

**IN THE COURT OF APPEALS OF IOWA**

No. 7-704 / 07-0116  
Filed December 12, 2007

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

**vs.**

**RAVIN CORNELIUS MILLER,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire (trial) and Charles H. Pelton (motion to suppress), Judges.

Ravin Miller appeals his judgment and sentence for possession of marijuana with intent to deliver and failure to affix a drug tax stamp.

**REVERSED.**

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

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, William E. Davis, County Attorney, and Robert Weinberg, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

**VAITHESWARAN, J.**

Ravin Miller appeals his judgment and sentence for possession of marijuana with intent to deliver and failure to affix a drug tax stamp. He argues there was insufficient evidence to support the jury's finding that he possessed marijuana. He also challenges the validity of a search warrant. We conclude the first issue is dispositive and requires reversal of Miller's judgment and sentence.

***I. Background Facts and Proceedings***

Davenport police officers executed a search warrant on the downstairs apartment of a duplex. The duplex had a common front door with separate private doors inside the entryway.

Almost immediately before the search team arrived, two men came out of the duplex and drove away. Officers stopped their car, determined that the men were Kenneth Phillips and Kenneth Parish, and executed arrest warrants on both men. Officers found \$1493 in cash on Phillips as well as a cell phone and a set of keys fitting the common door and the door to the downstairs apartment of the duplex.

As officers were arresting Phillips and Parish, Miller and a man later identified as Keith Aurthur came out of the front door of the duplex and walked toward the back of the house next door. The two did not appear to be carrying anything. Miller and Aurthur were apprehended about two blocks north of the duplex. Miller had \$735 in cash and, like Phillips, keys to the common door and the door to the downstairs apartment in the duplex. Aurthur had \$428 in cash and a small amount of marijuana.

Officers later followed the path they saw Miller and Aurthur take when the two left the duplex. On the ground, they found a plastic bag containing marijuana packaged in four separate plastic baggies. Meanwhile, officers searched the downstairs apartment of the duplex. The empty apartment was filled with “a big cloud of marijuana smoke.” In the living room, officers found a partially-smoked marijuana blunt in an ashtray and a tray containing marijuana stems and seeds. In the kitchen, officers found two vacuum-sealed plastic bags containing large quantities of compressed marijuana. On the counter were a digital scale, a box of plastic baggies, and marijuana residue. In one bedroom, officers found a pair of boots and a pair of jeans with “R Miller” written inside.

The State jointly charged Miller and Aurthur with possession of marijuana with intent to deliver and failure to affix a drug tax stamp. Iowa Code §§ 124.401(1)(d), 453B.12 (2005). Miller filed a motion to suppress, asserting the search warrant was not supported by probable cause. The district court denied his motion.

At the close of the State’s case, Miller moved for a judgment of acquittal on the ground that there was insufficient evidence of possession and intent. The jury found Miller guilty on both counts and Miller appealed.

## ***II. Sufficiency of the Evidence***

In reviewing challenges to the sufficiency of the evidence, we will uphold a jury’s finding of guilt if it is supported by substantial evidence. *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006).

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

1. On or about December 22, 2005, the defendant knowingly possessed marijuana or that he acted with, entered into a common scheme or design with, or conspired with, one or more other persons to Possess Marijuana with Intent to Deliver.<sup>1</sup>

2. The defendant knew that the substance was marijuana.

3. The defendant possessed the marijuana, or aided and abetted another or others with the intent to deliver.

The jury was further instructed that the State would have to prove the following elements of the drug tax stamp charge:

1. On or about December 22, 2005, the defendant knowingly possessed marijuana, a taxable substance, or aided and abetted another or others possessing a taxable substance . . . .

2. Defendant possessed forty-two and one-half grams or more of marijuana.

3. The marijuana that defendant possessed did not have permanently affixed to it a stamp, label or other official indication of payment of the state tax imposed on the substance.

Both instructions required proof of drug possession. That term was defined for the jury as follows:

“Possession” includes actual as well as constructive possession, and also sole as well as joint possession. A person who has direct physical control of something on or around his person is in actual possession of it. A person who is not in actual possession, but who has knowledge of the presence of something and has the authority or right to maintain control of it, either alone or together with someone else, is in constructive possession of it.

If something is found in a place which is exclusively accessible to only one person and subject to his or her dominion and control, you may, but are not required to, conclude that that person has constructive possession of it. If one person alone has possession of something, possession is sole. If two or more persons share possession, possession is joint.

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<sup>1</sup> Miller does not challenge the State's proof of conspiracy and aiding and abetting, also contained in the instructions.

It is undisputed that Miller did not have actual possession of any marijuana, at the time he was apprehended. Therefore, the appeal turns on whether the State proved he had constructive possession of the marijuana found inside and outside the duplex.

The State benefits from an inference of constructive possession when the controlled substance is found in a place “immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another.” *State v. Reeves*, 209 N.W.2d 18, 22 (Iowa 1973). However,

[W]here the accused has not been in exclusive possession of the premises but only in joint possession, knowledge of the presence of the substances on the premises and the ability to maintain control over them by the accused will not be inferred but must be established by proof.

*Id.* at 23.

There was not substantial evidence to establish that either the apartment in which the marijuana was found or the outside location where the bag of marijuana was found were exclusively accessible to Miller. Although Miller had keys to the apartment, so did Kenneth Phillips. While his jeans were found in the apartment, Miller was not the person who rented the apartment, he was not seen by the police inside the apartment, and the search warrant application tied Phillips, not Miller, to the apartment. Outside the duplex, officers admitted there were many footprints along the well-trodden route Miller followed.

Because Miller did not have exclusive access to the apartment or the outside area where the drugs were found, the State was not entitled to an

inference that Miller had knowledge of the marijuana and the ability to maintain control over it.

Without the benefit of an inference, the State had to establish knowledge and control with other evidence. *State v. Webb*, 648 N.W.2d 72, 79 (Iowa 2002).

Other evidence may 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.*

Miller made no incriminating statements. He also engaged in no incriminating behavior. *Cf. State v. Henderson*, 696 N.W.2d 5, 9 (Iowa 2005) (finding constructive possession where defendant was inside apartment with another woman where drugs were found, but defendant was belligerent when police tried to enter apartment and the other woman was cooperative). He walked away from the duplex "calmly" and appeared to have nothing in his possession. Drugs were not found near Miller's belongings. For example, even if a reasonable fact-finder could determine that the jeans in the bedroom of the apartment were his, the marijuana was not near the jeans or even in the same room. *Cf. Nitchee*, 720 N.W.2d at 556 (noting coffee filter used in manufacture of methamphetamine found in proximity to defendant's clothing). The boots in the bedroom resembled the boots Miller was wearing when he was apprehended but were a different size. Additionally, police did not connect Miller's boot prints with the boot prints near the bag outside. Miller's fingerprints were not found on the

drugs inside the apartment or on the bag of drugs outside the apartment. Although \$735 in ten and twenty dollar bills was found on Miller, an officer admitted that cash alone is not indicative of drug-dealing. See *Webb*, 648 N.W.2d at 80 (stating evidence of cash is “too tenuous and speculative” to support finding of constructive possession of drugs). Additionally, other people arrested that day also had large amounts of cash.

To support a conviction, the evidence “must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture.” *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003). The evidence does not pass this test. As there is not substantial evidence to establish that Miller had constructive possession of the marijuana found in the apartment or outside the duplex, we reverse the jury’s findings of guilt on the possession with intent to deliver and drug tax stamp charges. In light of our disposition, we find it unnecessary to address Miller’s challenge to the search warrant.

**REVERSED.**

Mahan, P.J. and Vaitheswaran, J. concur. Miller, J. dissents.

**MILLER, J.** (dissents)

I believe that the evidence as a whole, together with reasonable inferences that can be drawn from the evidence, is sufficient to support a finding that Miller had recently constructively possessed marijuana, a finding he had recently had actual possession of marijuana, or both. I therefore respectfully dissent from the reversal of his convictions.

In addition, if Miller's convictions are to be reversed I believe the appropriate disposition is to reverse and remand for retrial, limited to the theories that he does not challenge on appeal. *See, e.g., State v. Hogrefe*, 557 N.W.2d 871, 881 (Iowa 1996) (reversing defendant's conviction and remanding for a new trial where only one of three theories for conviction submitted to the jury was supported by substantial evidence). I therefore also respectfully dissent from the reversal without remand.

In view of the majority's decision, I find it unnecessary to reach the search warrant issue.