2017 IL App (2d) 161006-U
No. 2-16-1006
Order filed February 20, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Boone County.
Plaintiff-Appellee,	)	
	)	Nos. 12-CF-225, 12-DT-37,
v.	)	12-TR-1120-21
	)	
ANTWAIN V. BROWN,	)	Honorable
	)	C. Robert Tobin, III,
Defendant-Appellant.	)	Judge, Presiding.

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

ORDER

¶ 1 *Held:* The evidence was insufficient to establish that defendant committed the offenses of possession of a controlled substance and possession with intent to deliver because the State failed to prove beyond a reasonable doubt that defendant had knowledge of the existence of the narcotics in the vehicle he was driving. Reversed.

¶ 2 Defendant, Antwain V. Brown, was involved in a single-car accident. While investigating the scene, a trooper saw a baggie containing a cream-colored, solid like rock, later identified as heroin, on the driver's side floorboard of the vehicle. The vehicle was impounded, but the police did not recover the baggie until 12 days later. Following a bench trial, defendant was convicted of possession and possession with intent to deliver between 100 or more but less

than 400 grams of heroin. Defendant appeals, contending that (1) the evidence was insufficient to prove defendant committed the felony narcotics offenses because the State failed to prove beyond a reasonable doubt that defendant knew of the existence of the narcotics in the vehicle he was driving; (2) the trial court abused its discretion in finding that the State took reasonable protective measures to ensure that no tampering, alteration, or contamination occurred to the evidence; and (3) the waiver of his right to a jury trial was not knowing and voluntary. We reverse.

¶ 3 I. FACTS

¶ 4 Defendant was charged by traffic citation and complaint on February 4, 2012, with the offenses of driving under the influence of alcohol, illegal transportation of alcohol, improper lane usage, and failure to wear a seat belt. On November 13, 2012, however, the State filed a criminal complaint charging defendant with the unlawful possession of a controlled substance with intent to deliver (count I) and unlawful possession of a controlled substance (count II). The complaint alleged that the controlled substance was 100 grams or more but less than 400 grams of heroin. On November 30, 2012, a grand jury returned an indictment charging defendant with the same offenses. Defendant was subsequently arrested on December 12, 2012, pursuant to an arrest warrant.

¶ 5 On July 1, 2014, defendant executed a jury waiver, which was entered into the record. A bench trial commenced on December 1, 2015.[1] The following facts are taken from the trial.

¶ 6 While Gregory Boelkes was driving on Interstate 90 around 7 p.m. on February 4, 2016, a white SUV passed his car and nearly clipped its front end. He followed the SUV for several miles, watching it drift back and forth between the centerline to the edge of the grass before it

[1] Defendant also was tried for the traffic offenses during the same bench proceeding, but those are not at issue in this appeal.

crashed into the guardrail at a curve in the road, was lifted into the air by the impact, and traveled down into a "ravine" or "old creek bed" below the road. Boelkes pulled over and walked to within 30 or 40 feet of the SUV. The SUV sustained considerable damage and Boelkes' wife called 911 to report the accident.

¶ 7 Responding to the scene, Illinois State Police Master Sergeant Gregory Hart saw defendant inside the SUV sitting on the front passenger seat with his back to the passenger side door and his legs toward the driver's seat. Defendant had a visibly broken leg and told Hart that he was the only occupant. Hart noticed a "Grey Goose" bottle of alcohol inside the SUV. Defendant had to be extricated from the vehicle and he was transported by helicopter to the hospital. Before leaving the scene, Hart did not search the interior of the SUV or inventory its contents because of risk of injury due to the dangerous condition of the interior of the vehicle.

¶ 8 Hart spoke with defendant at the hospital and he noticed a strong odor of alcohol on defendant's breath. Hart was not able to obtain any information from defendant because defendant was unable to respond to questions appropriately.

¶ 9 Trooper Marcia Banfe, an accident reconstruction officer who photographed the scene, noted substantial damage to the SUV. She testified that the fire department had removed both of the driver's side doors and the doorpost in order to extricate defendant. Banfe believed that the vehicle's doors and doorpost had been removed with a sawzall tool.

¶ 10 Banfe also noticed that at least two of the wheels actually had broken off the vehicle and that it appeared the vehicle had flipped upside down, or rolled over, before reaching its final resting place. She observed that sign posts along the road had been knocked down due to the impact of the SUV; the guardrail was coiled from the crash; the driver's side doors were lying on the ground near the SUV; and other large debris was strewn about. As an expert in the field and

from what she saw, Banfe believed that the impact of the crash caused parts of the SUV to shift, fall out, and even break off.

¶ 11 As she was talking with Hart and was taking photographs of the scene, Banfe observed a "solid-like," cream-colored rock inside of a clear baggie located on the driver's side floorboard of the SUV. Banfe stated that she asked Hart what that was and continued photographing because she also observed the bottle that had been on the back seat. Hart denied that he had any discussions with Banfe about the baggie and he testified that he did not see the item at all on the date of the accident. Banfe photographed the baggie. She did not touch it and did not see anyone else at the scene touch it; her only responsibility was to document the scene, not to collect evidence. Banfe stated that at least two other officers were on the scene.

¶ 12 The SUV was eventually towed from the scene of the crash to Denny's Towing impound lot. Denny's used a "wrecker" to pull the SUV out of the ditch and placed it on a flatbed truck. A law enforcement hold was placed on the SUV while it was at the impound lot because the Illinois State Police considered it to be evidence. A tow report introduced into evidence showed that the SUV was owned by an individual named Charita Hart. The State never called the registered owner to testify at trial.

¶ 13 The SUV was not covered or protected when transported to the impound lot from the scene. Nor was it covered or protected while it sat at the uncovered lot. However, the impound lot at Denny's was surrounded by a six-foot tall privacy fence and the lot only could be accessed through the main office. The gate to the lot is locked after 5 p.m. and only the tow truck drivers have complete access. Dennis Spradling, the owner of Denny's, testified that the lot had previously experienced trespassers and thefts. Additionally, individuals are brought back into the lot in order to access their stored vehicles.

¶ 14 Twelve days after the accident, on February 16, 2012, Banfe went to Denny's to take additional photographs of the SUV. Typically, she takes follow-up photographs that are often difficult to obtain at the scene of the accident due to time constraints and lighting conditions. To gain access to the SUV, Banfe recalled that an employee of Denny's unlocked a gate to the area where the impounded vehicles were stored.

¶ 15 While photographing the SUV, Banfe noticed that the baggie she had seen on February 4 was still on the driver's side floorboard, and that the bottle of Grey Goose was still on the back seat. The baggie was in a "quite similar" place as when she first saw it at the scene. Banfe believed it to be the same baggie, although it had no unique identifying information. She photographed the items and contacted Hart and Trooper Bottcher, both who came to the impound lot and observed the items. The baggie was recovered after the police obtained a search warrant. A field test indicated the presence of heroin. A forensic chemist testified that the item weighed 196.2 grams and a representative sample taken from the substance tested positive for the presence of heroin. Hart testified that the baggie shown to her in court was similar but not in the same condition because the contents had been in a more solid form the last time she had seen it.

¶ 16 Following closing argument, the trial court entered findings of guilty on all charges on September 1, 2016. Defendant timely appeals.

¶ 17 II. ANALYSIS

¶ 18 In reviewing a defendant's insufficiency of evidence claim, the appellate court must examine the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v. Belknap*, 2014 IL 117094, ¶ 67. A criminal

conviction will not be reversed for insufficient evidence unless the evidence is so unreasonable, improbable, or unsatisfactory that it justifies a reasonable doubt of the defendant's guilt. *Belknap*, 2014 IL 117094, ¶ 67.

¶ 19 Defendant argues that the State failed to prove beyond a reasonable doubt that he had knowledge of the narcotics in the vehicle he was driving. In reviewing a conviction for possession of a controlled substance, the deciding question is whether the defendant had knowledge and possession of the drugs. See 720 ILCS 570/402 (West 2016) ("it is unlawful for any person knowingly to possess a controlled * * * substance"). Proof that a defendant had control over the premises where the drugs were located can assist in resolving the issue because it gives rise to an inference of knowledge and possession of the drugs, but control of the premises is not a prerequisite to a conviction. *People v. Adams*, 161 Ill. 2d 333, 345 (1994). Furthermore, possession may be actual or constructive. *People v. Frieberg*, 147 Ill. 2d 326, 361 (1992).

¶ 20 In this case, the State relied on a constructive possession theory, which requires proof of knowledge of the presence of the heroin. See *People v. Wilkerson*, 2016 IL App (1st) 151913, ¶66. A person who does not have the "immediate personal control" over the narcotics is guilty of constructive possession if he has the "intent and capacity to maintain control and dominion" over the drugs. *Frieberg*, 147 Ill. 2d at 361. The defendant also must know of the presence of the contraband. *People v. Bell*, 53 Ill. 2d 122, 126 (1972).

¶ 21 In *People v. Hampton*, 358 Ill. App. 3d 1029 (2005), this court held that knowledge may be inferred by a defendant's presence in the car when (1) the evidence is found within a place over which the defendant has regular, ongoing control, and (2) the item is one that human experience teaches is rarely, if ever, found unaccountably in such a place. *Id.* at 1032. In

Hampton, "[t]he loaded handgun found in a sock in the glove compartment of the vehicle that [the defendant] was driving certainly [was] an item that human experience teaches is rarely, if ever, found unaccountably in a given place." *Id*. at 1032. However, the State offered no proof that the defendant had any regular, ongoing control over the vehicle in which the weapon was found or that the defendant had ever driven the vehicle prior to the time of the traffic stop. *Id*. Because the State had not proved that the defendant had regular, ongoing control of the vehicle, we determined that the inference of knowledge based on the defendant's mere presence was unavailable to the State. *Id*. at 1032-33.

¶ 22 In the present case, the trial court relied almost exclusively on the fact that a baggie full of heroin is not something that a person reasonably would leave in his or her vehicle when loaning it to someone else. The court surmised that "it would be unreasonable to think that somebody with 196 grams of heroin would let somebody use the car and then just throw the 196 grams of heroin underneath a car seat hoping that the person would never find it." But, like in *Hampton*, the State presented no evidence linking defendant to the SUV. The SUV was registered to Charita Hart, but the State never produced any evidence at trial linking Hart to defendant. There was no evidence that defendant drove this vehicle previously or had regular access to it. Nor was there evidence as to how long defendant had been in the control of the vehicle on the day of the crash. Therefore, the inference of defendant's knowledge based on his operating the vehicle is unavailable.

¶ 23 As *Hampton* instructs, we now must analyze whether the State presented other evidence of knowledge. Since no direct evidence of knowledge was offered by the State, we look to the four factors cited in *People v. Bailey*, 333 Ill. App. 3d 888 (2002), to determine whether the State presented circumstantial evidence from which defendant's knowledge could be inferred. Those

factors include: (1) the visibility of the contraband from defendant's position in the car; (2) the period of time in which defendant had an opportunity to observe the contraband; (3) any gestures by defendant indicating an effort to retrieve or hide the contraband; and (4) the size of the contraband. *Id*. at 891-92.

¶ 24 When the heroin was photographed at the accident scene and later recovered in the impound lot, it was in plain view on the driver's side floorboard. This would be some evidence of defendant's knowledge. However, the problem with this is that we do not know whether it was in plain view when defendant was driving the vehicle. The SUV was substantially destroyed in the accident and in defendant's extrication from the vehicle. The baggie was small enough to have been concealed under floor mats or padding or in some other part of the vehicle. As the trial court indicated, the heroin may have been sitting at defendant's feet the entire time or it may have been dislodged from a concealed location by the accident. Further, there is no evidence that defendant made any furtive movements or attempted to conceal the heroin. In light of these particular circumstances, the *Bailey* factors lead us to conclude that the State proved little more than defendant was in the vehicle where the drugs were ultimately found.[2]

[2] Before the State rested its case, the State tendered certified copies of defendant's prior convictions involving heroin, which the State previously sought to introduce in a motion *in limine*. The State sought to introduce the priors to show knowledge, intent, motive, and lack of mistake, as well as for any other purpose the court deemed relevant pursuant to Rule 404(b) of the Illinois Rules of Evidence (eff. Jan. 1, 2011). The court allowed the convictions but solely to show that defendant would have known what heroin looked like if he had seen the baggie in the vehicle. The court specifically stated that it would not consider the convictions as proof that, since he had committed this type of offense in the past, he must have done so this time.

¶ 25 Based on these particular facts, we find no evidence from which defendant's knowledge of the presence of the heroin can be inferred. Because the State failed to introduce any evidence beyond a reasonable doubt that defendant had knowledge of the presence of the heroin in the vehicle he was driving, we must reverse his convictions for possession and possession with intent to deliver.

¶ 26 Defendant argues, in the alternative, that the trial court abused its discretion in allowing the admission into evidence of the narcotics because the State failed to take protective measures to ensure that the evidence was not tampered with, contaminated, substituted, or otherwise altered, as it sat for 12 days in a wrecked vehicle, exposed to the elements in a privately owned lot, vulnerable to possible trespassers, where no one guarded the SUV for safekeeping and no one checked it for 12 days. The police seized and impounded the vehicle with knowledge that the baggie and its contents were inside for 12 days. The police took no reasonable protective measures to satisfy the foundational requirements to admit the exhibit. See *People v. Norman*, 24 Ill. 2d 403, 407-08 (1962) (opened, tinfoil packets containing narcotics sat on chemist's desk unattended for about nine days); *People v. Brown*, 3 Ill. App. 3d 879, 881 (1972) (failed to establish adequate chain of custody where seized bottle of whiskey was stored in police locker for four months). While defendant's argument concerning the trial court's abuse of discretion in admitting the evidence is well taken, our reversal of the convictions on other grounds makes it unnecessary for us to address the chain of custody issue. For the same reasons, we need not

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The State never argued at trial or on appeal that the evidence of defendant's past drug offenses should have been admissible to show knowledge. See *People v. Moser*, 356 Ill. App. 3d 900, 913 (2005); *People v. Davis*, 248 Ill. App. 3d 886, 891-896 (1993).

address defendant's last contention that his waiver of the right to a jury trial was not knowing and voluntary.

¶ 27 III. CONCLUSION

¶ 28 For the foregoing reasons, the judgment of the circuit court of Boone County is reversed.

¶ 29 Reversed.