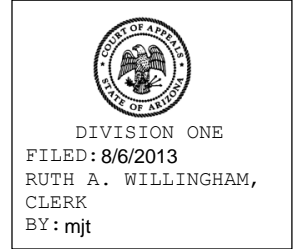


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 12-0332
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
FRANCISCO VALDEZ, JR.,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-121609-002

The Honorable William L. Brotherton, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Joseph T. Maziarz, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Adele Ponce, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Paul J. Prato, Deputy Public Defender
Attorneys for Appellant

G O U L D, Judge

¶1 Francisco Valdez, Jr. ("Valdez") appeals his conviction and sentence for misconduct involving weapons. Valdez argues on

appeal that the evidence was insufficient to support his conviction. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY¹

¶2 Officer Lua and Officer Wells were on patrol when they observed a vehicle speeding and driving erratically. When the officers conducted a traffic stop on the vehicle, they observed that Valdez was the sole occupant and driver of the vehicle. Valdez was asked to step out of the car, and as Officer Wells approached Valdez's vehicle to look for Valdez's identification, he smelled a strong odor of burnt marijuana coming from inside the vehicle. Officer Wells observed a blunt wrap used to smoke marijuana on the driver's seat, a bag of marijuana between the driver's floorboard and driver's seat, and a package of Zig-Zag rolling papers used to wrap marijuana on the rear passenger floorboard.

¶3 Sergeant Potter arrived on the scene to assist the officers. While looking into the vehicle, Sergeant Potter saw a gun wedged between the driver's seat and the center console. Sergeant Potter testified at trial that the gun "would be easily seen" by a person sitting in the driver's seat. Sergeant Potter asked Officer Wells to recover the gun. When Officer Wells

¹ We view the evidence presented at trial in the light most favorable to upholding the jury's verdict. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

looked in the vehicle, he could see approximately an inch and a half of the butt of the gun sticking up from between the seat and the console.

¶4 The officers performed a records check on the vehicle, which showed that the vehicle was registered to Magdalena G. In addition, subsequent DNA testing on the gun revealed there was DNA from at least three different individuals on the gun. Based on the sample taken from the gun, the forensics technician could not determine whether Valdez's DNA was present on the gun.

¶5 Valdez was charged with misconduct involving weapons based on his knowing possession of a handgun while being a prohibited possessor. Arizona Revised Statutes ("A.R.S.") sections 13-3101(7) and 13-3102(A)(4). Valdez was also charged with one count of possession or use of marijuana, and one count of possession of drug paraphernalia. The jury convicted Valdez on all three counts. Valdez timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. sections 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

DISCUSSION

¶6 Valdez challenges the sufficiency of the evidence to support his conviction for misconduct involving weapons. Specifically, Valdez argues there was insufficient evidence to prove he knowingly possessed the gun.

¶7 “Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of probative facts to support the conviction.” *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (quoting *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976)). In reviewing the sufficiency of the evidence, we resolve all conflicts in the evidence against the defendant. *State v. Bustamante*, 229 Ariz. 256, 258, ¶ 5, 274 P.3d 526, 528 (App. 2012). The credibility of witnesses and the weight given to their testimony are issues for the jury, not the court. *Id.* No distinction exists between circumstantial and direct evidence. *Id.*

¶8 A person commits misconduct involving weapons by knowingly “[p]ossessing a deadly weapon or prohibited weapon if such person is a prohibited possessor²” A.R.S. § 13-3102(A)(4) (2012). Possession may be actual or constructive. A.R.S. § 13-105(34) (2012); *State v. Barreras*, 112 Ariz. 421, 423, 542 P.2d 1120, 1122 (1975) (“‘Possess’ means knowingly to

² A “prohibited possessor” is defined as a person “[w]ho has been convicted within or without this state of a felony . . . and whose civil right to possess or carry a gun or firearm has not been restored.” A.R.S. § 13-3101(A)(7)(b) (2012). Valdez’s classification as a “prohibited possessor” was established at trial. A certified copy from the Clerk of the Superior Court of Arizona showed that Valdez was previously convicted of a felony, and that his right to possess weapons or firearms had not been restored.

have physical possession or otherwise to exercise dominion or control over property.”). “One who exercises dominion or control over property has constructive possession of it even if it is not in his physical possession.” *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 363, ¶ 13, 965 P.2d 94, 97 (App. 1998). Under a theory of constructive possession, two or more persons may jointly possess a prohibited object; possession need not be “[e]xclusive, immediate and personal.” *State v. Carroll*, 111 Ariz. 216, 218, 526 P.2d 1238, 1240 (1974).

¶9 Constructive possession may be proven by direct or circumstantial evidence. *State v. Villalobos Alvarez*, 155 Ariz. 244, 245, 745 P.2d 991, 992 (App. 1987). However, a person's mere presence at a location where a prohibited item is located is insufficient to show that he or she knowingly exercised dominion or control over it. *State v. Miramon*, 27 Ariz. App. 451, 452, 555 P.2d 1139, 1140 (1976) (citation omitted). Rather, the state must show by “specific facts or circumstances that the defendant exercised dominion or control” over the object. *Villalobos Alvarez*, 155 Ariz. at 245, 745 P.2d at 992.

¶10 The State established that Valdez constructively possessed the gun by presenting evidence that Valdez 1) knew that the gun was located between the driver's seat and the center console and 2) he exercised control over the gun. See *State v. Bustamante*, 229 Ariz. 256, 259, ¶ 10, 274 P.3d 526, 529 (App.

2012) (holding that where defendant was charged with misconduct involving weapons, in order to prove constructive possession over a gun on the driver's side floorboard of a car, the State "bore the burden of proving that defendant 1) knew that the gun was on the driver's side floorboard and 2) exercised control over it."); *State v. Cox*, 217 Ariz. 353, 357, ¶ 26, 174 P.3d 265, 269 (2007) (holding there was sufficient evidence to support a conviction for misconduct involving weapons where the State showed the defendant "(1) knew that the guns were in the trunk and (2) exercised control over them."); *State v. Villavicencio*, 108 Ariz. 518, 520, 502 P.2d 1337, 1339 (1972) (constructive possession exists when the prohibited property "is found in a place under [the defendant's] dominion and control and under circumstances from which it can be reasonably inferred that the defendant had actual knowledge" of its existence).

¶11 We conclude that the State presented substantial circumstantial evidence showing that Valdez constructively possessed the gun. Although there was evidence that other individuals may have exercised dominion and control of the same gun, the State presented evidence (1) Valdez was the sole occupant and driver of the vehicle, (2) the gun was located between the driver's seat and the center console, (3) a portion of the gun was visible, and (4) the gun was within Valdez's reach when he was seated in the driver's seat. Based on this evidence,

the jury could have reasonably inferred that Valdez had actual knowledge of the gun's existence and that he exercised control over it.³

CONCLUSION

¶12 For the foregoing reasons, we find substantial evidence supported Valdez's conviction for misconduct involving weapons, and accordingly affirm Valdez's conviction and sentence.

/s/

ANDREW W. GOULD, Presiding Judge

CONCURRING:

/s/

KENT E. CATTANI, Judge

/s/

PATRICIA K. NORRIS, Judge

³ We note that although DNA from three different individuals was found on the gun, under a theory of constructive possession, two or more persons may jointly possess a prohibited object; possession need not be "[e]xclusive, immediate and personal." *Carroll*, 111 Ariz. at 218, 526 P.2d at 1240. Thus, the State was not required to establish that Valdez's control over the gun was exclusive to him to support a conviction for misconduct involving weapons. See *State v. Cox*, 214 Ariz. 518, 521, ¶ 15, 155 P.3d 357, 360 (2007).