2012 IL App (2d) 111279-U
No. 2-11-1279
Order filed September 10, 2012

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Kane County.
Plaintiff-Appellee,	)	
v.	)	No. 11-CF-843
ADAN VENEGAS,	)	Honorable Patricia Piper Golden,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE HUTCHINSON delivered the judgment of the court.
Justices McLaren and Birkett concurred in the judgment.

ORDER

Held: The State proved defendant guilty beyond a reasonable doubt of constructively possessing a controlled substance: although there were three other occupants of the car in which the substance was found, defendant owned and was driving the car, defendant was closest to the substance, and defendant (and no one else) had made furtive gestures toward the area where it was found. We affirmed the judgment of the trial court.

¶ 1 After a bench trial, defendant, Adan Venegas, was convicted of unlawful possession of a controlled substance (720 ILCS 570/402(c) (West 2010)) and was sentenced to 24 months'

probation. On appeal, he contends that the State's evidence did not prove him guilty beyond a reasonable doubt of possessing the controlled substance. We affirm.

¶ 2 We summarize the evidence. John Gray, an Aurora police officer, testified on direct examination as follows. On April 28, 2011, at approximately 12:27 a.m., he and Officer David Bemer were on patrol in a marked squad car. As Bemer drove west on Spruce Street, the officers observed a black Chevy Cavalier going north on Elmwood Avenue proceed through the intersection without obeying a stop sign. The officers were probably within 100 feet of the Cavalier. Bemer turned and followed the Cavalier. The Cavalier turned right onto Charles Street; the squad car followed. The Cavalier then stopped in the first driveway on the left side of the street. The officers followed. As the Cavalier entered the driveway, Bemer turned on the squad car's overhead lights so as to stop the car. The squad car was approximately five feet behind the Cavalier.

¶ 3 Gray testified that he "observed the driver *** just reach down under, or reach down towards *** the bottom, like the floorboard area of the driver's seat." Bemer had activated the squad car's flashing strobe lights, and he now turned on the spotlight, which illuminated the Cavalier's interior. At first, Gray testified that he saw the driver bend down as he and Bemer were starting to exit the squad car. However, he then clarified that, before he got out of the squad car, he saw the driver bend over and also saw that four people occupied the Cavalier. At the time, Gray did not know whether the driver was "placing something in under his seat or reaching for something under his seat, and that[] [was] all happening *** as [Gray] was still in the car, but [the officers] were hopping out of the car right then also. Gray did not see any of the other occupants reach toward the driver's area. In court, Gray identified defendant as the driver.

¶ 4 Gray testified that, after exiting the squad car, he approached the Cavalier on the passenger's side and Bemer approached on the driver's side. Seeing open beer cans in the console between the front seats, they ordered the occupants out of the car. Later, Gray took possession of a bag that Bemer said that he had recovered from underneath the driver's seat.

¶ 5 Gray testified on cross-examination that, when he first saw the Cavalier, from about a hundred feet away, he could not tell how many people were in it. Before the spotlight came on, it had been difficult to see what was happening inside the Cavalier. When Gray saw the driver bend down, he did not see his hands or any other occupant's hands or hear any sounds from the car.

¶ 6 Bemer testified as follows. Searching the car, he found an open beer can in the center console and a clear plastic bag, containing a white powder, "directly underneath" the driver's seat. The bag was not covered by anything or sitting on top of anything. Bemer did not recall any other items having been under the seat. The car had bucket seats in front; each was on a track so that it could be moved backward or forward. Bemer ascertained that defendant owned the Cavalier.

¶ 7 The parties stipulated that the bag had contained 0.3 gram of a substance that tested positive for cocaine. Defendant put on no evidence.

¶ 8 In finding defendant guilty, the trial court explained that the State had proved that defendant had constructively possessed the cocaine. The trial court noted that, of the four people in the car, defendant had been closest to the cocaine. Moreover, he owned the car, and no one else had been seen making furtive movements toward where the cocaine was later found. Defendant was sentenced as noted. He timely appealed.

¶ 9 On appeal, defendant contends that the State's evidence did not prove him guilty beyond a reasonable doubt. He argues that no direct evidence established that he had ever handled the

cocaine; there was evidence that at least one other person (the passenger in back of him) had had access to the seat under which the cocaine was later found; and his furtive movement was ambiguous. For the following reasons, we disagree with defendant.

¶ 10 In deciding on the sufficiency of the evidence, we ask whether all of the evidence, viewed in the light most favorable to the prosecution, was sufficient for a rational fact finder to find the essential elements of the offense beyond a reasonable doubt. *People v. Baskerville*, 2012 IL 111056, ¶ 31. Possession of drugs can be either actual or constructive. *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). Constructive possession requires proof that the defendant both intended and was able to maintain control and dominion over the drugs. *Id.* The defendant's mere presence in a car where drugs are found does not establish that he knew that they were present. *Id.* However, that other people had access to the drugs does not in itself defeat a finding of constructive possession. *Id.* at 790; *People v. Rentsch*, 167 Ill. App. 3d 368, 371 (1988).

¶ 11 We conclude that the State proved that defendant constructively possessed the cocaine that the police recovered from under the driver's seat of his car. This is a close case, but the evidence established much more than defendant's mere proximity to the cocaine. The trial court considered that, very shortly after the police began following his car, defendant ducked down toward the floor, creating an inference that he was attempting to conceal the cocaine—which happened to be found where he had reached. See *Love*, 404 Ill. App. 3d at 788. Notably, no other object was found under the driver's seat; there was no evidence that defendant had retrieved anything from that area; nobody other than defendant had been seen reaching toward the area of the driver's seat; and defendant was the person closest to the cocaine. Furthermore, he owned the car. See *People v. Rangel*, 163 Ill. App. 3d 730, 740 (1987). The trial court reasonably found that these facts were not coincidental but

proved that defendant had known that the cocaine was there; that he had had physical control and had intended to exercise control over the cocaine; and that he had not abandoned the cocaine and nobody else had obtained possession. See *People v. Adams*, 161 Ill. 2d 333, 345 (1994). Defendant contends that neither his furtive motion nor his ownership of the car, *by itself*, was sufficient to prove constructive possession. However, the test is whether *all* of the evidence, viewed in the light most favorable to the State, proved constructive possession.

¶ 12 The cases on which defendant relies are distinguishable or of dubious validity. In *People v. Ray*, 232 Ill. App. 3d 459 (1992), the defendants were seated on a couch in an apartment. Cocaine was on a table 18 inches away, but no drugs were found on the defendants. The appellate court reversed their conviction. The reviewing court stressed that the State had failed to prove that the defendants had controlled the apartment, as there was no evidence that they had owned, rented, or lived in it. *Id.* at 462-63. *Ray* is distinguishable in that, here, defendant owned the car; the cocaine was found very close to him; and he had made furtive movements toward that spot. Also, *Ray*'s assumption that the State had to prove control of the premises (*id.* at 463) is no longer good law. See *Adams*, 161 Ill. 2d at 345.

¶ 13 *In re K.A.*, 291 Ill. App. 3d 1 (1997), is also distinguishable. There, the juvenile respondent and his friend were inside an apartment that was being used as a "drug house." *Id.* at 6. Drugs were found underneath a food container in the living room and inside a hole in the closet. *Id.* at 4. In reversing the respondent's adjudication of guilt, the reviewing court held that the State had proved only that he had been in the apartment in the vicinity of the concealed drugs. *Id.* at 9. Citing *Ray* (*id.* at 7), the reviewing court emphasized the lack of evidence that the respondent had controlled the apartment, making the same invalid assumption as had the *Ray* court. *Id.* at 6-7. *K.A.* thus is

irrelevant because its holding is based on bad law. Also, even were control of the premises an element of constructive possession, the State proved it here, as defendant owned and drove the car. *K.A.*'s facts are distinguishable anyway, as in that case there was no evidence that the respondent had made any effort to conceal the drugs, and his friend had entered the apartment first and been found equally near the drugs. *Id.* at 3.

¶ 14 In *People v. Jones*, 278 Ill. App. 3d 790 (1996), the trial court found that the defendant had violated his probation by possessing cocaine. The evidence showed that police executed a warrant to search a house. When they entered, several people downstairs had apparently just been using crack cocaine, with more crack cocaine nearby. Upstairs, the police found the defendant and another man hiding under a pile of clothing in a closet. Also under the clothing was a bag of cocaine. Reversing the judgment, the appellate court explained that nothing tied the defendant to the drugs found downstairs, and his mere proximity to the cocaine in the closet did not prove that he knew that it was there; the other man could just as easily have possessed the cocaine and hidden it without the defendant's knowledge. *Id.* at 793-94. Here, by contrast, the police saw defendant reach toward the exact area where the controlled substance was found; defendant was sitting directly over that area, closest to the controlled substance; and defendant owned the premises.

¶ 15 Finally, in *People v. Gore*, 115 Ill. App. 3d 1054 (1983), the defendant drove a friend's car, with Jerry and Anita Carnes riding in front. The officers found cannabis concealed in a paper bag underneath the front passenger seat. Reversing the defendant's conviction of possessing the cannabis, the reviewing court reasoned that there was no evidence that the defendant had been in exclusive control of the area underneath the passenger's seat. *Id.* at 1058. Aside from relying on the questionable assumption that the State had to prove the defendant's exclusive control of the area

where the cannabis was found, *Gore* is easily distinguishable. Here, the cocaine was found directly underneath the driver's seat, where defendant was sitting, and defendant had been seen reaching toward that area almost immediately before the stop. Moreover, defendant owned the car, and the cocaine was visible inside a clear plastic bag. Thus, *Gore* is also of no help to defendant.

¶ 16 For the foregoing reasons, we affirm the judgment of the circuit court of Kane County.

¶ 17 Affirmed.