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2016 IL App (3d) 140080

Order filed February 18, 2016

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2016

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court of the 10th Judicial Circuit, Peoria County, Illinois,
Plaintiff-Appellee,)	
v.)	Appeal No. 3-14-0080
TIMOTHY K. PURDLE,)	Circuit No. 12-CF-1050
Defendant-Appellant.)	Honorable Kevin Lyons, Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and Lytton concurred in the judgment.

ORDER

¶ 1 *Held:* The State presented insufficient evidence to show defendant was in constructive possession of the cocaine found in the coat pocket of his girlfriend in a bedroom located in the girlfriend’s apartment. Double jeopardy bars retrial of this charge against defendant.

¶ 2 Pursuant to a search warrant, Peoria police officers searched defendant Timothy K. Purdle’s person and most recent residence, an apartment leased to his girlfriend, Kimetta Ross. Defendant was not present during the search of Ross’s apartment when police located cocaine

inside the pocket of Ross's coat. Ross denied knowledge of the cocaine and told the police officers defendant was the only other person who could have put the cocaine in the coat.

¶ 3 The State charged defendant with possession of cocaine. After a bench trial, the trial judge stated that he was "about 80 percent [sure of how it] got there, but I do not know." The judge found defendant guilty of possession of cocaine and sentenced defendant to six years' imprisonment in the Illinois Department of Corrections (DOC). Defendant filed a timely notice of appeal. We reverse.

¶ 4 **BACKGROUND**

¶ 5 Peoria police officers had been conducting a surveillance of defendant for a period of time for the possible unlawful sale of controlled substances. The police obtained and executed a search warrant for 805 Northeast Perry Street, Peoria, Illinois, which was the apartment of defendant's girlfriend, Kimetta Ross, where defendant resided on September 24, 2012. Ross and her three young children were present at the apartment during the search, but defendant was not present. At the time of the search, defendant was using Ross's vehicle. The search warrant also authorized the police to search defendant's person. Therefore, the police officers asked patrol officers to locate Ross's vehicle and find defendant to search him as well.

¶ 6 At the apartment, the police officers located Ross's coat, which was hanging on the back of a bedroom door. This bedroom contained several pairs of men's shoes and men's clothing. The officers searched the pockets of Ross's coat and found one plastic baggie containing 2 rocks of white powder and a second baggie containing 11 smaller baggies of white powdery substance. Ross told the officers that the cocaine was not hers and she did not know how the cocaine ended up in her coat pocket. Ross explained to the officers that she and defendant had an off and on relationship, and the only other person staying at the apartment on that date was defendant. During the search, the police officers also discovered a digital scale containing white powdery

residue in a kitchen drawer. Ross denied knowledge that the digital scale was in the kitchen drawer and said the scale did not belong to her.

¶ 7 Peoria patrol officers stopped Ross's vehicle and identified defendant as a passenger in the vehicle. Officer Justin Sinks searched defendant at the scene of the traffic stop and found \$100 cash in defendant's pocket. No illegal substances were discovered in Ross's car or on defendant's person.

¶ 8 On October 16, 2012, the State indicted defendant, charging him with two counts of possession of a controlled substance. Count I alleged that, on September 24, 2012, defendant committed the Class 1 felony offense of unlawful possession with the intent to deliver a controlled substance, in that he knowingly and unlawfully possessed with the intent to deliver 1 or more grams but less than 15 grams of a substance containing cocaine, a controlled substance. Count II alleged defendant committed the Class 4 felony offense of unlawful possession of a controlled substance, in that he knowingly and unlawfully had in his possession less than 15 grams of a substance containing cocaine, a controlled substance.

¶ 9 The court held a bench trial for both counts on November 19, 2013. Officer Brett Lawrence testified he worked for the "vice and narcotics unit" of the Peoria police department on September 24, 2012, and participated in the execution of the search warrant at 805 Northeast Perry Street, in Peoria, Illinois. A videotape was taken during the execution of the search warrant, and the court admitted that videotape as an exhibit. Officer Lawrence narrated parts of the videotape to the court. A portion of the videotape depicted a bedroom at Ross's apartment, which had multiple pairs of size 12 men's shoes and men's clothing in the room. The videotape showed a "size 3X" coat hanging on the back of the door of this bedroom, that Ross admitted was her coat. Inside the pocket of this coat, the police officers located baggies containing

suspected crack cocaine. The plastic baggies were sealed in an envelope labeled as People's Exhibit No. 2.

¶ 10 Officer Lawrence identified a digital scale that was discovered in a kitchen drawer, which appeared to have white residue on it. The officer also identified a piece of mail, depicted in the videotape, bearing defendant's name and the 805 Northeast Perry Street address that was postmarked August 8, 2012. This mail was located in the main area of the apartment. Finally, in the main area of the apartment, the officer located a rent receipt for the Perry Street apartment bearing defendant's name and showing defendant paid \$440 in cash for the apartment rent on September 12, 2012.

¶ 11 Officer Carey Hightower testified he was working for the Peoria police department on September 24, 2012. On that date, Officer Sinks told him to locate a 2001 Chrysler vehicle, registered to Kimetta Ross, and conduct a traffic stop. Officer Hightower stopped the vehicle in question on East Nebraska Street in Peoria and determined defendant was a passenger in that vehicle. Since the search warrant allowed the officers to search defendant's person, Officer Hightower detained defendant until the vice officers arrived. While conducting a pat down search of defendant, Officer Hightower discovered \$100 cash.

¶ 12 Kimetta Ross testified that she dated defendant off and on in September of 2012. Ross said she rented the apartment at 805 Northeast Perry Street in Peoria, Illinois, with her three children, ages 10, 4, and 2 years old. Ross said defendant resided at that apartment with her "off and on." According to Ross, her "off and on" relationship with defendant meant they would be together for a week to a month at a time, then they would separate for a period of time, and then they would get back together. Ross stated she did not date anyone else during this off and on relationship with defendant. Around the time of the search, Ross stated that she did not get out much because she was on crutches, so she generally was home when she was not at work.

¶ 13 Ross was present when the police officers searched her apartment. During the search, Ross stated the police officers told her they found cocaine in a coat pocket and Ross admitted that the coat containing the cocaine belonged to her. However, Ross said the cocaine in her coat pocket did not belong to her, and she did not know who owned the cocaine or put it in her pocket. She testified she did not know the digital scale was in her kitchen drawer or how it got there. Ross denied telling the police officers the cocaine belonged to defendant, but said she told them that the only other person with her at the apartment, besides her three children, was defendant.

¶ 14 Ross said she paid \$395 per month for rent, but she was behind in her rent payments in September of 2012. Ross worked second shift at Walmart at that time, and defendant did not have a job. Ross stated she gave defendant the money to pay the rent to the landlord, evidenced by the rent receipt the officers discovered during the search. Ross said she paid all the bills at the apartment and defendant did not contribute to the payment of the household bills.

¶ 15 Officer Timothy Wong testified he worked as a crime scene technician for the Peoria police department in September of 2012. Officer Wong said he received two plastic sandwich bags in a sealed evidence locker from Officer Lawrence, labeled as People's Exhibit No. 2. Officer Wong conducted fingerprint testing on the baggies, but he did not locate any fingerprints that were suitable for identification on those baggies.

¶ 16 Next, Officer Justin Sinks of the Peoria police department testified that he was the lead officer for the case involving the search warrant at 805 Northeast Perry Street. Prior to September 24, 2012, Officer Sinks had been conducting surveillance of defendant, as a potential drug investigation target, and had routinely observed defendant drive Ross's 2001 Chrysler vehicle. Officer Sinks asked Officer Hightower to stop Ross's vehicle on September 24, 2012, based on the search warrant and detain defendant until Officer Sinks arrived at the stop. Officer

Sinks took the keys from the ignition of Ross's vehicle and observed Ross's apartment key on the key ring.

¶ 17 Upon discovery of the cocaine at the apartment, Officer Sinks asked Ross if the cocaine belonged to her. According to the officer, Ross was crying at the time and told Officer Sinks that the cocaine belonged to defendant. Officer Sinks said he observed several pairs of men's size 12 shoes and men's clothing in the bedroom where the cocaine was discovered.

¶ 18 The parties stipulated to the testimony of Denise Hanley, a forensic scientist from the Illinois State Police Morton Crime Lab. Hanley would testify that she received People's Exhibit No. 2, a sealed envelope from Officer Lawrence on October 23, 2012. Inside this envelope, Hanley observed 2 baggies: 1 baggie contained 2 separate bags containing white chunks, and the other baggie contained 11 separate plastic bags with a white substance inside. Hanley would testify that the gross weight of the 11 packages was 3.4 grams and the gross weight of the 2 bags containing white chunks was 6.7 grams. Hanley conducted a chemical test of the 2 chunks weighing 6.7 grams and determined the white substance in those packages contained cocaine. Hanley did not conduct separate chemical tests of the substances contained in the 11 plastic bags weighing 3.4 grams because, even if it tested positive for cocaine, it would not make a difference as to the class of the felony conviction. The court then admitted People's Exhibit No. 2 into evidence.

¶ 19 Finally, Officer Loren Marion, a Peoria police officer, testified he also participated in the execution of the search warrant at 805 Northeast Perry Street on September 24, 2012. Officer Marion originally located the baggies containing the white substance in the right front pocket of a coat located in a bedroom of the apartment. Officer Marion observed several pairs of men's shoes, size 12, in the bedroom where he recovered the plastic baggies from the coat pocket. The

officer also observed several photographs displayed throughout the apartment depicting defendant with the female occupant of the apartment.

¶ 20 The parties stipulated to Officer Marion’s expertise in the area of “packaging and sales of narcotics in the Peoria area” for purposes of his further testimony. The officer identified People’s Exhibit No. 2, the packages of cocaine recovered from the coat pocket in the bedroom. Officer Marion testified the current street value of cocaine in the Peoria area was approximately \$100 per gram. The officer said that the 2 chunks, weighing 6.7 grams or approximately 3.5 grams each, is approximately an eighth of an ounce of cocaine. He said this is a common weight for cocaine available for sale in the area referred to as an “eight-ball.” The officer stated eight-balls usually sell for \$180 to \$220 each depending on how many were purchased at a time. Further, the officer said the 11 packages of cocaine, weighing a total of 3.4 grams, were consistent with the sale of a “\$20 rock,” or approximately two-tenths of a gram of cocaine in each separate baggie.

¶ 21 Officer Marion testified that the total value of the cocaine recovered from the coat pocket was approximately \$600. Additionally, the officer said the digital scale recovered during the search warrant was consistent with the type used by drug dealers to package the cocaine in specific weights for sale. The officer said no paraphernalia or burnt spoons or pipes were discovered in the apartment during the execution of the search warrant, which indicated to Officer Marion that the cocaine found at the apartment, and its method of packaging, was consistent with the intent to deliver the cocaine or sell it to others rather than for personal use.

¶ 22 The State rested after Officer Marion’s testimony. Defendant opted not to testify and the defense did not present any other evidence.

¶ 23 After closing arguments, the court found Ross testified that she had an off and on relationship with defendant and he stayed at her apartment from time to time. The court noted

there were several pairs of men's shoes in the bedroom where the cocaine was discovered. The trial judge also stated that he did not believe the cocaine belonged to Ross because she "reacted appropriately," and cried and was shocked when the cocaine was discovered during the search. The court noted, although Ross did not specifically testify that the cocaine was defendant's cocaine, she testified that she did not put the cocaine in her coat pocket and defendant was the only other person that could have put the cocaine in that location. The court also noted there were no fingerprints found on the baggies of cocaine, but found that was "not at all uncommon."

¶ 24 The court stated that it "was ill-instructed of all the places in the house or the apartment to search, the three children and a lady and [defendant]." Although the witnesses did not discuss every place searched in the apartment, the trial judge said he could infer that the officers did not locate any other cocaine during the search. The judge stated the only cocaine discovered at the apartment was located in "[defendant's] girlfriend's coat." The judge then stated, "I don't know how it got there; I can conclude how it got there, about 80 percent [how it] got there, but I do not know." The judge went on to say, "I don't know if [Ross] held it for somebody or if she knew it was there, I assume not, but I think that all of the reasonable inferences are that [defendant] put it there, he knew it was there, but I don't know." The court noted that Ross testified "she didn't go out much, she had a fractured foot, she didn't have many people visit her[,] and she was laid up." The court continued, "I do not have any reasonable doubts with regard to possession of the cocaine."

¶ 25 The judge then found defendant guilty of count II, the Class 4 felony offense of possession of cocaine. Regarding count I, the offense of possession with the intent to deliver, the court found it was possible that defendant could have been possessing baggies of cocaine for his own use. The court noted that Officer Marion testified this type of packaging in the specified amounts "typically" meant the person was selling or distributing the drugs, which was a valid

theory. However, the court found the evidence was not sufficient to find defendant guilty of possession of the cocaine with the intent to deliver.

¶ 26 After a sentencing hearing, the court entered a conviction against defendant for unlawful possession of a controlled substance, cocaine. The court found defendant qualified for an extended term, based on prior convictions, and the court sentenced defendant to serve six years' imprisonment in DOC. After the court denied defendant's motion for a new trial, defendant filed a timely notice of appeal.

¶ 27 ANALYSIS

¶ 28 Defendant raises two issues on appeal. First, defendant contends that the State presented insufficient evidence to prove beyond a reasonable doubt that defendant possessed the cocaine found in his girlfriend's coat during a search that occurred when defendant was not present. Second, defendant argues his trial counsel was ineffective for failing to object to the State's improper impeachment of Ross, its own witness, regarding hearsay statements Ross made to police officers about the cocaine belonging to defendant.

¶ 29 The State submits it presented sufficient evidence to prove defendant guilty of constructive possession of cocaine. Further, the State argues, even if defense counsel failed to object to the impeachment of Ross, defense counsel properly argued that Ross's prior hearsay statements could only be used for impeachment purposes and defendant failed to establish that he was prejudiced by any deficiencies in counsel's performance.

¶ 30 We first address whether the evidence was sufficient to prove defendant guilty of unlawful possession of cocaine beyond a reasonable doubt. On appeal, to sustain a guilty verdict when challenging 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.’ ” *People v.*

Pollock, 202 Ill. 2d 189, 217 (2002) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)).

We will not set aside a criminal conviction on grounds of insufficient evidence unless the proof is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt.

Id.; *People v. Schmalz*, 194 Ill. 2d 75, 80 (2000).

¶ 31 Here, the charge is unlawful possession of cocaine, a controlled substance. In order for the State to prove defendant guilty of the offense of unlawful possession of a controlled substance, the State must prove defendant had knowledge of the possession of the controlled substance and that defendant had immediate and exclusive control over the controlled substance. *People v. Macias*, 299 Ill. App. 3d 480, 484 (1998) (citing *People v. Frieberg*, 147 Ill. 2d 326, 360 (1992)). Possession may be actual or it may be constructive. *Id.* The theory raised in the instant case was that defendant constructively possessed the cocaine at issue, since he was not personally present during the search.

¶ 32 To prove constructive possession, the State must produce evidence that defendant had both knowledge of the contraband and that defendant exercised immediate and exclusive control over the area where the contraband was found. *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 23; *Macias*, 299 Ill. App. 3d at 484. Constructive possession can be proven by circumstantial evidence. *Maldonado*, at ¶ 23. Habitation at the location where contraband is found can constitute sufficient evidence of residency and control over the area to prove constructive possession. *Id.* at ¶ 29. Existing case law supports an inference of residency where mail addressed to a defendant was found where the contraband was recovered. *Id.*

¶ 33 During the bench trial, the State produced evidence of two items discovered in the main living area of the apartment: one piece of mail that contained defendant's name and the 805 Northeast Perry Street address on it, postmarked August 8, 2012; and a rent receipt for the Perry address, dated September 12, 2012, bearing defendant's name and showing he paid \$440 in cash

for rent. Although these items can be used to infer this was defendant's residency on those dates, Ross testified that she leased the apartment, she and defendant had an "off and on" relationship, and defendant did not always reside at her apartment. However, Ross testified defendant was "staying" at her apartment on the date of the search warrant. Ross also stated that she was the only person employed who contributed to the expenses for the apartment. In fact, Ross testified that she gave money to defendant to pay the rent on September 12, 2012, for which defendant received the rent receipt in his name.

¶ 34 The police officers produced evidence that men's clothing and several pairs of men's size 12 shoes were located in the bedroom where the cocaine was found. However, the State did not offer any testimony linking the men's clothing to defendant. Ross did not testify that she shared the bedroom with defendant or whether he had access to her coat and the contraband just prior to the search. Therefore, we conclude the evidence did not show that defendant had exclusive control or dominion over Ross's coat or the bedroom area where the cocaine was discovered beyond a reasonable doubt. See *Maldonado*, at ¶ 29. For this reason, the State's evidence did not establish proof beyond a reasonable doubt that defendant had constructive possession of the cocaine and committed the offense of unlawful possession of a controlled substance.

¶ 35 Moreover, the trial judge expressed his own reasonable doubt about the State's evidence. In fact, the judge personally quantified the level of doubt in his own mind by stating, "I don't know how it got there; I can conclude how it got there, about 80 percent [how it] got there, but I do not know." This significant percentage of expressly articulated judicial doubt supports our conclusion that the State's evidence was insufficient in the case at bar.

¶ 36 It is well established when a conviction is reversed based on the insufficiency of evidence, as in the case at bar, double jeopardy precludes the State from retrying the defendant. *People v. Williams*, 239 Ill. 2d 119, 133 (2010). Therefore, the only proper remedy is a

judgment of acquittal. *Id.* Given our decision on the insufficiency of the evidence, it is unnecessary to address defendant's other argument regarding ineffective assistance of counsel.

¶ 37

CONCLUSION

¶ 38

For the foregoing reasons, we reverse defendant's conviction for unlawful possession of a controlled substance and enter a judgment of acquittal.

¶ 39

Reversed.