

**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.

FILED BY CLERK

JUL 29 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,

)
)
) Appellee,)
)
)

2 CA-CR 2010-0301
DEPARTMENT A

v.)
)

MEMORANDUM DECISION

MONTY L. HELMS,

)
)
) Appellant.)
)
)
_____)

Not for Publication
Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200900409

Honorable Bradley M. Soos, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson

Tucson
Attorneys for Appellee

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E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, appellant Monty Helms was convicted of possession of a dangerous drug for sale, possession of drug paraphernalia, and misconduct involving weapons. He was sentenced to a combination of consecutive and concurrent terms of imprisonment totaling 12.5 years. Helms argues that he was denied the right to an automatic change of judge after he withdrew a guilty plea and that insufficient evidence supports his convictions for possession of methamphetamine for sale and weapons misconduct. For the following reasons, we affirm his convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the convictions, resolving all inferences against Helms. *State v. Fontes*, 195 Ariz. 229, ¶ 2, 986 P.2d 897, 898 (App. 1998). Apache Junction Police Department officers executed a search warrant at Helms's residence and found guns, methamphetamine, drug paraphernalia, and \$1,210 in cash in Helms's bedroom. He was arrested and charged with possession of a dangerous drug for sale, possession of drug paraphernalia, and weapons misconduct for possessing a weapon during a felony drug offense. After initially entering into a plea agreement with the state, Helms withdrew from it and proceeded to trial. He was found guilty of all charges and sentenced to 12.5 years' imprisonment. This appeal followed.

Discussion

¶3 Helms argues he was denied his right to an automatic change of judge after withdrawing from his guilty plea. Appearing before Pinal County Superior Court Judge William O'Neil, Helms initially pled guilty to count three, misconduct involving a weapon, in exchange for the state agreeing to dismiss the other two charges. Then, at a

review hearing in front of Pinal County Superior Court Judge Bradley Soos, Helms's counsel informed Judge Soos that Helms wanted to change counsel and to withdraw from the plea agreement. Judge Soos told Helms he had been informed "a little bit on what's going on with this case" and that Helms would be "passing up a sweetheart of a deal." However, Helms was allowed to withdraw from the agreement, the pending trial date was vacated, and Helms was given three weeks to obtain new counsel before a new trial date would be set. After several months of continuances during which time Helms still had not obtained new counsel, Judge Soos reappointed the law firm that originally had represented Helms and set a date for trial.

¶4 Helms contends he was denied his right to a change of judge pursuant to Rule 17.4(g), Ariz. R. Crim. P. That rule provides: "If a plea is withdrawn after submission of the presentence report, the judge, upon request of the defendant, shall disqualify himself or herself, but no additional disqualification of judges under this rule shall be permitted." *Id.* As the state points out, this rule is inapplicable to Helms because when he withdrew from his plea agreement, the presentence report had not yet been filed. The purpose of the rule is to prevent the prejudice that could occur if a judge were to conduct a trial already having examined the presentence report, a document that "may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged." *Chavez v. Superior Court*, 181 Ariz. 93, 95, 887 P.2d 623, 625 (App. 1994), quoting *Gregg v. United States*, 394 U.S. 489, 492 (1969).

¶5 Helms concedes the presentence report had not yet been prepared but, although not squarely contending the plain language of the rule does not apply, appears to

argue he suffered a similar type of prejudice because Judge Soos “knew more than average about [his] case” and had “[c]learly . . . formed an opinion as to [his] guilt or innocence.” But he rests this argument in part on the erroneous statement that Judge Soos presided over his change of plea hearing and his trial. And even assuming that Helms had shown Judge Soos had the same prejudicial knowledge of the case he would have gained from the presentence report, the rule still would not apply here because Helms never requested a change of judge. *See* Ariz. R. Crim. P. 17.4(g) (“If a plea is withdrawn after submission of the presentence report, the judge, *upon request of the defendant*, shall disqualify himself or herself”) (emphasis added).

¶6 Nevertheless, Helms maintains the trial court erred because he “should have been advised of his right to a change of judge.” Yet nothing in the rule requires this, and Helms’s lone support for this contention is that he was not represented by counsel for several months after he withdrew his guilty plea. It was ultimately Helms’s choice to proceed unrepresented, and litigants proceeding pro se are held to the same standards as attorneys. *See State v. Cornell*, 179 Ariz. 314, 331, 878 P.2d 1352, 1369 (1994). In short, Rule 17.4(g) is inapplicable here because the presentence report had not been filed, and Helms did not request a change of judge. We find no error.

¶7 Helms also argues the evidence was insufficient to sustain his conviction for possession of methamphetamine and possession of a handgun during the commission of a felony offense.¹ “We review the sufficiency of evidence presented at trial only to

¹Helms concedes there was sufficient evidence supporting his conviction for possessing drug paraphernalia.

determine whether substantial evidence supports the jury’s verdict, ‘viewing the facts in the light most favorable to sustaining the jury verdict.’” *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007), quoting *State v. Roque*, 213 Ariz. 193, ¶ 93, 141 P.3d 368, 393 (2006). “Substantial evidence is evidence that ‘reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.’” *Id.*, quoting *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914-15 (2005). Knowing possession of a dangerous drug for sale is prohibited under A.R.S. § 13-3407(A)(2).² And, under A.R.S. § 13-3102(A)(8), “[a] person commits misconduct involving weapons by knowingly . . . [u]sing or possessing a deadly weapon during the commission of any felony [drug] offense.”³

¶8 Apache Junction Police officers searched Helms’s residence pursuant to a warrant. In Helms’s bedroom, officers found \$1,210 in cash strewn on the floor, a glass pipe next to a desk, and an electronic scale on the floor under the desk. Another electronic scale was found on the bed. Inside a portable safe in the bedroom, they found two firearms, an eyeglass case containing three syringes and a plastic bag of methamphetamine, small plastic bags that commonly are used for packaging small quantities of drugs, another plastic bag containing methamphetamine, a small scale, a manila envelope containing the titles to a motorcycle and a truck both in Helms’s name, and a note to “Monte” signed with a heart. An officer testified the safe “had to be pried

²The version of the statute in effect at the time Helms committed the offense is the same in relevant part as the current version. *See* 2008 Ariz. Sess. Laws, ch. 301, § 72.

³We cite the current version of the statute, as the relevant provision has not changed. *See* 2008 Ariz. Sess. Laws, ch. 274, § 2.

open” because the officers “didn’t have the combination.” Helms told the officers he did not own the safe.

¶9 Helms’s former neighbor, R. L., testified that another man living at Helms’s residence had offered R. L. the use of the safe to store guns and had opened it with a combination and a key. At that time the safe had been stored in R. L.’s backyard in a shed, but had been moved into Helms’s residence shortly before the search. Although officers found ammunition in the guns, the neighbor did not believe the guns had been loaded when he put them in the safe.

¶10 Helms contends that the safe belonged to someone else and there was no evidence he had access to it; thus, he did not possess either the guns or the drugs found in the safe. Section 13-105(34), A.R.S., defines “[p]ossess” as “knowingly to have physical possession or otherwise to exercise dominion or control over property.”⁴ Dominion or control in the absence of actual physical possession has been characterized as constructive possession. *See 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 the existence of the [property].” *Id.* Constructive possession may be proven by direct or circumstantial evidence. *See State v. Villalobos Alvarez*, 155 Ariz. 244, 245, 745 P.2d 991, 992 (App. 1987).

⁴We cite the current version of the statute, as it has not changed in relevant part since Helms committed his offenses. *See* 2008 Ariz. Sess. Laws, ch. 301, § 10.

¶11 To support his contention that he did not possess the drugs or weapons in the safe, Helms relies heavily on “the fact that [he] was unable to provide police with the combination to the safe.” But the evidence was merely that Helms did not provide the combination and claimed he did not own the safe, and more than one inference can be drawn from that evidence. Rather than believing Helms was unable to provide the combination, the jury reasonably could have inferred that Helms was being untruthful about owning the safe and refused to cooperate with the police in providing the combination. There was ample other evidence that Helms had possession of the items in the safe: the safe was in his bedroom, and it contained vehicle titles in his name and a note addressed to him.⁵ Moreover, the evidence that someone else may have had access to the safe does not negate Helms’s ability to exercise dominion and control over it. Possession need not be exclusive but “may be sole or joint.” *State v. Miramon*, 27 Ariz. App. 451, 452, 555 P.2d 1139, 1140 (1976); *see also Villavicencio*, 108 Ariz. at 520, 502 P.2d at 1339 (cardboard box of narcotics on open back porch accessible to others still under dominion and control of defendant).

¶12 Helms also argues there is insufficient evidence of weapons misconduct because the statute under which he was convicted requires actual physical possession of the firearm. He relies on *State v. Kerr*, 142 Ariz. 426, 690 P.2d 145 (App. 1984), although he acknowledges that case “relates to constructive possession by a prohibited possessor,” whereas this case involves possessing a weapon during a felony drug offense.

⁵Helms alleges the note was found on the bed, but the record shows it was found inside the safe.

As the state points out, the applicable standard is set forth in *State v. Petrak*, 198 Ariz. 260, ¶¶ 16-19, 8 P.3d 1174, 1179-80 (App. 2000), in which this court recognized that § 13-3102(A)(8) does not require the defendant to have actual possession of a weapon. Rather, actual or constructive possession suffices so long as the state proves “that the defendant intended to use or could have used the weapon to further the felony drug offense underlying the weapons misconduct charge.” *Petrak*, 198 Ariz. 260, ¶ 19, 8 P.3d at 1180. As stated above, the jury reasonably could have found he had constructive possession of the firearms in the safe. And there was additional evidence that he had intended to use or could have used those firearms to further the sale of methamphetamine: the guns that had been unloaded when R. L. placed them in the safe were found loaded in the safe with the drugs. We find no error.

Disposition

¶13 For the foregoing reasons, we affirm Helms’s convictions and sentences.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge