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**IN THE  
COURT OF APPEALS OF INDIANA**

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MAURICE W. BAKER,  
Appellant-Defendant,

vs.

STATE OF INDIANA,  
Appellee-Plaintiff.

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No. 91A04-0512-CR-724

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APPEAL FROM THE WHITE SUPERIOR COURT  
The Honorable Robert B. Mrzlack, Judge  
Cause No. 91D01-0504-FD-66

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**July 31, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**CRONE, Judge**

## **Case Summary**

Maurice W. Baker appeals his conviction for possession of methamphetamine, a class D felony. We affirm.

## **Issues**

We restate Baker's issues as follows:

- I. Whether the prosecutor's comments regarding and the admission of Baker's statement made while he was in custody and had not been given his *Miranda* rights constituted fundamental error; and
- II. Whether the evidence was sufficient to support Baker's conviction for possession of methamphetamine.

## **Facts and Procedural History**

On April 20, 2005 Monticello Police Officer Kyle Peterson saw Baker driving a van. Officer Peterson knew that Baker's license had been suspended about six weeks earlier. He stopped Baker and asked him if his license was still suspended. Baker responded affirmatively. Officer Peterson then placed Baker under arrest. After he had been handcuffed and placed in Officer Peterson's patrol car, Baker asked Officer Peterson to get his wallet from the van. Officer Peterson retrieved Baker's wallet from the van's center console and found a white tube in plain view. The tube had a tan residue on it. Without advising Baker of his *Miranda* rights, Officer Peterson held up the tube and asked him if it would test positive for methamphetamine or cocaine. Baker responded that the tube would not test positive for either substance. The Indiana State Police Laboratory tested the residue, which was found to contain precursors to methamphetamine.

On April 25, 2005, Baker was charged with possession of methamphetamine, a class D felony, and operating a vehicle while suspended, a class A misdemeanor. A jury trial was held on September 27, 2005. During his opening statement, the prosecutor told the jury that Officer Peterson had asked Baker if the tube would test positive for methamphetamine or cocaine, and that Baker had said it would not. The prosecutor suggested that if Baker were innocent, he would have denied having ever seen the tube before. The prosecutor also questioned Officer Peterson about this conversation and referred to it again in his closing argument. Baker did not object to the admission of his statement. On the contrary, Baker's defense counsel discussed the statement during her opening statement, her closing statement, and upon cross-examination of Officer Peterson. The jury found Baker guilty as charged. Baker now appeals his conviction on the possession count.

## **Discussion and Decision**

### ***I. Fundamental Error***

Baker asserts that the prosecutor introduced a custodial statement taken in violation of *Miranda* and that this constitutes prosecutorial misconduct. Because Baker did not make an objection at trial, he must establish that both prosecutorial misconduct and fundamental error occurred. *Booher v. State*, 773 N.E.2d 814, 818 (Ind. 2002).

A fundamental error is “a substantial, blatant violation of basic principles of due process rendering the trial unfair to the defendant.” It applies only when the actual or potential harm “cannot be denied.” The error must be “so prejudicial to the rights of a defendant as to make a fair trial possible.”

*Carter v. State*, 754 N.E.2d 877, 881 (Ind. 2001) (citations omitted). Even if an asserted error touches on a fundamental right of the defendant, the error may still be harmless if the

defendant pursued the improperly opened issue or if there was overwhelming evidence of the defendant's guilt. *Jones v. State*, 619 N.E.2d 275, 276 (Ind. 1993); *Oldham v. State*, 779 N.E.2d 1162, 1173 (Ind. Ct. App. 2002), *trans. denied*.

Baker alleges, and the State does not dispute, that his response to Officer Peterson's question about the tube was obtained in violation of *Miranda*. Statements obtained from a person in police custody are not admissible at trial if that person has not received *Miranda* warnings. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). Baker was in custody at the time he made the statement, as he was under arrest, handcuffed, and in the back seat of a patrol car. Because he was not advised of his *Miranda* rights, Baker's statement should have been excluded at trial if he had made an objection.

In *Jones*, the State improperly opened the issue of the defendant's reputation concerning peace and quietude. The defendant, however, made no objection and continued to pursue the issue. Our supreme court held that this was not fundamental error. Baker's situation is similar. Baker did not object to the admission of or references to his custodial statement. Instead, Baker attempted to use the very same evidence as proof that he was unaware that there were any drugs in the tube. While Baker has a right to suppress statements elicited in violation of *Miranda*, he also may waive that right. *Taylor v. State*, 659 N.E.2d 1054, 1058 (Ind. Ct. App. 1995). Because Baker pursued the improperly opened issue, we find no fundamental error here. Consequently, we need not address his claim of prosecutorial misconduct.

## *II. Sufficiency of the Evidence*

Baker also asserts that the evidence was insufficient to support the jury's verdict on the possession charge. "In reviewing sufficiency of the evidence, we will affirm a conviction if, considering only the probative evidence and reasonable inferences supporting the verdict, and without weighing evidence or assessing witness credibility, a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt." *Alves v. State*, 816 N.E.2d 64, 65 (Ind. Ct. App. 2004), *trans. denied*.

Possession may be proven by showing that the defendant had constructive possession of the item. *State v. Emry*, 753 N.E.2d 19, 21 (Ind. Ct. App. 2001). Constructive possession consists of the ability and intent to maintain dominion and control over an item. *Id.* at 22. Constructive possession of items found in a vehicle may be imputed to the driver of the vehicle. *Id.* at 21-22. Exclusive possession of a vehicle is sufficient to raise a reasonable inference of intent. *Id.* at 22.

The evidence favorable to the verdict includes the fact that the van was registered to Baker, that he was the driver and sole occupant of the van when the tube was found, and that the tube was found in plain view near his wallet. Baker argues that the State did not establish that he had exclusive possession of the vehicle because Officer Peterson testified that it appeared to have been used as a work vehicle. Baker also points to the fact that there was a large roll of carpet in the van, which was too heavy for one person to carry. Therefore, he argues, someone may have had access to the front part of the van, where the tube was found. While this is a possible theory, the reasonable inference favorable to the verdict is that Baker knew that the tube was in his van since it was found in plain view near his wallet.

Constructive possession may be imputed to the driver even when there are other passengers in the vehicle, *Young v. State*, 564 N.E.2d 968, 972 (Ind. Ct. App. 1991); therefore, such an inference is clearly permissible when the driver is the only occupant. Baker had exclusive possession of the van when the tube was found, and as the registered owner of the van, he had the ability and intent to maintain dominion and control over the tube.

Affirmed.

KIRSCH, C. J., and BAILEY, J. concur.