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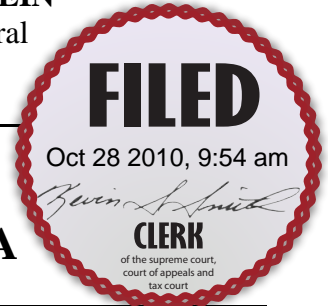
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**IN THE
COURT OF APPEALS OF INDIANA**



JOSEPH HOSKINS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-1004-CR-524

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Rebecca Pierson-Treacy, Judge
The Honorable Christina Klineman, Commissioner
Cause No. 49F19-0911-CM-94147

October 28, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Following a jury trial, Joseph Hoskins was convicted of Possession of Marijuana¹ as a class A misdemeanor and subsequently sentenced to ninety days, with two days executed and the remaining suspended. On appeal, Hoskins argues that the evidence is insufficient to sustain his conviction.

We affirm.

The facts most favorable to the conviction reveal that on April 28, 2009, Indianapolis Police Officers Charles Martin, Tracy Knecht, and Christopher Wuensch initiated a traffic stop of a black Chevy Tahoe in the 3200 block of East 32nd Street in Indianapolis. Officer Martin, who was driving the marked police vehicle, and Officer Wuensch, who was riding in the front passenger seat, observed the Tahoe fail to stop at a stop sign at 32nd Street and Euclid Avenue. All of the officers observed that the Tahoe had dark tinted windows and that the stereo was playing so loudly that it caused vibrations to the police vehicle. These three traffic violations served as the basis for the traffic stop.

While Officer Martin stayed in the police vehicle, Officer Wuensch approached the driver side of the Tahoe and Officer Knecht approached the passenger side. Officer Martin noted that the Tahoe had a temporary license plate. When Officer Knecht asked the passenger to roll down the window, she immediately detected the odor of marijuana emanating from inside the vehicle. Officer Knecht described the odor as a “very strong ten” on a scale of one to ten. *Transcript* at 43. Likewise, Officer Wuensch was confronted with an “overwhelming smell of raw marijuana” when he asked Hoskins, the driver of the Tahoe, to roll down his window. *Id.* at 70.

¹ Ind. Code Ann. § 35-48-4-11 (West, Westlaw through 2010 2nd Regular Sess.).

When Officer Knecht observed a handgun next to the passenger, she secured the weapon and then asked the passenger to exit the vehicle. Officer Wuensch asked Hoskins if he had a weapon, and Hoskins responded affirmatively. Officer Wuensch removed a handgun from Hoskins's right front pant pocket and secured it and then asked Hoskins to exit and move to the rear of the vehicle. Hoskins produced a valid handgun permit for both weapons.

Officer Martin ran a check of Hoskins's identification that revealed Hoskins had an active warrant out of Marion County for a driving violation. Hoskins was then placed under arrest. Hoskins denied ownership of the vehicle, and the officers confirmed that he was not the Tahoe's registered owner. Hoskins would not, however, reveal who the actual owner of the vehicle was. Because neither Hoskins nor his passenger could operate the Tahoe,² the officers requested that it be towed. Prior to the Tahoe being towed, Officer Wuensch conducted an inventory search. When Officer Wuensch lifted the removable center tray in the center console, he found a bag that was later determined to contain 6.99 grams of marijuana, the street value of which was approximately \$100. Hoskins denied ownership of the marijuana, but would not give the officers information regarding ownership of the Tahoe. A search incident to arrest revealed that Hoskins had \$362 in cash on his person, but no drug paraphernalia.

On November 23, 2009, the State charged Hoskins with possession of marijuana as a class A misdemeanor. A jury trial was held on March 4, 2010, at the conclusion of which the

² The officers had learned that the passenger did not have a valid driver's license.

jury found Hoskins guilty as charged. That same day, the trial court sentenced Hoskins to ninety days, with two days executed and the remainder suspended. Hoskins now appeals.

Hoskins argues that the evidence is insufficient to sustain his conviction. Specifically, Hoskins contends that the State's evidence did not establish that he possessed the marijuana under a theory of constructive possession. In support of his argument, Hoskins notes that the marijuana was not in plain view, but rather was found in a "hidden compartment."³ *Appellant's Brief* at 1, 5.

When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh the evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the conviction, and "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *Id.* at 126 (*quoting Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)).

The State charged Hoskins as follows:

On or about 4/28/09, in Marion County, State of Indiana, the following named defendant Joseph Hoskins, did knowingly possess a Controlled Substance, that is: MARIJUANA, of an aggregate weight of less than 30 grams.

Appellant's Appendix at 14. In order to convict Hoskins of the possession offense, the State

³ We acknowledge that Hoskins relies upon an opinion of the Indiana Tax Court, *Hall v. Dep't of State Revenue*, 720 N.E.2d 1287 (Ind. Tax 1999), in arguing that the State's evidence was insufficient to establish that he constructively possessed the marijuana. We, however, are not bound by a decision of the tax court in a non-criminal matter.

was required to prove that Hoskins was the person who possessed the marijuana. A conviction for possession of contraband may rest upon proof of either actual or constructive possession. *Deshazier v. State*, 877 N.E.2d 200 (Ind. Ct. App. 2007), *trans. denied*. “Actual possession occurs when the defendant has direct physical control over the item, while constructive possession involves the intent and capability to maintain control over the item even though actual physical control is absent.” *Britt v. State*, 810 N.E.2d 1077, 1082 (Ind. Ct. App. 2004). Here, we are presented with the issue of constructive possession.

Evidence of constructive possession is sufficient where the State proves that the defendant had both the capability and intent to maintain dominion and control over the contraband. *Goliday v. State*, 708 N.E.2d 4 (Ind. 1999). Evidence that the defendant is able to reduce the contraband to the defendant’s personal possession is sufficient evidence to establish the defendant had the capability to maintain dominion and control over the item. *Grim v. State*, 797 N.E.2d 825 (Ind. Ct. App. 2003). To prove the intent element, the State must demonstrate the defendant’s knowledge of the presence of the contraband. *Id.* Knowledge may be inferred from the exclusive dominion and control over the premise containing the contraband or additional circumstances indicating the defendant’s actual knowledge of the contraband if the control over the premise is non-exclusive. *Id.* Additional circumstances that will support an inference of an intent to control the contraband are: possession of the drug on the defendant’s person, the defendant had smoked marijuana from the same bag earlier, flight, proximity to contraband in plain view, furtive conduct, and the smell of marijuana emanating from the vehicle. *Godar v. State*, 643 N.E.2d 12 (Ind. Ct. App. 1994). Mere presence in the vicinity or association with one having possession of drugs is

not sufficient to support a finding of constructive possession. *Id.*

Here, the evidence at trial showed that Hoskins was not the only person in the vehicle. We are thus faced with the issue of non-exclusive constructive possession. Hoskins does not dispute that he had the capability to maintain dominion and control over the marijuana that was found in the center console of the vehicle he was driving, under a removable tray and clearly within his reach. Hoskins's argument is that the State failed to establish that he had actual knowledge of the presence and illegal character of the substance and therefore, the State failed to prove he had the intent to maintain dominion and control over the marijuana.

As previously noted, Hoskins was the driver of the vehicle. Although the vehicle was not registered to Hoskins, Hoskins refused to tell the officers who the Tahoe belonged to. Further, the marijuana was found in the center console of the car under a removable tray. Contrary to Hoskins's claim, the area was not a "hidden compartment", but rather, the center console contained a standard removable tray that the officer was able to remove with very little effort. Thus, while the marijuana was not found in plain view, it was also not found in a secret, unusual location that could be considered outside of the general knowledge of the driver of the vehicle. Hoskins had easy access to the center console and the area under the removable tray.

In addition to Hoskins's close proximity to the marijuana, the State presented evidence that the passenger compartment of the Tahoe reeked of raw marijuana. The odor was immediately detected by the officers as soon as Hoskins and his passenger rolled down the windows. Indeed, the officers testified that the odor was a "very strong ten" on a ten-point scale and "overwhelming." *Transcript* at 43, 70. The smell of marijuana has been deemed a

valid additional circumstance in support of a finding of constructive possession. *See Whitney v. State*, 726 N.E.2d 823 (Ind. Ct. App. 2000); *Corrao v. State*, 154 Ind.App. 525, 290 N.E.2d 484 (1972). Here, it is evident from the officers' testimony that the overwhelming odor of raw marijuana could not have been overlooked by Hoskins. The evidence presented by the State was sufficient from which the jury, using its common sense, could have concluded that Hoskins had actual knowledge of the presence and illegal nature of the marijuana. We therefore conclude that the evidence sufficiently established that Hoskins constructively possessed the marijuana found in the center console of the vehicle he was driving. The evidence was sufficient to support Hoskins's conviction for class A misdemeanor possession of marijuana.

Judgment affirmed.

BARNES, J., and CRONE, J., concur.