FIFTH DIVISION
October 23, 2015

No. 1-13-3266

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).

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. 12 CR 6745
	)	
THALMUS ELZY,	)	Honorable
	)	Thomas M. Davy,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Justices Gordon and Lampkin concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Judgment entered on defendant's bench conviction of possession of a controlled substance with intent to deliver affirmed over his contentions that the evidence was insufficient to prove his guilt; counsel was ineffective for failing to produce the landlord as a witness, and the trial court erred in failing to conduct a *sua sponte Krankel* inquiry.

¶ 2 Following a bench trial, defendant Thalmus Elzy was convicted of possession of a controlled substance with intent to deliver and sentenced to 12 years' imprisonment. On appeal, he contests the sufficiency of the evidence to sustain his conviction. He also alleges that he received ineffective assistance of trial counsel for failing to present certain exculpatory evidence, and that the trial court failed in its *sua sponte* duty to inquire into whether counsel was ineffective pursuant to *People v. Krankel,* 102 Ill. 2d 181 (1984).

¶ 3 The record shows that defendant was charged in a 10 count indictment with armed habitual criminal, possession of a controlled substance with intent to deliver, and unlawful use a weapon by a felon, following the recovery of a large cache of narcotics and drug paraphernalia from a home on the south side of Chicago. At trial, Chicago police detective Gary Olson testified that on March 9, 2012, he and a team of 10 police officers, executed a search warrant at the two-story single family residence on South Hermitage Avenue. Prior to entering the building, Detective Olson gave his team a booking photograph of defendant which was taken after a previous arrest, and displayed a Gary, Indiana, address. When they entered the house, the only people they saw were defendant and a female sitting in the living room. Detective Olson could hear dogs barking, and defendant twice stated, "[d]on't shoot my dogs. Don't shoot my dogs."

¶ 4 Detective Olson searched the home and found a hidden compartment in a kitchen cabinet which contained $5,643, a knotted bag containing a chunk of suspect heroin, a loaded handgun, and 24 live rounds of ammunition. He also found a plaid button-down colored shirt and a V-neck sleeveless Argyle sweater in the kitchen, and recognized these clothing items as the same ones defendant wore during his last arrest. The detective further testified that his team found a coat in

an upstairs bedroom which contained $3,000, and the dogs in a middle unfurnished bedroom on the first floor, which contained food for the dogs, and other dog-related items.

¶ 5 When Detective Olson asked defendant if there was any more illegal contraband in the house, he responded, "[t]he judge is gonna [*sic*.] be wondering why you hit my crib. I already did fed [*sic*.] time." The detective explained that crib, means home. Prior to leaving the house, defendant asked if he could retrieve shoes and a sweatshirt from "my room."

¶ 6 Chicago police officer Steven Insley testified that Sergeant Hardy performed a custodial search of defendant, and recovered $288, and a set of keys. One of the keys opened the front security door of the residence and another opened the front door.

¶ 7 Officer Insley went upstairs to the second floor where he noticed a cut-out in the carpeting at the top of the landing. Officer Jerry Nowak peeled back the carpeting, and saw a cut-out wooden floorboard with a hinge. The officers opened the hidden compartment and found narcotics packaging, three spoons, three electric grinders, a black plastic container, a strainer, a loaded handgun, and four bags containing suspect heroin.

¶ 8 In the kitchen, Officer Insley found a camping lantern in a cabinet and, when he unscrewed the bottom where the battery compartment was located, he found four clear plastic knotted bags, three of which contained 16 smaller ziploc bags of heroin. He also found a large, heavy, steel motorized narcotics press in the same cabinet. Officer Insley further testified that Officer Joritz found two bags of suspect cocaine in the bottom front part of the microwave, and Officer Insley noted that he did not find any female clothing in the residence.

¶ 9 The parties stipulated to the chain of custody of all the evidence and to the chemical composite of the narcotics recovered from the premises. Those items tested positive for 12.4 grams of cocaine, 100.7 grams of heroin (lantern), 170.1 grams of heroin (stairwell) and 116.6 grams of heroin (kitchen).

¶ 10 After closing arguments, the trial court initially found defendant guilty of all charges. In announcing its findings, the court noted that defendant had keys to the security and front doors of the residence, showing control of the premises, and defendant's reference to the house as his "crib," was not something a temporary guest would do. The court also noted that defendant had clothing inside the apartment that belonged to him, which "indicate[d] that this [was] something beyond him staying there," and the fact that another individual was in the residence at the time did not defeat defendant's possession thereof because possession may be joint. Based on the totality of the testimony presented, the court found that the State proved defendant guilty beyond a reasonable doubt.

¶ 11 Defendant subsequently filed a motion for a new trial, alleging there was insufficient evidence to sustain his convictions. The court granted the motion regarding the armed habitual criminal counts, but denied it as to the rest of the charges. In doing so, the court noted that "someone can say don't shoot my dogs[,] having walked the dogs down from the street," but the evidence that defendant had keys to the residence which opened the "storm" and main doors, had clothing there, and referred to the residence as "'my'" crib, were sufficient to show that the State met its burden with regard to the possession charges.

¶ 12 Counsel then informed the court that he had a copy of the rental agreement with the lease holder's names and although he was not asking the court to reopen the case, he wanted to apprise the court of it, before it rendered its ruling. Counsel stated that he had spoken with the landlord, and that

> "maybe I am opening myself up, but I will do it anyway. I made a tactical decision not to call the landlord only because he was just a difficult witness to locate, but he confirmed the fact as to who the lease holders were and how the payments were made."

¶ 13 The court responded that counsel was essentially asking to reopen the proofs, to which the State objected. The court noted that this was "hindsight" on counsel's part, that this evidence did not meet the standard of newly discovered evidence, and denied counsel's request to reopen proofs.

¶ 14 At the sentencing hearing which followed, the court merged the remaining convictions into one count of possession of a controlled substance with intent to deliver, and sentenced defendant to 12 years' imprisonment. Defendant now appeals from that judgment.

¶ 15 In this court, defendant first challenges the sufficiency of the evidence to sustain his conviction for possession of a controlled substance with intent to deliver. He contends that the State failed to provide sufficient evidence connecting him to the residence where the narcotics were found or show that he had knowledge of the hidden drugs discovered after the execution of the search warrant. The State responds that the evidence established defendant's constructive

possession of the narcotics found in the house and proved him guilty of possession of a controlled substance with intent to deliver beyond a reasonable doubt.

¶ 16 When defendant challenges the sufficiency of the evidence to sustain his conviction, our duty is to determine whether all of the evidence, direct and circumstantial, when viewed in the light most favorable to the prosecution, would cause a rational trier of fact to conclude that the essential elements of the offense have been proved beyond a reasonable doubt. *People v. Wiley*, 165 Ill. 2d 259, 297 (1995). A criminal conviction will be reversed only if the evidence is so unsatisfactory or improbable that it leaves a reasonable doubt of defendant's guilt. *Wiley*, 165 Ill. 2d at 297. For the reasons that follow, we do not find this to be such a case.

¶ 17 To sustain defendant's conviction of possession of a controlled substance with intent to deliver, the State was required to prove, in relevant part, that defendant was in constructive possession of the contraband, *i.e.*, that he had knowledge of the presence of the contraband and exercised immediate and exclusive control over the area where the narcotics were found. *People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003). Control over the area where the contraband was found gives rise to an inference that defendant possessed the contraband. *McCarter*, 339 Ill. App. 3d at 879. Habitation in a premises where narcotics are discovered has been found relevant to establishing control of them (*People v. Cunningham*, 309 Ill. App. 3d 824, 828 (1999)); however, constructive possession does not require proof of defendant's ownership or legal interest in the premises where the contraband was discovered (*People v. Williams*, 98 Ill. App. 3d 844, 848 (1981)). Evidence of constructive possession is often established by circumstantial evidence (*People v. McLaurin*, 331 Ill. App. 3d 498, 502 (2002)), and in determining whether constructive

possession has been shown, the trier of fact is entitled to rely on reasonable inferences of knowledge and possession, absent other facts and circumstances which might create a reasonable doubt as to defendant's guilt (*People v. Bui*, 381 Ill. App. 3d 397, 419 (2008)).

¶ 18 In this case, the evidence shows that police had a search warrant for the premises in question and a photograph of defendant. Upon entering, the officers encountered only defendant and a female inside, and defendant immediately asked police not to shoot his dogs. He also referred to the premises as "my crib," and called one of the bedrooms, where his clothing was found, "my room." Only male clothing was found in the house and the officers recognized items of clothing that defendant had worn during a prior arrest. In addition, the keys recovered from defendant opened the security and front doors to the residence. This evidence, and the natural inferences flowing therefrom, support the inference that defendant had control over the premises and was in constructive possession of the narcotics discovered there during the search (*McCarter*, 339 Ill. App. 3d at 879) thus proving him guilty of the possession charge beyond a reasonable doubt (*Bui*, 381 Ill. App. 3d at 420-21).

¶ 19 In reaching that conclusion, we have considered *In re K.A.*, 291 Ill. App. 3d 1 (1997), cited by defendant, but find it inapposite to the case at bar. In *K.A.*, the juvenile's mere presence near the narcotics and flight from the home was deemed insufficient to prove constructive possession. *In re K.A.*, 291 Ill. App. 3d at 6-9. Here, defendant was not merely in a house where a huge amount of contraband was secreted, evidence of his control and habitation were evidenced by his own statements and admissions, his clothing was found there, and he was in possession of keys to the main entrance of the residence.

¶ 20 Defendant next contends that he received ineffective assistance of trial counsel for failing to provide exculpatory evidence. His claim is based on counsel's post-trial admission that he did not call the landlord who would have testified that defendant was not on the lease for the apartment.

¶ 21 Under the two-prong test for examining a claim of ineffective assistance of counsel, defendant must establish that his attorney's performance fell below an objective standard of reasonableness, and that but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on such a claim, defendant must satisfy both prongs of the *Strickland* test, and if this court concludes that defendant did not suffer prejudice, we need not decide whether counsel's performance was deficient. *People v. Harris*, 206 Ill. 2d 293, 304 (2002).

¶ 22 Based on the record before us, we find that defendant cannot establish the prejudice prong of the *Strickland* test. At best, defendant's claim is based on conjecture and surmise since counsel never identified the leaseholder. However, even if we assume that defendant was not a leaseholder and that the landlord would have testified to that fact, this would not defeat the finding of possession for constructive possession may be joint. *People v. Hill*, 226 Ill. App. 3d 670, 673 (1992)). Moreover, the evidence presented at trial sufficiently established defendant's control of the premises from which his knowledge and possession of the contraband could be reasonably inferred. *Williams*, 98 Ill. App. 3d at 849. Under these circumstances, we find that defendant cannot establish prejudice resulting from counsel's failure to present the allegedly exculpatory evidence (*People v. Harris*, 182 Ill. 2d 114, 137 (1998); *People v. Taylor*, 344 Ill.

App. 3d 929, 939-40 (2003)), and his claim of ineffective assistance of counsel necessarily fails (*Harris*, 206 Ill. 2d at 304).

¶ 23 In reaching this conclusion, we find *People v. Spann*, 332 Ill. App. 3d 425 (2002), cited by defendant, factually inapposite. In *Spann*, counsel presented no witnesses or evidence, no pre-trial motions or opening statement, when, among other things, a motion to quash arrest and suppress evidence would have been viable, and, if granted, would have precluded the State from proving possession with intent to deliver. *Spann*, 332 Ill. App. 3d at 430- 37. Here, unlike *Spann*, the alleged leaseholder evidence which counsel chose not to present at trial would not have precluded a finding of joint constructive possession of the premises given the strong evidence of defendant's control of the premises. *Hill*, 226 Ill. App. 3d at 673.

¶ 24 Defendant finally contends that the trial record supports an inference that he received ineffective assistance of counsel, and, therefore, the trial court failed in its *sua sponte* duty to inquire further into counsel's failure to present exculpatory evidence. He thus claims that this court should, at minimum, remand his case for an inquiry into counsel's possible incompetence.

¶ 25 Under the rule which developed in interpreting *Krankel*, when defendant presents a post-trial motion alleging ineffective assistance of counsel, the trial court should first examine the factual basis for defendant's claim. *People v. Moore*, 207 Ill. 2d 68, 77-78 (2003). However, in the absence of a sufficient claim, no inquiry is required. *People v. Taylor*, 237 Ill. 2d 68, 77 (2010).

¶ 26 In this case, defendant did not make a *pro se* complaint of ineffective assistance, but maintains that the trial court has a duty to inquire *sua sponte* when the record provides a clear

basis for an allegation of ineffectiveness. In support of his contention, defendant cites *People v. Williams*, 224 Ill. App. 3d 517, 524 (1992), where, as here, defendant relied on counsel's statements to the court as the basis for his appellate claim.

¶ 27 In *Williams*, after defendant was found guilty of murder, counsel filed a motion for a new trial, informing the court of two witnesses who would have supported his alibi defense, but that he had not called despite his knowledge of them. *Williams*, 224 Ill. App. 3d at 521-23. The trial court denied the motion, rejecting counsel's claim that these witnesses constituted new evidence. *Williams*, 224 Ill. App. 3d at 522-23. On appeal, this court noted that the two witnesses would have provided critical support for defendant's alibi defense, then held that where the record discloses a clear basis for an allegation of ineffectiveness of counsel, a defendant's failure to explicitly make that allegation does not result in waiver, and remanded the cause for a *Krankel* inquiry. *Williams*, 224 Ill. App. 3d at 524.

¶ 28 A similar claim was recently considered and rejected by this court. In *People v. Steele*, 2014 IL App (1st) 121452, defendant was convicted, in relevant part, of aggravated battery to a peace officer causing great bodily harm. At trial, the officer testified that when defendant drove into him, causing him to land on top of the car, and then swerved, throwing him into oncoming traffic, he suffered bruises, and torn ligaments in both knees and his right shoulder and needed surgery to remove bone fragments from his shoulder; the medical records provided to counsel, however, did not document any torn ligaments. *Steele*, 2014 IL App (1st) 121452, ¶¶3, 9. In his posttrial motion, counsel suggested that he may have been ineffective for not properly using the medical records to impeach the officer's credibility regarding his injuries, and on appeal,

defendant requested a remand because the trial court failed to conduct a *sua sponte* inquiry into counsel's ineffectiveness. *Steele*, 2014 IL App (1st) 121452, ¶46.

¶ 29 In making that argument, defendant, as here, relied on *Williams*. This court found, however, that unlike *Williams*, counsel's statements did not concern defendant's guilt or innocence of the charged offense, and the court was not presented with evidence of defense counsel neglecting to present witnesses or put on a defense. *Steele*, 2014 IL App (1st) 121452, ¶49. Moreover, even if counsel questioned the officer about his injuries and the medical reports, it is unlikely the outcome would have been different where the trial court stated it was convinced that the officer suffered great bodily injury even without the evidence of torn ligaments. *Steele*, 2014 IL App (1st) 121452, ¶49.

¶ 30 We reach the same result here where evidence of the lease holder would not have changed the outcome of the trial because defendant's constructive possession of the narcotics was established beyond a reasonable doubt and possession may be joint. *Hill*, 226 Ill. App. 3d at 673. Under these circumstances, we find no error by the trial court in failing to conduct a *sua sponte Krankel* inquiry based on counsel's statements. *Steele*, 2014 IL App (1st) 121452, ¶49.

¶ 31 For the reasons stated, we affirm the judgment of the circuit court of Cook County.

¶ 32 Affirmed.