

IN THE COURT OF APPEALS OF IOWA

No. 8-863 / 07-1186
Filed January 22, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CLINTON OSSIE TAYLOR,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Eliza J. Ovrom,
Judge.

Clinton Taylor appeals from judgment and sentence entered upon his convictions for possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp. **REVERSED AND REMANDED FOR DISMISSAL.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant Attorney General, John P. Sarcone, County Attorney, and Robert Diblasi, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield, J. and Robinson, S.J.*
*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

POTTERFIELD, J.**I. Background Facts and Proceedings**

On the night of December 14, 2006, defendant Clinton Taylor was driving his girlfriend's car on 63rd Street in Des Moines, just a few blocks away from the apartment they shared. He was alone in the car. Officer Christopher Feeley conducted a traffic stop of the car driven by Taylor because no license plates were displayed. Feeley approached the car, and Taylor gave the officer a driver's license. Feeley observed nothing in the interior of Taylor's car that suggested drug possession or use. In a routine check, Feeley discovered that Taylor's license was suspended. While Feeley waited in his patrol car for back-up, Taylor's girlfriend arrived and parked in front of Taylor. Feeley approached Taylor a second time. Taylor told Feeley that he had called his girlfriend as she had the insurance card for the car. Feeley then told Taylor his license was suspended and asked him to step out of the vehicle. Taylor denied that his license was suspended. He then put the car in drive and took off, leading Feeley on a chase up 63rd Street.

About a half mile later, Taylor attempted a left turn at the intersection of Southwest Creston and 63rd, heading toward his apartment. His vehicle "caught the corner" of a median, traveled across two lanes of oncoming traffic, and ended up on the shoulder of the road. Feeley was in pursuit about a block behind Taylor. He did not see anything thrown out of Taylor's car.

Taylor jumped out of his car and fled on foot through a field with Feeley chasing him. After about 200 yards, Taylor complied with Feeley's orders to get on the ground. Feeley placed Taylor in custody and searched the car he had

been driving as well as the field through which he had fled. He found no evidence of drugs or drug use in the field or in Taylor's car.

Officer Anthony Giampolo arrived to assist after Feeley had arrested Taylor. He had not seen Taylor's route of travel. Giampolo placed Taylor in the back of his patrol car and began to drive on 63rd Street to take Taylor to the West Des Moines police station. By the illumination of his headlights, Giampolo saw what he thought was contraband in the middle of the lane of traffic. He stopped and picked up a plastic baggie containing 12.7 grams of crack cocaine. He later testified the baggie was in the middle of the road between skid marks on the pavement about twenty-five feet behind the location where Taylor had stopped the car he was driving.

Taylor was transferred to the police station where narcotics detective Mark Rehberg met with him. Rehberg interviewed Taylor, who denied any knowledge of the drugs and asked that the baggie be fingerprinted. Rehberg left the police station. Taylor then requested to speak with Rehberg a second time, so Rehberg returned for a second interview. Rehberg testified that in the second interview, Taylor asked him to drop the charge of possession with intent to deliver and promised Rehberg in return that "he would identify his source and that we could clean up the west side." Rehberg informed Taylor that he was not in a position to offer such a deal, and Taylor declined to provide any information. The baggie was submitted to the DCI for fingerprint analysis, but the analysis was not done before trial because of time constraints.

On March 7, 2007, a jury returned a guilty verdict for the crimes of possession of a controlled substance with intent to deliver, in violation of Iowa

Code section 124.401(1)(b)(3) (2005), and failure to affix a drug tax stamp, in violation of Iowa Code sections 453B.3 and 453B.12.¹ Taylor appeals from the judgment and sentence entered following the jury's verdict, arguing the record does not contain sufficient evidence to support the element of possession of the crack cocaine.

II. Standard of Review

We review challenges to the sufficiency of the evidence for errors at law. *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003). We will uphold a verdict if substantial evidence supports it. *Id.* Evidence is considered substantial if it would convince a rational fact-finder that the defendant is guilty beyond a reasonable doubt. *Id.* We review the evidence, including legitimate inferences and presumptions that may fairly be deduced from the evidence, in the light most favorable to the State. *Id.* The State has the burden to prove every fact necessary to constitute the crimes with which the defendant is charged. *Id.* The evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture. *Id.*

III. Sufficiency of the Evidence

The State is required to prove beyond a reasonable doubt that Taylor was in actual or constructive possession of and had authority over or right to control the drugs that Giampolo found on 63rd Street. Considering all of the evidence in the light most favorable to the State, we cannot find the State presented sufficient evidence to show knowing possession and control. Under the principles

¹ The jury also found Taylor guilty of eluding, in violation of Iowa Code section 321.279(3). Taylor does not challenge this conviction on appeal.

established by our supreme court for evaluating sufficiency of the evidence to prove possession of controlled substances, we find that there is insufficient evidence to support the jury's verdict of guilty on the charges of possession with intent to deliver and violation of the drug tax stamp requirement. See *State v. Kemp*, 688 N.W.2d 785 (Iowa 2003); *State v. Bash*, 670 N.W.2d 135 (Iowa 2003); *State v. Atkinson*, 620 N.W.2d 1 (Iowa 2000).

Possession can be either actual or constructive. *Kemp*, 688 N.W.2d at 789. Actual possession occurs when the controlled substance is found on the defendant's person. *Atkinson*, 620 N.W.2d at 3. The drugs here were found in a busy thoroughfare in Des Moines. The State contends that the presence of the drugs in 63rd Street establishes Taylor's actual possession of them since he drove the car. However, this is not a case of exclusive access to the car that might permit the inference of actual possession argued by the State. The State's case for actual possession fails because Taylor did not have exclusive possession of the car and the evidence did not place the drugs in his personal possession.

Turning to the theory of constructive possession, the State must prove that: (1) Taylor exercised dominion and control over the substance; (2) he had knowledge of its presence; and (3) he had knowledge that the material was a controlled substance.² *Id.* Our supreme court has distinguished between evidence sufficient to prove constructive possession when drugs are found on premises in the exclusive possession of the accused and when drugs are found

² Taylor does not challenge the elements of intent to deliver or absence of a drug tax stamp.

on premises in joint possession of the accused and others. *State v. Kemp*, 688 N.W.2d 785, 789 (Iowa 2004).

But where 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. (citing *State v. Reeves*, 209 N.W.2d 18, 23 (Iowa 1973)). The fact that an accused drives an automobile is not sufficient to prove constructive possession of contraband in the car, where possession of the car is not exclusive. *Id.*

Here, the evidence showed that, although Taylor was the sole occupant of the car, he was not the owner. The car was owned by Taylor's girlfriend, and Taylor did not have exclusive use of the car. Because Taylor did not enjoy exclusive access to the vehicle, the State had to prove that Taylor had knowledge of the presence of controlled substances in the car before they were found in 63rd Street, and that, by throwing them out of the car, Taylor demonstrated dominion and control. *Maghee*, 573 N.W.2d 1, 10 (Iowa 1997).

The State presented no direct evidence at trial to establish that Taylor had possession of the drugs before he threw them out of the car. However, the circumstantial evidence is sufficient to establish that Taylor threw the drugs out the window and that he therefore had knowledge of the presence and nature of the drugs. The fact-finder in this case reasonably could infer that Taylor threw the baggie out the window of his car as he was driving away from the traffic stop. The baggie was found somewhere near skid marks presumably left by Taylor's tires. Giampolo testified that the baggie was intact and did not appear as though anyone had run over it, though it was found in the middle of a busy road. The

jury fairly could conclude from this evidence that the baggie had not been lying in the middle of the road for long. The jury could also fairly infer that it was unlikely for another individual to have left a baggie of crack cocaine with a value of \$1200 in the middle of the road on that same night. The jury further could infer that Taylor fled the scene of the traffic stop because he was concerned about the baggie of crack cocaine, rather than about his suspended license.

Turning to the elements of dominion and control, we note that a defendant's "raw physical ability to exercise control" over drugs is insufficient to establish constructive possession. *Bash*, 670 N.W.2d at 135 (finding defendant's physical ability to flush her spouse's drugs down the toilet insufficient to show a right to dominion and control). The State failed to prove that Taylor had more than a "raw physical ability to exercise control" over the drugs found in the street.

When the facts show non-exclusive possession of premises where contraband is found and only raw physical ability to exercise control, constructive possession has to be established by additional proof. *Id.*

Such proof could include incriminating statements made by the defendant, incriminating actions of the defendant upon the police's discovery of the controlled substance among or near the defendant's personal belongings, the defendant's fingerprints on the packages containing the controlled substance, and any other circumstances linking the defendant to the controlled substance.

Id.

The State's evidence against Taylor included his incriminating offer to cooperate with the police by identifying his source of illegal drugs. This statement could lead a rational fact-finder to infer that Taylor was involved with illegal drugs. However, Taylor's statement did not link Taylor to the drugs he was

charged with possessing and is insufficient to plug the holes in the State's case on the elements of dominion and control here.

The evidence was insufficient to prove beyond a reasonable doubt that Taylor had dominion and control over the crack cocaine. Since the underlying possession charge fails, Taylor cannot be guilty of a violation of section 435B.3 or section 435B.12 for failing to affix a tax stamp. We reverse the district court's judgment of conviction and sentence on the charges of possession with intent to deliver and drug stamp violation and remand for an order of dismissal.

REVERSED AND REMANDED FOR DISMISSAL.

Vaitheswaran, P.J. and Potterfield, J. concur. Robinson, S.J. dissents.

ROBINSON, S.J. (dissenting)

I respectfully dissent.

The majority opinion carefully outlines the facts. These facts, in my opinion, circumstantially support the guilty verdict for “actual” possession. Taylor’s act of throwing the crack cocaine from the vehicle demonstrates more than the “ability” to exercise control over drugs, see *State v. Bash*, 670 N.W.2d 135, 139 (Iowa 2003), it demonstrates direct physical control of the drugs. I would affirm.