

**IN THE COURT OF APPEALS OF IOWA**

No. 1-264 / 10-1036  
Filed July 13, 2011

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

**vs.**

**DAVID ALLAN CALLISON,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Douglas F. Staskal,  
Judge.

Callison appeals his conviction and sentence for possession of  
methamphetamine. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant  
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney  
General, John P. Sarcone, County Attorney, and Stephen K. Bayens, Assistant  
County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes  
no part.

**SACKETT, C.J.**

Appellant, David Callison, appeals his conviction and sentence for possession of a controlled substance, third offense, to wit: methamphetamine, in violation of Iowa Code sections 124.401(5), 902.8, and 902.9(3) (2009). Callison claims the trial court erred in 1) denying his motion for a new trial on the basis of the weight of the evidence; 2) denying his motion for judgment of acquittal based on the sufficiency of the evidence; and 3) imposing an illegal sentence by not setting a proper limit on the amount of court-appointed attorney fees he had to pay in violation of *State v. Dudley*, 776 N.W.2d 606, 620–22 (Iowa 2009). For the reasons stated below, we affirm the decisions of the trial court.

**I. BACKGROUND AND PROCEEDINGS.** On July 16, 2009, officers with the Mid-Iowa Narcotics Enforcement Task Force, with the assistance of the Des Moines tactical team, executed a search warrant at the home of Kerry Roark. The tactical team entered the home first due to the concern the home's occupants may have weapons. After securing all six of the occupants in the living room with restraints, the narcotics team was allowed inside in order to conduct the search. When Deputies Griffiths and Burrows entered the home, they observed Callison kneeling next to a television set a few feet inside the front door with his hand secured behind his back. Callison was sweating profusely, had "pinpoint" pupils, and was mumbling and shaking his head.<sup>1</sup>

Deputy Burrows, as the agent in charge, first spoke with Kerry Roark in another room while Deputy Griffiths kept watch over the other occupants of the

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<sup>1</sup> Heavy sweating, small pupils and nervousness are all signs of methamphetamine intoxication.

living room. Deputy Griffiths located a wallet on top of the television set and opened it to discover the identification card of Callison. Tucked behind the card, Griffiths found two small baggies containing a white substance consistent with methamphetamine. Griffiths left the baggies in the wallet and later alerted Burrows to their presence. Burrows opened the wallet and removed the baggies. He gave them to the evidence custodian on scene who logged them into evidence and placed them in a sealed bag. This substance was later tested and found to be methamphetamine. The wallet was returned to Callison before he was taken to jail. Callison bonded out of jail the following day and signed for his wallet and identification card to be returned to him. Callison was in jail at a later date when he placed a call to his girlfriend. In that call Callison stated law enforcement officials removed his wallet from him during the execution of the search warrant.

A trial information was filed against Callison on August 17, 2009, charging him with possession of methamphetamine, third offense, and notice was given of the application of the habitual offender enhancement as Callison had at least two prior felony convictions. Trial commenced on May 17, 2010, and at the close of the State's case, Callison's attorney made a motion for a judgment of acquittal asserting the evidence was insufficient to support a conviction. This motion was denied by the district court and the following day the jury returned a guilty verdict on the possession charge. Callison stipulated to two or more controlled substance convictions, which enhanced the offense to a class "D" felony, and

stipulated to two or more felony convictions making him an habitual offender under Iowa Code sections 902.8 and 902.9(3).

Before sentencing, Callison filed a joint motion in arrest of judgment and a motion for new trial asserting the weight of the evidence did not support the jury verdict, because the evidence did not support a finding Callison possessed the methamphetamine due to a breach in the chain of custody. At sentencing on June 11, 2010, the court denied the motions. The court sentenced Callison to a term of incarceration not to exceed fifteen years with a minimum term of three years. Callison was also ordered to “pay restitution for attorney fees, to the extent defendant is reasonable able to do so, pursuant to Section 815.9.” A restitution plan was later filed on July 19, 2010, which listed the total costs due by Callison to be \$3339.89.

Callison appeals his conviction and sentence asserting the district court erred in denying his motion for a new trial based on the weight of the evidence and erred in finding sufficient evidence to support his conviction. He also asserts the district court imposed an illegal sentence when it required him to repay attorney fees without setting a limit on the amount.

**II. SCOPE OF REVIEW.** We review the district court’s decision on a motion for a new trial for an abuse of discretion. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). We review sufficiency-of-the-evidence claims for correction of errors at law and the verdict is binding on us on appeal if it is supported by substantial evidence. *State v. Nitchev*, 720 N.W.2d 547, 556 (Iowa

2006). Our review of a challenge to an illegal sentence is for correction of errors at law. *State v. Maxwell*, 743 N.W.2d 185, 190 (Iowa 2008).

**III. WEIGHT OF THE EVIDENCE.** Callison challenges the district court's decision denying his motion for a new trial on the basis of the weight of the evidence. Callison asserts there was a significant breach in the chain of custody because no one testified at trial to removing the wallet from him, and the wallet was placed on the television console in a very crowded room where there was the opportunity for commingling. Callison contends there was no testimony supporting a physical link between him and the bags found in the wallet.

In ruling on a motion for a new trial, the district court has broad discretion and our review is limited to "a review of the exercise of the trial court, not the underlying question of whether the verdict is against the weight of the evidence." *Reeves*, 670 N.W.2d at 203.

The granting of a new trial based on the conclusion that a verdict is against the weight of the evidence is reserved for those situations in which there is a reason to believe that critical evidence has been ignored in the fact-finding process.

*State v. Grant*, 722 N.W.2d 645, 648–49 (Iowa 2006). Only in cases where the evidence "preponderates heavily against the verdict" should the district court step in and grant a new trial. *Maxwell*, 743 N.W.2d at 193.

The evidence presented from both Deputy Griffiths and Burrows indicates the wallet contained the identification card of Callison and the baggies were tucked inside. While neither Griffiths nor Burrows knew precisely who removed the wallet from Callison, both concluded it was a member of the tactical team that went inside the house first to secure the house and occupants. Deputy Burrows

testified from the time the tactical team entered the house until he left the scene, there were never any periods of time where a member of law enforcement was not monitoring the detainees who were restrained. Callison himself acknowledged ownership of the wallet when he signed for its return upon his release from jail. He also admitted law enforcement officers took the wallet from him during the search in a taped phone conversation with his girlfriend. We find the district court did not abuse its discretion in denying the motion for a new trial based on the weight of the evidence. This is clearly not a case where the evidence preponderates heavily against the verdict.

**IV. SUFFICIENCY OF THE EVIDENCE.** Next Callison challenges the district court's denial of his motion for judgment of acquittal asserting the evidence was not sufficient to support his conviction. He asserts the evidence was insufficient to prove he knowingly possessed methamphetamine.

In reviewing evidence under a sufficiency challenge, we will uphold a verdict if it is supported by substantial evidence. *Nitcher*, 720 N.W.2d at 556. Evidence is substantial if it would convince a rational jury of the defendant's guilt beyond a reasonable doubt when the evidence is view in the light most favorable to the State. *Id.* We consider all evidence, not just inculpatory evidence. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000).

In this case the jury was instructed the State had to prove the following elements of the offense of possession of a controlled substance:

1. On or about July 16, 2009, the defendant knowingly possessed methamphetamine.

2. The defendant knew the substance possessed was methamphetamine.<sup>2</sup>

Callison challenges the first element, that he knowingly possessed methamphetamine. He asserts this was a constructive possession case as there was no evidence the methamphetamine was found on his person. We disagree.

There was evidence introduced from which the jury could conclude the methamphetamine was found on his person. As stated above, both Deputy Griffiths and Burrows testified they assumed the tactical team had removed Callison's wallet from him when they secured the scene. In addition, Callison confirmed this assumption in the recorded phone conversation when he stated the wallet was taken from him by a member of law enforcement. While there is a time gap between the removal of the wallet and the search of the wallet, we do not see how this makes the evidence of Callison's actual possession insubstantial. Deputy Burrows testified there were law enforcement officers monitoring the restrained detainees at all times. There is no evidence anyone other than Callison placed the methamphetamine in his wallet. We find the district court properly denied Callison's motion for judgment of acquittal.

**V. ATTORNEY FEES.** Finally, Callison asserts the court imposed an illegal sentence when it ordered him to pay attorney fees without setting a limit on the amount he had to pay. Callison claims this violates *Dudley*, 776 N.W.2d at 620–22, where the supreme court found acquitted defendants represented by contract attorneys cannot be ordered to pay more than the fee limitations

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<sup>2</sup> Because Callison does not assert the law in the jury instruction was incorrect, we will examine his claim based on the law the district court gave to the jury. *Nitcher*, 720 N.W.2d at 556.

applicable to defendants represented by public defenders. He asks this court to remand the case for a revised order limiting the amount of attorney fees he has to pay to a maximum of \$1200.<sup>3</sup>

The State asserts this claim is premature because we do not have a clear order from the district court requiring Callison to pay more than \$1200. The restitution plan called for Callison to pay \$3339.89 in costs which included the costs associated with the criminal action and also attorney fees. The State recommends we affirm the sentence because the breakdown of the costs is unclear on the record before us, and then allow Callison to file a petition for a restitution hearing on the question of the amount of attorney fees, if he so chooses. In the alternative, the State asserts we may modify the restitution plan to include the maximum amount Callison is required to pay in attorney fees or remand for the district court to do the same.

Based on the record currently before us, we find it is not possible for us to determine whether the restitution plan requires Callison to pay more than \$1200 in attorney fees. We therefore affirm the sentence imposed by the district court. If in the future it is determined Callison is required to pay more than \$1200 in attorney fees under the restitution plan, he may petition for a restitution hearing under Iowa Code section 910.7.

**AFFIRMED.**

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<sup>3</sup> Callison was charged with a class “D” felony. Under Iowa Administrative Code 493-12.6(1), the maximum that a defendant can be charged for attorney fees is \$1200.