

**IN THE COURT OF APPEALS OF IOWA**

No. 3-051 / 12-0016  
Filed April 10, 2013

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

**vs.**

**HERBERT HENRY BROWN,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Robert A. Hutchison,  
Judge.

Herbert Henry Brown appeals the judgment and sentence for the crimes of possession of a controlled substance with intent to deliver as a habitual offender and as a second or subsequent offender, and failure to affix a tax stamp.

**AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley M. Bender,  
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney  
General, John Sarcone, County Attorney, and Stephanie Cox, Assistant County  
Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

**BOWER, J.**

Herbert Henry Brown appeals the judgment and sentence for the crimes of possession of a controlled substance with intent to deliver as a habitual offender and as a second or subsequent offender, and failure to affix a tax stamp. As there is substantial evidence to support the convictions and the district court gave adequate reasons for imposing consecutive sentences, we affirm.

**I. Background Facts and Proceedings**

Herbert Henry Brown was arrested on April 28, 2011, following surveillance by the Des Moines Police Department narcotics unit. Police initiated a traffic stop of an automobile Brown had been seen driving. At the time of the stop, however, the vehicle was being driven by Brown's wife, Stephanie Lomax. Officers in a marked patrol car initiated the stop after observing Brown act in a suspicious manner. During the stop police detained Brown and found a napkin clenched in his left hand. The napkin contained a plastic baggie corner. No controlled substances were found on Brown's person or in the vehicle; however, there was reason to believe Brown may have placed something in his mouth prior to being stopped. Brown was found to have ninety-nine dollars, including a marked five dollar bill used by police to purchase heroin from Brown earlier that day.

Des Moines police obtained a search warrant for what was believed to be Brown's residence, located at 2208 Southeast Rose, apartment 14, in Des Moines. Brown denied living at this address. Only Lomax's name appeared on

the lease; however, Brown had a key and spent the night there when he was in town. Police also discovered that Brown had mail forwarded to that address.

During the search, police found a digital scale and plastic baggie corners, similar to the baggie removed from Brown at the time of the stop, which were later connected to the drug trade by expert witness testimony during trial. In the bedroom, Brown admitted to using when he stayed at the apartment,<sup>1</sup> and police discovered a large plastic baggie inside a pair of men's socks, located amongst other men's items, inside a dresser drawer. The bag was found to contain a brown powder later determined to be heroin. The heroin was individually package in fifty-one smaller baggies totaling 8.51 grams. No fingerprints were found on the baggies, drugs, or scale.

Brown denied possessing the heroin. Lomax testified she did not know about the heroin and asserted that it did not belong to Brown, although she admitted no other men slept in the bedroom or were allowed to keep clothes in the dresser.

On August 25, 2011, a bench trial was held, following Brown's waiver of his right to a jury trial. Several law enforcement officers testified and connected the scale and baggies to the sale of drugs. Further testimony established that the quantity of heroin found was in excess of an amount consistent with personal use and that the quantity found was more consistent with intent to deliver. The testimony also established that no tax stamp was affixed to the heroin.

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<sup>1</sup> Brown testified he only stayed at the Southeast Rose apartment a few times per month, spending the rest of his time in Minnesota. He also stated that other people he knew would, from time-to-time, stay at the apartment; however, they were not identified by Brown.

During trial Brown denied possessing the heroin. He further testified the socks were not his but did acknowledge that his mail was being forwarded to the apartment.

The court returned its verdict on September 16, 2011, finding the State had proven beyond a reasonable doubt that Brown had possessed a controlled substance with intent to deliver and failed to affix a tax stamp. Trial was held on November 7, 2011, to determine if Brown was a second or subsequent offender and a habitual offender for purposes of sentencing. The district court found Brown to be a second or subsequent offender and a habitual offender. On December 21, 2011, Brown was sentenced to serve up to forty-five years in prison.

## **II. Standard of Review**

Brown challenges the sufficiency of the evidence to support his conviction. We review sufficiency of the evidence challenges for errors of law. *State v. Musser*, 721 N.W.2d 758, 659-60 (Iowa 2006). The district court's finding of guilt will be upheld so long as there is substantial evidence to support it. *State v. Petithory*, 702 N.W.2d 854, 856 (Iowa 2005). "Evidence is substantial if it could convince a rational jury of the defendant's guilt beyond a reasonable doubt." *State v. Corsi*, 686 N.W.2d 215, 218 (Iowa 2004). The evidence is viewed in the light most favorable to the verdict. *Petithory*, 702 N.W.2d at 856. "That said, we consider not only the evidence that supports the verdict, but also that which detracts from it." *Id.* at 856-57.

### III. Discussion

#### A. Sufficiency of Evidence

Brown was convicted of violating Iowa Code section 124.401(1)(c)(1) (2011), which makes it illegal, in relevant part, to possess less than one hundred grams of heroin with the intent to deliver. He was also convicted of violating sections 453B.3 and 453B.12, which makes it illegal to possess a taxable substance, such as heroin, without a permanent tax stamp affixed.

Brown argues the district court relied upon insufficient evidence to support his conviction. Specifically, Brown argues there is insufficient evidence in the record to show that he possessed heroin.

There are two types of possession—actual or constructive. *State v. Carter*, 696 N.W.2d 31, 38 (Iowa 2005). “Actual possession occurs when the controlled substance is found on the defendant’s person. 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.” *Id.* at 38–39. Because no controlled substances were found on Brown’s person, he was not in actual possession. To establish possession, the State was required to show that Brown was in constructive possession of the substance.

Our supreme court has listed a number of factors which are to be considered in assessing constructive possession of a controlled substance when the individual in question is not in exclusive possession of the place the substances were located. *Carter*, 696 N.W.2d at 39. The factors include

(1) incriminating statements made by the accused, (2) incriminating actions of the accused upon the police’s discovery of a controlled

substance among or near the accused's personal belongings, (3) the accused's fingerprints on the packages containing the controlled substance, and (4) any other circumstances linking the accused to the controlled substance.

*Id.* Regardless of the presence of these factors, however, the court must also consider all the facts and circumstances which could create an inference of control and dominion over the substance. *State v. Maxwell*, 743 N.W.2d 185, 194 (Iowa 2008). Constructive control must be more than the ability to exercise control, and must include a "proprietary interest or an immediate right to control" the substance. *Carter*, 696 N.W.2d at 40 (quoting *State v. Bash*, 670 N.W.2d 135, 139 (Iowa 2003)).

In this case Brown made no incriminating statements and was not present in the apartment when the incriminating evidence was discovered. Also, Brown denied he lived at the apartment, and there were no fingerprints found on the heroin, baggies, or scale. The district court was left to determine ownership only from "other circumstances" which might link Brown to the heroin.

The district court determined Brown was initially found with a plastic baggie corner, consistent with possession of a controlled substance, which was similar to other plastic baggies found at his residence. Heroin was found in a dresser drawer containing men's clothes in the bedroom Brown shared with his wife. No men, other than Brown, were allowed to keep their clothes in the bedroom dresser. Brown initially denied telling the police he was a drug user; however, evidence clearly shows the opposite. He also denied having been previously convicted of a felony, which was later shown to be untrue, further undermining his credibility. Finally, Brown was arrested with money on his

person, which had been used to purchase heroin from him earlier that day. The combination of this evidence is sufficient to conclude, beyond a reasonable doubt, that Brown was in possession of heroin.

The evidence also supports a conclusion that Brown possessed the heroin with intent to deliver. As the district court summarized, Brown possessed a significant quantity of heroin consistent with distribution. The heroin was packaged in single-dose containers, which is also consistent with distribution as opposed to personal use. The presence of a digital scale and baggies, each of which are commonly used in the distribution of drugs, is also consistent with the intent to deliver. See *State v. Grant*, 722 N.W.2d 645, 647–48 (Iowa 2006) (intent to deliver supported by substantial quantity of drugs possessed and packaging of drugs into smaller amounts). Because the district court’s conclusions are adequately supported, we affirm.

### **B. Sentencing**

Brown challenges his sentence and argues that the district court failed to give adequate reasons for imposing consecutive sentences.

Our rules of criminal procedure require the district court to “state on the record its reason for selecting the particular sentence.” Iowa R. Crim. P. 2.23(3)(d). The court must also state its reasoning when imposing consecutive sentences. *State v. Jacobs*, 607 N.W.2d 679, 690 (Iowa 2000) (vacating the district court when it failed to specifically justify the decision to make sentences consecutive). We have held, however, that the reasons need not be specifically addressed to the consecutive nature of the sentences but rather can be found

from the “overall sentencing plan.” *State v. Delaney*, 526 N.W.2d 170, 178 (Iowa Ct. App. 1994). “Thus, we look to all parts of the record to find the supporting reasons.” *Id.*

During the sentencing hearing, the district court specifically pointed to Brown’s:

[A]ge, his prior record of convictions . . . his record of probation and treatment, his employment circumstances, his mental health and substance abuse history, his family circumstances, the nature of the offense that was committed here . . . the defendant’s financial circumstances, his need for rehabilitation and potential for that, and necessity for protecting the community from further offenses . . . and other factors that are set forth in the Presentence Investigation Report.

The court went on to state its belief that Brown is a “career criminal” who has taken no responsibility and displayed no desire to change his behavior. Finally, the court expressed its opinion that Brown would likely return to his criminal behavior at the earliest possible opportunity.

The district court imposed consecutive sentences as part of its overall sentencing plan which was adequately supported by specific reasons contained in the record. This is not a case where the district court appears to have believed consecutive sentences were mandatory, or where no reasons were given for the sentence. See *State v. Hennings*, 791 N.W.2d 828, 838–39 (Iowa 2010). Having given specific and justifiable reasons for imposing consecutive sentences, the sentence imposed by the district court is affirmed.

**AFFIRMED.**