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FILED
Jul 17 2009, 8:58 am
CLERK
of the supreme court, court of appeals and tax court

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IN THE
COURT OF APPEALS OF INDIANA

DAJUAN V. NELSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 29A05-0811-CR-686
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable J. Richard Campbell, Judge
Cause No. 29D04-0709-CM-4733

July17, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Dajuan Nelson ("Nelson") was convicted in Hamilton Superior Court of Class A misdemeanor possession of marijuana and Class C misdemeanor operating a vehicle having never received a license. He was sentenced to an aggregate term of 365 days with all but thirty days suspended and was also placed on probation for one year. Nelson appeals and raises the following issue: whether the evidence is sufficient to prove that he constructively possessed marijuana. We also raise the following issue sua sponte: whether Nelson was ordered to serve an illegal sentence for his Class C misdemeanor conviction. We reverse and remand for proceedings consistent with this opinion.

Facts and Procedural History

On September 25, 2007, Officer Ben Colling ("Officer Colling") of the Fishers Police Department initiated a traffic stop of a vehicle driven by Nelson. Officer Colling smelled the odor of burnt marijuana when he approached the driver's side window. After the officer asked Nelson for his license, Nelson produced a state identification card and indicated that he did not have a driver's license. Nelson and his passenger were then ordered out of the vehicle.

Nelson consented to a vehicle search. Officer Colling and an assisting officer found marijuana on the driver's side floorboard and rear passenger seat. The marijuana was collected and placed into an evidence bag. The weight of the marijuana was 0.10 gram.

Nelson was charged with Class A misdemeanor possession of marijuana and Class C misdemeanor operating a vehicle having never received a license. A bench trial was held on July 28, 2008, and Nelson was found guilty as charged. The trial court ordered

Nelson to serve an aggregate sentence of 365 days, all but 30 days suspended, and 365 days of probation. Nelson appeals.

I. Sufficient Evidence

First, Nelson argues that the State did not prove that he constructively possessed the small amount of marijuana found in the vehicle. When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

To convict Nelson of Class A misdemeanor possession of marijuana, the State was required to prove that Nelson knowingly or intentionally possessed marijuana. See Ind. Code § 35-48-48-11. Nelson was not in actual possession of the marijuana, therefore, we consider whether he constructively possessed it. We have explained the proof necessary to show constructive possession as follows:

> In the absence of actual possession of drugs, our court has consistently held that constructive possession may support a conviction for a drug offense. In order to prove constructive possession, the State must show that the defendant has both (1) the intent to maintain dominion and control and (2) the capability to maintain dominion and control over the contraband.

Jones v. State, 807 N.E.2d 58, 65 (Ind. Ct. App. 2003), trans. denied. (internal quotations and citations omitted). Control in this sense concerns the defendant's relation to the place where the substance is found: whether the defendant has the power, by way of legal

authority or in a practical sense, to control the place where the substance is found. Id. Where a person's control is non-exclusive, intent to maintain dominion and control may be inferred from additional circumstances that indicate that the person knew of the presence of the contraband. Allen v. State, 798 N.E.2d 490, 501 (Ind. Ct. App. 2003). These additional circumstances include: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the drugs; (5) drugs in plain view; and (6) location of the drugs in close proximity to items owned by the defendant. Id.; Jones, 807 N.E.2d at 65.

Nelson argues that although he was the driver of the vehicle, there was no evidence presented that he owned the car, and the "miniscule quantity" of marijuana was scattered around the vehicle "making its presence unnoticeable and certainly disguising its illegal character." Appellant's Br. at 7. Nelson does not dispute that he had the capability to maintain dominion and control over the contraband, but argues that there is no evidence establishing his intent to maintain dominion and control. Id. at 8.

Our court has previously observed that the State is required to prove only that the defendant knowingly or intentionally possessed an identifiable amount of contraband. Beeler v. State, 807 N.E.2d 789, 792 (Ind. Ct. App. 2004), trans. denied. In this case, a total of 0.08 to 0.10 gram of loose marijuana was found scattered on both the driver's side floorboard and rear passenger seat.[1]

[1] The officer who tested the marijuana stated that the margin of error with his testing equipment is .02 gram, and therefore, admitted that the amount discovered in the vehicle could be .08 gram of marijuana. Tr. p. 35.

Although as Officer Colling approached the vehicle, he smelled the odor of burnt marijuana, this fact is not enough to prove that Nelson intended to maintain dominion and control over the marijuana.[2] This is especially true in this case where the State failed to prove whether Nelson was the owner of the vehicle. The amount of marijuana seized was miniscule, scattered throughout the vehicle and was not a useable amount. These are all factors which make the *inference* of required intent and the finding of that intent beyond a reasonable doubt, impossible.

Moreover, there was no evidence that Nelson had recently smoked marijuana. We can reasonably assume that Officer Colling assessed the possibility that Nelson was operating the vehicle under the influence and determined that he was not.

For all of these reasons, the evidence is insufficient to establish that Nelson constructively possessed the 0.08 to 0.10 gram of marijuana found in the vehicle. Accordingly, we reverse his conviction for Class A misdemeanor for possession of marijuana.

II. Illegal Sentence

With regard to his Class A misdemeanor possession of marijuana conviction, Nelson also argued that the trial court's imposition of a 30-day executed sentence and 365 days probation exceeds the maximum one-year term proscribed for a Class A misdemeanor, and is therefore, illegal. We need not address this argument because we conclude that the evidence is insufficient to support his conviction.

[2] An odor may or may not indicate that marijuana was recently smoked in the vehicle. Without some other additional evidence such as ashes in the vehicle's ash tray, rolling papers, or burnt marijuana leaves or a marijuana cigarette, we cannot conclude that the odor of burnt marijuana, by itself, is sufficient to prove intent to maintain dominion and control over the .08 to .10 gram of marijuana seized in this case.

Nelson was also convicted of Class C misdemeanor operating a vehicle having never received a license. For that conviction, he was ordered to serve a sixty-day sentence with all but twenty days suspended. Additionally, he was ordered to serve 363 days of probation. Pursuant to Indiana Code section 35-50-3-4, "[a] person who commits a Class C misdemeanor shall be imprisoned for a fixed term of not more than sixty (60) days[.]" However,

> whenever the court suspends in whole or in part a sentence for a Class A, Class B, or Class C misdemeanor, it may place the person on probation under IC 35-38-2 for a fixed period of not more than one (1) year, notwithstanding the maximum term of imprisonment for the misdemeanor set forth in sections 2 through 4 of this chapter. However, **the combined term of imprisonment and probation for a misdemeanor may not exceed one (1) year.**

Ind. Code § 35-50-3-1(b) (2004) (emphasis added).

The one-year maximum combined term of imprisonment and probation for Class C misdemeanor convictions does not apply when court suspends in whole or in part a sentence for the misdemeanor conviction, and "the use or abuse of alcohol, drugs, or harmful substances is a contributing factor or a material element of the offense." In those cases, the trial court is allowed to place a person on probation for a period of not more than two years. Ind. Code § 35-50-3-1(c) (2004).

Because we reverse Nelson's conviction for possession of marijuana, we conclude that the exception enumerated section 35-50-3-1(c) is inapplicable. Consequently, the trial court improperly sentenced Nelson to a combined term of imprisonment and probation that exceeds one year. See Ind. Code § 35-50-3-1(b). We therefore correct Nelson's sentence to sixty days with all but twenty days suspended and 305 days of

probation plus costs. See Collins v. State, 835 N.E.2d 1010, 1017-18 (Ind. Ct. App. 2005), clarified on rehearing, trans. denied (stating that incarceration includes the both the executed and suspended portions of the defendant's sentence).

Conclusion

We reverse Nelson's conviction for Class A misdemeanor possession of marijuana. Moreover, the trial court improperly ordered Nelson to serve a combined term of imprisonment and probation that exceeds one year for his Class C misdemeanor conviction. Therefore, we vacate Nelson's sentence and remand this case with instructions to correct Nelson's sentence to sixty days with all but twenty days suspended and 305 days of probation.

Reversed and remanded for proceedings consistent with this opinion.

BAILEY, J., concurs.

BARNES, J., dissents with separate opinion.

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BARNES, Judge, dissenting with separate opinion

I respectfully dissent. I have no trouble in finding that the marijuana, though a small amount, was constructively possessed by Nelson. The police officer approached the car and smelled the odor of burnt marijuana coming from the car. Taking this with the marijuana recovered from the driver's side floorboard of the car, I conclude that the facts support a possession conviction.

Indiana Code Section 35-50-3-1(c) speaks of the trial court finding that the "use or abuse" of alcohol, drugs, or harmful substances is a contributing factor or a material element of the offense to justify an extended period of probation. One need not be Columbo to infer that the use of marijuana was in play here. I would affirm the trial court in all regards.