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# IN THE
# COURT OF APPEALS OF INDIANA

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| RAUL PEREZ, | ) | |
| | ) | |
| Appellant-Defendant, | ) | |
| | ) | |
| vs. | ) | No. 49A02-0903-CR-227 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Plaintiff. | ) | |

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APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Peggy R. Hart, Commissioner
Cause No. 49G23-0807-FC-162706

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**October, 21, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**VAIDIK, Judge**

## Case Summary

Raul Perez appeals his conviction for Class C felony possession of marijuana with intent to deliver. Perez received a package containing seventy pounds of marijuana from UPS. Perez argues there is insufficient evidence that he constructively possessed the contraband. He also argues the trial court erred by admitting hearsay evidence that the package's return address was nonexistent. We find sufficient evidence to sustain Perez's conviction, and we find any error in the admission of the hearsay harmless. We affirm.

## Facts and Procedural History

In July 2008 drug interdiction authorities were called to an Indianapolis UPS facility to investigate a suspicious package. The parcel was a RIDGID tool chest which had arrived from Texas and which was addressed to Perez. It had not yet been picked up by its recipient and was still on a freight truck at the UPS loading dock.

Trooper Jeffrey Sego drove to UPS to examine the chest. As he pulled into the lot, Sego noticed two men in or around a white van. They would later be identified as Perez and Mr. Flores. Sego proceeded to the freight truck and inspected the package. The chest was locked, but Sego noticed a pungent odor of raw marijuana emanating from it.

Sego was soon notified that two people had arrived at the UPS facility to claim the parcel. The two individuals were Perez and Flores. Perez signed for the package, and one or both of them paid cash for the delivery. The total cost was $692.93. UPS employees then unloaded the tool chest into Perez and Flores' white van using a forklift.

Sego initiated an investigatory stop once the chest had been placed inside the van and the doors had been shut. A canine sniff indicated that the parcel contained a

controlled substance. Sego obtained a search warrant. Neither Perez nor Flores had a key to the chest, so law enforcement ultimately had to pick the lock to open it. Police found six plastic-wrapped bricks of marijuana inside. The contraband weighed a combined seventy pounds.

The State charged Perez with Class C felony dealing in marijuana[1] and Class D felony possession of marijuana.[2] He was tried to the bench.

At trial the State called Trooper Sego. Sego was asked on direct examination if he had investigated the return address on the package's delivery receipt. Sego testified that he had contacted authorities in Texas who informed him that the return address did not exist. Perez objected to the foregoing testimony as hearsay. The court overruled the objection and admitted Sego's testimony for the purpose of explaining the course of his investigation.

The trial court found Perez guilty of both counts. The court merged the possession charge as a lesser-included offense and entered judgment of conviction for Class C felony dealing in marijuana. Perez now appeals.

## Discussion and Decision

Perez raises two arguments: (1) whether there is sufficient evidence that he constructively possessed the contraband and (2) whether the trial court erred by admitting Sego's testimony that the package's return address did not exist.

### I. Sufficiency of the Evidence

[1] Ind. Code § 35-48-4-10.

[2] Ind. Code § 35-48-4-11.

Perez first argues that there is insufficient evidence that he was in constructive possession of the marijuana. 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. *Fought v. State*, 898 N.E.2d 447, 450 (Ind. Ct. App. 2008). We will consider only the evidence most favorable to the judgment 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. *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.*

Indiana Code section 35-48-4-10 provides that anyone who possesses more than ten pounds of marijuana with intent to deliver commits a Class C felony. 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). Actual possession occurs when a person has direct physical control over the substance. *Walker v. State*, 631 N.E.2d 1, 2 (Ind. Ct. App. 1994). Here Perez never had actual possession of the storage chest and/or its contents, because they were never within his direct physical control. The subsequent issue is whether the State showed Perez's constructive possession of the marijuana.

Constructive possession occurs when someone has both (1) the intent and (2) the capability to maintain dominion and control over the subject contraband. *Atwood v. State*, 905 N.E.2d 479, 484 (Ind. Ct. App. 2009). To prove the intent element of

constructive possession, the State must demonstrate the defendant's knowledge of the presence of the controlled substance. *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999). Knowledge may be inferred from either the exclusive dominion and control over the premises containing the contraband or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband. *Id.* The capability requirement is met when the State shows that the defendant is able to reduce the controlled substance to the defendant's personal possession. *Id.*

In this case, Perez was the addressee of the shipment, he travelled to the UPS facility and signed for the delivery, and either he or Flores tendered nearly $700 to claim the parcel. Perez and Flores also brought a van to accommodate the storage chest, which was so heavy that UPS personnel required a forklift to move it. We find it unlikely that an addressee who has gone to such effort and expense to claim a package would not know what he is receiving. We believe the evidence supports an inference that Perez had knowledge of what the shipment contained and intent to maintain dominion over the contraband. Moreover, Perez had the capability to exercise control over the drugs once he claimed the package and it was placed inside the van. We find the evidence sufficient to sustain a finding that Perez had constructive possession of the marijuana.

**II. Admission of Hearsay**

The State elicited the following testimony from Trooper Sego at trial:

> Q The address that that package came from, sir, did you do any follow-up investigation from that address?
> A Yes, I did.

Q This, for the Court's record -- can't see it anymore -- that came from where?

A It came from, it came from Missions, Texas. The address was 117 Pased, that is P-A-S-E-D De, D-E, Tranquilidad, T-R-A-N-G – correction, Q-U-I-L-I-D. That is in Missions, Texas.

Q Did you do any follow-up investigation as to that address?

A Yes, I did.

Q What did you find out?

A I called the officers in Missions Texas, some guys that worked for the Department of Public Safety in Texas, and --

**[DEFENSE COUNSEL]:** Your Honor, I'm going to object. May I ask a preliminary question?

**THE COURT:** You may.

**BY [DEFENSE COUNSEL]:**

Q Are you going to tell the Court what they told you over the phone?

A Yes.

**[DEFENSE COUNSEL]:** At this point I object to any hearsay testimony that come from third party [sic].

**[THE STATE]:** Judge, I don't think it goes -- it is just through the course of the investigation as to what he did next. I don't think he is going to -- there is no secret in (inaudible). It is kind of in the negative as to what he is going to say, but --

**[DEFENSE COUNSEL]:** It is still hearsay, it's a statement from a non-party and person who is not here testifying.

**[THE STATE]:** It is not really for the truth of what he is even going to say, it is just for what he did next in his investigation. So I would disagree that it is hearsay.

**THE COURT:** Well, he testified what he did next in his investigation, that he contacted law enforcement in Texas and notified him --

**[THE STATE]:** I can rephrase the question then.

**THE COURT:** -- of this particular arrest.

**[THE STATE]:** I can rephrase the question so that he doesn't actually say what they said.

**THE COURT:** Okay.

**[THE STATE]:** I will withdraw that question and rephrase it.

**THE COURT:** Okay.

Q After you spoke with the people in Texas, were you able to follow up on that address?

A No. We were not able to follow up on it because the address does not exist.

**[DEFENSE COUNSEL]:** I have an objection and ask permission to ask a preliminary question again.

**THE COURT:** You may.

BY [DEFENSE COUNSEL]:

Q So the address didn't exist. Did you learn that from the source you spoke to over the phone?

A Yes, I did.

**[DEFENSE COUNSEL]:** Then I would object and move to strike.

**THE COURT:** Okay.

**[THE STATE]:** Did you sustain that?

**THE COURT:** Pardon?

**[THE STATE]:** Did you sustain that?

**THE COURT:** Well, he learned it from another law enforcements [sic] officer though.

**[DEFENSE COUNSEL]:** In another State who is not part of the Indiana State Police.

**THE COURT:** That's all right. I think you still rely on hearsay information from another law enforcement during an investigation. Although the investigation with regard -- is not really -- in Missions, Texas is not relevant, I guess, to this procedure, correct?

**[DEFENSE COUNSEL]:** Well, it demonstrates with that -- I could see an argument the State might make with that information.

**THE COURT:** State?

**[THE STATE]:** I think it just goes to the Court's investigation, Judge. I don't think it is hearsay, I just simply asked if he was able to verify the address. He is not saying anything that the other party said. That's what hearsay would be. He is just confirming whether or not he could follow up on the address.

**THE COURT:** No, he said that he learned that information from another law enforcement officer, correct? So he has no personal knowledge of that, that the address does not exist, correct?

**[THE STATE]:** That is correct.

**[DEFENSE COUNSEL]:** Foundational. I'll strike it. The State asked him whether he followed up on it and the answer is yes or no. The officer added that the information regarding the existence of the address and also the answer was non-responsive to the question that was asked.

**THE COURT:** Well, I'm going to overrule your objection, and obviously that will go to the weight --

**[DEFENSE COUNSEL]:** Okay.

> **THE COURT:** -- and not necessarily its admissibility. But obviously I will consider the fact that he has no personal knowledge of it, how is that?
>
> **[DEFENSE COUNSEL]:** Okay.

Tr. p. 37-41.

Perez argues that the trial court erred by admitting the testimony shown above. The admission and exclusion of evidence falls within the sound discretion of the trial court, and we review the admission of evidence only for abuse of discretion. *Wilson v. State*, 765 N.E.2d 1265, 1272 (Ind. 2002). An abuse of discretion occurs where the trial court's decision is clearly against the logic and effect of the facts and circumstances. *Smith v. State*, 754 N.E.2d 502, 504 (Ind. 2001).

Hearsay is not admissible except as provided by law or by other court rules. Ind. Evidence Rule 802. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c).

"When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope . . . ." Ind. Evidence Rule 105. If evidence has both permissible and impermissible purposes, the trial court may exclude the evidence pursuant to Evidence Rule 403 if the risk of misuse outweighs the evidence's probative value. 12 Robert Lowell Miller, Jr., *Indiana Practice* § 105.101 (3d ed. 2007); *see also* Fed. R. Evid. 105 advisory committee's note. Evidence Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the

jury, or by considerations of undue delay, or needless presentation of cumulative evidence."

Here Texas law enforcement officers told Trooper Sego that the package's return address was nonexistent. Sego testified at trial to the information he was provided by Texas authorities. If the communications from Texas were offered to prove that the package's return address in fact did not exist, then they would have constituted inadmissible hearsay. The State, however, purported to offer the evidence for an alternative purpose. The State claimed that the information relayed from Texas explained the course of Sego's subsequent investigation. The evidence thus had both impermissible and ostensibly permissible uses, and the trial court had discretion to balance the evidence's probative value against its prejudicial effect pursuant to Rule 403. Perez notes that the evidence was prejudicial because a false return address made it "more likely that [he] knew the tool box contained marijuana." Appellant's Br. p. 14. The State responds that the "purpose of Sego's testimony was to illustrate where the trail of his investigation ended." Appellee's Br. p. 10. We agree with Perez that the prejudicial effect of the hearsay testimony outweighed its probative value. The manner in which Trooper Sego's investigation concluded was of no relevance to the issues in the case. We therefore find that the trial court erred by admitting the hearsay testimony.

That being said, even if an evidentiary decision is an abuse of discretion, we will not reverse if the ruling constituted harmless error. *Brown v. State*, 911 N.E.2d 668, 672 (Ind. Ct. App. 2009). An error is harmless if it is sufficiently minor so as not to affect the substantial rights of the parties. Ind. Trial Rule 61; *Farmer v. State*, 908 N.E.2d 1192,

1199 (Ind. Ct. App. 2009). In light of the totality of the evidence supporting the trial court's judgment, we conclude that admission of Sego's hearsay testimony constituted harmless error.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.