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IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

IN RE SHANE R.

No. 1 CA-JV 17-0401
FILED 3-13-2018

Appeal from the Superior Court in Yavapai County
No. P1300JV201700159
The Honorable Anna C. Young, Judge

REVERSED

COUNSEL

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IN RE SHANE R.
Decision of the Court

MEMORANDUM DECISION

Presiding Judge Jon W. Thompson delivered the decision of the Court, in which Judge Peter B. Swann and Judge James P. Beene joined.

T H O M P S O N, Presiding Judge:

¶1 Shane R. appeals from the juvenile court's ruling adjudicating him delinquent for possession of drug paraphernalia and placing him on juvenile intensive probation (JIPS). Shane argues the evidence was insufficient to prove he used or knowingly possessed with intent to use the drug paraphernalia. For the following reasons, we reverse the juvenile court's finding of delinquency.

FACTUAL AND PROCEDURAL HISTORY

¶2 On May 25, 2017, the juvenile court placed Shane on standard probation for possession of drug paraphernalia, a class 1 misdemeanor. Five days later, Shane's Juvenile Probation Officer (the JPO) conducted a scheduled home visit at Shane's apartment where he lived with his mother and shared a room with his brother, A.R.

¶3 When the JPO arrived shortly after 11 a.m., Shane was alone in the home. The JPO noticed the odor of unburned marijuana and instructed Shane to exit the apartment to wait for the police after seeing a partially burned marijuana cigarette on the bathroom floor.

¶4 A Prescott Valley Police Department officer (the Officer) arrived to assist the JPO search the home and he also detected the odor of marijuana. The JPO and Officer proceeded to search the common areas of the apartment including the bedroom Shane shared with A.R. In the living room, the Officer found a pipe with marijuana residue hidden behind a stack of picture frames on a shelf by the television. On the boys' bedroom floor between the door and A.R.'s bed the JPO found a second, "mostly smoked," marijuana cigarette. The JPO discovered a metal container holding marijuana residue under A.R.'s bed, inside a shoe box. Finally, the JPO and Officer found two blue pill bottles containing marijuana residue under Shane's bedding and under a couch cushion in the living room and

IN RE SHANE R.
Decision of the Court

a white tray with marijuana residue under A.R.'s bed.¹ Although they found drug paraphernalia in common areas, all areas were shared rooms in which Shane did not exercise exclusive control. Shane denied knowledge of the drug paraphernalia in the home at that time and at the adjudication hearing.

¶5 The state filed a delinquency petition in June 2017 alleging:

Count 1 - Shane . . . did use or possess with intent to use drug paraphernalia, to-wit: pipe and cigarette

. . .

Count 2 - Shane . . . did use or possess with intent to use drug paraphernalia, to-wit: metal container . . .

in violation of Arizona Revised Statute (A.R.S.) section 13-3415(A) (2010). Following a contested adjudication hearing in July, the juvenile court adjudicated Shane delinquent on both counts and found him in automatic violation of his probation. Before the August 2017 disposition hearing, the JPO prepared a disposition report which noted that aside from one diluted drug test, all of Shane's weekly tests were negative for illegal substances. Taking the report into consideration, the juvenile court placed Shane on juvenile intensive probation (JIPS) until his eighteenth birthday.

¶6 Following disposition, Shane timely appealed. We have jurisdiction pursuant to A.R.S. §§ 8-235(A) (2016) and 12-120.21 (2018).

DISCUSSION

¶7 On appeal, Shane argues the state presented insufficient evidence to find him "guilty" of possession of drug paraphernalia beyond a reasonable doubt.

¶8 We review an adjudication of delinquency in a juvenile proceeding for an abuse of discretion. *In re Ryan A.*, 202 Ariz. 19, 23, ¶ 16 (App. 2002). We do not reweigh the evidence but review the evidence in the light most favorable to upholding the adjudication when we review a challenge to the sufficiency of the evidence. *In re Kyle M.*, 200 Ariz. 447, 448, ¶ 6 (App. 2001). We will reverse for insufficient evidence only when there is a "complete absence of probative facts to support a judgment or when a judgment is clearly contrary to any substantial evidence." *Id.* at 448-49, ¶ 6.

¹ The state did not charge Shane with possession of these three items.

IN RE SHANE R.
Decision of the Court

¶9 Applying these principles to the case at bar, we find the juvenile court erred by concluding, beyond a reasonable doubt, that Shane possessed drug paraphernalia.

I. Adjudication finding

¶10 Shane attacks the adequacy of evidence of the culpable mental state for the offense. A.R.S. § 13-3415(A) prohibits a person from using or possessing with intent to use drug paraphernalia and a violation of this statute is a class 6 felony.

¶11 For a court to adjudicate a juvenile delinquent of possession of drug paraphernalia, the state must prove the juvenile knowingly possessed the contraband. A.R.S. § 13-3415. “[P]ossess” means “knowingly to have physical possession or otherwise to exercise dominion or control over property.” A.R.S. § 13-105(34) (2015). Thus, the state had to “prove, among other things, ‘either actual physical possession or constructive possession with actual knowledge of the presence of the . . . substance.’” *State v. Teagle*, 217 Ariz. 17, 27, ¶ 41 (App. 2007) (quotation and citation omitted). “Constructive possession can be established by showing that the accused exercised dominion and control over the drug itself, or the location in which the substance was found.” *Id.*; see also *State v. Arce*, 107 Ariz. 156, 160 (1971) (stating “[c]onstructive possession is all that is necessary” and may be shown with circumstantial evidence). However, mere presence at a place where drugs are found does not establish “knowledgeable possession or control.” *Teagle*, 217 Ariz. at 27–28, ¶ 41.

¶12 At the adjudication hearing, the JPO testified that on his arrival at the house, Shane sat on the living room couch putting on his shoes. After the JPO observed the discarded marijuana cigarette on the bathroom floor, he stepped out of the apartment with Shane and waited outside for the police to arrive. The Officer testified Shane was outside the apartment on his arrival and remained there with a field training officer while he and the JPO conducted their search.

¶13 The search of the apartment revealed several items of drug paraphernalia. In Shane’s bedroom, which he shared with A.R., the JPO and Officer found one mostly smoked marijuana cigarette on the floor, a metal canister in a shoebox under Shane’s brother’s bed, a white plastic tray between A.R.’s bedframe and wall, and a blue plastic pill bottle under Shane’s bedding. A burned marijuana cigarette was on the bathroom floor. In the living room, the only room Shane is placed in by any testimony, the

IN RE SHANE R.
Decision of the Court

Officer found a pipe hidden behind a stack of frames on a shelf, and the JPO found a second blue pill bottle under the couch cushion.

¶14 The state argues that Shane had access to the apartment and, in particular, to the rooms where drug paraphernalia was found; the marijuana cigarettes were in plain sight; and Shane would recognize drug paraphernalia by sight and smell.

¶15 However, the state offered insufficient evidence, direct or circumstantial, to infer Shane knowingly possessed the drug paraphernalia. The state failed to offer evidence directly linking the paraphernalia to Shane, such as any testimony Shane was in either the bedroom or bathroom at any time contemporaneous to the time the items were left there. There was no circumstantial evidence presented suggesting Shane used or intended to use the drug paraphernalia. No testimony was presented regarding Shane's physical condition, i.e., whether he was under the influence of marijuana, or that they detected the odor of marijuana on his breath, hands, etc. Neither the JPO nor the Officer testified Shane's conversation with them appeared affected by marijuana use. No marijuana or paraphernalia was found on his person, under his fingernails, or on his clothing. The JPO testified that when seated on the couch, Shane made no furtive movements and he conceded he did not know if Shane left the blue pill bottle in the couch. There was no evidence introduced which showed, or tended to show, that Shane knew the pipe, metal canister, or marijuana cigarettes were there although he clearly did exercise dominion or control over the searched areas of the residence itself.

¶16 Shane's mother testified that Shane arrived at the apartment shortly before the JPO arrived, and did not sleep at home the previous night, but A.R. was there with friends. A.R. corroborated this and testified his friends left "stuff" at the apartment, and he admitted placing the metal container under his bed months ago. Regarding the night prior to the search, he stated one friend slept in Shane's bed and another friend slept on the couch.

¶17 We note Shane had no positive urinalysis tests leading up to the adjudication and disposition hearings which demonstrates he was not using marijuana during the time period in question.

¶18 In short, the only evidence presented was that Shane was in his home where drug paraphernalia was hidden from view. The state only charged Shane with possession of the metal canister found under A.R.'s

IN RE SHANE R.
Decision of the Court

bed, the pipe concealed on the living room shelf, and a cigarette. At the close of the adjudication hearing, the juvenile court stated:

“It is very interesting to me that he is expecting a visit from his probation officer, and when he entered the home, he smelled of marijuana and doesn't immediately leave. I think that there are ways that if, in fact, he didn't know it was drug paraphernalia, he could have avoided a lot of trouble by perhaps waiting outside, telling [the JPO], "When I got home, it smelled like pot in the house," but he didn't. The fact that we've got a joint on the floor in open sight and the canister in his bedroom, the State has met their burden of proof beyond a reasonable doubt.”

¶19 The state’s petition first charged Shane with possession of a “pipe and cigarette” and at the adjudication hearing, the state proceeded to present evidence of two “smoked” marijuana cigarettes the JPO found in the bathroom and bedroom. We find the juvenile court’s pronouncement of delinquency to be ambiguous and unsupported by the facts.

¶20 The juvenile court was silent as to the charge that Shane possessed the pipe but found him responsible for the metal container and “a joint.” The finding is in the singular which makes it impossible to discern which cigarette the court found Shane to have knowingly possessed and the ambiguity of the finding makes it difficult for us to defer to the court.

¶21 The state’s evidence that Shane was also in possession of a “metal container” does not support the finding that Shane knew it was hidden under A.R.’s bed. The testimony presented to the court was that the container was placed under the bed by A.R., smelled of marijuana only after it was opened, and it was hidden from view.

II. Disposition

¶22 In the course of our appellate review, we determined that independent of the erroneous adjudication finding, the juvenile court’s imposition of JIPS could constitute fundamental error. *See State v. Mann*, 188 Ariz. 220, 232 n.1 (1997) (Martone, J., concurring) (appellate court has discretion to address fundamental error it observes in course of appellate review). It appears the court erroneously believed it was required to impose JIPS.

¶23 We will not disturb the juvenile court’s disposition unless we find a clear abuse of discretion. *Maricopa County Juv. Ac. No. JV-110720*, 156

IN RE SHANE R.
Decision of the Court

Ariz. 430, 431 (App. 1988). Although the trial court has broad powers to dispose of the matter, it may not “misapply the law or a legal principle.” *Maricopa County Juv. Ac. No. JV-510312*, 183 Ariz. 116, 118 (App. 1995). Because disposition of a juvenile is analogous to the sentencing of an adult, we refer to sentencing law for guidance. *Id.* at 119. In ordering a disposition, the court must have accurate information. *See State v. Watton*, 164 Ariz. 323, 327 (1990).

¶24 A.R.S. § 8-352 (2017) identifies the evaluation and criteria required for a juvenile’s placement on JIPS. As a general matter, before recommending JIPS, a juvenile probation officer must “evaluate the needs of the juvenile and the juvenile’s risk to the community, including the nature of the offense, the delinquent history of the juvenile, the juvenile’s history of referrals and adjustments and the recommendation of the juvenile’s parents.” § 8-352(B). The probation officer may recommend that the court place the juvenile on intensive probation “[i]f the nature of the offense and the prior delinquent history of the juvenile indicate that the juvenile should be included in an intensive probation program pursuant to supreme court guidelines for juvenile intensive probation.” *Id.*; *see also* Ariz. Code of Jud. Admin. § 6-302.01(H) (“Eligibility Requirements for JIPS”).²

¶25 A juvenile court may place a juvenile on JIPS “[a]fter reviewing the juvenile’s prior record, the facts and circumstances of the current delinquent act . . . and the [probation officer’s] disposition summary report.” A.R.S. § 8-352(C). A limited exception to the extensive evaluation requirements in § 8-352(C) is found in § 8-341(D) (2017), which provides, “if a juvenile is fourteen years of age or older and is adjudicated as a repeat felony juvenile offender, the juvenile court shall place the juvenile on juvenile intensive probation.” *See also In re Russell M.*, 200 Ariz. 23, 24, 25 ¶¶ 1, 5 (App. 2001) (finding § 8-341(D) mandatory as applied to

² The supreme court guidelines provide, *inter alia*, that “[t]he probation officer shall include in the disposition summary report, case information related to delinquent risk and criminogenic needs as documented by the youth assessment, in addition to other file and collateral information” and “the officer’s recommendation for supervision and treatment services based upon the juvenile’s documented delinquent risk and criminogenic needs.” Ariz. Code of Jud. Admin. § 6-302.01(H)(3). In addition, “[p]robation officers shall support any recommendation for the placement of a juvenile on JIPS with the youth assessment, and other documented factors that increase risk.” Ariz. Code of Jud. Admin. § 6-302.01(H)(4).

IN RE SHANE R.
Decision of the Court

adjudication for second felony offense committed by juvenile over fourteen). In all circumstances, however, “when granting [JIPS] the court shall set forth on the record the factual reasons for using the disposition.” A.R.S. § 8-352(D).

¶26 In imposing JIPS in this case, the juvenile court reasoned:

because you are at high risk for being committed to the Department of Juvenile Corrections, because you benefit from the added supervision of house arrest components, because you're in need of a highly structured program such as intensive probation . . . and because you have been adjudicated on two separate felony charges . . . You've been adjudicated repeat felony juvenile offender.

However, Shane’s only past offense was a class 1 misdemeanor and, by all accounts, he maintained excellent grades in school, was employed, planned to attend college, and the JPO, in his disposition report, indicated Shane was classified as having a low probability of having a substance use disorder, and reported the Arizona Youth Assessment System Disposition Instrument indicated Shane should be placed on a low level of supervision. The JPO then recommends the imposition of JIPS because:

- A. The juvenile is at high risk for being committed to the Arizona Department of Juvenile Corrections.
- B. The juvenile would benefit from the added supervision and house arrest components of Juvenile Intensive Probation.
- C. The juvenile is in need of a highly structured program such as Juvenile Intensive Probation.
- D. The juvenile has been adjudicated of two separate felony charges mandating a recommendation of Juvenile Intensive Probation.

But JIPS is only a mandatory disposition when a juvenile adjudicated is a “repeat felony juvenile offender,” § 8-341(D), which Shane is not.

¶27 A repeat felony offender is a juvenile who: “(a) is adjudicated delinquent for an offense that would be a felony offense if committed by an adult, and (b) previously has been adjudicated a first time felony juvenile offender.” A.R.S. § 8-341(V)(2). Because the JPO and juvenile court were mistaken about Shane’s status as a two-time felony offender, we conclude the court’s disposition was an abuse of discretion. It appears the court erroneously believed it was required to impose JIPS for what was Shane’s

IN RE SHANE R.
Decision of the Court

first felony disposition. *Cf. State v. Stroud*, 209 Ariz. 410, 414, ¶ 21 (2005) (in criminal case, remand for resentencing is proper when trial court “erred in believing that consecutive sentences were statutorily mandated”); *State v. Harrison*, 195 Ariz. 1, 3, 5, ¶¶ 1, 6, 17 (1999) (remand for resentencing proper for trial court’s failure to substantially comply with statutory requirement that aggravated or mitigated sentence be supported by “factual findings and reasons in support of such findings . . . set forth on the record”); *State v. Hardwick*, 183 Ariz. 649, 656–57 (App. 1995) (remand for resentencing necessary when “record does not reveal” whether sentencing judge would have imposed same sentence when not considering improper factor).

¶28 Although the appropriate remedy is traditionally to remand the case for a new disposition hearing, in this case, our reversal of the juvenile court’s order adjudicating Shane delinquent moots the issue.

CONCLUSION

¶29 Insufficient evidence supported the juvenile court’s order adjudicating Shane delinquent, and we reverse the adjudication.



AMY M. WOOD • Clerk of the Court
FILED: AA