

IN THE SUPREME COURT OF THE STATE OF DELAWARE

WILLIAM E. WHITE,	§	
	§	No. 111, 2007
Defendant Below-	§	
Appellant,	§	Court Below: Superior Court
	§	of the State of Delaware in and
	§	for New Castle County
v.	§	
	§	
STATE OF DELAWARE	§	ID # 0605022769
	§	
Plaintiff Below,	§	
Appellee.	§	
	§	

Submitted: July 18, 2007
Decided: August 15, 2007

Before **STEELE**, Chief Justice, **HOLLAND**, and **RIDGELY**, Justices.

ORDER

This 15th day of August 2007, it appears to the Court that:

(1) Appellant William White appeals his Superior Court convictions of Possession of Marijuana, Possession of Drug Paraphernalia, and Use of a Dwelling for Keeping Controlled Substances. White makes two arguments on appeal. First, he contends that there was insufficient evidence to support his convictions. Second, White argues that his possession conviction should be vacated because it is a lesser included offense of maintaining a dwelling for keeping controlled substances. We find no merit to either argument. Accordingly, we affirm.

(2) On May 23, 2006, Wilmington Police executed a search warrant at two locations after receiving information that White, a person prohibited from possessing a gun, attempted to purchase a firearm from a gun store. The police first searched an apartment located at 709 N. Broom Street. The left half of the bedroom contained female items, while male clothing and items were situated on the right side of the bed. On a shelf to the right of the bed, police found a 9-millimeter handgun case, parking tickets addressed to White, and a cigar box. Inside the cigar box, police discovered a plastic bag containing 15.4 grams of marijuana.¹ Police also recovered a digital scale, \$1,737 in cash, and several partially smoked blunts.²

(3) The officers also searched an auto body shop that White operated. White was found at that location and arrested. Inside the shop's safe, Police found a 9-millimeter handgun, a box of 14 hollow tip rounds and a magazine containing 15 live rounds.³ While under arrest, White told the police that he primarily resided with his girlfriend at 709 N. Broom Street.

(4) White was indicted on charges of possession with intent to deliver marijuana, use of a dwelling for keeping controlled substances, possession of a deadly weapon by a person prohibited, possession of ammunition by a person

¹ The parking tickets were addressed to a different address, 521 N. King Street, Apt. 503.

² A "blunt" is a cheap cigar that is regularly hollowed out and filled with marijuana.

³ White admitted that the 9-millimeter handgun belonged to him.

prohibited, false or written statement in connection with transfer or purchase of firearm, and possession of drug paraphernalia. During the trial, the judge granted White's motion for judgment of acquittal on the weapons charges. A Superior Court jury convicted White of possession of marijuana as a lesser included offense of possession with intent to deliver marijuana, use of a dwelling for keeping controlled substances, and possession of drug paraphernalia. White was sentenced to four years at Level 5, suspended for four months at Level 4 supervision, two years at Level 3 supervision, and fined \$500. This appeal followed.

(5) White first contends that the State produced insufficient evidence to support his convictions. Because White did not move for judgment of acquittal with respect to these charges, we review his claim for plain error.⁴ Plain error exists when the error is "so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process."⁵ Such error must be apparent on the face of the record and be "so basic, serious and fundamental in their character that they clearly deprive an accused of a substantial right or show manifest injustice."⁶

(6) To secure a conviction under Section 4755(a)(5) for maintaining a dwelling for the purpose of keeping a controlled substance, the State must show that the defendant knowingly kept or maintained a dwelling "which is resorted to

⁴ *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986).

⁵ *Id.*

⁶ *Hunter v. State*, 788 A.2d 131 (Del. 2001) (TABLE).

by persons using controlled substances in violation of this chapter for the purpose of using these substances or which is used for keeping or delivering them in violation of this chapter.”⁷ The “critical benchmark” for determining whether the evidence sufficiently supports a conviction for maintaining a dwelling for the purpose of keeping a controlled substance is “the degree of the defendant's control or use of the [dwelling] in connection with the possession of drugs.”⁸ Although ownership of the dwelling is not required, “a single incident of using a building to facilitate a drug deal is insufficient.”⁹ The State must “offer evidence of some affirmative activity by the defendant to utilize the [dwelling] to facilitate the possession, delivery, or use of controlled substances.”¹⁰

(7) We find that the State produced sufficient evidence to demonstrate that White knowingly used the apartment to keep marijuana. White admitted to police that he primarily resided at the Broom Street apartment. In addition, the marijuana was found among various other personal items belonging to White, including parking tickets and a case matching the size of his handgun. This evidence demonstrates more than a single incident of using the apartment and is therefore sufficient to support his conviction.

⁷ 16 *Del. C.* § 4755(a)(5).

⁸ *Hopkins v. State*, 893 A.2d 922, 932 (Del. 2006).

⁹ *Id.*

¹⁰ *Priest v. State*, 879 A.2d 576, 580 (Del. 2005).

(8) The evidence was also sufficient to support his possession of marijuana and drug paraphernalia convictions. To support a possession conviction, the State must show that the defendant was in actual or constructive possession of the drug and paraphernalia.¹¹ Constructive possession is demonstrated by evidence that a defendant knew the location of the drug, had the ability to exercise dominion and control over the substance, and intended to guide the destiny of the drug.¹² In *Carter v. State*,¹³ this Court held that the State submitted sufficient evidence of constructive possession when the defendant had seven bags of cocaine and one bag of marijuana in the pocket of his pants found directly next to his bed.¹⁴ The fact that the drugs were located in a pair of pants located directly next to the bed, where the defendant slept, created a reasonable inference that he constructively possessed the drugs.¹⁵ Similarly, in this case the marijuana was found at a residence where White spent most of his time. More specifically, the marijuana was found on a shelf directly next to his bed which contained other personal items belonging to him. By treating the marijuana as one of his belongings, and keeping it within feet of where he slept, it was reasonable for the jury to find that White constructively possessed the drug.

¹¹ 16 *Del. C.* § 4754(b).

¹² *White (Jan) v. State*, 906 A.2d 82, 86 (Del. 2006).

¹³ 839 A.2d 665 (Del. 2003) (TABLE).

¹⁴ *Id.*

¹⁵ *Id.*

(9) White next contends that his possession of marijuana conviction should be vacated because it was an included offense of keeping a dwelling for the purpose of using or keeping marijuana. This argument was also not raised below. Therefore, we review for plain error.

(10) A defendant may not be convicted of more than one offense if one offense is included in the other.¹⁶ One offense is included in another offense if “it is established by the proof of the same or less than all the facts required to establish the commission of the offense charged.”¹⁷ This Court held in *Lilly v. State*,¹⁸ however, that “the Delaware statute prescribing included offenses is not limited exclusively to the standard ‘statutory elements’ definition.”¹⁹ “[A]lthough [an] included offense must produce the same result as the inclusive offense, there may be some dissimilarity in the elements necessary to prove the offense.”²⁰

(11) In this case, White’s possession conviction was not a lesser included offense of maintaining a dwelling because the two offenses are dissimilar. Possession of marijuana is an offense involving a person who knowingly or intentionally possesses marijuana.²¹ The elements of maintaining a dwelling for

¹⁶ 11 *Del. C.* § 206(a)(1).

¹⁷ 11 *Del. C.* § 206(b)(1).

¹⁸ *Lilly v. State*, 649 A.2d 1055 (Del. 1994).

¹⁹ *Id.* at 1061.

²⁰ *Id.*

²¹ 16 *Del. C.* § 4754(b).

the purpose of keeping controlled substances include knowingly keeping a dwelling with knowledge that the dwelling is used for keeping controlled substances.²² Proof of the elements for possession of marijuana does not prove the elements of maintaining a dwelling. Moreover, the two statutes punish two different behaviors. One punishes the possession the drug, while the other punishes the *use of a dwelling* for possessing the drug. Possession of marijuana is not a lesser included offense of maintaining a dwelling for the purpose of keeping a controlled substance.

NOW, THEREFORE, IT IS ORDERED that the judgment of the Superior Court is **AFFIRMED**.

BY THE COURT:

/s/ Henry duPont Ridgely
Justice

²² 16 *Del. C.* § 4755(a)(5).