2015 IL App (1st) 133567-U

SIXTH DIVISION
June 5, 2015

No. 1-13-3567

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 4090
	)	
VINCENT RIZZO,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

O R D E R

¶ 1 ***Held:*** Defendant's conviction for possession of cannabis affirmed over his contentions that the trial court erred in denying his motion to quash arrest and suppress evidence and that the evidence was insufficient to sustain his conviction.

¶ 2 Following a bench trial, defendant Vincent Rizzo was found guilty of possession of cannabis and sentenced to 18 months' probation. On appeal, he contends that the trial court erred in denying his motion to quash arrest and suppress evidence based on lack of probable cause because the police arrested him before they determined that he was the target of a search warrant

and before any contraband was discovered. Defendant further contends that the evidence was insufficient to sustain his conviction.

¶ 3 Defendant was charged with possession of cannabis with intent to deliver in relation to an incident that occurred on February 3, 2010, in a residence located in Chicago, during which defendant was detained by police who were executing a search warrant. Prior to trial, defendant filed a motion to quash arrest and suppress evidence, asserting that he was arrested, searched and seized without probable cause, a valid warrant, reasonable suspicion or any authority whatsoever. He thus requested that his arrest be quashed and any evidence discovered or statements made by him as a result be suppressed.

¶ 4 At the hearing on the motion, Steven Teufel testified for the defense that at 8:30 p.m. on February 3, 2010, he arrived at 3550 North Ravenswood, apartment 4E (the apartment), where defendant lived with his roommate Nenard Denovich. Around 9 p.m., Teufel and Denovich exited the rear of the apartment and walked down to the garage to retrieve Denovich's car. Denovich began to back the car out of the garage, but stopped when a police officer who was holding a gun slapped the back of the car. Teufel and Denovich complied with the officer's request that they exit the car and provide identification. Another police officer arrived on the scene, and Denovich gave the officers consent to search his car. Both he and Teufel were searched and handcuffed.

¶ 5 Teufel further testified that approximately 10 minutes later, the officers brought him and Denovich back into the apartment. Teufel was seated at the kitchen table and Denovich was escorted to an adjacent room. Approximately 10 minutes later, officers moved Teufel to a couch

in the living room, and, about 10 minutes thereafter, Teufel saw defendant walk down the stairs with an officer. Defendant, who was in handcuffs, was led into the room in which Denovich was sitting, but eventually both Denovich and defendant were also seated on the couch with Teufel. All three men were still handcuffed. At some point, a fourth individual, Jeff Goldford, entered the apartment. The police searched Goldford, handcuffed him, and seated him on the couch with the other three men. Approximately 30 minutes later, the officers took defendant and Denovich from the apartment and removed Teufel's handcuffs. Teufel was not arrested.

¶ 6 On cross-examination, Teufel testified that he had known defendant for 15 years, and that he called defendant "Michael," which is a name defendant also "goes by." During the time he was in the garage, and while he was seated at the kitchen table, Teufel could not see what was going on in the apartment or what defendant was doing. The police did not ask Teufel for a combination to a safe, nor did he hear them ask anyone else for the combination.

¶ 7 Defendant testified that on the day of the incident he lived at the apartment with two roommates, Denovich and David Crowler. At approximately 9:15 p.m., defendant was alone in the apartment when he heard a loud banging on the front door. Before he could open it, the door "c[a]me down and *** eight to ten policemen ran through the door" and two of them "tackled" him. The officers threw him to the ground face first, screamed profanities at him, and placed him in handcuffs. Two officers then "yanked" defendant up off the floor by his arms. At this point, the officers had not inquired as to his identity, nor had they shown him an arrest warrant, and defendant did not feel free to leave. Defendant was then walked upstairs by some officers as they conducted their search, and he "put [his] puppy away."

¶ 8 On cross-examination, defendant testified that he "go[es] by Michael" in certain circles and acknowledged that he has a credit card in the name "V. Michael Rizzo" and a checkbook in the name "Michael Rizzo." Defendant further testified that the officers never showed him a search warrant, but approximately 10 to 15 minutes after they arrived on the scene, officers did ask him his name and he told them that it was "Vincent Michael Rizzo." The defense then rested.

¶ 9 Chicago police officer Ryan Delaney testified for the State that around 9:15 p.m. on the night of the incident he and a team of eight officers executed a search warrant at the apartment. The officers made a forced entry after receiving no response to their knock on the door, and Officer Delaney was the second officer to enter. Upon doing so, Officer Delaney holstered his weapon and saw defendant, who fit the description of the target of the search warrant. That person was described as a white male, approximately 24-to-26 years old, 5'6" to 5'9" tall, and approximately 150 to 170 pounds, with medium-length black hair who "went by Michael."[1] Officer Delaney then handcuffed defendant. Defendant was compliant and Officer Delaney did not throw him to the ground or say anything to him. Officer Delaney handed defendant to a teammate and proceeded with his partner to the second floor to secure it. Once upstairs, they encountered a large dog. They placed the dog in his cage, secured the rest of the upper floor and confirmed that no other person was present. No contraband had been recovered at this point.

¶ 10 Officer Delaney further testified that he then returned to the first floor and spoke with defendant, who was standing by the staircase, and advised defendant of his rights, presented him

[1] The search warrant, a copy of which is included in the record, authorized the search of the apartment, as well as "Michael," for cannabis and equipment used in its manufacture and delivery.

with a copy of the search warrant, and told him the police were there for cannabis. Defendant told him "the cannabis is upstairs and I'll show you where it is." Officer Delaney proceeded upstairs with defendant and recovered the cannabis. At that point, Officer Delaney asked defendant for his name and defendant responded that it was "Vincent Michael Rizzo." Officer Delaney clarified that this transpired prior to when he showed defendant the search warrant. Defendant was then taken back downstairs and at some later point he was placed on a couch.

¶ 11 Officer Delaney further testified that he had remained in radio contact with other members of his team and learned that other individuals had been located when officers were securing the back of the residence. Those individuals were brought into the apartment and were handcuffed for officer safety because the officers were executing a search warrant for drugs and would need to preserve evidence and prevent anyone present from fleeing. While executing the search warrant, the officers had to force entry into a safe because none of the detained individuals gave them the combination to it. Defendant and the other individuals remained in handcuffs during the entirety of the incident, which lasted approximately an hour. Defendant was arrested and transported to the police station.

¶ 12 On cross-examination, Officer Delaney viewed the search warrant to refresh his recollection and testified that it reflected that the target of the search was approximately 5'5" to 5'7" tall. Officer Delaney testified that he would describe defendant's hair at the time of the incident as medium-length, but acknowledged that the case report states that defendant had long hair. Officer Delaney was asked at what point he asked defendant for his name and testified "when I was Mirandizing him is when we had the discussion about the name *** I can't say if I

asked him his name or read him his rights first." Officer Delaney testified that the police report reflects that he read defendant his *Miranda* rights prior to asking him about the contraband, but does not state at what point he asked for defendant's name.

¶ 13 After the State rested, the trial court noted that according to trial testimony the apartment was located at 3550 North Ravenswood, but that the address listed on the search warrant was 1801 West Addison. The trial court granted defendant's motion to quash and suppress based on the address discrepancy, which the court found was a "fatal flaw," and denied the State's request to present additional evidence to clarify the issue.

¶ 14 The State filed a certificate of substantial impairment, arguing that the trial court's order granting defendant's motion substantially impaired its ability to prosecute the case. In the interlocutory appeal that followed, this court found that the trial court erred in failing to allow the State to reopen its case to respond to the court's *sua sponte* challenge to the search warrant. *People v. Rizzo*, 2013 IL App (1st) 120015-U, ¶¶ 1, 23-25. Accordingly, this court reversed the trial court's order granting defendant's motion to quash arrest and suppress evidence and remanded the case for further proceedings to allow the State to reopen its case to respond to the address discrepancy and for the trial court to rule on the substance of defendant's motion. *Id.*

¶ 15 On remand, Officer Delaney testified that the building at issue is on a corner, with one side of the building facing Addison Street and bearing the address 1801 Addison, and another side of the building facing Ravenswood and bearing the address 3550 North Ravenswood, and that the apartment was located in that building and could be accessed by either entrance. The trial court then denied defendant's motion to quash arrest and suppress evidence.

¶ 16 The case proceeded to a bench trial, and the parties agreed to incorporate the testimony that was presented at the hearing on the motion to quash and suppress, except for defendant's testimony and the portion of Officer Delany's testimony pertaining to defendant being the target of the search warrant.

¶ 17 Officer Delaney testified at trial and provided testimony consistent with his testimony at the hearing on the motion to quash and suppress. He further added that in performing the initial sweep of the apartment, he saw that the second floor consisted of one bedroom, a half kitchen area, a large closet and a balcony. When defendant accompanied the officers upstairs, he showed the officers where the cannabis in his room was located. In that upstairs bedroom, Officer Delaney recovered a large bag of cannabis on top of a digital scale on a counter, a cardboard box containing three additional plastic bags of cannabis, as well as plastic bags used for packaging narcotics in the closet, and $461 of suspected narcotics revenue in a drawer. Another officer recovered a ledger in the upstairs bedroom. At this point, defendant was placed into custody. Officer Delaney was then advised that another officer had found evidence in an "office-type room" on the first floor which showed that defendant lived in the apartment. Officer Delaney went to that location and saw a letter addressed to defendant, as well as a checkbook and a credit card in defendant's name. Defendant was then transported to the police station for processing.

¶ 18 On cross-examination, Officer Delaney testified that the cannabis on the counter in the upstairs bedroom was out in the open. Although he did not see the cannabis during his initial sweep of the residence, the purpose of that sweep was safety, so he was looking for people or other threats, not cannabis. Officer Delaney acknowledged that the arrest report did not include

defendant's statement that the cannabis was upstairs and that he would show the officers where it was, and that the incident report did not state that defendant went upstairs with the officers and showed them where the cannabis was located. Officer Delaney further testified that when he first entered the residence, there was a large dog upstairs. The dog, which he later learned belonged to defendant, was then secured in a cage that was also located upstairs. Officer Delaney learned that Denovich, who also lived in the residence, told other officers that he had guns in a safe. Officers used tools to open the safe because Denovich refused to give the officers the combination to it.

¶19 On re-direct examination. Officer Delaney testified that he does not include every detail of an incident in an arrest report because it is just a summary. The parties then stipulated that a proper chain of custody of the suspect cannabis recovered in this case was maintained at all times and that forensic chemist Tiffany Neal would testify that she tested those items, and that they tested positive for cannabis and weighed 1,144.3 grams.

¶ 20 Following closing arguments, the trial court found defendant guilty of the lesser included offense of possession of cannabis. In doing so, the court stated that Officer Delaney was a "credible and compelling witness." The trial court denied defendant's subsequently filed motion for a new trial and sentenced him to 18 months' probation. On appeal, defendant first contends that the trial court erred in denying his motion to quash arrest and suppress evidence.

¶ 21 In reviewing an order denying defendant's motion to quash arrest and suppress evidence mixed questions of law and fact are presented. *People v. Pitman,* 211 Ill. 2d 502, 512 (2004). Factual findings made by the trial court will be upheld unless they are against the manifest weight of the evidence, whereas the trial court's application of the facts to the issues presented

and the ultimate question of whether the evidence should be suppressed is subject to *de novo* review. *Id.* On appeal, we may consider the evidence presented at the hearing on the motion to quash and suppress, as well as the evidence presented at trial to the extent that it supports affirming the trial court's judgment. *People v. Butorac*, 2013 IL App (2d) 110953, ¶ 14, citing *People v. Brooks*, 187 Ill. 2d 91, 127-28 (1999).

¶ 22 The fourth amendment to the United States constitution guarantees the right to be free from unreasonable searches and seizures. U.S. Const., amend, IV; *People v. Gherna*, 203 Ill. 2d 165, 176 (2003). Some seizures, however, constitute such limited intrusions on the personal security of those detained, and are justified by such substantial law enforcement interests, that they may be made on less than probable cause. *Michigan v. Summers*, 452 U.S. 692, 699 (1981). The central inquiry under the fourth amendment is "the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." *People v. Connor*, 358 Ill. App. 3d 945, 949 (2005), citing *Summers*, 452 U.S. at 700, n. 11.

¶ 23 Here, defendant argues that pursuant to the factors discussed in *United States v. Mendenhall*, 446 U.S. 544, 554 (1980), such as the threatening presence of several officers, the display of weapons, physical touching, and the use of language or tone indicating that compliance might be compelled, he was seized immediately upon the police officers' entry to the apartment. An in-depth discussion of the *Mendenhall* factors is not needed here, however, because there is no question that defendant was seized within the meaning of the fourth amendment immediately after the officers entered the apartment. See *Conner*, 358 Ill. App. 3d at 949.

¶ 24 Defendant further argues that his seizure constituted an unlawful arrest in that the officers lacked probable cause to arrest him because they did so before they determined that he was the target of the search warrant and before any contraband was recovered. However, not every seizure necessarily equates to an arrest, and the pertinent question here is whether defendant's seizure was reasonable. *Id.*

¶ 25 In *Summers*, 452 U.S. at 704-05, upon which the State relies, the United States Supreme Court held that officers executing a valid warrant to search premises for contraband have the authority to detain the occupants of the premises while the search is conducted. *Id.* In doing so, the Court reasoned that the justifications for such an intrusion, including preventing any of the occupants from fleeing, minimizing the risk of harm to the officers, and facilitating the orderly completion of the search, are substantial. *Id.* at 699, 702-03. The Court subsequently addressed this issue in *Muehler v. Mena*, 544 U.S. 93, 99-102 (2005), and held that (1) the questioning by an officer of an individual detained during the execution of a search warrant does not convert the detention into an arrest so long as the questioning does not prolong the detention, and (2) the use of handcuffs during such a detention is reasonable and does not convert the detention into an arrest. *Id.*

¶ 26 Defendant here does not contest that the officers had a valid warrant to search the apartment for cannabis, and the record shows that not only did defendant live in the apartment on the date at issue, but that he was present inside of the apartment at the time the officers carried out the search warrant. This court has held that the holding in *Summers* applies equally to residents of the premises subjected to a search warrant, as well as to non-residents who are

present at the time the search is conducted. *Connor*. 358 Ill. App. 3d at 958-59. Due to defendant's presence in the apartment at the time the officers carried out the search, we find that his detention was plainly permissible under *Summers*. See *Muehler*, 544 U.S. at 98. Further, contrary to defendant's contention, at the time the officers arrived on the scene, they did not need to verify whether he was the person described as "Michael" in the search warrant, or even whether he lived in the unit. His mere presence in the apartment gave the officers the authority to detain him while they carried out the search warrant (*Conner*, 358 Ill. App. 3d at 958-59), and, pursuant to *Muehler*, this included the authority to handcuff him. *Muehler*, 544 U.S. at 99-100, 102.

¶ 27 Defendant points out that Officer Delaney advised him of his *Miranda* rights prior to telling him that the police were looking for cannabis. However, contrary to defendant's contention, we find that this did not convert the situation into a custodial arrest, given that a custodial situation cannot be created by the mere giving of *Miranda* warnings (*People v. McDaniel*, 249 Ill. App. 3d 621, 633 (1993)), and that officers may question detained individuals during the execution of a search warrant (*Muehler*, 544 U.S. at 100-02). Here, Officer Delaney testified that defendant was not arrested until after the officers recovered cannabis in the upstairs bedroom. Prior to that point, the evidence in the record shows that defendant was lawfully detained while the officers executed a valid search warrant to search the apartment. We thus find that the trial court did not err in denying defendant's motion to quash arrest and suppress evidence.

¶ 28 Defendant next challenges the sufficiency of the evidence to sustain his conviction. The standard of review on a challenge to the sufficiency of the evidence 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. *People v. Siguenza-Brito,* 235 Ill. 2d 213, 224 (2009). This standard applies to all criminal cases, whether the evidence is direct or circumstantial, and acknowledges the responsibility of the trier of fact to determine the credibility of witnesses, to weigh the evidence and draw reasonable inferences therefrom, and to resolve conflicts in the evidence. *People v. Campbell*, 146 Ill. 2d 363, 374-75 (1992). A reviewing court will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt. *People v. Jackson,* 232 Ill. 2d 246, 281 (2009).

¶ 29 Here, defendant was found guilty of possession of cannabis. 720 ILCS 550/4(e) (West 2010). To sustain defendant's conviction, the State was required to prove beyond a reasonable doubt that defendant knowingly possessed more than 500 grams but not more than 2,000 grams of any substance containing cannabis. *Id*. Defendant argues that the State failed to show that he controlled the area where the drugs were recovered and that he had knowledge that the cannabis was present.

¶ 30 When establishing the element of possession, constructive possession is sufficient and the State need not prove that defendant had actual possession of the controlled substance. *People v. McLaurin*, 331 Ill. App. 3d 498, 502 (2002). To establish constructive possession, the State must show that defendant had knowledge of the controlled substance, and exercised immediate and

exclusive control over the area where it was found. *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). Knowledge may be shown by evidence of defendant's acts, declarations or conduct from which it can be inferred that he knew the contraband existed in the place where it was found. *People v. Beverly*, 278 Ill. App. 3d 794, 798 (1996). Constructive possession is often proved entirely by circumstantial evidence (*People v. McCarter*, 339 Ill. App. 3d 876, 879 (2003)), and exclusive possession can be established even where possession is joint or others have access to the area where contraband is located (*People v. Griffin*, 194 Ill. App. 3d 286, 292 (1990)).

¶ 31 A defendant's control over the premises where controlled substances are located gives rise to an inference of knowledge and control of those substances. *People v. Brown*, 277 Ill. App. 3d 989, 997-98 (1996), citing *People v. Adams*, 161 Ill. 2d 333, 345 (1994). Habitation of the residence where controlled substances are discovered has been found to be sufficient evidence of control to constitute constructive possession. *People v. Spencer*, 2012 IL App (1st) 102094, ¶17; *People v. Cunningham*, 309 Ill. App. 3d 824, 828 (1999).

¶ 32 Although constructive possession is often proved entirely by circumstantial evidence, in this case we have direct evidence of defendant's knowledge of the cannabis. Officer Delaney testified that after he advised defendant of his rights and about the search warrant for cannabis, defendant told him that the cannabis was upstairs and he would go with the officers to find it. Once in the upstairs bedroom, defendant showed the officers where the cannabis was located in the room. In addition to this direct evidence of defendant's constructive possession of the cannabis, there is circumstantial evidence of his constructive possession of it. The evidence presented at trial showed that defendant lived, and was present in, the apartment on the night the

officers carried out the search warrant. Three items bearing his name were found in an office located on the first floor of the apartment; a letter, a checkbook, and a credit card. Viewing this evidence in the light most favorable to the prosecution, we find that a reasonable trier of fact could find that defendant had constructive possession of the cannabis in that he knew it was located in the upstairs bedroom of the residence in which he lived. See *Spencer*, 2012 IL App (1st) 102094, ¶18.

¶ 33 Defendant, however, argues that the State failed to show that he had knowledge of the cannabis because Officer Delaney's testimony that defendant told him that the cannabis was upstairs was not credible, and that certain other aspects of Officer Delaney's testimony were contradictory and impeached. In so arguing, defendant contends that it strains credulity that Officer Delaney did not see the cannabis when he conducted his initial sweep of the residence, given his testimony that the cannabis was sitting on a counter out in the open. However, Officer Delaney testified that during that sweep he was determining whether other people were present in the apartment, and was not searching for cannabis at that time.

¶ 34 Defendant further argues that Officer Delaney's testimony that Denovich voluntarily told the officers that he had guns in a safe, but refused to give them the combination to it, is illogical. Defendant points out that Teufel testified that officers did not ask him for the combination to the safe, and he did not hear the officers ask anyone else for the combination, in contrast to Officer Delaney's testimony that the officers did ask for the combination to the safe but did not receive it. Defendant contends that under these circumstances, it is likely that Denovich did not actually make the statement pertaining to the safe that was attributed to him, and, accordingly, that it is

equally as likely that he, defendant, did not make the statement being attributed to him regarding his knowledge of the location of the cannabis. These are issues concerning the credibility of witnesses and the resolution of conflicts in the evidence, which is the purview of the trier of fact. *Campbell*, 146 Ill. 2d at 374-75. Here, the trial court resolved these issues in favor of the State, and, in doing so, stated that Officer Delaney was a credible witness. We have no basis for substituting our judgment for that of the trial court on these matters. *Id.* at 389.

¶ 35 Finally, we reject defendant's contention that the State failed to prove his immediate and exclusive control of the room in which the cannabis was recovered because the documents bearing his name were found in an office on the first floor and because he had a roommate. Mere access by others is insufficient to defeat constructive possession. *People v. Ortiz,* 91 Ill. App. 3d 466, 472 (1980); see also *People v. Birge,* 137 Ill. App. 3d 781, 790 (1985). Here, there is no evidence that defendant's access to the second floor bedroom was limited in any way, and he cites no authority standing for the proposition that proof of residency must be found in the same room in which the contraband is recovered.

¶ 36 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 37 Affirmed.