Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

FILED
Nov 10 2009, 9:41 am
CLERK
of the supreme court, court of appeals and tax court

ATTORNEY FOR APPELLANT:

MARIELENA DUERRING
South Bend, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

IAN McLEAN
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

D.F.,	)	
	)	
Appellant/Defendant,	)	
	)	
vs.	)	No. 71A03-0906-CR-262
	)	
STATE OF INDIANA,	)	
	)	
Appellee/Plaintiff.	)	

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John Marnocha, Judge
Cause Nos. 71D02-0714-FD-67; 71D03-9710-CF-466; 71D04-9512-CF-576

November 10, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Defendant D.F. appeals from his conviction for Class D felony Cocaine Possession. We affirm.

FACTS AND PROCEDURAL HISTORY

As of approximately 7:45 p.m. on January 14, 2007, South Bend Police Officer Jason King had been watching a blue PT Cruiser that he did not recognize "circling around the area a few hours before that." Tr. p. 110. Officer King noticed at one point that the PT Cruiser stopped for an extended period of time at a stop sign when there was no cross-traffic to prevent its crossing the intersection. When Officer King approached in his police car, the PT Cruiser proceeded through the intersection but soon made a right-hand turn without signaling.

Officer King stopped the PT Cruiser and, as he approached, could see three passengers, all of whom were "moving around." Tr. p. 141. D.F. was in the front passenger seat, Tomala Waddell was driving, and Danelle Brumley was in the back seat. Officer King approached the PT Cruiser, which D.F. said he had rented, and determined that Waddell did not have a valid driver's license. After the occupants exited the PT Cruiser at Officer King's request, he searched it. Officer King immediately noticed a small book "shoved" in between the front passenger seat (where D.F. had been sitting) and the center console, lower than the level of the seat but still clearly visible without moving the seat. Officer King saw what he believed to be crack cocaine resting on top of the book, and the substance was later determined to be 0.17 grams of cocaine base. Neither Waddell nor Brumley, to whom D.F. had offered rides earlier that evening, possessed any cocaine when she was picked up.

On January 16, 2007, in cause number 71D02-0714-FD-67 ("Cause No. 67") the State charged D.F. with Class D felony cocaine possession. At some point in 2007, the State filed petitions to revoke D.F.'s probation in cause numbers 71D03-9710-CF-466 ("Cause No. 466") and 71D04-9512-CF-576 ("Cause No. 576") apparently based on the alleged cocaine possession that formed the basis of his charges in Cause No. 67. On March 6, 2009, a jury found D.F. guilty as charged in Cause No. 67. On March 27, 2009, the trial court sentenced D.F. to three years of incarceration in Cause 67, ordered his probation revoked in Cause No. 466 and imposed a five-year sentence, and ordered his probation revoked in Cause No. 576 and imposed a four-year sentence, all sentences to be served consecutively for an aggregate sentence of twelve years.

DISCUSSION AND DECISION

D.F. contends that the State produced insufficient evidence to sustain his conviction for cocaine possession.[1] Our standard of review for challenges to the sufficiency of the evidence supporting a criminal conviction is well-settled:

> In reviewing a sufficiency of the evidence claim, the Court neither reweighs the evidence nor assesses the credibility of the witnesses. We look to the evidence most favorable to the verdict and reasonable inferences drawn therefrom. We will affirm the conviction if there is probative evidence from which a reasonable jury could have found Defendant guilty beyond a reasonable doubt.

[1] Although D.F. does not specifically challenge the revocation of his probations in Cause Nos. 466 and 576, his appeals from those revocations were consolidated with his appeal from his conviction in Cause No. 67 by order of this court on August 6, 2009. Had we concluded that we must reverse D.F.'s conviction for cocaine possession, we would have then had to consider whether his argument was sufficient to allow us to reverse his probation revocations as well. Our affirmance of D.F.'s conviction, however, renders the question moot.

Vitek v. State, 750 N.E.2d 346, 352 (Ind. 2001) (citations omitted). "[C]onviction for possessory offenses does not depend on the accused being 'caught red-handed' in the act by the police." *See Wilburn v. State*, 442 N.E.2d 1098, 1101 (Ind. 1982).

> A defendant is in the constructive possession of drugs when the State shows that the defendant has both (i) the intent to maintain dominion and control over the drugs and (ii) the capability to maintain dominion and control over the drugs. *Lampkins v. State*, 682 N.E.2d 1268, 1275 (Ind. 1997), *on reh'g*, 685 N.E.2d 698 (Ind. 1997). The proof of a possessory interest in the premises on which illegal drugs are found is adequate to show the capability to maintain dominion and control over the items in question. *Davenport v. State*, 464 N.E.2d 1302, 1307 (Ind. 1984). In essence the law infers that the party in possession of the premises is capable of exercising dominion and control over all items on the premises. *See id.*; *Martin v. State*, 175 Ind. App. 503, 372 N.E.2d 1194, 1197 (1978) ("[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 drugs discovered therein, whether he is the owner, tenant, or merely an invitee."). And this is so whether possession of the premises is exclusive or not.
>
> However, the law takes a different view when applying the intent prong of constructive possession. When a defendant's possession of the premises on which drugs are found is not exclusive, then the inference of intent to maintain dominion and control over the drugs "must be supported by additional circumstances pointing to the defendant's knowledge of the nature of the controlled substances and their presence." *Lampkins*, 682 N.E.2d at 1275. The "additional circumstances" have been shown by various means: (1) incriminating statements made by the defendant, (2) attempted flight or furtive gestures, (3) location of substances like drugs in settings that suggest manufacturing, (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. *Henderson v. State*, 715 N.E.2d 833, 836 (Ind. 1999).

Gee v. State, 810 N.E.2d 338, 340-41 (Ind. 2004).

Here, D.F. told police that he had rented the PT Cruiser in question, thereby establishing a possessory interest and therefore his capability to maintain dominion and

control over the drugs found within. Moreover, we conclude that several circumstances establish D.F.'s intent to maintain dominion and control over the cocaine. First, the cocaine was found within inches of D.F., on top of a book "shoved" into the space between his seat and the center console of the PT Cruiser. Second, the book and cocaine were readily visible to the police without having to move the passenger seat and would have been so to D.F. but likely not to the other two occupants of the PT Cruiser. Third, Officer King observed all three occupants of the PT Cruiser "moving around" after he stopped it, allowing a reasonable inference that D.F. was attempting to conceal the book and cocaine base. Finally, both Waddell and Brumley testified that they did not have any cocaine when D.F. picked them up, allowing an inference that D.F. was the person who had brought the cocaine into the PT Cruiser. As we recently noted, we are "far more likely to find sufficient evidence where evidence suggests that a vehicle's passenger could see the [contraband], was in the best position to access the [contraband], and no evidence clearly indicates the [contraband] belonged to or was under the control of another occupant of the vehicle." *Deshazier v. State*, 877 N.E.2d 200, 208 (Ind. Ct. App. 2007), *trans. denied*. This is one of those cases. In short, the evidence established that D.F. could likely see the cocaine and was in the best position to access it, and there is no evidence that it belonged to or was controlled by the other occupants. As such, we conclude that the State produced sufficient evidence to sustain D.F.'s conviction for cocaine possession in Cause No. 67.

We affirm the judgment of the trial court.

BAILEY, J., and VAIDIK, J., concur.