2016 IL App (1st) 143524-U

FIFTH DIVISION
September 9, 2016

No. 1-14-3524

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. 13 CR 10389
	)	
JOSEPH FITZEK,	)	Honorable
	)	William Hooks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Justices Lampkin and Burke concurred in the judgment.

O R D E R

¶ 1 *Held:* Defendant's convictions for possession of methamphetamine with intent to deliver affirmed over his contention the evidence was insufficient to prove he had constructive possession of the methamphetamine; trial court did not abuse its discretion in denying his motion for a new trial where newly discovered evidence did not directly relate to defendant's case.

¶ 2 Following a bench trial, defendant Joseph Fitzek was found guilty of two counts of possession of methamphetamine with intent to deliver. The trial court sentenced him to 14 years' imprisonment on both counts, to be served concurrently. On appeal, defendant contends that: (1)

the State failed to prove beyond a reasonable doubt he had constructive possession of the methamphetamine to support his convictions and (2) the trial court abused its discretion when it denied his motion for a new trial after newly discovered evidence established that another trial court in an unrelated case determined that some of the officers involved in defendant's case had lied during a suppression motion. We affirm.

¶ 3 The State charged defendant with three counts of possession of methamphetamine with intent to deliver and two counts of possession of a controlled substance with intent to deliver.

¶ 4 At trial, the evidence established that at approximately 10:30 a.m. on May 3, 2013, Chicago Police Officer Michael Killeen was part of a team executing a search warrant at an apartment building on the 4300 block of North Hazel Street in Chicago. Defendant was named in the search warrant. The officers knocked on the front door of the subject residence and announced their presence. After a minute with no response, the officers forcibly entered the residence. Upon doing so, the officers encountered and detained Michael Pyle, who was not the subject of the warrant. They did not find defendant.

¶ 5 Killeen proceeded to one of the two bedrooms in the apartment, the south bedroom. There, he recovered 17 clear plastic bags, 10 red plastic bags and 1 blue plastic bag containing suspect methamphetamine from inside a suitcase, a combined $113,343 from inside another suitcase and from on top of a dresser, and a black metal money counting machine. Killeen also recovered in the south bedroom various documents containing defendant's name and the address which was the subject of the search warrant.

¶ 6 Killeen identified these documents, which included: a letter from Turbo Tax, a 1099 tax form from the Illinois Department of Revenue, a United States income tax return from 2005, a United States income tax return summary from 2005, an account statement from Chase Bank, a letter from Chase Bank containing an account summary from July 13, 2012 through August 10, 2012, a letter from Country Wide Home Loans, a letter from Accenture Foundation and Company, a State of Illinois certificate of title for a vehicle containing an issue date of November 22, 2011, a release of lien signed and dated March 3, 2012, a letter from Bank One containing an individual retirement account statement, and a bill from ComEd dated March 25, 2013. Killeen also identified a small, red memo book found in the bedroom, which contained a social security number, various email addresses with portions of defendant's name, and various banking account IDs and passwords with some of the IDs including portions of his name. Lastly, Killeen identified a check from on top of a dresser in the bedroom which contained defendant's name on the top left corner.

¶ 7 Killeen acknowledged that he did not know when the documents with defendant's name, the methamphetamine or the money arrived at the residence. Additionally, no fingerprints were recovered at the scene. After Killeen recovered the evidence, he returned to the police station and tendered the evidence to Officer Vince Morgan to inventory, which Morgan testified doing.

¶ 8 Six days later, Officer Frances Bochnak, who participated in the execution of the warrant on May 3, was at an apartment building located on the 1400 block of West Albion Avenue in Chicago with other officers. The officers knocked on the apartment's door, and a man named Conrad Frieze allowed them inside the unit. Once inside, Bochnak observed Pyle who he had

previously seen at the apartment on North Hazel Street. Frieze then directed the officers to a closet, where they discovered defendant hiding inside. The police subsequently arrested him.

¶ 9 On cross-examination, Bochnak denied that he observed defendant standing in a corner in front of Pyle when he entered the residence. Bochnak acknowledged writing an arrest report in defendant's case, and stated the report was written before a case incident report was authored by Officer William Pruente, who was also present when the police arrested defendant. Bochnak stated he did not do anything to address a difference between his report and Pruente's as to defendant's location in the apartment. On redirect examination, Bochnak stated Pruente's report documented the arrest of Pyle, not defendant, whereas his report documented defendant's arrest.

¶ 10 Prior to the conclusion of the State's case, the parties stipulated that the contents of 4 of the red and blue plastic bags tested positive for methamphetamine and weighed 110 grams, and all 11 of the red and blue plastic bags weighed a combined 302.2 grams. The parties further stipulated that the contents of the 17 clear plastic bags tested positive for methamphetamine and weighed 473.5 grams.

¶ 11 At the conclusion of the State's case, the State dismissed three counts against defendant: one count of possession of methamphetamine with intent to deliver and both counts of possession of a controlled substance with intent to deliver.

¶ 12 Defendant moved for a directed finding on the final two counts, but the court denied his motion.

¶ 13 In defendant's case, the parties stipulated that Officer William Pruente would have testified that after entering the apartment located on the 1400 block of West Albion Avenue, he

observed Pyle sitting in the living room and defendant standing in a corner in front of Pyle. Defendant did not testify or present any other evidence.

¶ 14 Following argument, the court found defendant guilty of two counts of possession of methamphetamine with intent to deliver. The court observed that this case was not one regarding actual possession of narcotics, but rather constructive possession and "one of the most thorough constructive possession cases [the] court has ever read about." Although defendant was not present during the execution of the search warrant, the court found that in the bedroom where the narcotics were recovered, there was a "treasure trove" of sensitive, personal information concerning defendant. Additionally, the court noted that the police also recovered large amounts of cash and a money counting machine in the same bedroom.

¶ 15 Defendant filed a motion for a new trial, which he amended twice. In his second amended motion, he argued *inter alia* that the State failed to prove he had constructive possession of the narcotics. Additionally, he argued he was entitled to a new trial based on an unrelated case, People v. Joseph Sperling (13 CR 1479601), where a different trial judge granted Sperling's motion to quash arrest and suppress the evidence based on the testimony of four officers, including Morgan and Pruente. Defendant included with his motion the transcripts and video evidence from the hearing on the Sperling case, which occurred approximately a month after defendant's trial. In granting Sperling's motion, the trial judge found the officers' conduct "very outrageous," that they "lied on the [witness] stand" and there was "strong evidence" that the officers conspired together to lie.

¶ 16 Defendant argued that officers involved in Sperling's case were also involved in his case, including Morgan who testified in both. Additionally, defendant stated that while Killeen and Bochnak did not testify in Sperling's case, they were involved in the operation that led to Sperling's arrest. Defendant acknowledged, however, he was unaware of Killeen and Bochnak being accused of any wrongdoing. The State responded that defendant's newly discovered evidence claim was without merit because only Morgan testified in both cases, and his role in defendant's case was to establish chain of custody. Furthermore, the State argued Killeen and Bochnak's credibility had not been impeached at trial, there was no evidence they lied in a previous case and the court based its guilty finding on their testimony, not Morgan's. Lastly, the State clarified that Pruente's role in defendant's case was stipulated testimony in his case in chief.

¶ 17 The court observed that the other trial court's credibility finding was not something it could simply ignore, but rather the question was how much weight to give it. The court took the matter under advisement and six weeks later, it denied defendant's motion for a new trial, focusing exclusively on defendant's argument concerning constructive possession. The trial court subsequently sentenced defendant to 14 years' imprisonment on both counts, to be served concurrently. This appeal followed.

¶ 18 Defendant first contends that the State failed to prove beyond a reasonable doubt that he had constructive possession of the methamphetamine to support his convictions for possession of methamphetamine with intent to deliver.

¶ 19 When a defendant challenges a conviction based upon the sufficiency of the evidence presented against him, we must ask whether, after viewing the evidence in the light most

favorable to the State, any rational trier of fact could find all the elements of the crime proven beyond a reasonable doubt. *People v. Brown*, 2013 IL 114196, ¶ 48 (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). All reasonable inferences must be allowed in favor of the State. *People v. Lloyd*, 2013 IL 113510, ¶ 42. While we must carefully examine the evidence before us, we must give proper deference to the trier of fact who observed the witnesses testify (*Brown*, 2013 IL 114196, ¶ 48), because it was in the "superior position to assess the credibility of witnesses, resolve inconsistencies, determine the weight to assign the testimony, and draw reasonable inferences therefrom." *People v. Vaughn*, 2011 IL App (1st) 092834, ¶ 24. Despite this level of deference to the trier of fact, we will reverse a conviction if the evidence is "so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *Brown*, 2013 IL 114196, ¶ 48.

¶ 20 In order to convict a defendant of possession of methamphetamine with intent to deliver, the State must prove that defendant had possession of methamphetamine and also had the intent to deliver the methamphetamine. 720 ILCS 646/55(a)(1) (West 2012). As defendant makes no argument concerning his intent to deliver the methamphetamine, he essentially concedes the State sufficiently proved this element. Therefore, our analysis will focus on whether he had possession of the methamphetamine.

¶ 21 Possession may be actual or constructive. *People v. Pittman*, 2014 IL App (1st) 123499, ¶ 36. Here, it is undisputed that defendant did not have actual possession of the narcotics, thus his guilt could only rest on a constructive possession theory, which exists when "defendant had knowledge of the presence of the contraband, and had control over the area where the contraband

was found." *People v. Hunter*, 2013 IL 114100, ¶ 19. Constructive possession is usually proven exclusively by circumstantial evidence. *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 23. Habitation in a residence where narcotics have been discovered demonstrates the requisite level of control to constitute constructive possession. *People v. Spencer*, 2012 IL App (1st) 102094, ¶ 17. Proof of residency is relevant to show a defendant lived at the premises in question. *People v. Cunningham*, 309 Ill. App. 3d 824, 828 (1999). When narcotics are discovered in a residence under the defendant's control, "it may be inferred that he had the requisite 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).

¶ 22 In the instant case, while defendant was not present when the officers executed the warrant, there was significant evidence that he resided not only in the residence where the police recovered 28 clear plastic bags containing methamphetamine, but the very room where the bags were discovered. In that bedroom, the police also recovered what the trial court considered a "treasure trove" of personal information related to defendant. This included a memo book with private banking account information and a social security number, and multiple documents with defendant's name and the address subject to the search warrant from banking institutions, the Illinois government and the federal government.

¶ 23 The most recently dated materials were from a State of Illinois certificate of title for a vehicle containing a release of lien dated March 3, 2012, a letter from Chase Bank containing an account summary from July 13, 2012 through August 10, 2012, and a letter from ComEd dated

March 25, 2013, only six weeks prior to the execution of the warrant.[1] Additionally, from the same room, the police recovered $113,343 and a money counting machine. In light of the foregoing, there was overwhelming evidence of defendant's habitation in the residence, specifically the bedroom where the methamphetamine was recovered. Consequently, it may be inferred that defendant controlled the premises and knew of the methamphetamine there because the evidence does not reveal other circumstances creating a reasonable doubt of defendant's guilt. See *Spencer*, 2012 IL App (1st) 102094, ¶ 17; *Bui*, 381 Ill. App. 3d at 419. Therefore, when viewing the evidence in the light most favorable to the State with all reasonable inferences in its favor, a rationale trier of fact could have found defendant constructively possessed the methamphetamine to support his convictions for possession of methamphetamine with intent to deliver.

¶ 24 Nevertheless, defendant argues multiple facts, taken together, mandate the reversal of his convictions. First, he argues that he was not present when the warrant was executed and not seen near the residence before or after the search, thus resulting in the State's inability to prove his constructive possession of the methamphetamine. His presence, however, during the execution of the warrant was not necessary to establish his constructive possession of the methamphetamine (see *People v. McCarter*, 339 Ill. App. 3d 876, 877-80 (2003)), especially in light of the abundant evidence demonstrating his habitation in the room the methamphetamine was recovered.

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[1] The photographs taken of the bedroom and the exhibits of the evidence recovered therein were not included in the record on appeal. To the extent that their absence causes any doubt, we resolve that doubt against defendant, who bore the burden to present a complete record. *People v. Lopez*, 229 Ill. 2d 322, 344 (2008) (citing *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)).

¶ 25 Next, defendant argues the State failed to prove his constructive possession of the methamphetamine because the police arrested him a week after the execution of the warrant at a different location than where the police recovered the methamphetamine. The location of defendant's arrest, however, has no bearing on whether defendant knew of the methamphetamine and controlled the area where it was found, and thus, whether he constructively possessed the methamphetamine. Defendant additionally argues he did not make any acts or declarations to demonstrate his knowledge of the methamphetamine. While it is true that "[k]nowledge may be shown by evidence of a defendant's acts, declarations, or conduct" (*Spencer*, 2012 IL App (1st) 102094, ¶ 17), it is equally true that knowledge may be inferred from evidence that defendant controlled the premises were the narcotics were present absent other circumstances creating a reasonable doubt of his guilt. *Bui*, 381 Ill. App. 3d at 419. Here, as discussed, the ample evidence of defendant's habitation in the room where the methamphetamine was recovered demonstrates his control of the premises and properly allows an inference of knowledge.

¶ 26 Lastly, defendant highlights that Pyle, who was present during the warrant's execution, had access to the bedroom where the methamphetamine was located and never denied owning it. While both assertions may be true, this evidence does not defeat a finding that defendant possessed the methamphetamine. See *People v. Denton*, 264 Ill. App. 3d 793, 798 (1994) ("Mere access by other individuals is insufficient to defeat a charge of constructive possession."). Furthermore, at trial, the only documents that Killeen testified to being recovered from the bedroom with the methamphetamine bore defendant's name. Although defendant suggests that after the police knocked on the residence, Pyle could have had time to move the

methamphetamine to the south bedroom before the police entered, this is highly speculative. A plethora of evidence was recovered in the south bedroom, and it is highly unlikely that it was moved there after the police knocked.

¶ 27 We have also considered *Maldonado*, 2015 IL App (1st) 131874 and *People v. Wolski*, 27 Ill. App. 3d 526 (1975), which defendant cites in support of his argument that the State failed to prove he had constructive possession of the methamphetamine. In both cases, there was tenuous evidence connecting the defendants to the areas where the police recovered contraband. See *Maldonado*, 2015 IL App (1st) 131874, ¶¶ 41-42 (while two unopened envelopes and delivery receipt, all addressed to the defendant, were found at the residence, the State failed to provide any evidence connecting the defendant to contraband recovered in two bedrooms and a kitchen); *Wolski*, 27 Ill. App. 3d at 527 (State failed to provide any evidence connecting the defendant to contraband besides the mere fact he lived in the apartment where it was found). Here, in contrast, the State presented copious amounts of evidence connecting defendant to the very room the methamphetamine was recovered. Furthermore, the proofs of residency in *Maldonado*, 2015 IL App (1st) 131874, ¶¶ 7, 28, consisted of two unopened envelopes, one a mass marketing mailer and another from a bank, and a delivery receipt addressed to defendant, but signed by his wife. Here, there was what the trial court considered a "treasure trove" of information related to defendant, including mail, a utility notice, bank documents, tax documents, a certificate of title for a vehicle and a memo book with personal information.

¶ 28 Accordingly, defendant's convictions for possession of methamphetamine with intent to deliver are affirmed.

¶ 29 Defendant next contends the trial court erred when it denied his motion for a new trial based upon the newly discovered evidence that another trial judge determined that officers, including Morgan and Pruente, testified untruthfully in a suppression hearing on an unrelated case. Defendant asserts that their actions in this unrelated case, "casts doubt on the integrity of the investigation, arrest, and conviction" in his case.

¶ 30 For newly discovered evidence to warrant a new trial, "the evidence: (1) must be of such conclusive character that it would likely change the result on retrial; (2) must be material to the issue but not merely cumulative; and (3) must have been discovered since the trial and be of such character that it could not have been discovered sooner through the exercise of due diligence." *People v. Smith*, 177 Ill. 2d 53, 82 (1997). However, evidence which merely discredits a witness will not warrant a new trial. *Id.* at 83-84. Instead, the newly discovered evidence must "present[] a state of facts which differs from that to which the witness testified." *Id.* at 83 (quoting *People v. Holtzman*, 1 Ill. 2d 562, 568 (1953)). We review the trial court's decision to deny a motion for a new trial based on newly discovered evidence for an abuse of discretion (*id.* at 82), which occurs only when its "decision is arbitrary, fanciful, or unreasonable, such that no reasonable person would take the view adopted by the trial court." *People v. Ramsey*, 239 Ill. 2d 342, 429 (2010).

¶ 31 Here, defendant's newly discovered evidence fails to warrant a new trial because the evidence was from a completely unrelated case. This evidence establishes that another trial judge determined that the officers who testified in Sperling's suppressing hearing did not testify

truthfully, but this evidence fails to establish any wrongdoing in defendant's case. See *People v. Gray*, 166 Ill. App. 3d 586, 589 (1988) ("A review of the many cases cited to us by the parties to this appeal demonstrates conclusively that newly discovered evidence can justify the grant of a new trial *only* when that evidence directly concerns the crime for which defendants were convicted.") (Emphasis in original.) Because defendant cannot establish a nexus between his proffered evidence and the facts in his case, defendant has no legal basis for a new trial. See *Smith*, 177 Ill. 2d at 83-84; see also *Gray*, 166 Ill. App. 3d at 591 ("Illinois courts have declined to grant a new trial where new evidence is discovered which merely discredits a witness or which impeaches a witness without establishing that the witness committed perjury while on the witness stand.")

¶ 32 Furthermore, the critical evidence of defendant's guilt came from Officer Killeen, who testified to recovering the evidence in the south bedroom. Killeen was not accused of any wrongdoing by the trial judge in Sperling's case. While both Morgan and Pruente were involved in Sperling's case, neither were pivotal witnesses in defendant's convictions. Morgan testified to inventorying the evidence and established an evidentiary chain of custody, both of which were uncontested at trial. In fact, Killeen corroborated Morgan's testimony when he identified and discussed the various exhibits as the evidence he recovered in the south bedroom. Pruente's role in the trial was that of stipulated testimony presented in defendant's case-in-chief, introduced to contradict Officer Bochnak's testimony regarding where he arrested defendant.

¶ 33 The trial court heard the testimony of the witnesses at trial, and it was able to judge their credibility and carefully consider defendant's motion for a new trial based on the transcripts it

was provided. We do not find that the court's decision was "arbitrary, fanciful, or unreasonable" (*Ramsey*, 239 Ill. 2d at 429), and we therefore conclude that it did not abuse its discretion in denying defendant's second amended motion for a new trial.

¶ 34 Nevertheless, defendant cites to *People v. Villareal*, 201 Ill. App. 3d 223 (1990) to support his claim that a new trial is warranted. There, the newly discovered evidence was an affidavit from a firearm's expert attached to a motion for a new trial. *Id.* at 228-29. At codefendants' trial, a police officer testified that he had a struggle for his firearm and held the weapon's cylinder, which caused it to misfire. *Id.* at 228. The officer attributed the misfiring to a dimple mark on the firearm that he caused while holding the weapon during the struggle. *Id.* However, the affidavit from the firearm's expert directly contradicted the officer's testimony, as the expert determined the dimple mark was created during the firearm's manufacturing process. *Id.* at 228-29. Because "[t]he new evidence would tend to establish that [the officer's] recitation of this series of events was false," the appellate court found this evidence casted doubt upon the entirety of his testimony. *Id.* at 230. As the officer was the key witness in the case, the court found the evidence was of such a conclusive character to likely change the result on retrial, thus warranting a new trial. *Id.*

¶ 35 In *Villareal*, the newly discovered evidence related directly to the police officer's testimony in that case, specifically contradicting it. Here, in contrast, the newly discovered evidence is from a completely unrelated case and does not provide any evidence that the officers committed wrongdoing in defendant's case.

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

¶ 37 Affirmed.