2012 IL App (1st) 081677-U

SIXTH DIVISION
Modified order filed April 27, 2012

No. 1-08-1677

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. 07 CR 1179
	)	
PATRICK WALLS,	)	Honorable
	)	Nicholas Ford,
Defendant-Appellant.	)	Judge Presiding.
	)	

PRESIDING JUSTICE ROBERT E. GORDON delivered the judgment of the court. Justices J. Gordon and Palmer[1] concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in finding defendant guilty of possession of a controlled substance when defendant was discovered in a drug house in the process of standing up from a table that held a large quantity of drugs and drug paraphernalia on its surface and fled upon realizing that the police had entered the premises.

[1] Justice Robert Cahill originally sat on the panel of this appeal and participated in its disposition. Justice Cahill passed away prior to the disposition of defendant's petition for rehearing. Therefore, Justice Palmer now serves in his stead and has reviewed the briefs, record, and the original decision.

¶ 2 Defendant Patrick Walls was convicted of one count of possession of a controlled substance (720 ILCS 570/402(a)(1)(B) (West 2003)) following a bench trial. After hearing aggravation and mitigation, the trial court sentenced defendant to eight years of incarceration in the Illinois Department of Corrections. Defendant appeals his conviction, arguing that the State did not prove him guilty of possession of a controlled substance beyond a reasonable doubt. We affirm.

¶ 3 BACKGROUND

¶ 4 At a bench trial on February 19, 2008, Chicago police officer Slawomir Plewa testified on behalf of the State that on the afternoon of December 8, 2006, he and approximately 14 other Chicago police officers executed a search warrant on two apartments located in a three-flat building on North Lorel Avenue in Chicago's Austin neighborhood. The police made a forced entry into the premises, with Officer Plewa leading a team of officers into the basement apartment. Officer Plewa testified on direct examination that upon entering the basement apartment, he observed defendant and two other individuals, Antwain Jones and Marvell Harris, standing up from a table in the living room. Defendant and the other two men then fled to the back of the apartment. Officer Plewa did not pursue the three men, but instead proceeded to secure the living room area of the basement apartment. While doing so, Officer Plewa observed that the table near which defendant was standing held a grinder, scales, United States currency, cell phones, jackets, and several hundred plastic bags containing cocaine.

¶ 5 On cross-examination, defense counsel confronted Officer Plewa with an incident report that Officer Plewa had created following the arrest of defendant. In the report, Officer Plewa

stated that he had observed defendant and the other two men sitting at the table and packaging narcotics. The report made no mention of defendant's flight. When confronted with the report contradicting his testimony on direct examination, Officer Plewa accommodated his testimony to agree with the statements in the incident report. Defense counsel asked him whether the report stated that he observed defendant and the other two men packaging narcotics, rather than standing up and fleeing, as the officer had testified on direct examination. Officer Plewa answered, "That's what they were doing when we made entry, yes."

¶ 6 Chicago police officer James Sankovich testified next. Officer Sankovich testified that he was the third or fourth officer to enter the basement apartment. Upon entering the apartment, Officer Sankovich observed narcotics packaging materials on the table in the living room, namely, a grinder, a spoon, a glass plate, and United States currency, which he secured. At this time, Officer Sankovich observed other officer taking defendant into custody at the rear of the apartment.

¶ 7 Chicago police officer Robert Jackson testified that he also participated in executing the search warrant on the basement apartment at North Lorel Avenue. Officer Jackson testified that upon entering the basement apartment, he observed narcotics and packaging material on the table in the living room, which he secured for later inventory at the police station. Officer Jackson also testified that he observed defendant being taken into custody at the rear of the apartment.

¶ 8 Chicago police officer James DeCicco testified last. Officer DeCicco also participated in executing the search warrant at North Lorel Avenue. When Officer DeCicco entered the basement apartment, he observed defendant in the custody of the police. Officer DeCicco also

observed narcotics on a television stand, which was two to three feet away from the table in the living room. Officer DeCicco testified that he secured the narcotics and later inventoried them, along with the items recovered by Officer Sankovich, at the police station.

¶ 9 Both sides stipulated that the police recovered seven bags containing 23.1 grams of cocaine; 84 ziplock bags containing heroin, of which 5.6 grams tested positive out of an estimated 10.3 grams total weight; and 547 bags containing cocaine, of which 106.4 grams tested positive out of an estimated 278.9 grams total weight.

¶ 10 Officers Sankovich, Jackson, and DeCicco testified that they each created inventory slips for the items that they had recovered from the basement apartment. The inventory slips indicated that the items had been recovered from defendant. All three officers testified that they did not personally recover the items from defendant, but that other officers had instructed them to indicate on the inventory slips that the items were recovered from defendant. The items were recovered from the living room table and television stand.

¶ 11 Defendant's fingerprints were not found on any of the plastic bags containing narcotics or on the packaging equipment. None of the officers could recollect whether defendant possessed any keys allowing him access to the basement apartment. None of the officers observed any mail or bills addressed to defendant at the North Lorel Avenue address inside the apartment. Upon arrest, defendant informed officers that he did not reside at the North Lorel Avenue address. The four officers testified that they could not recollect observing any evidence linking defendant with the North Lorel Avenue address. No evidence was presented at trial as to who lived in the basement apartment at the North Lorel Avenue address, but the defense attorney in closing

argument referred to the property as a "drug house."

¶ 12 The trial court found defendant guilty of constructive possession of a controlled substance, based on defendant's proximity to the narcotics and flight from police. In explaining his factual findings to support the guilty verdict, the trial judge stated that he did not include Officer Plewa's testimony that defendant was packaging narcotics as a basis for finding defendant guilty. The trial judge explained his findings of fact as follows:

> "THE COURT: I watched Officer Plewa closely during the course of his testimony. His observation obviously is the most crucial because he is the first person to see the defendant *** at the table.
>
> My view is that when I take a kind of a global view of what he says he saw [defendant] do, I come up with the conclusion that [defendant] had knowledge of what was present on the table. That he was, in fact, in mutual constructive possession of the items thereon based on his flight from the area, and based on his proximity to the narcotics at the time when he first entered.
>
> [Defense counsel] did some excellent cross of what his exact position was, that being the defendant's exact position was at the time Plewa first saw him. He certainly identifies somewhat of a contradiction in that at some point, [defendant] is described as being sitting there packaging narcotics and really the testimony was

> more that he was standing up and in the process of fleeing from the table where all these drugs were.
>
> But despite that well executed cross-examination, it is my view that the defendant has been shown to be in constructive possession of the items on the table."

¶ 13 After hearing aggravation and mitigation, the trial court sentenced defendant to eight years of incarceration in the Illinois Department of Corrections. This appeal followed.

¶ 14 ANALYSIS

¶ 15 Defendant contends that the State failed to prove defendant guilty of possession of a controlled substance beyond a reasonable doubt. When presented with a challenge to the sufficiency of the evidence, a reviewing court should not retry a defendant. *People v. Collins*, 106 Ill. 2d 237, 261 (1985). Instead, "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." *Collins*, 106 Ill. 2d at 261 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). We will not reverse a criminal conviction "unless the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the guilt of the defendant." *People v. Schmalz*, 194 Ill. 2d 75, 80 (2000). For the following reasons, we affirm.

¶ 16 In order to prove a defendant guilty of possession of a controlled substance, the State must establish beyond a reasonable doubt that (1) the defendant had knowledge of the presence of narcotics and (2) the narcotics were in his immediate and exclusive control. *People v. Scott*,

367 Ill. App. 3d 283, 285 (2006). The State must establish that the defendant had possession of the narcotics themselves. *People v. Adams*, 161 Ill. 2d 333, 344-45 (1994); *People v. Valdez*, 230 Ill. App. 3d 975, 981 (1992). The possession may be actual or constructive. *Adams*, 161 Ill. 2d at 344-45. "Constructive possession exists where there is no actual personal present dominion over the contraband, but defendant has an intent and a capability to maintain control and dominion over the contraband." *People v. Macias*, 299 Ill. App. 3d 480, 484 (1998).

¶ 17 Proof that the defendant has control over the premises where the narcotics are found can lead to the inference that the defendant maintained control and dominion over the narcotics. *Valdez*, 230 Ill. App. 3d at 981. However, mere proximity to the narcotics is not sufficient to establish the requisite control for constructive possession. *People v. Ray*, 232 Ill. App. 3d 459, 462 (1992). Even evidence that the defendant was first observed fleeing from a location where narcotics were found is not sufficient to prove constructive possession without further indicia of knowledge and control. *In re K.A.*, 291 Ill. App. 3d 1, 7-9 (1997). Nevertheless, "where the other circumstantial evidence is sufficiently probative, proof of proximity combined with inferred knowledge of the presence of contraband will support a finding of guilt on charges of possession." *People v. Brown*, 277 Ill. App. 3d 989, 998 (1996). Additionally, "[c]onstructive possession may exist even where an individual is no longer in physical control of the drugs, provided that he once had physical control of the drugs with intent to exercise control in his own behalf, and he has not abandoned them and no other person has obtained possession." *Adams*, 161 Ill. 2d at 345.

¶ 18 The State can establish that the defendant had the requisite control of narcotics by

showing that the defendant owned, leased, or resided in the premises where the narcotics were found. *People v. Smith*, 191 Ill. 2d 408, 413 (2000). In the instant case, the State presented no evidence that defendant owned, leased, or resided on the premises. When narcotics are found in a residence where multiple people reside, or in a "drug house," then proof of residency is not sufficient and the State must present further indicia of control. *People v. Martin*, 357 Ill. App. 3d 663, 671 (2005) (holding that even though multiple people resided in the house where the narcotics were found, because the defendants admitted to owning the narcotics found by the police, a trier of fact could reasonably find the defendant guilty by constructive possession); *People v. Lawton*, 253 Ill. App. 3d 144, 148 (1993) (finding sufficient evidence to sustain conviction where defendants admitted to owning a key to the locked apartment where narcotics were found and where defendants' clothing was discovered inside the apartment). Other indicia of control include evidence of defendant's fingerprints on plastic bags containing narcotics (*Adams*, 161 Ill. 2d at 340); evidence that defendant, a visitor to the premises, concealed himself in a hidden crawl space in an attempt to evade police detection (*Brown*, 277 Ill. App. 3d at 998); evidence that defendant possessed keys to the premises where narcotics were found (*Valdez*, 230 Ill. App. 3d at 981); and evidence that defendant, on multiple occasions, had visited the premises where narcotics were found (*People v. Butler*, 242 Ill. App. 3d 731, 733 (1993)). The mere access of others to the location where the drugs were found will not defeat a charge of constructive possession, and several people may share "immediate and exclusive control" or the "intention and power to exercise control." *People v. Love*, 209 Ill. App. 3d 816, 819 (1991).

¶ 19 In the case at bar, the trial court found that defendant was in constructive possession of

the narcotics, finding:

> "My view is that when I take a kind of a global view of what [Officer Plewa] says he saw [defendant] do, I come up with the conclusion that [defendant] had knowledge of what was present on the table. That he was, in fact, in mutual constructive possession of the items thereon based on his flight from the area, and based on his proximity to the narcotics at the time when he first entered."

Defendant argues that his proximity to the narcotics and his flight from the area was insufficient to establish constructive possession. We find defendant's argument unpersuasive.

¶ 20 Defendant primarily relies on three cases in support of his argument: *Ray*, *In re K.A.*, and *People v. Adams*, 242 Ill. App. 3d 830 (1993). In *Ray*, police officers discovered the defendants seated on a couch 18 inches from a coffee table holding 21 small plastic bags containing cocaine, $492 in United States currency, and a handgun. *Ray*, 232 Ill. App. 3d at 460-61. After the defendants were arrested, the officers subsequently discovered other drug paraphernalia in the apartment, including a triple beam scale, a grinder, a telephone beeper, and a bottle of Anesthetol. *Ray*, 232 Ill. App. 3d at 461. They also discovered a cable television bill in one defendant's name on top of the television. *Ray*, 232 Ill. App. 3d at 461. The arresting officers found no drugs on defendants' persons. *Ray*, 232 Ill. App. 3d at 461. On appeal, this court held that defendants' mere proximity to the narcotics was insufficient evidence to sustain a conviction for possession of a controlled substance where the State could not provide any evidence other

than the lone cable bill linking defendants to the premises. *Ray*, 232 Ill. App. 3d at 462-63.

¶ 21 As Justice Hutchinson explained in *People v. Eghan*, 344 Ill. App. 3d 301, 308 (2003), *Ray* must be read in light of our supreme court's decision in *Adams*, 161 Ill. 2d at 344-45. The *Adams* court held that a defendant in constructive possession of narcotics need not have control over the premises where narcotics are found, so long as the defendant did not abandon the narcotics and no other person obtained control over them. *Adams*, 161 Ill. 2d at 344-45. Implicit in the *Adams* court's holding is the assumption that the defendant at some point maintained control over the narcotics – a defendant cannot abandon narcotics that he did not have control over in the first place. Thus, *Ray* still stands for the proposition that where the State cannot establish that a defendant had some sort of control over narcotics, including control of the premises in which narcotics were found, mere proximity to the narcotics is not sufficient to support a finding of constructive possession. See *Ray*, 232 Ill. App. 3d at 462.

¶ 22 The second case defendant relies on is *In re K.A.*, 291 Ill. App. 3d 1. In that case, police entered an apartment and observed the defendant between one and three feet from a McDonald's box that was later discovered to be concealing cocaine and approximately five to six feet from a closet in which cocaine was later discovered in a hole in the floor. *In re K.A.*, 291 Ill. App. 3d at 3. The defendant immediately fled the apartment. *In re K.A.*, 291 Ill. App. 3d at 3. The defendant informed the police that he was visiting the apartment and had come "to smoke a joint and listen to some music"; the defendant stated that he ran because he was afraid and denied any knowledge of the narcotics within the apartment. *In re K.A.*, 291 Ill. App. 3d at 3. No cannabis was discovered in the apartment or on the defendant and no scales or cutting agents were

recovered from the apartment. *In re K.A.*, 291 Ill. App. 3d at 3. The police discovered $140 in the defendant's pocket, but the defendant's mother testified that she had given him the money to buy clothes. *In re K.A.*, 291 Ill. App. 3d at 4.

¶ 23 On appeal, the Second District Appellate Court noted that the presence of the defendant in the vicinity of contraband could not establish constructive possession but that "where other circumstantial evidence is sufficiently probative, proof of proximity combined with inferred knowledge of the presence of contraband will support a finding of guilt on charges of possession." *In re K.A.*, 291 Ill. App. 3d at 6. The court determined that in light of the evidence as a whole, there was a reasonable doubt that the apartment where the drugs were found was under the defendant's exclusive control and therefore it could not be inferred that the narcotics were in his constructive possession. *In re K.A.*, 291 Ill. App. 3d at 6. The court noted that the apartment was a "drug house" and there was no evidence to prove the defendant's control over it. The court noted, *inter alia*, that there was no evidence of drug paraphernalia and the narcotics were not in plain sight and also stated that while the defendant was present when the police executed the search warrant and fled the scene, those factors were insufficient to prove control. *In re K.A.*, 291 Ill. App. 3d at 7, 9. The court found that "[i]n sum, the record shows that the State only proved that [the defendant] was present in a drug house where the police found drugs and that [the defendant] fled the apartment. In light of the overall circumstances of this case, the State failed to prove beyond a reasonable doubt that [the defendant] exercised control over the apartment." *In re K.A.*, 291 Ill. App. 3d at 9. Accordingly, the court found that the State failed to prove possession beyond a reasonable doubt. *In re K.A.*, 291 Ill. App. 3d at 9.

¶ 24 Finally, defendant relies on the Third District Appellate Court's *Adams* decision,[2] in which the defendant was discovered in a bathroom, standing in front of a toilet with his hands above his head. *Adams*, 242 Ill. App. 3d at 831. After the defendant had been removed from the bathroom, the police found a gun and $200 in the bathtub and, in a closed cabinet under the sink, discovered a bucket filled with water that contained 11 small packets later determined to contain cocaine. *Adams*, 242 Ill. App. 3d at 831. A search of the premises revealed other guns in the apartment and an additional 25 small packets of cocaine in the freezer. *Adams*, 242 Ill. App. 3d at 831. On appeal, the Third District found the evidence to be insufficient to show constructive possession, since the defendant was a visitor to the property and there was no evidence connecting him to the cocaine in the cabinet. *Adams*, 242 Ill. App. 3d at 832-33. The court noted that "[t]he State would have the defendant's conviction stand on his mere presence in the vicinity where cocaine was found. Such attenuated proof would set an unsettling and dangerous precedent." *Adams*, 242 Ill. App. 3d at 833.

¶ 25 In the case at bar, the factual circumstances are significantly different from defendant's cited cases. For instance, unlike the defendants in *Ray*, defendant here was discovered at a table containing a much larger quantity of narcotics, as well as drug paraphernalia. Additionally, while defendant here fled, much like the defendant in *In re K.A.*, the narcotics in the case at bar were not concealed, as they were in that case and in *Adams*. The factual differences between the cases are significant, since the question of whether there is possession is a question of fact. See *Ray*,

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[2] The Third District's *Adams* case, decided in 1993, is unrelated to the Illinois Supreme Court's *Adams* decision, decided in 1994 and cited earlier.

232 Ill. App. 3d at 462 ("[k]nowledge and possession are questions of fact to be resolved by the trier of fact"). Here, the factual circumstances of the case at bar lead to a different result than in defendant's cited cases.

¶ 26 Discounting Officer Plewa's testimony that defendant was sitting and packaging narcotics when the police entered, as the trial court did, the evidence at trial established the following: the police entered a drug house and observed defendant standing up from the table and fleeing to the back of the apartment. The table contained several hundred bags of narcotics and packaging material, including a grinder, a spoon, a glass plate, scales, United States currency, cell phones, and jackets; there is no evidence in the record that the items on the table were concealed in any way. Based on this evidence, the trial court could properly have found defendant guilty of possession of a controlled substance.

¶ 27 As noted, "where the other circumstantial evidence is sufficiently probative, proof of proximity combined with inferred knowledge of the presence of contraband will support a finding of guilt on charges of possession." *Brown*, 277 Ill. App. 3d at 998. Here, defendant was in close proximity to narcotics. Additionally, there was a large quantity of narcotics and packaging material lying unconcealed on the table, leading to the inference that packaging activity was taking place; indeed, the trial court distinguished *Ray* from the case at bar by noting that "[t]his is more of an active role in my view than what was present in Ray." Finally, defendant was observed rising from the table and attempted to flee when the police arrived. See *People v. Campbell*, 146 Ill. 2d 363, 388 (1992) ("While flight by itself is not sufficient to establish guilt, it may be a circumstance to be considered with other factors tending to establish

guilt."); *In re K.A.*, 291 Ill. App. 3d at 9 (noting that flight may be considered along with other factors tending to establish guilt). Based on the evidence we cannot find that "the evidence is so improbable or unsatisfactory that it creates a reasonable doubt of the guilt of the defendant," (*People v. Schmalz*, 194 Ill. 2d at 80) and accordingly affirm defendant's conviction.

¶ 28 CONCLUSION

¶ 29 For the reasons set forth above, we affirm the judgment of the trial court.

¶ 30 Affirmed.