



## **Case Summary**

Shawn M. Swartout appeals his convictions for Class D felony possession of methamphetamine, Class D felony possession of a narcotic drug, Class A misdemeanor possession of marijuana, and Class A misdemeanor possession of paraphernalia. Swartout contends there is insufficient evidence that he constructively possessed the contraband found in his bedroom. Finding sufficient evidence to sustain his convictions, we affirm.

## **Facts and Procedural History**

In November 2008, Columbia City Police Sergeant Robert Stephenson, a member of the Whitley County Drug Task Force, and two other officers searched Swartout's Whitley County residence pursuant to the terms of Swartout's probation in another matter. Although Swartout's mother owned the home, only Swartout and Jerry Vielhauer lived there. Vielhauer was present during the search. In the common area of the home, the officers found a coffee grinder and a paper or plastic bag, both containing traces of white residue insufficient for forensic testing. The officers found no evidence of contraband in Vielhauer's bedroom.

Vielhauer led the officers to Swartout's bedroom. There, the officers found marijuana on the floor by the nightstand, methamphetamine and a pipe used for smoking methamphetamine inside an open eyeglass case on the nightstand, and morphine and an aluminum foil "boat" used for ingesting illegal substances also on the nightstand. In addition to the contraband, the officers found a baseball cap on the nightstand bearing the name "Corporate Construction," which is where Swartout was employed at the time, and

mail or documents bearing Swartout's name in his bedroom. The officers found no evidence that Swartout's girlfriend Tiffany Rose lived with him.

The State charged Swartout with Class D felony possession of methamphetamine, Ind. Code § 35-48-4-6.1, Class D felony possession of a narcotic drug, Ind. Code § 35-48-4-6, Class A misdemeanor possession of marijuana, Ind. Code § 35-48-4-11, and Class A misdemeanor possession of paraphernalia, Ind. Code § 35-48-4-8.3.

At trial, the State called Officer Stephenson and one of the other officers who conducted the search to testify to the foregoing events. After the State rested, Swartout moved for a directed verdict, which the trial court denied. Rose then testified for the defense. She claimed that she lived with Swartout and was in the process of moving her belongings to the home. According to Rose, she arrived at 3:30 a.m. on the day the police found the contraband to wake Swartout for work, and after Swartout left she put the contraband on her nightstand in the bedroom. A jury found Swartout guilty of all charges, and the trial court sentenced him to an aggregate term of three years. He now appeals.

### **Discussion and Decision**

Swartout contends there is insufficient evidence that he constructively possessed the contraband found in his bedroom. Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, we do not reweigh the evidence or judge the credibility of the witnesses. *Fought v. State*, 898 N.E.2d 447, 450 (Ind. Ct. App. 2008). We consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and affirm if the evidence and

those inferences constitute substantial evidence of probative value to support the verdict. *Id.* A conviction may be based upon circumstantial evidence alone. *Id.* Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense. *Id.*

The charging information alleged that Swartout “did knowingly or intentionally possess” methamphetamine, a narcotic drug, marijuana, and drug paraphernalia. Appellant’s App. p. 12-13. A conviction for possession of contraband may rest upon proof of either actual or constructive possession. *Washington v. State*, 902 N.E.2d 280, 288 (Ind. Ct. App. 2009), *trans. denied*. Actual possession occurs when a person has direct physical control over the contraband. *Gee v. State*, 810 N.E.2d 338, 340 (Ind. 2004). Swartout was not present when police seized the contraband and thus did not have direct physical control over it; therefore, we consider whether the State established that he constructively possessed it.

Constructive possession occurs when someone has the intent and the capability to maintain dominion and control over the contraband. *Atwood v. State*, 905 N.E.2d 479, 484 (Ind. Ct. App. 2009), *trans. denied*. The capability requirement is met when the State shows that the defendant is able to reduce the contraband to his or her personal possession. *Iddings v. State*, 772 N.E.2d 1006, 1015 (Ind. Ct. App. 2002), *trans. denied*. Proof of a possessory interest in the premises in which contraband is found is adequate to show the capability to maintain control and dominion over the items in question. *Gee*, 810 N.E.2d at 340. This is so regardless of whether the possession of the premises is exclusive. *Id.* at 341. A defendant’s possessory interest in the premises does not require

actual ownership. *Jones v. State*, 807 N.E.2d 58, 66 (Ind. Ct. App. 2004), *trans. denied*. A house or apartment used as a residence is controlled by the person who lives in it, and that person may be found in control of any contraband discovered therein, whether he or she is the owner, tenant, or merely an invitee. *Id.*

Here, Officer Stephenson testified that Swartout lived at the residence and that Vielhauer led the officers to Swartout's bedroom, where the contraband was found. Furthermore, mail or documents bearing Swartout's name was found in that bedroom. We find ample evidence that Swartout had a possessory interest in the premises where the contraband was found and, thus, the State presented sufficient evidence that he had the capability to maintain dominion and control over the contraband.

To prove the intent element of constructive possession, the State must demonstrate the defendant's knowledge of the presence of the contraband. *Iddings*, 772 N.E.2d at 1015. This knowledge may be inferred from the defendant's exclusive dominion and control over the premises containing the contraband. *Id.* When a defendant's possession of the premises is nonexclusive, the State must show evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband. *Gee*, 810 N.E.2d at 341. Such additional circumstances may include but is not limited to: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the contraband to the defendant; (5) location of the contraband within the defendant's plain view; and (6) the mingling of the contraband with other items owned by the defendant. *Id.* The place where the contraband is found has also been identified as an additional circumstance from which a

trier of fact could conclude that the defendant had the requisite intent in a nonexclusive constructive possession case. *Id.* at 344.

The bedroom where the contraband was found was Swartout's. Although Rose testified that she lived in the bedroom with Swartout, the officers testified that they found no evidence that Rose lived with him. We find this testimony, taken in a light most favorable to the verdict, supports the conclusion that Swartout had exclusive dominion and control over his bedroom and, thus, knowledge of the presence of the contraband.

Even if we were to find Swartout's possession nonexclusive, the State presented sufficient evidence of additional circumstances indicating Swartout's intent to maintain dominion and control over the contraband. All of the contraband was found in Swartout's bedroom. The marijuana was found on the floor by the nightstand, and the methamphetamine, morphine, pipe, and aluminum foil boat were found on the nightstand. Also on the nightstand was a baseball cap bearing the name "Corporate Construction," which is where Swartout was employed at the time. Although Swartout argues on appeal that no witness testified that the cap belonged to him, we find that such ownership was a reasonable inference to draw from testimony that it bore the name of Swartout's employer. And although Rose testified that the nightstand was hers, it was within the province of the jury to disbelieve her.

Swartout attempts to compare the situation here to other cases; however, we find each to be clearly distinguishable. First, Swartout cites *Martin v. State*, 175 Ind. App. 503, 372 N.E.2d 1194 (1978), for the proposition that "[a] defendant cannot be presumed to know the full contents of a room over which he does not have exclusive control."

Appellant's Br. p. 12. In *Martin*, we reversed a drug conviction where police found drugs inside a bureau drawer in a master bedroom shared by the defendant and his wife and to which a houseguest had access. 175 Ind. App. at 505-06, 372 N.E.2d at 1196. There was no evidence that any of the defendant's belongings were in the bureau drawer where the drugs were found or anywhere else around the bureau. *Id.* at 510, 372 N.E.2d at 1199. The defendant was not at the apartment when police arrived. *Id.* There was no evidence of when the defendant was last at the apartment, although he did testify that he was frequently absent because of an extramarital affair. *Id.* at 506, 372 N.E.2d at 1196. There was evidence that the houseguest used the master bedroom for a week prior to the arrest. *Id.* *Martin* thus involved drugs concealed in a bureau drawer, with no evidence that any of the defendant's belongings were in or around the bureau, and no evidence that the defendant was recently in the bedroom. Here, the contraband was found on Swartout's nightstand by his bed, his baseball cap was also on the nightstand, and Swartout was in the bedroom just that morning. We decline to find *Martin* sufficiently analogous.

Swartout then notes our recognition in *Edwards v. State*, 179 Ind. App. 363, 367, 385 N.E.2d 496, 498 (1979), that an aura of suspicion of guilt is not sufficient to sustain a conviction. In that case, however, there was no evidence linking the defendant to the drugs found in the butter compartment of a refrigerator apart from the fact that he lived at the apartment with other people and was present when the drugs were found. *Id.* at 364, 385 N.E.2d at 496. There was also evidence that a party was recently held where several people had access to the refrigerator and that the defendant never used the butter

compartment of the refrigerator. *Id.* at 367, 385 N.E.2d at 498. Swartout also cites *Gee*, where the defendant's drug convictions were reversed when the State failed to link him to drugs found concealed in the basement laundry room of a house he shared with his cousin. 810 N.E.2d at 341, 342, 344. There was no evidence that the drugs were found near any of the defendant's belongings. *Id.* at 343-44. The factual situations in both *Edwards* and *Gee* are different from what we have here. Because the contraband was found in Swartout's bedroom on his nightstand next to his baseball cap and Swartout was in the bedroom just that morning, we find more than merely an aura of suspicion of guilt.

Finally, Swartout discusses *Moore v. State*, 613 N.E.2d 849, 851 (Ind. Ct. App. 1993), where the defendant's drug convictions were reversed because the State failed to prove he had any control, exclusive or nonexclusive, over the apartment where the drugs were found. The instant case is clearly distinguishable as the State proved that Swartout had exclusive control over his bedroom, and even if he had only nonexclusive control, additional circumstances support the inference that he knew of the presence of the contraband.

Swartout's other arguments, that Rose lived with him and the contraband was hers, are merely invitations to reweigh the evidence and reassess the credibility of witnesses, which we may not do. Finding that Swartout had the intent and capability to maintain dominion and control over the contraband, we conclude that there was sufficient evidence that Swartout constructively possessed the contraband found in his bedroom.

Affirmed.

NAJAM, J., and BROWN, J., concur.