**IN THE COURT OF APPEALS OF IOWA**

No. 1-077 / 10-0432
Filed March 30, 2011

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**JOHN FITZGERALD SYKES,**
Defendant-Appellant.

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

A defendant appeals his judgment and sentence for possession of marijuana with intent to distribute, contending that counsel was ineffective for failing to properly challenge the sufficiency of the evidence to support the charge. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brook Jacobsen, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

**VAITHESWARAN, P.J.**

John Fitzgerald Sykes appeals his judgment and sentence for possession of marijuana with intent to distribute. He contends his trial attorney was ineffective in failing to properly challenge the sufficiency of the evidence supporting the finding of guilt.

## *I. Background Facts and Proceedings*

Early one morning, a Waterloo police officer on routine patrol noticed a vehicle slowly passing through a previously drug-ridden block of Waterloo. The officer stopped the vehicle for an equipment violation. As he made the stop, he noticed the front seat passenger shift in his seat, reach underneath him, and bend over slightly. The officer identified the passenger as Sykes.

The officer removed Sykes from the vehicle and patted him down. He felt what he thought was narcotics packaging in Sykes's back pocket. As Sykes pulled his wallet out of that pocket, a baggie also came out. Sykes quickly stuffed the baggie back in. Later, the officer retrieved several empty baggies from that pocket.

Meanwhile, the driver consented to a search of the vehicle, which uncovered four bags of marijuana totaling 26.9 grams. The drugs were found underneath the front passenger floor mat.

The State charged Sykes with possession of marijuana with intent to deliver as a habitual offender. At the close of the State's evidence, Sykes's attorney made a general motion for judgment of acquittal, which the district court overruled. A jury subsequently found Sykes guilty. Sykes appealed following imposition of sentence.

## *II. Analysis*

Sykes contends his attorney was ineffective in failing to make a detailed challenge to the sufficiency of the evidence supporting the jury's finding of guilt. *See State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996) (analyzing a defendant's challenge to the sufficiency of the evidence under an ineffective-assistance-of-counsel rubric when a general motion for judgment of acquittal was inadequate to preserve error on the sufficiency of the evidence claim). "A claim of ineffective assistance of trial counsel based on the failure of counsel to raise a claim of insufficient evidence to support a conviction is a matter that normally can be decided on direct appeal." *State v. Truesdell*, 679 N.W.2d 611, 616 (Iowa 2004). If the record

> fails to reveal substantial evidence to support the convictions, counsel was ineffective for failing to properly raise the issue and prejudice resulted. On the other hand, if the record reveals substantial evidence, counsel's failure to raise the claim of error could not be prejudicial.

*Id*. Our review is de novo. *Id.* at 615.

The jury was instructed that the State would have to prove the following elements of possession with intent to deliver:

> 1. On or about the 8th day of September, 2009, the defendant knowingly possessed a controlled substance; Marijuana.
> 2. The defendant knew that the substance he possessed was a controlled substance; Marijuana.
> 3. The defendant possessed the substance with the intent to deliver.

*See* Iowa Code § 124.401(1)(d) (2009).

Sykes initially challenges the evidence supporting the possession element. He contends he did not have actual or constructive possession of the

drugs. *See State v. Cashen*, 666 N.W.2d 566, 569 (Iowa 2003) (distinguishing between actual and constructive possession). The State essentially concedes Sykes did not have actual possession but asserts a reasonable fact-finder could have found he constructively possessed the drugs.

Constructive possession exists "where the defendant has knowledge of the presence of the [contraband] 'and has the authority or right to maintain control of [it].'" *Id.* (quoting *State v. Maghee*, 573 N.W.2d 1, 10 (Iowa 1997)). The record shows both of these requirements for constructive possession were met.

Sykes was in a vehicle that was "slowly trolling" a neighborhood known for drug activity. Sykes made suspicious movements as the vehicle was stopped. When asked why he was carrying baggies in his back pocket, he responded they were for his lunch. No sandwiches were found in or around the baggies and the stop took place at 2:50 a.m., roughly nine hours before lunchtime. The marijuana was found underneath the front passenger floor mat. Sykes was in the front passenger seat.

These facts amount to substantial evidence of constructive possession. *See State v. Carter*, 696 N.W.2d 31, 40 (Iowa 2005) (finding constructive possession with intent to deliver based on furtive movements and other suspicious behavior, location of drugs, presence of baggie, and other narcotics arrests in area); *cf. Cashen*, 666 N.W.2d at 572 (declining to find constructive possession where defendant did not behave suspiciously and the car was "crammed with six passengers, four of whom were seated in the back seat" and all of whom had equal access to the drugs); *State v. Atkinson*, 620 N.W.2d 1, 2,

4–5 (Iowa 2000) (declining to find constructive possession by front seat passenger of fanny pack found under driver's seat notwithstanding observation of suspicious movements by passenger).

Sykes next takes issue with the "intent to deliver" element. In determining intent, a trier of fact may consider testimony by law enforcement personnel experienced in the area of buying and selling drugs. *State v. Grant*, 722 N.W.2d 645, 648 (Iowa 2006).

One of the officers testified that the large quantity of marijuana seized from the vehicle, the equivalent of sixty-four joints, was inconsistent with personal use. There was also evidence that the marijuana was packaged in four separate baggies, with varying quantities in each. The amount of the drug in one of the baggies was equivalent to a commonly-sold "nickel bag," and the amounts in two other baggies were equivalent to commonly-sold "quarter-ounce" bags. These facts amounted to substantial evidence of an intent to deliver.

As the record reveals substantial evidence to support the jury's finding of guilt, trial counsel was not ineffective in failing to make a more detailed challenge to the sufficiency of the evidence.

We affirm Sykes's judgment and sentence for possession of marijuana with intent to deliver.

**AFFIRMED.**