

IN THE COURT OF APPEALS OF IOWA

No. 1-742 / 10-1798
Filed January 19, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSEPH KEITH PITTMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Patrick C. McCormick, Judge.

Joseph Pittman appeals his convictions for possession of marijuana and possession of drug paraphernalia. **CONVICTION REVERSED; SENTENCE AND NUNC PRO TUNC ORDER VACATED; REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Patrick Jennings, County Attorney, and Athena Ladeas, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Doyle and Mullins, JJ.

MULLINS, J.

In this consolidated appeal, Joseph Pittman appeals from the judgment and sentence entered upon a jury verdict finding him guilty of possession of marijuana, a serious misdemeanor, in violation of Iowa Code section 124.401(5) (2009), as well as the judgment and sentence entered by the district court after finding him guilty of possession of drug paraphernalia, a simple misdemeanor, in violation of Sioux City Municipal Code section 8.20.050. He was also found guilty of frequenting a disorderly house, a simple misdemeanor, in violation of Sioux City Municipal Code section 8.08.040, but did not appeal that conviction. Pittman argues the evidence is insufficient to support his possession of drug paraphernalia conviction, and in the alternative, the conviction was contrary to the weight of the evidence. Pittman further argues the district court erred in amending his possession of marijuana sentence by entry of a nunc pro tunc order. We find the evidence is not sufficient to support a finding that Pittman possessed drug paraphernalia. Because a nunc pro tunc order is not the proper method for correcting an illegal sentence, we vacate the order and sentence and remand for resentencing.

I. Background Facts and Proceedings.

Jury trial on the serious misdemeanor charge of possession of marijuana and bench trial on the simple misdemeanors were consolidated for trial. All the evidence was presented to the jury for its consideration on the possession of marijuana charge. The trial evidence revealed the following facts.

At around 5:45 p.m. on October 8, 2009, Detective Jason Braunschweig with several other officers and agencies were conducting a “gang suppression project.” As a part of this project, Detective Braunschweig and several other officers went to 1700 Court Street in Sioux City to perform a probation check on a gang member believed to be at that address. When they arrived, the officers discovered that the house had been turned into several apartments, and the officers were not sure which apartment the gang member actually lived in. Therefore, the officers decided to knock on all the doors and see if they could find which apartment the gang member was in.

Detective Braunschweig knocked on the door on the south side of the residence around towards the back. The door was answered by Aletha Hedlund. Aletha lived at the house with her mother, stepdad, and two older brothers, Michael and William Hedlund. When the door was opened, Detective Braunschweig testified that he immediately smelled the strong odor of marijuana. At this time, other officers were knocking at a different door to the residence, so Detective Braunschweig told Aletha to meet him at the other door.

When Detective Braunschweig arrived at the other door, he saw three males already speaking with the other officers. The males were Michael, William, and Michael’s friend Joseph Pittman. Detective Braunschweig testified Pittman was doing most of the speaking with the officers at the door, and that each of the males appeared to be somewhat guarded, very nervous, and speaking fast. Detective Braunschweig further testified that he observed the

three men to have bloodshot eyes and that he could smell a very strong odor of marijuana coming out from the doorway.

Detective Braunschweig testified that he requested the males have a seat in the first room to the house, which appeared to be a living room made into a makeshift bedroom. He then asked who was smoking the marijuana, and all three males indicated that they had. Detective Braunschweig then asked where the marijuana was. Detective Braunschweig testified that at this point, Pittman got up and took him to a back bedroom and showed him some large chunks of marijuana on a nightstand. Detective Braunschweig also observed a pop can marijuana pipe, a tin foil marijuana pipe, a wood marijuana pipe, a silver grinder, Top rolling papers, a Skunk magazine, and two burnt marijuana cigarette ends in an ashtray on the bed next to the nightstand. Pittman then pointed to the bedroom closet and informed Detective Braunschweig that they had been smoking marijuana in the closet trying to not let the smoke out. Detective Braunschweig testified he observed the closet to still have a little bit of haze, and that the bedroom had a really strong odor of marijuana.

Detective Braunschweig and Pittman then rejoined the others in the front room, and Detective Braunschweig requested a canine unit to come to the scene. Officer William Nice Jr. responded to the call with his canine. During Officer Nice's canine search of the apartment, another bag of marijuana was discovered in the closet where Pittman stated they were smoking the marijuana. The marijuana was on the first shelf tucked in between some cloths. When asked whose marijuana it was, no one claimed ownership.

After Officer Nice returned his canine to his vehicle, he performed an additional search of a computer desk in a middle room of the residence. Officer Nice testified that inside one of the desk cabinet drawers, he discovered a pack of cigarettes that contained a tin foil marijuana pipe and two smaller bags of marijuana.

Pittman, Michael, and William were placed under arrest. When Pittman was placed under arrest, he stated, "It's my marijuana." Detective Braunschweig testified Pittman may have been trying to take the fall for everybody.

Aletha testified that earlier in the day on October 9, 2009, she was walking home from a friend's house when she observed Pittman and Michael getting into a blue van. Aletha did not stop and talk, but continued walking home. When she got home, William was watching TV. About fifteen minutes later, Michael and Pittman returned home and went directly into Michael's room. Five minutes later, Aletha knocked on Michael's door to ask him a question. When the door was opened, Aletha observed Pittman pulling two big bags of marijuana out of a book bag. She then observed Pittman, who was sitting on the bed with Michael, begin to break up the larger bags of marijuana into smaller bags for reselling. Michael then rolled the left over amount into a blunt stick, which Pittman, Michael, and William smoked together. Aletha testified that she then got in the shower, and after about twenty minutes, William knocked on the bathroom door and told her she needed to answer the door. She further testified that Pittman and Michael admitted to the officers they had been smoking marijuana, and that Pittman showed the officers where the marijuana was. Aletha did not know if anything

was on the bed. Aletha testified everybody in the house smoked marijuana, but that she had never seen the grinder and wooden pipe before. Aletha also testified the marijuana in the desk cabinet drawer belonged to her stepdad's son.

Pittman testified he was with Michael walking when they got a ride from an acquaintance for a half-block to Michael's. When they got to Michael's, Aletha was already in the shower. Pittman then sat down in the living room while Michael went directly to his bedroom in the back. Two to three minutes later, the officers knocked at the back door and Aletha answered. Pittman stood up to see who was at the door, but when he got to the back door, the person was walking away and Aletha was heading to the front door. Pittman testified that Michael was still in the bedroom when the officers knocked at the front door. Pittman further stated that Michael did not come out into the living room until after the officers asked Pittman to have everyone in the residence come to the living room. Pittman then stated that the officers asked if any marijuana was in the house. Pittman testified he told the officer there was marijuana in the house and pointed it out to the officer because it was in plain sight in Michael's room from where he was sitting in the living room. Pittman testified that he did not see the drug paraphernalia on the bed. Pittman also testified that he admitted to the officers he does smoke marijuana, but denied smoking any marijuana on that day. Pittman testified that after he returned to the living room he asked what would happen if he admitted the marijuana was his.

Following the presentation of the above evidence, the jury returned a guilty verdict on the possession of marijuana charge. The following day, the

district court entered an order finding Pittman guilty on both the possession of drug paraphernalia and frequenting a disorderly house charges based upon the evidence heard during the jury trial.

Pittman filed a motion in arrest of judgment and a motion for new trial in both cases, arguing the State failed to present substantial evidence to warrant convictions, and the verdicts were contrary to the weight of the evidence. The district court denied the motions.

On the possession of marijuana charge, Pittman was sentenced to 270 days in jail as well as fines, surcharges, court-costs, reimbursement of court-appointed counsel, and loss of driving privileges. On the two simple misdemeanor counts, Pittman was sentenced to thirty days in jail to run concurrently with the sentence for the possession of marijuana as well as fees.

The following day, the district court entered a nunc pro tunc order in the possession of marijuana case, stating that the previous sentencing order improperly exceeded the maximum incarceration allowed by law, and that the jail term would be amended to 180 days. Pittman appeals.

II. Sufficiency of the Evidence.

Pittman only challenges the sufficiency of the evidence supporting his possession of drug paraphernalia conviction. We review challenges to the sufficiency of the evidence for correction of errors at law. *State v. Kemp*, 688 N.W.2d 785, 788 (Iowa 2004). Because the drug paraphernalia charge was tried to the court, the district court's findings of fact have the effect of a special verdict and are binding on appeal if supported by substantial evidence. Iowa R. App. P.

6.907; *State v. Hall*, 287 N.W.2d 564, 565 (Iowa 1980). Substantial evidence is evidence that would “convince a rational fact finder that the defendant is guilty beyond a reasonable doubt.” *Kemp*, 688 N.W.2d at 789. 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.*

Because the drug paraphernalia was not found on Pittman’s person, the State had to prove Pittman had constructive possession of it. “Constructive possession occurs when the defendant has knowledge of the presence of the [paraphernalia] and has the authority or right to maintain control of it.” *State v. Bash*, 670 N.W.2d 135, 138 (Iowa 2003). “The existence of constructive possession turns on the peculiar facts of each case.” *Webb*, 648 N.W.2d at 79.

When a person has not been in exclusive possession of the premises where the paraphernalia was found, several factors are considered to determine whether the person had constructive possession of the item. *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 [the paraphernalia] among or near the person’s personal belongings;
- (3) the person’s fingerprints on the [paraphernalia]; and
- (4) any other circumstances linking the person to the [paraphernalia].

Id. 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 paraphernalia and had control and dominion over it. *Id.* at 39-40.

The district court did not issue findings of fact and conclusions of law in rendering its verdict on the possession of drug paraphernalia charge, so it is unclear as to which drug paraphernalia items the court found to be used or possessed by Pittman. The State introduced a number of items into evidence, some of which would fall within the definition of drug paraphernalia under the Sioux City municipal code. Aletha testified that while in Michael's room, she saw Pittman grab two large bags of marijuana from a book bag and begin to divide the bags into smaller portions for the purpose of selling, and that she observed Michael roll some of the left over marijuana into a blunt stick, which she witnessed Michael, William, and Pittman smoke. But there is no evidence that any of the seized paraphernalia was used by Pittman in dividing the marijuana or used by him in connection with smoking the marijuana. The only drug paraphernalia items which could conceivably be tied to Pittman were the two pipes and the grinder found on the bed in Michael's bedroom when Pittman led Detective Braunschweig to the back bedroom and showed him the marijuana on the nightstand. There was no testimony Pittman was seen using any of these items. Pittman's mere proximity to these items is insufficient to support a finding of constructive possession. See *State v. Cashen*, 666 N.W.2d 566, 572 (Iowa 2003). Pittman did not live at the residence, and there is no evidence he exercised any dominion or control over the paraphernalia. Additionally, none of

the factors to be considered in determining whether Pittman had constructive possession were present in the record. See *Carter*, 696 N.W.2d at 39.

Upon our review of the record, we find there is not substantial evidence to support a finding that Pittman constructively possessed the drug paraphernalia. Accordingly, we reverse his conviction for possession of drug paraphernalia and remand for an order dismissing that charge.

III. Weight of the Evidence.

Pittman also challenges the district court's denial of his motion for a new trial because the verdict on the possession of drug paraphernalia was contrary to the weight of the evidence. See Iowa R. Crim. P. 2.24(2)(c). We need not consider this argument in light of the disposition of the sufficiency of the evidence determination above.

IV. Sentencing.

Pittman also argues that the district court erred by entering an order nunc pro tunc to decrease his incarceration length on his possession of marijuana conviction from 270 days to 180 days. Nunc pro tunc orders are used to correct clerical errors or to conform the order to the court's original intent, not to correct legal mistakes. See *State v. Johnson*, 744 N.W.2d 646, 648-49 (Iowa 2008). Here, the district entered the nunc pro tunc order after discovering the original sentence violated the maximum punishment proscribed by law. See Iowa Code § 124.401(5) (stating the maximum term of imprisonment for a first offense possession of marijuana is six months). “[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.” *State v. Suchanek*, 326 N.W.2d 263, 265-66 (Iowa 1982). Accordingly, we vacate the nunc pro tunc order and sentence and remand for resentencing on the possession of marijuana conviction.

V. Conclusion.

We conclude Pittman’s conviction for possession of drug paraphernalia does not withstand scrutiny under the sufficiency of the evidence standard and must be reversed. Since the nunc pro tunc order was improper, we vacate the order and sentence on the possession of marijuana conviction and remand to the district court for resentencing.

CONVICTION REVERSED AND REMANDED; SENTENCE AND NUNC PRO TUNC ORDER VACATED AND REMANDED FOR RESENTENCING.