of the minivan during the matter of seconds that he observed them. He also testified that he did not observe defendant looking into the box or making any furtive movements, and that he did not know how long defendant had been holding the box.

The parties stipulated to the testimony of Laneen Blount, a forensic chemist working for the Illinois State Police Crime Lab. The testimony stated that the substance tested positive for 930.8 grams of cocaine.

After the State rested, defendant made a motion for a directed finding, which the court denied. Defendant did not testify on his own behalf or present any evidence. The court then found defendant guilty of possession of 900 or more grams of cocaine with intent to deliver, in violation of 720 ILCS 540/401(a)(2)(D).

The trial court, in rendering the verdict, stated that the elements of intent and knowledge are normally inferred from the surrounding circumstances. The court found that to be true of the present case, in which the element of knowledge was properly inferred from fact that Officer Gonzales observed defendant holding the box. The court also found that the element of intent was properly inferred from sheer quantity. The court found that the State had proven all elements of the offense beyond a reasonable doubt.

#### ANALYSIS

Defendant argues on appeal the sufficiency of the evidence, claiming that the State failed to prove, beyond a reasonable doubt, that the defendant knowingly possessed the cocaine and that the defendant intended to deliver the cocaine. Defendant also argues that the State failed to prove that he possessed the cocaine voluntarily. We find the defendant's arguments

No. 1-10-3070

unpersuasive.

When considering a challenge to a criminal conviction based on the sufficiency of the evidence, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Smith*, 185 Ill. 2d 532, 541 (1999). “[A] reviewing court will not reverse a criminal conviction unless the evidence is so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant’s guilt.” *People v. Rowell*, 229 Ill. 2d 82, 98 (2008). The reviewing court does not retry the defendant or substitute its judgment for that of the trier of fact with respect to the credibility of the witnesses or the weight to be given to a witness’s testimony. *People v. Ross*, 229 Ill. 2d 255, 272 (2008).

A person commits the offense of possession of a controlled substance with intent to deliver when he or she knowingly possesses, with intent to deliver, 900 grams or more of a substance containing cocaine. 720 ILCS 540/401(a)(2)(D). The offense contains three elements: the individual had knowledge of the presence of the narcotics; the narcotics were in the individual’s immediate possession or control of the narcotics; and the individual intended to deliver the narcotics. *People v. Robinson*, 167 Ill. 2d 397, 408 (1995).

A defendant has acted knowingly where he was aware of the existence of facts that make his conduct unlawful. *People v. Hodogbey*, 306 Ill. App. 3d 555, 559 (1999), citing *People v. Gean*, 143 Ill. 2d 281, 288 (1991), & *People v. Weiss*, 263 Ill. App. 3d 725, 731 (1994). Because knowledge is not ordinarily susceptible to direct proof, it is generally established by circumstantial evidence. *Hodogbey*, 306 Ill. App. 3d at 560, citing *Weiss*, 263 Ill. App. 3d at 731.

No. 1-10-3070

“Where possession has been shown [beyond a reasonable doubt], an inference of guilty knowledge can be drawn from the surrounding circumstances.” *People v. Schmalz*, 194 Ill. 2d 75, 82 (2000), citing *People v. Jackson*, 23 Ill. 2d 360, 365 (1961). Possession can be established by evidence of actual or constructive possession. *People v. Scott*, 367 Ill. App. 3d 283, 285 (2006). A defendant has actual possession when he exercises present and personal dominion over the substance. *Scott*, 367 Ill. App. 3d at 285. “[A defendant] exercises constructive possession when he has the ‘intent and capability to maintain control and dominion’ over the item,” even if he does not have personal control over it. *People v. Carodine*, 374 Ill. App. 3d 16, 25 (2007), quoting *People v. Frieburg*, 147 Ill. 2d 326, 360 (1992).

The State’s argument relies on *People v. Schmalz*, which we find to be dispositive on this matter. In *Schmalz*, a police officer was invited to enter a residence in which, once inside, he smelled marijuana burning. 194 Ill. 2d at 82. The officer followed the odor and found four people, including the defendant, sitting on the floor, within reach of several clear plastic bags containing a crushed green plant and drug paraphernalia. *Schmalz*, 194 Ill. 2d at 82-83. When asked what the four were doing, the defendant replied that they were “having a party.” *Schmalz*, 194 Ill. 2d at 83. The Illinois Supreme Court held that, once possession has been established, the surrounding circumstances can create an inference of guilty knowledge. *Schmalz*, 194 Ill. 2d at 83.

In the case at bar, the trial court found that the State had established actual possession, and that the defendant’s knowledge could be reasonably inferred from holding the open box of cocaine in his lap. The evidence shows that the defendant exercised complete dominion over the box. Further, the box was lidless its contents were within plain sight of the arresting officer, who

No. 1-10-3070

was outside the van's window. It is therefore reasonable for the trial court to have found that the defendant was equally able to observe the contents of the box, thus strengthening the inference of guilty knowledge.

Even if defendant had not exercised actual possession of the box, he did exercise constructive possession. The box was large enough that the defendant must have been aware of its presence in the vehicle. The amount of cocaine within the box was so large that, because the evidence established that the box was open, it is reasonable to infer that the defendant knew what was inside.

Furthermore, we have held in the past that “[k]nowledge and possession are factual issues, and the trier of fact’s findings on these questions will not be disturbed unless the evidence is so unbelievable, improbable, or palpably contrary to the verdict that it creates a reasonable doubt of the defendant’s guilt.” *Carodine*, 374 Ill. App. 3d at 25, quoting *People v. Brown*, 277 Ill. App. 3d 989, 998 (1996). In the present case, none of the evidence presented is so unbelievable that it creates a reasonable doubt of the defendant’s guilt.

The defendant also argues that the trial court’s reliance on the fact that the defendant should have known the box contained narcotics because the driver had fled equates to guilt by association. The defendant cites to *People v. Perez*, citing guilt by association as a “thoroughly discredited doctrine.” 189 Ill. 2d 254, 267 (2000). Here, however, the facts are clearly distinguishable from those in *Perez*, in which the court held that a person’s mere association with a group was insufficient to establish the intent to commit a crime attributed to that group. *Perez*, 189 Ill. 2d 267-68. The defendant’s argument is unpersuasive because, as we have established, the defendant was in actual or constructive possession of the narcotics. Further, in

No. 1-10-3070

the case at bar, the trial court relied, in part, on the reasonable inference that the driver's flight would have conveyed to a reasonable person that the box contained an illegal substance. It is well established that a trier of fact is entitled to rely on reasonable inferences of knowledge and possession. *People v. Smith*, 191 Ill. 2d 408, 413 (2000).

The defendant next argues that the State failed to prove, beyond a reasonable doubt, that the defendant voluntarily possessed the box of cocaine. Interestingly, both the State and the defendant appear to agree that voluntary possession of the substance is an essential element of the crime in question. "Possession is a voluntary act if the defendant knowingly procured or received the thing possessed, or was aware of his control thereof for a sufficient time to have been able to terminate his possession." 720 ILCS 5/4-2 (2010). Both parties base this notion on *People v. Ackerman*, in which the court states that possession "as so described" (referencing identical language to 720 ILCS 5/4-2 from the Criminal Code of 1961) is an essential element of the crime. *Ackerman*, 2 Ill. App. 3d 903, 905 (1971), citing *People v. Mills*, 40 Ill. 2d 4, 12 (1968). This language does not, however, add the additional element of voluntariness into the statute. Rather, it merely defines what a voluntary action is. Furthermore, even if we construe it as adding the element of voluntariness, the language dictates that knowingly procuring or receiving the thing possessed is indicative of voluntary possession. We have already established that the defendant knowingly possessed the box of cocaine. From this fact, as well as the undisputed testimony of Officer Gonzales that the defendant made no effort to terminate his possession of the box, it follows that the defendant voluntarily possessed the cocaine.

The defendant finally argues that the State failed to prove, beyond a reasonable doubt, that the defendant intended to deliver the cocaine. Like knowledge, intent is rarely susceptible of

No. 1-10-3070

direct proof, and courts may use circumstantial evidence to find it. *People v. Contreras*, 327 Ill. App. 3d 405, 408 (2002), citing *People v. Rivera*, 293 Ill. App. 3d 574, 576 (1997). The Illinois Supreme Court has established several factors that may create an inference of intent to deliver. Among these are that the quantity of the controlled substance was more than could be reasonably seen as for personal use; high purity of the substance; possession of weapons; possession of large amounts of cash; possession of police scanners, cell phones, or pagers; possession of drug paraphernalia; and the manner in which the controlled substance was packaged. *Robinson*, 167 Ill. 2d at 408. These factors are not exhaustive. *People v. White*, 221 Ill. 2d 1, 17 (2006), abrogated on other grounds in *People v. Luedmann*, 222 Ill. 2d 530 (2006).

Here, the defendant argues that the State failed to prove intent because only the first *Robinson* factor was present. Particularly, the defendant argues that the driver's flight from the scene and the subsequent finding of the narcotics in the defendant's lap raise a reasonable doubt as to the defendant's intent to deliver the narcotics. We find this argument unpersuasive. It has been established in our case law that sheer quantity can be sufficient to show intent to deliver where the amount of the controlled substance confiscated "could not reasonably be viewed as designed for personal consumption." *People v. Clinton*, 397 Ill. App. 3d 215, 225 (2010), quoting *Robinson*, 167 Ill. 2d at 411. Furthermore, there is nothing to demonstrate that the evidence presented is so "unreasonable, improbable or unsatisfactory" that it creates a reasonable doubt of the defendant's guilt.

#### CONCLUSION

We find that the State successfully proved, beyond a reasonable doubt, that the defendant knowingly and voluntarily possessed the cocaine with intent to deliver. We therefore affirm the

No. 1-10-3070

defendant's conviction.

Affirmed.