

IN THE COURT OF APPEALS OF IOWA

No. 0-387 / 09-1247
Filed July 14, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CHARLES THOMAS LEISS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Charles Thomas Leiss appeals his convictions and sentences for possession of a simulated controlled substance with the intent to deliver and failure to affix a drug tax stamp. **CONVICTIONS AFFIRMED; SENTENCE AND NUNC PRO TUNC ORDER VACATED; REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and David Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean Pettinger, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Walz, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ. Tabor, J., takes no part.

MANSFIELD, J.

Charles Thomas Leiss appeals from the judgment and sentence entered upon jury verdicts finding him guilty of possession of a simulated controlled substance with intent to deliver and failure to affix a drug tax stamp. See Iowa Code §§ 124.401(1)(c), 453B.12 (2009). Leiss challenges the sufficiency of the evidence to show he possessed the substance or had an intent to deliver. He also appeals the district court's use of a nunc pro tunc order to amend his sentence. Upon our review, we affirm his convictions, but vacate the sentence and remand for resentencing.

I. Background Facts and Proceedings.

The trial evidence revealed the following facts. At approximately 11:00 p.m. on April 15, 2009, Edward Brown stopped by a property he owned at 720 Newton Street in Waterloo. Although he had rented out the house on the property to Jason Reynolds, Brown kept equipment for his business in the garage and visited the property almost daily.

When Brown arrived, he saw a person through a window in the house whom he did not recognize. This raised a concern for Brown, because he had spoken to Reynolds earlier in the day and knew that Reynolds was going to be working late at his family farm. Brown attempted to reach Reynolds by phone, but was unsuccessful. Brown then continued to the rear of the house where he saw that a basement window had been "busted out." At that point, Brown called the police.

Officers Nathan Watson, Dustin Yates, and Randy Girsch responded to Brown's call. When they arrived, the man within the home saw Officers Watson

and Yates approaching and met them at the front door. The man identified himself as Leiss. Officer Watson informed Leiss why they were there and directed him to take a seat on the couch in the living room. When Officer Watson asked Leiss why he was at the residence, Leiss said he had permission to be there to do some laundry. There was a basket of folded laundry on the couch.

Leiss was also asked if he had any other possessions in the residence, to which he responded that he had a backpack. The backpack was situated on the floor within arm's reach of Leiss on the couch. As Leiss was answering Officer Watson's questions, Officer Yates noticed Leiss use his right arm to "casually just kind of push[] this black bag—just kind of push it away."

While Officers Watson and Yates spoke with Leiss, Officer Girsch proceeded to the backyard where he met with Brown, the landlord. Brown unlocked the back door, and they proceeded inside to the kitchen which opened into the living room. When they entered the residence, Officer Girsch saw a cake cooling on the counter.

Eventually, efforts to reach Reynolds, the tenant, were successful. Reynolds informed the officers that Leiss did not have his permission to be within the residence. At that point, Leiss was placed under arrest. Thereupon, Leiss told the officers (contrary to his earlier statement) that the backpack did not belong to him. When the backpack was lifted up, four small clear plastic bags containing a white powdery substance were discovered underneath. None of the bags had any Iowa drug tax stamps attached. The backpack was also searched and found to contain some clothing items, a tenancy application with Leiss's name on it, and some toiletries.

Leiss was transported to the Waterloo police station, where he was given *Miranda* warnings and interviewed by Officer Girsch. In the interview, Leiss returned to his prior admission that the backpack belonged to him, and stated that “it was his natural instinct to cover [the plastic bags] up when the officers came.” When asked about the substance within the plastic bags, Leiss said it was “some sort of baking substance.” According to Leiss, he watched Reynolds fill “the [plastic bags] up with baking soda or powdered sugar.” Leiss said that Reynolds had given him the plastic bags because he was “trying to recruit him [Leiss] to sell drugs.” Leiss described Reynolds as “a kingpin drug dealer.” Later in the interrogation, Leiss denied the plastic bags were his, despite his admission that Reynolds had given them to him.

Initially, the State charged Leiss by trial information with possession of a controlled substance with the intent to deliver and a drug tax stamp violation.¹ Both charges sought the enhanced sentencing provisions available under sections 902.8 and 902.9 (habitual offender).

However, the day before trial, test results on the contents for the plastic bags were returned, confirming they were not controlled substances. Therefore, the State amended the trial information charging Leiss with possession of a simulated controlled substance with the intent to deliver.

At trial, Officers Watson, Yates, and Girsch testified to the events on the evening of April 15. A DCI criminalist testified that the plastic bags weighed 4.61

¹ Prior to trial, Leiss also was charged with and pled guilty to criminal trespass and fifth-degree criminal mischief. Those convictions are not at issue in the present appeal.

grams, 4.22 grams, 4.17 grams and 3.59 grams respectively, and that none of them contained any controlled substances.

The State also offered testimony from the landlord, Brown, and the tenant, Reynolds. Reynolds testified he had met Leiss about six months before the night in question when they both worked as truck drivers. Reynolds stated that when he returned home late at night on April 14, Leiss was inside his home. Reynolds had not let him in and did not know how he got there, but did allow Leiss to stay and sleep on the couch in his living room. On the morning of April 15, Reynolds dropped Leiss off before heading out to his family farm. Reynolds did not give Leiss permission to return to his home that evening. Reynolds also denied having anything to do with the plastic bags of powder. Additionally, Reynolds identified the backpack as Leiss's, and said he carried it "all the time."

Officer Kyle Richter of the drug enforcement task force also testified for the State. Officer Richter explained that at the street level drug dealers sell "eight balls," which usually weigh approximately 3.5 grams. He further testified that when drug dealers are selling "bunk" or fake drugs, they do not measure the weight precisely and tend to put in more than 3.5 grams so "it will be more appealing to the customer." Officer Richter stated that the substance found within the four bags in this case had a similar appearance and consistency to cocaine and would be "exactly what I would see out on the street." Officer Richter also stated the packaging, appearance, and weight of the substance were consistent with trafficking rather than personal use.

On July 24, 2009, the jury returned guilty verdicts on both the possession with intent to deliver a simulated controlled substance count and the failure to

affix drug stamp count. Leiss admitted to being a habitual offender for the purposes of the enhanced penalty. On August 17, 2009, Leiss was sentenced to incarceration for fifteen years on each charge with a mandatory minimum of three years. The two sentences were ordered to run concurrently. On August 31, 2009, the State filed a motion for an order nunc pro tunc requesting the sentencing order be amended to give Leiss a mandatory minimum of five years. The district court granted the State's motion on September 24, 2009. Leiss now appeals, challenging both the sufficiency of the evidence to convict him and the nunc pro tunc order modifying his sentence.

II. Sufficiency of the Evidence.

A. Scope and Standard of Review.

Leiss argues he should not have been convicted of either charge because there is insufficient evidence that he either possessed or intended to deliver the simulated cocaine. We review challenges to the sufficiency of the evidence for correction of errors at law and will uphold the jury's verdict if supported by substantial evidence. *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006). Evidence is substantial if it "can convince a rational jury that the defendant is guilty beyond a reasonable doubt." *Id.* We review the evidence in the light most favorable to the State, including all legitimate inferences and presumptions that may fairly and reasonably be deduced from the record. *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002). However, the inferences drawn must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture. *Id.*

B. Possession

Because the simulated cocaine was not found on Leiss's person, the State had to prove Leiss had constructive possession of it. "Constructive possession occurs when the defendant has knowledge of the presence of the controlled substance and has the authority or right to maintain control of it." *State v. Bash*, 670 N.W.2d 135, 138 (Iowa 2003).

When a person has not been in exclusive possession of the premises where the contraband was found, several factors are considered to determine whether the person had constructive possession of the substance. *State v. Maxwell*, 743 N.W.2d 185, 194 (Iowa 2008). These factors include:

- (1) incriminating statements made by the person;
- (2) incriminating actions of the person upon the police's discovery of a controlled substance among or near the person's personal belongings;
- (3) the person's fingerprints on the packages containing the controlled substance; and
- (4) any other circumstances linking the person to the controlled substances.

Id. (citing *Webb*, 648 N.W.2d at 79). However, these factors merely act as a guide. *State v. Carter*, 696 N.W.2d 31, 39 (Iowa 2005). Even if some factors are present, we are still required to determine whether all of the facts and circumstances create a reasonable inference that the person knew of the presence of the substance and had control and dominion over it. *Id.* at 39-40.

After viewing the evidence in the light most favorable to the State, we conclude it is sufficient to support a finding that Leiss possessed the simulated cocaine. Although the residence where the baggies were found was not Leiss's, he was the only person present when they were found, and they were retrieved

underneath his backpack. In addition, when the officers were questioning him he apparently pushed his backpack to cover them up, showing knowledge of their presence. Leiss also made several incriminating statements, including that Reynolds gave him the substance in an effort to recruit him to sell drugs, and that he knew the substance was not cocaine but some sort of baking substance.

C. Intent

Because intent is difficult to prove by direct evidence, proof of intent usually consists of circumstantial evidence and the inferences that can be drawn therefrom. *State v. Grant*, 722 N.W.2d 645, 647-48 (Iowa 2006). Intent may be inferred from the manner of packaging the drugs, from large amounts of unexplained cash, and from the quantity of drugs possessed. *Id.* at 648. The supreme court has also recognized that “opinion testimony by law enforcement personnel experienced in the area of buying and selling drugs may be offered as evidence for purposes of aiding the trier of fact in determining intent.” *Id.*

In this case, the substance had an appearance similar to cocaine and was packaged in four individual plastic bags that weighed near what an “eight ball” would weigh. Officer Ritcher testified that the packaging and appearance matched “exactly what I would see out on the street,” and that it was “consistent with intending to traffic it and not use it.” Further, Leiss told the police that Reynolds had recruited him to sell the packages. There was sufficient evidence to establish an intent to deliver.²

² Leiss argues more proof should be required to establish intent to deliver than just packaging and amount when the substance is not genuine. Regardless of the abstract merits of this argument, we find the combination of the plastic bags themselves,

III. Sentencing.

Leiss also argues that the district court erred by entering an order nunc pro tunc to increase his mandatory minimum sentence from three to five years. Although the State requested nunc pro tunc relief below, the State now agrees an order nunc pro tunc was not the proper means of amending the sentence originally imposed. See *State v. Johnson*, 744 N.W.2d 646, 648-49 (Iowa 2008) (nunc pro tunc orders are used to correct clerical errors or to conform the order to the original intent, not to correct legal mistakes). However, this does not mean the district court lacked any authority to modify Leiss's sentence: An illegal sentence may be corrected at any time and should be vacated where necessary. See Iowa R. Crim. P. 2.24(5)(a) ("The court may correct an illegal sentence at any time."); *State v. Suchanek*, 326 N.W.2d 263, 265 (Iowa 1982) ("[T]he imposition of a sentence that is not permitted by statute is an illegal sentence, and such sentence is void and must be vacated."). In this case, the original sentence was illegal because it established a mandatory minimum that was one-fifth of the fifteen-year maximum sentence prescribed by law, see Iowa Code § 902.9(3) (fifteen-year maximum for habitual offender), whereas Iowa Code section 124.413(1) required a minimum sentence of one-third the maximum. Accordingly, we vacate Leiss's sentence and remand for resentencing.

IV. Conclusion

We conclude sufficient evidence supports Leiss's convictions for possession of a simulated controlled substance with intent to deliver and failure

Officer Ritcher's expert testimony, and Leiss's admissions to the police constitute sufficient evidence that Leiss intended to distribute the counterfeit substance here.

to affix a drug tax stamp. However, since the nunc pro tunc order was improper, we vacate Leiss's sentence and remand to the district court for resentencing.

CONVICTIONS AFFIRMED; SENTENCE AND NUNC PRO TUNC ORDER VACATED; REMANDED FOR RESENTENCING.