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IN THE
COURT OF APPEALS OF INDIANA

GARY M. THOMPSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0902-CR-177
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
CRIMINAL DIVISION, ROOM 14
The Honorable Jose Salinas, Judge
The Honorable John Alt, Master Commissioner
Cause No. 49G14-0710-CM-216661

October 5, 2009

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Gary M. Thompson (Thompson), appeals his conviction for possession of marijuana, as a Class D felony, Ind. Code § 35-48-4-11, and the trial court's determination that he is an habitual substance offender, I.C. § 35-50-2-10.

We affirm.

ISSUES

Thompson raises seven issues, which we consolidate and restate as the following two:

(1) Whether the marijuana entered as evidence to convict Thompson was discovered as a result of a warrantless seizure; and

(2) Whether the State presented evidence sufficient to prove beyond a reasonable doubt that Thompson possessed marijuana.

FACTS AND PROCEDURAL HISTORY

On October 11, 2007, Captain Jason Dierdorff (Captain Dierdorff) of the Speedway Police Department was working part-time as a security officer at a gas station. Captain Dierdorff observed Thompson at the gas station, remembered him from a prior encounter and believed that he may have had an outstanding warrant for his arrest. Months prior, he had checked Thompson's warrant status and learned that, at that time, there was a warrant for Thompson's arrest. When Thompson left the gas station, Captain Dierdorff followed him. While following, Captain Dierdorff checked whether there was a current outstanding warrant for Thompson's arrest, and learned from a dispatch operator that one existed from Tacoma, Washington, for Thompson's failure to appear in court in 1994.

When Thompson pulled into a parking lot to watch his son's football game, Captain Dierdorff pulled behind Thompson and activated his emergency lights. As Captain Dierdorff approached Thompson's vehicle, he smelled burnt marijuana coming from it. Captain Dierdorff had Thompson step out of the vehicle and placed him in handcuffs. Captain Dierdorff asked Thompson if he could search his car, and Thompson indicated that he could. Captain Dierdorff performed a search and discovered marijuana in the area of the driver's side front seat, and remnants from burnt marijuana blunts in the backseat ash tray.

On October 12, 2007, the State filed an Information charging Thompson with Count I, possession of marijuana, as a Class A misdemeanor, I.C. § 35-48-4-11, and Count II, possession of marijuana, as a Class D felony, I.C. § 35-48-4-11. On January 10, 2008, the State filed an amendment to the Information adding an allegation that Thompson is an habitual substance offender due to four prior unrelated substance convictions, which the trial court granted on March 5, 2008. On April 23, 2008, Thompson moved to suppress the evidence of the marijuana arguing that Captain Dierdorff's seizure of him was unreasonable, which the trial court denied on May 27, 2008. On December 3, 2008, the trial court conducted a bench trial. During the trial, Thompson did not object to the admission of the marijuana. At the close of evidence and argument, the trial court found Thompson guilty of Count II, possession of marijuana, as a Class D felony, and found him to be an habitual substance offender. The trial court utilized alternative misdemeanor sentencing for Count II, and imposed no jail time or probation for that Count, but enhanced his sentence by three years for being an habitual substance offender.

Thompson now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Admission of Evidence*

The first six issues that Thompson presents rely upon and develop his argument that Captain Dierdorff performed the search which discovered the marijuana after seizing Thompson without any knowledge of a valid and active warrant for his arrest. We disagree.

Thompson acknowledges that fundamental error analysis is appropriate because he failed to object to the evidence at trial, despite having advanced a motion to suppress previously. "Generally, the failure to object, and thereby properly preserve an issue for appeal results in waiver." *Marsh v. State*, 818 N.E.2d 143, 145 (Ind. Ct. App. 2004). However, we may reverse on appeal if an error is so prejudicial to the rights of the defendant as to make a fair trial impossible and constitutes a blatant violation of basic principles. *Absher v. State*, 866 N.E.2d 350, 355 (Ind. Ct. App. 2007). The harm or potential for harm must be substantial, and the resulting error must deny the defendant of fundamental due process. *Id*.

As a general rule, the Fourth Amendment to the United State's Constitution prohibits warrantless searches and seizures. *Sanchez v. State*, 803 N.E.2d 215, 219 (Ind. Ct. App. 2004), *trans. denied*. This rule is applicable to the states through the Fourteenth Amendment. *Id*. Thompson contends that he was seized when Captain Dierdorff activated his emergency lights while parked behind his vehicle, which the State does not dispute. Thompson contends that, at this time, Captain Dierdorff had no knowledge of any *active* or *valid* warrant for his

arrest. Therefore, his seizure was a warrantless seizure. The State contends to the contrary that Captain Dierdorff learned of an active or valid warrant from dispatch prior to seizing Thompson, but merely did not know whether Tacoma, Washington, was willing to extradite Thompson based on that warrant.

During the hearing on Thompson's motion to suppress, Captain Dierdorff testified as to how he came to learn of the warrant for Thompson's arrest:

> At that time, as I said, I radioed our communications, I don't have a, as an investigator, I don't have a laptop computer in my car where I can run people. So, at that time I radioed our dispatch and had them do a warrants check on Mr. Thompson.
>
> * * *
>
> [I did this] to verify whether or not he was still wanted at that time because as I had stated, the last time that Mr. Thompson had come up, we knew there [were] warrants for him but a considerable amount of time had gone by and I was unsure at that time if there [were] any outstanding warrants for him.

(Transcript pp. 94-95). Further, he explained that he learned from the dispatch operator that there was a warrant from Tacoma, Washington, prior to pulling his car behind Thompson's parked car. As for the status of the warrant, Captain Dierdorff testified as follows: "as far as I was concerned, he had a valid warrant for him at that time that we were attempting to confirm whether or not they wanted to extradite him." (Tr. p. 111). Thompson does not explain why Captain Dierdorff could not rely upon the dispatch operator's statement that a warrant existed to conclude that the warrant was active and valid in order to effectuate a seizure.

Earlier this year, the United States Supreme Court addressed a situation where an officer effectuated an arrest upon learning from a dispatch operator that a warrant existed.

Herring v. U.S., 129 S. Ct. 695, 698 (2009). The defendant was found with a gun and drugs during the arrest; however, minutes later, the arresting officer learned from the dispatch operator that the warrant was no longer active and was listed on the computer database in error. *Id*. The State conceded that because the warrant was no longer valid the seizure was unlawful, but argued that the evidence found during the arrest should not be subject to the exclusionary rule. The Court agreed, concluding that the error by the dispatch operator was not a "systemic error or reckless disregard of constitutional requirements" that required application of the exclusionary rule. *Id*. at 704.

Thompson attempts to discern the facts addressed in *Herring* by painting Captain Dierdorrf's actions as being an intentional disregard of whether the warrant for Thompson was valid and active. However, we disagree with Thompson's characterization of the facts. Like the arresting officer in *Herring*, Captain Dierdorff simply acted on information from dispatch that a warrant existed for Thompson's arrest. Moreover, the warrant for Thompson proved to be active and valid, as opposed to the warrant relied upon by the arresting officer in *Herring*. Therefore, we conclude that Captain Dierdorff did not execute a warrantless seizure of Thompson, and Thompson's claim of fundamental error must fail.

II. *Sufficiency of the Evidence*

Thompson also contends that the State failed to present evidence sufficient to prove beyond a reasonable doubt that he possessed marijuana. Specifically, Thompson argues that he was merely in the vicinity of the drugs, which is not sufficient to sustain his conviction for possession.

> Our standard of review with regard to sufficiency claims is well settled. In reviewing a sufficiency of the evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. We will consider only the evidence most favorable to the verdict and the reasonable inferences drawn therefrom and will affirm if the evidence and those inferences constitute substantial evidence of probative value to support the judgment. A conviction may be based upon circumstantial evidence alone. Reversal is appropriate only when reasonable persons would not be able to form inferences as to each material element of the offense.

Perez v. State, 872 N.E.2d 208, 212-13 (Ind. Ct. App. 2007), *trans. denied* (citations omitted).

In order to convict Thompson of possession of marijuana, the State was required to prove that Thompson knowingly or intentionally possessed marijuana. I.C. § 35-48-4-11. Possession can be by either physical possession or constructive possession. *Bradley v. State*, 765 N.E.2d 204, 211 (Ind. Ct. App. 2002).

> When a person knowingly has direct physical control over an object at a certain time then he or she has actual possession of it. When a person does not have actual possession, but instead knowingly has the capability and intent to exercise dominion and control over the object then this person is deemed to constructively possess the object.

Id. (citations omitted). To establish the intent element, the prosecution must show that the defendant had knowledge of the presence of the contraband. *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999). A defendant's exclusive possession of a vehicle is sufficient to raise a reasonable inference of intent to maintain dominion and control over the contraband inside the vehicle. *Id*. A defendant has exclusive possession of a vehicle when he or she is the only person in the vehicle when the police stopped it. *Id*.

Thompson was the only person in the vehicle when it was stopped by Captain Dierdorff. However, Thompson argues that since the amount of marijuana inside the vehicle was small, it is possible that he did not even know that it existed. The marijuana which Thompson was found to possess consisted of "small amounts" including a stem found in the door pocket of the driver's side door, some larger stems on the floor board between the driver's seat and the center console, and burnt marijuana blunts in the rear passenger door ashtray. (Tr. p. 8). That being said, Captain Dierdorff testified that the stems were "readily apparent" as soon as he looked in the pocket of the driver's side door and between the driver's seat and center console. (Tr. p. 27). Essentially, Thompson is requesting that we reweigh the evidence, which we cannot do. *See Perez*, 872 N.E.2d 213. We conclude that the State presented sufficient evidence to prove that Thompson was in constructive possession of the marijuana.

CONCLUSION

Based on the foregoing, we conclude that the trial court's admission of the marijuana as evidence was not fundamental error, and the State presented evidence sufficient to prove beyond a reasonable doubt that Thompson possessed marijuana.

Affirmed.

BAKER, C.J., and FRIEDLANDER, J., concur.