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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 01/10/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0175
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
FERNANDO MENDOZA ALPIZAR,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2010-136113-001 SE

The Honorable Lisa Ann VandenBerg, Judge *Pro Tem*

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Louise Stark, Deputy Public Defender
Attorney for Appellant

D O W N I E, Judge

¶1 Fernando Mendoza Alpizar appeals his convictions and sentences for possession or use of marijuana and possession of drug paraphernalia. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY¹

¶2 While conducting surveillance on an apartment complex, a Tempe police officer saw Alpizar drive into the complex and leave a short time later. The officer followed Alpizar's car and stopped it when Alpizar committed a traffic violation. The officer "smelled the distinct odor of [burnt] marijuana coming from the passenger compartment" after he approached the vehicle. When Alpizar exited the vehicle, the officer noticed that Alpizar "had a little bit of ash on the front of his pants."

¶3 A canine unit responded to the scene and conducted a "sniff" of the vehicle. The dog alerted along the exterior passenger side door and to a "folded up piece of paper" on the front passenger seat. Inside the paper was 2.14 grams of marijuana.

¶4 Alpizar was charged with possession or use of marijuana ("count 1") and possession of drug paraphernalia ("count 2"), both class 1 misdemeanors. A bench trial ensued. At the conclusion of trial, the court found him guilty on both

¹ In addition to the evidence discussed herein, the State's witnesses testified about statements Alpizar made during the traffic stop. However, the trial court did not consider those statements when determining guilt, so we do not consider them.

counts and sentenced him to concurrent one-year terms of probation. Alpizar timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and -4033.

DISCUSSION

¶15 Alpizar contends the State failed to present sufficient evidence that he knowingly possessed the marijuana and paraphernalia. We disagree.

¶16 "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) (citation omitted). On appeal, we view all evidence in the light most favorable to sustaining the verdict and resolve all reasonable inferences against a defendant. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989) (citation omitted). We resolve any evidentiary conflicts in favor of sustaining the verdict. *Id.* (citation omitted).

¶17 The State was required to prove, beyond a reasonable doubt, that Alpizar possessed the marijuana and the paper (the drug paraphernalia at issue), with "actual knowledge" of its presence. See Ariz. Rev. Stat. ("A.R.S.") §§ 13-3405(A)(1), -3415(A), (F)(2) (prohibiting possession or use of marijuana and any products or materials "used, intended for use or designed

for use" to store, contain, conceal, ingest or otherwise introduce a drug into the human body), -105(10)(b) (" 'Knowingly' means, with respect to conduct or to a circumstance described by a statute defining an offense, that a person is aware or believes that the person's conduct is of that nature or that the circumstance exists.").

¶18 Constructive possession is sufficient to sustain Alpizar's conviction. "Constructive possession exists when the prohibited property 'is found in a place under [the defendant's] dominion [or] control and under circumstances from which it can be reasonably inferred that the defendant had actual knowledge of the existence of the [property]." *State v. Cox*, 214 Ariz. 518, 520, ¶ 10, 155 P.3d 357, 359 (App. 2007) (alteration in original) (citations omitted). However, "mere presence" at a location where drugs are found "is insufficient to establish knowledgeable possession or dominion and control." *State v. Teagle*, 217 Ariz. 17, 27-28, ¶ 41, 170 P.3d 266, 276-77 (App. 2007) (citation omitted).

¶19 During the State's case-in-chief, an officer testified that the drug dog immediately alerted on the paper containing a usable amount of marijuana sitting on the passenger seat of the vehicle Alpizar was driving. Another officer testified that the passenger compartment smelled like "burnt marijuana" and that Alpizar had white ash on his pants. Alpizar was the only

occupant of the vehicle when it was stopped. Based on these facts, a reasonable trier of fact could infer from the location of the paper and the marijuana, the odor of burnt marijuana, and the white ash on Alpizar's pants that Alpizar knew the marijuana and paper were inside the vehicle and that he had control over them. See *State v. Blevins*, 128 Ariz. 64, 67, 623 P.2d 853, 856 (App. 1981) ("The probative value of evidence is not reduced simply because it is circumstantial.") (citation omitted). These circumstantial links between Alpizar and the contraband distinguish this situation from the "mere presence" cases upon which Alpizar relies.

¶10 To the extent Alpizar offered a different version of events at trial, it is apparent that the superior court found the State's evidence more credible. Such a determination was within its purview. See *State v. Pike*, 113 Ariz. 511, 514, 557 P.2d 1068, 1071 (1976) ("The credibility of witnesses is a question for the trier of fact whose determination will not usually be disturbed on appeal."); *State v. Cox*, 217 Ariz. 353, 357, ¶ 27, 174 P.3d 265, 269 (2007) ("[T]he credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury.") (citation omitted); see also *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981) ("On appeal, this Court will not engage in re-weighing the evidence.") (citations omitted).

CONCLUSION

¶11 For the foregoing reasons, we affirm Alpizar's convictions and sentences.

/s/

MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/

PETER B. SWANN, Judge

/s/

DONN KESSLER, Judge