

FIRST DIVISION
June 13, 2011

No. 1-09-2126

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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 14761
)	
LORENZO LANCASTER,)	Honorable
)	Jorge Luis Alonso,
Defendant-Appellant.)	Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court.
Justices Hoffman and Lampkin concur with the judgment.

ORDER

HELD: The plain-error doctrine does not allow consideration of defendant's forfeited challenge to a jury instruction on constructive possession, as it was not error to give the instruction where the State presented some evidence at trial to support that theory of the case.

Following a jury trial, defendant, Lorenzo Lancaster, was convicted of possession of a controlled substance and sentenced to five years in prison. On appeal, defendant contends he was denied a fair trial when the trial court gave a jury instruction regarding constructive possession even though the State's case was based on a theory of actual possession. We affirm.

Defendant's conviction arose from events that occurred June 28, 2007. At trial, Chicago police officer Joseph Wagner testified that, on that day, he was working as a narcotics-surveillance officer in a residential neighborhood, while his two partners, Officer Mario Limone and Officer James Triantafillo, worked as enforcement officers. At approximately 7 p.m., while it was still light out, Officer Wagner saw defendant standing on the sidewalk and saw codefendant, Alexis Perkins,

No. 1-09-2126

sitting on a porch approximately one building away from defendant. Defendant yelled, "Rocks," which Officer Wagner explained is a street term for crack cocaine, to a person on the street. The person approached defendant, engaged him in a brief conversation, and handed him some money. Defendant took a small object from a plastic bag and handed it to the person, who then walked away.

A few minutes later, Officer Wagner saw a second person approach defendant and give him money. Defendant reached into the plastic bag he was holding, took out a small object, and gave it to the person. After the person left, defendant remained standing on the sidewalk.

Officer Wagner testified he radioed his partners to pick him up in their unmarked car. The officers drove toward the area where defendant was standing on the sidewalk. Once they were close, Officer Wagner and Officer Limone got out of the car and approached defendant on foot. Defendant looked in the officers' direction and walked around the side of the porch where Ms. Perkins was sitting. Officer Wagner saw defendant throw a bag containing white, rock-like objects to the top of the porch. The bag landed approximately one foot away from Ms. Perkins. Defendant yelled, "Baby, get rid of that shit."

When Ms. Perkins approached the bag, Officer Wagner told her to leave it alone. While Officer Limone detained defendant, Officer Wagner ran to the fence at the front of the porch, jumped over the locked gate, and went up the steps. Ms. Perkins stuffed the bag into her shirt. Before she could get inside the residence, Officer Wagner detained and arrested her. The officers then took defendant and Ms. Perkins to the station.

Chicago police officer James Triantafillo testified he picked up Officer Wagner and drove him and Officer Limone to the location Officer Wagner had identified. There, Officer Wagner pointed out defendant. Officer Wagner and Officer Limone got out and approached the residence on foot while Officer Triantafillo repositioned the car. When Officer Triantafillo got out, he noticed Ms. Perkins on the porch. As Officer Triantafillo started walking toward the scene, he heard defendant say "something to the effect to get rid of that shit." Officer Triantafillo then heard Officer

No. 1-09-2126

Wagner direct someone to "leave it alone." He saw Officer Wagner jump over the fence and saw Ms. Perkins, who was on the porch and heading toward the front door of the residence, place a white object in the front of her shirt. Officer Triantafillo testified he jumped the fence and joined Officer Wagner, who had detained Ms. Perkins. Shortly thereafter, he drove defendant and Ms. Perkins to the station. There, Officer Limone searched defendant and recovered \$269. Officer Triantafillo asked a female officer to search Ms. Perkins.

Chicago police officer Catherine Miller testified she performed a custodial search of Ms. Perkins in the women's restroom. Officer Miller felt something small and lumpy near Ms. Perkins' rib cage, and, when she shook Ms. Perkins' shirt, a small plastic baggie containing 13 smaller baggies fell from it. Officer Miller recovered the baggies and, in addition, recovered \$10 from Ms. Perkins.

Several State witnesses testified as to the chain of custody of the 13 baggies recovered from Ms. Perkins. The forensic scientist who analyzed the contents of the baggies testified the total weight of the rock-like substance was 4.624 grams, and the 2.4 grams she tested were positive for cocaine.

On defendant's behalf, his aunt, Diane Jamison, testified that she lived two houses south of the residence where defendant and Ms. Perkins were arrested. At approximately 7 p.m. on the evening in question, defendant stopped by her home to borrow a garment bag, as he was planning to go out of town. Ms. Jamison testified she was unable to lend defendant a bag, so he left and headed north. Ms. Jamison, who was sitting near her front window, did not hear him yell the word "rocks" or see him engage in hand-to-hand transactions with people on the street.

Eventually, Ms. Jamison saw an unmarked police car driving the wrong way on the one-way street. The police slowed down in front of the residence in question and glanced at it. At that time, defendant was standing right outside the gate. Ms. Jamison testified that she went to her bedroom to get her shoes and then went outside. When she got down the street, one officer was behind

defendant and another was on the porch with Ms. Perkins. Ms. Jamison stayed at the scene until the officers placed defendant and Ms. Perkins in the police car and drove away.

Defendant also called as a witness Theresa Scruggs, a neighbor of Ms. Jamison. Ms. Scruggs testified that at approximately 6 or 7 p.m. on the day in question, she was outside talking with another neighbor, when she saw defendant come out of his aunt's house and walk toward Ms. Perkins' house. When defendant passed her, they exchanged greetings. As defendant was walking, Ms. Scruggs noticed a police car driving the wrong way on the street. The car passed her and then backed up. Two officers jumped out and grabbed defendant, who was at the gate to Ms. Perkins' house. Ms. Scruggs heard defendant say, "I'm sick of this shit."

Ms. Scruggs testified one of the officers told Ms. Perkins to open the gate. Ms. Perkins replied she had to get the key and started toward the door. Before Ms. Perkins got inside, the officer had jumped over the fence, climbed the steps to the porch, and grabbed her. Ms. Scruggs testified she did not ever hear defendant yell out "rocks" and did not see anyone give him money for drugs.

During the jury instruction conference, defense counsel objected to the inclusion of Illinois Pattern Jury Instructions, Criminal, No. 4.16 (4th ed. 2000) (hereinafter IPI Criminal No. 4.16), regarding constructive possession. The trial court indicated it would give the instruction over defendant's objection.

The jury found defendant guilty of possession of a controlled substance. The trial court entered judgment on the verdict and sentenced defendant to six years' imprisonment. Subsequently, the trial court granted defendant's motion to reconsider sentence and resented him to five years imprisonment.

On appeal, defendant contends he was denied a fair trial by the trial court's giving of IPI Criminal No. 4.16. He argues the basis for the charge against him was police testimony that an officer observed him engage in two hand-to-hand transactions and then throw a bag of crack-cocaine to Ms. Perkins as police approached. Defendant asserts that, because the State's case was based on

actual possession, the trial court's decision to give the instruction on constructive possession injected irrelevant issues into the jury deliberations. According to defendant's argument, the instruction was confusing, misleading, and invited improper speculation regarding his relationship with Ms. Perkins.

Defendant acknowledges he did not raise this issue in his posttrial motion, but, nevertheless, asserts we should consider his contention as plain error. The plain-error doctrine allows us to review a forfeited issue affecting substantial rights in either of two circumstances: (1) where the evidence is so closely balanced the verdict may have resulted from the error and not the evidence; or (2) where the error is so serious, defendant was denied a substantial right and, thus, a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). The first prong of plain-error review is to determine whether any error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

IPI Criminal No. 4.16, as given by the trial court in the instant case, provides as follows:

"Possession may be actual or constructive. A person has actual possession when he has immediate and exclusive control over a thing. A person has constructive possession when he lacks actual possession of a thing but he has both the power and the intention to exercise control over a thing either directly or through another person.

If two or more persons share the immediate and exclusive control or share the intention and the power to exercise control over a thing, then each person has possession." Illinois Pattern Jury Instructions, Criminal, No. 4.16 (4th ed. 2000).

Defendant argues this instruction should not have been given because constructive possession was not at issue in his case. We disagree. Constructive possession exists when a person has the " 'intent and capability to maintain control and dominion' " over an item, but does not have immediate personal control of it. *People v. Carodine*, 374 Ill. App. 3d 16, 25 (2007) (quoting *People v. Frieberg*, 147 Ill. 2d 326, 361). In the instant case, the State presented evidence at trial that, as police officers approached defendant, he threw a bag, later determined to contain crack-cocaine, up

onto a porch where Ms. Perkins was sitting. At that point, defendant was no longer in actual possession of the drugs. However, he demonstrated continuing control by directing Ms. Perkins to "get rid of that shit," which she attempted to do by putting the bag in her shirt and heading indoors. This continuing control constituted evidence of constructive possession.

" 'Very slight evidence upon a given theory of a case will justify the giving of an instruction.' " *People v. Reeves*, 314 Ill. App. 3d 482, 488 (2000) (quoting *People v. Jones*, 175 Ill. 2d 126, 132). Moreover, where the evidence at trial supports both a theory of actual possession and a theory of constructive possession, both theories may be given to the jury. *People v. Crisantos*, 211 Ill. App. 3d 870, 876 (1991). Here, the evidence was sufficient to support an instruction on constructive possession. Accordingly, we find no error.

Absent error, the plain-error doctrine does not apply. Defendant's challenge to the jury instruction regarding constructive possession is forfeited.

Defendant contends we should review his challenge to the jury instruction because his counsel's failure to preserve the issue in his posttrial motion constituted ineffective assistance. To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient, and the deficient performance prejudiced defendant. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). More specifically, defendant must demonstrate counsel's performance was objectively unreasonable under prevailing professional norms, and that there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The failure to satisfy either prong of the *Strickland*, test precludes a finding of ineffective assistance of counsel. *Strickland*, 466 U.S. at 697.

As discussed above, the trial court committed no error in the giving of the instruction where there was evidence at trial supporting a theory of constructive possession. In the absence of any error in the giving of instruction, defense counsel's failure to raise the issue in his posttrial motion was neither objectively unreasonable, nor did it prejudice defendant. Accordingly, defendant's claim of

No. 1-09-2126

ineffective assistance fails.

For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

Affirmed.