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IN THE
COURT OF APPEALS OF INDIANA

JABBAR L. DAVIS,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 82A01-0905-CR-257
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable Carl A. Heldt, Judge
The Honorable Kelli E. Fink, Magistrate
Cause No. 82C01-0810-FC-1092

November 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Jabbar L. Davis ("Davis") appeals his conviction for Dealing in Marijuana, as a Class C felony.[1] We affirm.

Issues

Davis presents three issues for review:

I. Whether there is sufficient evidence to support his conviction;
II. Whether the trial court abused its discretion by allowing a belatedly disclosed fingerprint expert to testify; and
III. Whether the trial court abused its discretion by admitting evidence obtained in a vehicle search conducted in violation of Davis's Fourth Amendment rights.

Facts and Procedural History

On October 8, 2008, Sergeant David Eads of the Vanderburgh County Sheriff's Department ("Sergeant Eads") initiated a traffic stop of a Chevy Tahoe that was speeding. Sergeant Eads spoke with the driver, Adra Armstead ("Armstead"), and requested his driver's license and registration. Meanwhile, Sergeant Eads detected an odor of raw marijuana emanating from inside the vehicle. Sergeant Eads asked Armstead to step outside the vehicle and requested permission to search it. Armstead stepped outside the vehicle but denied Sergeant Eads permission to search it.

Officer Wayne Hunt ("Officer Hunt") arrived momentarily, and requested that Davis, who was seated in the front passenger seat, exit the vehicle. Officer John Evans ("Officer Evans") and his canine partner, Sundantile ("Sunny"), arrived within three or four minutes of

[1] Ind. Code § 35-48-4-10(a)(2)(C) - (b)(2).

the initial stop. At Sergeant Eads' request, Officer Evans took Sunny around the vehicle. Sunny alerted to the presence of drugs. After the alert, the officers searched the Tahoe. Inside, they located a red suitcase sitting between the second and third rows of seats. Inside the suitcase were two plastic bags containing approximately eleven pounds of marijuana.

On October 13, 2008, Davis was charged with Dealing in Marijuana. On March 10, 2009, a jury found him guilty as charged. Davis was sentenced to five years imprisonment, with the sentence to run consecutively to sentences in two other cases. This appeal ensued.

Discussion and Decision

I. Sufficiency of the Evidence

A. Standard of Review

Our supreme court has recently summarized our standard of review when assessing claims of insufficient evidence:

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted) (emphasis in original).

B. Analysis

The State alleged that Davis committed Dealing in Marijuana as a Class C felony when he "did knowingly possess with the intent to deliver marijuana in an amount greater than 10 pounds." App. 13. See Ind. Code § 35-48-4-10. Davis claims that the State failed to establish that he possessed the marijuana retrieved from the vehicle in which he was merely a passenger.

A conviction for possession of contraband may rest upon either actual possession or constructive possession. Goodner v. State, 685 N.E.2d 1058, 1061 (Ind. 1997). Actual possession of contraband occurs when a person has direct physical control over the item. Gee v. State, 810 N.E.2d 338, 340 (Ind. 2004). In this case, the marijuana was not found on Davis's person, and the State did not allege that he was in actual possession of it. Rather, the State prosecuted its case against Davis under a theory of constructive possession.

In order to prove constructive possession of contraband, the State must prove that the defendant has both the intent and capability to maintain dominion and control over the contraband. Id. In cases where the defendant had exclusive possession of the premises on which contraband was found, an inference is permitted that the defendant knew of the presence of contraband and was capable of controlling it. Holmes v. State, 785 N.E.2d 658, 661 (Ind. Ct. App. 2003). However, when possession of the premises is non-exclusive, the inference is not permitted absent some additional circumstances indicating knowledge of the contraband and the ability to control it. Id.

Proof of dominion and control of contraband has been found through a variety of means, including (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. Henderson v. State, 715 N.E.2d 833, 836 (Ind. 1999).

Here, there is evidence regarding an additional circumstance pointing to Davis's knowledge of the presence of the marijuana, specifically, its pungent odor. Sergeant Eads testified that the odor of raw marijuana was detectable as he stood beside the driver's side door. After he entered the vehicle to search, Sergeant Eads determined that the odor of marijuana was "much stronger inside." (Tr. 31.) Likewise, Officer Hunt and Officer Evans were readily able to detect the odor of marijuana emanating from the Tahoe. Officer Evans testified that, when he approached the Tahoe, he noticed an "overwhelming odor of raw marijuana coming from the vehicle." (Tr. 91-2.) Officer Hunt testified that, upon approach, he "could smell the odor of raw marijuana." (Tr. 117.) The jury could reasonably infer that the marijuana odor was likewise readily detectable by Davis and thus he knew the marijuana was present.

To establish that the defendant was capable of maintaining dominion and control, the State must demonstrate that he was able to reduce the contraband to his personal possession. Holmes v. State, 785 N.E.2d 658, 661 (Ind. Ct. App. 2003). Possession of contraband need not be exclusive; it can be possessed jointly. Iddings v. State, 772 N.E.2d 1006, 1015 (Ind.

Ct. App. 2002), trans. denied. Here, the State presented evidence that the suitcase of marijuana was sitting on the floor between the seats in the interior of the vehicle in which Davis was a passenger. Thus, the factfinder could infer that Davis was capable of reducing it to his possession and exerting control over it.

The evidence is sufficient to show that Davis had the intent and capability to maintain dominion and control over the marijuana. Accordingly, the State established Davis's constructive possession of the marijuana.

II. Testimony by Fingerprint Expert

At the conclusion of testimony by the State's forensic scientist regarding the testing and weighing of the marijuana, a juror propounded the question, "is he the same guy that would check for fingerprints" and the witness answered in the negative. (Tr. 87.) Thereafter, the State sought to call as a surprise witness Detective Tony Walker ("Detective Walker"), whose duties include processing and comparison of fingerprints for the City of Evansville Crime Scene Unit.

Davis's counsel objected that her "very brief opportunity" to speak with Detective Walker was inadequate to prepare for his testimony; however, counsel did not request a continuance. (Tr. 129.) Counsel moved to exclude Detective Walker as a witness, which motion the trial court denied. The trial court issued an order limiting the State to inquiring of Detective Walker whether he could or could not obtain a fingerprint from a plastic baggie.

Detective Walker testified that he did not attempt to retrieve fingerprints from the baggies or suitcase. He opined that lifting a fingerprint suitable for comparison would not

have been impossible, but would have been difficult. Without a contemporaneous objection from Davis, Detective Walker continued on, testifying in some detail about the factors contributing to the ability to lift identifiable fingerprints.

On appeal, Davis claims that he was subjected to undue prejudice and that "the trial court's solution is tantamount to pre-trial denial of a motion to depose an opposing party's expert." Appellant's Brief at 12. However, Davis did not move for a continuance in order to depose Detective Walker. He may not now predicate error upon the alleged denial, having failed to present the trial court with the opportunity to remedy the situation that he now deems prejudicial. See Purifoy v. State, 821 N.E.2d 409, 412 (Ind. Ct. App. 2005) (observing that a party may not sit idly by and appear to assent to an offer of evidence or ruling by the court only to cry foul after an unfavorable outcome), trans. denied.

The trial court action that Davis actually requested is that of witness exclusion. Trial courts have discretion to exclude a belatedly disclosed witness when there is evidence of bad faith or a showing of substantial prejudice. Farris v. State, 818 N.E.2d 63, 68 (Ind. Ct. App. 2004), trans. denied. Here, Davis has not alleged bad faith on the part of the State in the late addition of a witness; indeed, the parties agree that Detective Walker was called as a witness in response to a juror inquiry. Detective Walker then offered limited testimony not concerning the elements of the charged crime, but dealing with a collateral matter of evidence collection procedures. Davis has not established that the trial court erred by allowing Detective Walker's abbreviated testimony.

III. Admission of Evidence Obtained in Vehicle Search

Finally, Davis argues that the trial court erroneously admitted evidence obtained in violation of his rights under the Fourth Amendment to the United States Constitution.[2] Our standard of review for rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by an objection at trial. Ackerman v. State, 774 N.E.2d 970, 974-75 (Ind. Ct. App. 2002), trans. denied. The determination of reasonable suspicion and probable cause requires de novo review on appeal; however, a trial court's determination of historical facts is entitled to deference. Myers v. State, 839 N.E.2d 1146, 1150 (Ind. 2005). We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. Collins v. State, 822 N.E.2d 214, 218 (Ind. Ct. App. 2005), trans. denied. We also consider uncontroverted evidence in the defendant's favor. Id.

Davis challenges the admission of all of the evidence regarding his possession of marijuana. He claims that the officers' purported detection of the smell of raw marijuana did not amount to reasonable suspicion for an investigatory stop, or Terry[3] stop, because the officers lacked "formal training regarding the detection of raw marijuana by odor or in distinguishing it from other substances." Appellant's Brief at 12. According to Davis,

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[2] The Fourth Amendment provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV.

[3] See Terry v. Ohio, 392 U.S. 1, 30 (1968) (holding that a police officer may, without a warrant or probable cause, briefly detain a person for investigatory purposes if, based on specific and articulable facts, the officer has a reasonable suspicion of criminal activity.).

"without the Terry stop, there would be no canine sweep, [and] there would be no probable cause to search." Appellant's Brief at 15.

However, Davis fails to acknowledge Sergeant Eads' uncontroverted testimony that he stopped the Tahoe for speeding. Davis has not challenged this traffic stop. Rather, he begins his challenge at the point in time when Sergeant Eads detected a smell, after the concededly lawful traffic stop had been initiated and Sergeant Eads had approached the Tahoe. Moreover, Davis has not challenged the State's contention that the canine officer arrived within minutes and conducted the canine sweep without prolonging the traffic stop.

At the commencement of the traffic stop, Sergeant Eads and Officer Hunt each detected a smell prompting the request for a canine sweep. "[A] canine sweep of the exterior of a vehicle does not intrude upon a Fourth Amendment privacy interest." Myers, 839 N.E.2d at 1149. As our supreme court noted in Myers:

> The use of narcotics sniffing dogs by police has recently been addressed by the United States Supreme Court. Deciding "[w]hether the Fourth Amendment requires a reasonable, articulable suspicion to justify using a drug-detention dog to sniff a vehicle during a legitimate traffic stop," the Court declared that the use of a narcotics-detection dog "generally does not implicate legitimate privacy interests." Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 837, 838, 160 L.Ed.2d 842, 846-47 (2005). It reasoned that "[o]fficial conduct that does not compromise any legitimate interest in privacy is not a search subject to the Fourth Amendment," that "government conduct that only reveals the possession of contraband compromises no legitimate privacy interests," and that "the expectation that certain facts will not come to the attention of the authorities is not the same as an interest in privacy that society is prepared to consider reasonable." Caballes, 125 S.Ct. at 837-38, 160 L.Ed.2d at 847 (included quotations omitted). The Court held that "conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner...." Caballes, 125 S.Ct. at 837-38, 160 L.Ed.2d at 848. The Court did note, however, that a "seizure that is justified solely by the interest in issuing a warning ticket to the driver can

> become unlawful if it if prolonged beyond the time reasonably required to complete that mission." Caballes, 125 S.Ct. at 837, 160 L.Ed.2d at 846.

Myers, 839 N.E.2d at 1149.

Here, the record indicates that the Tahoe was stopped for a speeding violation. Officer Evans and Sunny arrived within three to four minutes after the initial stop, and Davis has made no claim that the canine sniff prolonged his detention by police. The dog then alerted to the presence of drugs. Davis does not argue that probable cause for the search was lacking in light of the perceptions of three police officers and one trained dog.[4]

Davis has not shown that he was detained without reasonable suspicion or that the Tahoe was searched without probable cause. As such, Davis has not shown evidence was procured in violation of his Fourth Amendment rights and then erroneously admitted at trial.

Conclusion

Davis has not demonstrated error in the trial court's evidentiary rulings. Sufficient evidence supports his conviction.

Affirmed.

VAIDIK, J., and BRADFORD, J., concur.

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[4] See Neuhoff v. State, 708 N.E.2d 889, 891 (Ind. Ct. App. 1999) (observing that "the alert of a trained dog can provide probable cause necessary to obtain a search warrant.")