2012 IL App (3d) 091037–U

Order filed March 12, 2012

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the Circuit Court |
| | ) | of the 14th Judicial Circuit, |
| Plaintiff-Appellee, | ) | Henry County, Illinois, |
| | ) | |
| v. | ) | Appeal No. 3-09-1037 |
| | ) | Circuit No. 09-CF-138 |
| EARL R. CASTILLO, | ) | |
| | ) | Honorable |
| Defendant-Appellant. | ) | Charles H. Stengel, |
| | ) | Judge, Presiding. |

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JUSTICE O'BRIEN delivered the judgment of the court.
Justice Holdridge concurred in the judgment.
Justice McDade dissented.

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**ORDER**

¶ 1 Held: State presented sufficient evidence to prove beyond a reasonable doubt that defendant possessed cannabis but did not establish beyond a reasonable doubt that the amount of cannabis seized weighed more than 5,000 grams.

¶ 2 Defendant Earl Castillo was convicted by a jury of possession of cannabis and sentenced to 8 years' imprisonment. He appealed his conviction. We affirm his conviction but modify his sentence to time served.

¶ 3 **FACTS**

¶ 4 Defendant Earl Castillo was stopped for a traffic violation and cannabis was discovered during a search of the vehicle. He was charged with cannabis trafficking, possession of more than 5,000 grams of cannabis with intent to deliver, and possession of more than 5,000 grams of cannabis. 720 ILCS 550/5.1(a), 550/5(g), 550/4(g) (West 2008). A jury trial took place and the following evidence was presented.

¶ 5 Illinois State Police (ISP) trooper Brian Strouss captured the Range Rover sports utility vehicle (SUV) Castillo was driving going 73 miles per hour (mph) in a 65 mph zone. Castillo pulled over immediately and provided his California driver's license and the vehicle registration. Strouss discovered that Castillo's license was suspended. Castillo did not own the SUV. He told Strouss that a friend of the owner had asked him to drive the car from Las Vegas to New Hampshire because the SUV's owner was sick and had to fly home. An individual named Carranza was a passenger in the car. While standing outside the car's open window, Strouss smelled a strong odor of raw cannabis coming from inside the car. Strouss asked Castillo to sit in his squad car. ISP sergeant Floyd Blanks arrived to assist with the stop. He, too, smelled a strong odor of cannabis, which was more pronounced in the back of the SUV.

¶ 6 Blanks and Strouss searched the vehicle. They discovered a jar containing cannabis residue inside a backpack belonging to Carranza that was on the floor in the back seat. They also discovered a non-factory compartment in the car's luggage area. The compartment had a plastic cover that was spray-painted black and insulated with foam around the edges. It was covered by a carpeted piece of the luggage compartment. According to Strouss, the black cover was not factory made. It was not visible by looking in the back of the vehicle. The officers lifted the carpeted piece and Strouss

used a pocket knife around the cover's sealed edges to remove the plastic. In the compartment, they found bundles of suspected cannabis which they determined weighed approximately 11. 5 pounds. A K-9 unit arrived at the scene and alerted to the vehicle's spare tire, which was secured under the vehicle. Strouss let the air out of the tire and smelled raw cannabis. He cut open the tire and found another 11.5 pounds of suspected cannabis. The cannabis was in clear plastic bags with a "grease masking agent". The material was field-tested and determined to be positive for the presence of cannabis.

¶ 7 Strouss and Blanks each testified that they were trained to recognize the smell of raw cannabis. Through their experiences as officers, Strouss had smelled raw cannabis hundreds of times and Blanks, thousands of times. Both officers recognized the smell from the Range Rover based on their training and experience. Strouss stated the training was only available to law enforcement but an individual could know the smell of cannabis from personal use or exposure to others using it.

¶ 8 The Range Rover was towed. In another search at the towing premises, the officers found three cell phones and two suitcases containing men's clothes. In one suitcase, a t-shirt was found that depicted a cannabis leaf and the words, "Go Organic". The owner of the suitcases and t-shirt was not identified. Strouss took the cannabis and drove it to the police station, where he placed it in an evidence box that he put in a secured vault. ISP trooper Nena Myers, the station's evidence custodian, transported the box to the ISP crime laboratory in Morton. Forensic scientist Joanie Little performed two tests on the contents of the box: a stereoscopic examination and a Duquenois-Levine test. The results of the tests were positive for the presence of cannabis. Little stated the contents of the box contained 9,832 grams of plant material.

¶ 9 The defense did not present any evidence. The jury convicted Castillo of possession of more

than 5,000 grams of cannabis. The trial court sentenced him to a 8-year term of imprisonment. He appealed.

¶ 10 **ANALYSIS**

¶ 11 On appeal, Castillo challenges the sufficiency of the evidence. He submits that the State failed to prove him guilty beyond a reasonable doubt of possession of cannabis and failed to prove beyond a reasonable doubt the weight of the cannabis. When reviewing a sufficiency of evidence claim, the standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. People v. Collins, 106 Ill. 2d 237, 261 (1985).

¶ 12 We begin with Castillo's argument that the State's evidence was insufficient to prove him guilty beyond a reasonable doubt of possession of cannabis. He contends that the State did not establish he had knowing possession of the cannabis. Castillo submits that the cannabis was found in a non-factory compartment and in a spare tire, that he did not own the vehicle, and that he cooperated with the police and did not demonstrate nervous behavior. According to Castillo, these factors indicate he did not have knowledge that the cannabis was in the SUV.

¶ 13 Possession of cannabis must be knowing to constitute a criminal offense. 720 ILCS 550/4 (2008). Possession may be actual or constructive. People v. Minniweather, 301 Ill. App. 3d 574, 578 (1998). To sustain a conviction based on constructive possession, the State must prove the drugs were in defendant's immediate and exclusive control and that he knew the drugs were present. People v. Beverly, 278 Ill. App. 3d 794, 798 (1996). Drugs found in a vehicle under a defendant's control and in a place where he could have been or should have been aware of them gives rise to an inference of knowledge and possession which may be sufficient to sustain a conviction for

possession. People v. Wells, 241 Ill. App. 3d 141, 146 (1993). The trier of fact is to decide questions of knowledge and control and this court will not disturb its determination unless the evidence is so palpably contrary to the verdict, or so unreasonable, improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilty. Wells, 241 Ill. App. 3d at 146.

¶ 14 The State presented evidence sufficient to sustain the jury's determination that Castillo knowingly possessed the cannabis found in the SUV he was driving. The non-factory compartment containing the cannabis was in the rear portion of the main body of the SUV. Although it was covered by carpet, both officers testified that they detected the compartment merely by searching the rear portion of the SUV. Most significantly, both officers testified that they detected a strong odor of cannabis when standing outside the open passenger window of the vehicle. Their testimony also established their extensive training and experience in drug detection, including the smell of cannabis. However, Strouss testified that an individual could be familiar with the smell of cannabis from personal use or use by others. Given that both officers immediately detected the cannabis odor, it is improbable that Castillo did not notice it and was unaware that there was cannabis in the SUV. Moreover, we find it reasonable to infer that Castillo's knowledge of the cannabis in the luggage area of the SUV extends to the cannabis in the spare tire. Even assuming, arguendo, that Castillo was not familiar with the odor of cannabis, the strength of this particular odor would cause a reasonable person to search the vehicle to find the cause of the odor. In either event, it was reasonable for the trier of fact to conclude that Castillo either knew or should have known about the presence of the cannabis in the vehicle.

¶ 15 Castillo relies on People v. Ortiz, 196 Ill. 2d 236 (2001) as support for his argument. In Ortiz, the defendant was stopped for speeding and consented to a search of his tractor-trailer, which

resulted in the discovery of a large amount of cocaine stashed in a non-factory compartment in the front portion of the trailer. Ortiz, 196 Ill. 2d at 240. In reversing Ortiz's conviction, the reviewing court relied, in part, on the fact that Ortiz was driving a vehicle for hire which he did not own and that the non-factory compartment was not visible from the rear of the trailer, which had been loaded before Ortiz picked it up. Ortiz, 196 Ill. 2d at 267-68. Because it is factually distinguished, Ortiz does not help Castillo. In the instant case, Castillo claimed to be driving a car across the country for someone he did not know in response to a request from an unnamed friend. Although concealed under carpet, the non-factory compartment was in a readily accessible portion of the SUV. Moreover, unlike the cocaine discovered in Ortiz, the cannabis found in the SUV Castillo was driving had a distinct and strong odor. Under the circumstances of the instant case, the jury could reasonably infer that Castillo had knowledge of the cannabis. We find that the State established the knowledge element and that the evidence was sufficient to prove Castillo guilty of possession of cannabis beyond a reasonable doubt.

¶ 16 We next consider whether the State proved beyond a reasonable doubt the weight of the cannabis. Castillo challenges that the State's evidence regarding the weight of the cannabis was sufficient to prove that he possessed more than 5,000 grams of cannabis. Castillo submits that the State's failure to test each package of cannabis seized makes any evidence of the weight of the cannabis surmise and conjecture.

¶ 17 When a defendant is charged with possession of a particular amount of an illegal drug, its weight is an essential element of the crime that the State must prove beyond a reasonable doubt. People v. Jones, 174 Ill. 2d 427, 428-29 (1996). Every sample need not be tested in order for a chemist to render an opinion of the makeup of the substance as a whole. Jones, 174 Ill. 2d at 429.

When the samples are sufficiently homogenous such that one could infer beyond a reasonable doubt that the untested samples contain the same substance as the tested samples, random testing is sufficient. Jones, 174 Ill. 2d at 429. However, when the seized samples are not homogeneous, a portion of each must be tested to determine the sample's content. Jones, 174 Ill. 2d at 429.

¶ 18 Castillo relies, in part, on People v. Clinton, 397 Ill. App. 3d 215 (2010), to support his argument that the State's evidence was insufficient as to weight because it failed to test each sample of the cannabis. In Clinton, the drugs at issue were commingled with untested or non-homogenous samples prior to testing any of the samples. Clinton, 397 Ill. App. 3d at 222 (chemist emptied individual packets onto scale and then tested mixture). Here, the ISP chemist testified that she performed two tests on the samples in the evidence box and that the total weight of the seized material was 9,832 grams, which tested positive for cannabis. The record is unclear regarding whether the seized materials were divided into multiple packages, and if so, how many individual packages. The record is also unclear about whether the cannabis was commingled into one box. She did not specify the weight of the tested samples, nor did her testimony identify the bundle from which the tested sample came. Moreover, the State did not establish that the bundles were of a sufficiently homogenous substance based on the same physical characteristics as to size, shape, marking and density of the bundles. Although both Strouss and Blanks testified that they recognized the seized materials as cannabis, that the material seized from both locations weighed 11.5 pounds and was packaged similarly, and Strouss testified that the material discovered in the spare tire field-tested positive for cannabis, their testimony alone is insufficient to carry the State's burden as to weight. There was no indication that either bundle seized contained any homogeneous materials, other than the officers' testimony that merely suggested the cannabis discovered in both locations

was similar in appearance, weight, and smell. Rather, the record established only that the State combined an unknown number of bundles of unknown sizes and description which were discovered in two different locations in the vehicle. This limited description of the bundles is insufficient to allow the State to aggregate the bundles into a single group. Accordingly, we conclude that the random testing failed to establish that the 9,832 grams of seized materials contained cannabis. Because we find that the evidence was insufficient to establish beyond a reasonable doubt that Castillo possessed more than 5,000 grams of a substance containing cannabis, we reduce Castillo's conviction to a Class C misdemeanor based on possession of not more than 2. 5 grams of a substance containing cannabis (720 ILCS 550/4(a) (West 2008)). Castillo has already served in excess of the maximum sentence for a Class C misdemeanor. 730 ILCS 5/5-8-3(a)(3) (West 2008) (sentence for Class C misdemeanor not more than 30 days imprisonment). We thus exercise the authority granted to this court pursuant to Supreme Court Rule 615(b) (Ill. S. Ct. R. 615(b) (eff. Aug. 27, 1999)) and reduce Castillo's sentence to time served.

¶ 19 For the foregoing reasons, the judgment of the circuit court of Henry County is affirmed in part and modified in part.

¶ 20 Affirmed in part and modified in part.

¶ 21 JUSTICE McDADE, dissenting:

¶ 22 The majority finds that defendant, Earl Castillo, knowingly possessed more than 5000 grams of cannabis. The State clearly proved that cannabis was in and under the vehicle that Castillo was driving at the time he was stopped and it was searched. The State did not, however, even pay lip service to its obligation to prove Castillo's *knowing* possession.

¶ 23 The two police officers, Brian Strouss and Floyd Blanks, each testified to smelling a strong odor of raw cannabis emanating from the car when they approached it. Strouss identified the odor based on his years of training (available only to law enforcement personnel) and drug experience including hundreds of occasions smelling raw cannabis. Blanks credited his years of training and drug experience for his recognition of the odor, claiming to have smelled raw cannabis more than a thousand times. The jury was presented no evidence of the defendant's contact with or knowledge of this or any other raw cannabis. Rather, his conviction rests solely on an inference that he knowingly possessed the cannabis in the vehicle.

¶ 24 The State advances a complex analytical mosaic created of a series of inferences based on defendant's alleged control of the "premises" to show it proved Castillo's "constructive possession" of the cannabis. Then, having "proven" possession, the State, relying on *People v. Schmalz,* 194 Ill. 2d 75, 82 (2000), asserts that surrounding facts and circumstances were sufficient to permit an "inference of guilty knowledge."

¶ 25 There are, however, no relevant facts sufficient to support any reasonable inference with regard to defendant's knowledge of the presence of the cannabis in the vehicle. The facts on which the State relies are (1) there was undeniably cannabis secreted in the SUV, (2) the defendant was driving the vehicle, (3) Strouss recognized the strong odor of raw cannabis, (4) Blanks recognized the odor of raw cannabis; *ergo* Castillo was in knowing possession of the contraband.

¶ 26 The majority then uses that inference (which I believe to be factually unsupported) and the extremely restrictive review allowed us under the standard set out in *People v. Collins,* 106 Ill. 2d 237, 261 (1985), to affirm the conviction of a man not actually proven to have any actual knowledge of the crime.

¶ 27 Is it possible Castillo knew he was transporting cannabis? Certainly it is. But our courts are not supposed to convict people of crimes on the basis of speculation; only on proof beyond a reasonable doubt of facts or reasonable inferences from proven facts. Where such facts do not exist, even *Collins* does not authorize us to create them, nor does it require that, in their absence, we affirm the conviction.

¶ 28 In the instant case, Castillo was driving a motor vehicle that was not his. He was reportedly delivering it to the home of a woman who had taken ill in Las Vegas and had had to fly rather than drive home to New Hampshire. There is no evidence concerning the circumstances or conditions under which the car was turned over to Castillo, whether he had an opportunity to explore its contents or time to store anything of his own in it. What evidence there is shows only that two suitcases containing mens' clothes and three cell phones were found in the vehicle – obviously not in the secret compartment. Although these items presumably belonged to Castillo and the other occupant of the SUV, the State did not identify the owner of any of them.

¶ 29 When he was stopped by Strouss, Castillo was fully cooperative. He handed over his license, which proved to have been suspended, without hesitation. Moreover, he showed none of the nervousness, which is frequently cited as a tell-tale sign of a drug mule's guilty knowledge which justifies a police search of a stopped vehicle.

¶ 30 Half of the contraband was hidden in a camouflaged storage compartment located in the vehicle's luggage compartment. The compartment was created of plastic that had been painted black, insulated with a foam seal, sealed over with more plastic, and covered with carpet. Officer Strouss testified the compartment could not be seen when simply looking into the back of the vehicle. When Strouss attempted to open it, the seal had to be cut with a knife before he could do so. The other half

of the cannabis was found in the spare tire under and outside of the vehicle. It was only discovered after a police dog alerted the officers to its presence. The State's scene-of-the-crime witnesses have confirmed that the cannabis was not in plain sight. Those witnesses assert plain and distinctive smell.

¶ 31 There was no evidence presented that Castillo had packed the compartment or the spare tire with cannabis; had access to the vehicle, the compartment or the tire prior to starting the drive to New Hampshire; had ever opened the compartment or the tire; or had any knowledge of what was in them. There is no evidence to support an inference or a finding that Castillo had control of the SUV at any time or in any manner other than simply driving it. Nor has the State produced any evidence to prove, or even to create a reasonable inference, that Castillo could recognize the odor of raw cannabis.

¶ 32 The inference of the finder of fact at trial and of the majority on appeal that Castillo knew the cannabis was in or about the vehicle is grounded solely on two facts: that the cannabis was incontrovertibly in the vehicle driven by Castillo, and that Strouss and Blanks detected and recognized the strong and distinctive odor of raw cannabis. Neither of those facts is compelling (or even persuasive) evidence that Castillo knowingly possessed the cannabis.

¶ 33 For this reason, I cannot agree with and, therefore, dissent from the majority's decision to affirm Castillo's conviction. Having so concluded, I would find no reason to reach defendant's second claim in appeal.