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MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

ANTHONY CUSAMANO,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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Case No. 2D18-5113

Opinion filed June 26, 2020.

Appeal from the Circuit Court for  
Hillsborough County; Nick Nazaretian,  
Judge.

Howard L. Dimmig, II, Public Defender, and  
Robert Rosen, Assistant Public Defender,  
Bartow, for Appellant.

Ashley Moody, Attorney General,  
Tallahassee, and Michael Schaub, Assistant  
Attorney General, Tampa; and C. Todd  
Chapman, Assistant Attorney General,  
Tampa (substituted as counsel of record) for  
Appellee.

KHOUZAM, Chief Judge.

Anthony Cusamano appeals from an order revoking his probation, disputing a finding of three probation violations. We find merit in one of his arguments, reverse the revocation order, and remand for reconsideration by the trial court.

Cusamano was convicted of possession of obscene material and placed on probation in May 2018. Among the conditions of this probation, he was prohibited from leaving Hillsborough County without permission from his probation officer, possessing any firearm, and breaking any laws. In October 2018, during the aftermath of Hurricane Michael, Cusamano was pulled over in Bay County while a local curfew was in effect. He was driving a vehicle with several passengers, all of whom were carrying firearms as members of a private security company. However, Cusamano himself was not carrying any weapons. The men were arrested for violating the curfew, and the State sought to revoke Cusamano's probation. After a hearing, the trial court found Cusamano in violation of probation for leaving Hillsborough County without permission, being in constructive possession of firearms, and for violating the curfew ordinance. The court revoked his probation and sentenced him to 270 days' imprisonment.

"In order for a trial court to revoke a defendant's probation, the alleged violation of the probation must be both willful and substantial." Thompson v. State, 172 So. 3d 527, 529 (Fla. 3d DCA 2015) (citing Lawson v. State, 969 So. 2d 222, 230 (Fla. 2007)). When reviewing an order revoking probation, this court must "first assess whether the finding of a willful and substantial violation is supported by competent substantial evidence." Savage v. State, 120 So. 3d 619, 621 (Fla. 2d DCA 2013). Evidence is competent when admissible under the rules of evidence; it is substantial

when it is "real, material, pertinent, and relevant" with "definite probative value." Id. (quoting Dunn v. State, 454 So. 2d 641, 649 n.11 (Fla. 5th DCA 1984) (Cowart, J., concurring specially)). And because the trial judge is in the best position to weigh and evaluate evidence, "we assess the record evidence from which the trial court reached its conclusion for its sufficiency, not its weight." Id. at 622.

Cusamano contends that there was insufficient evidence to support the trial court's finding that he was in constructive possession of the firearms carried by the men in the car he was driving. "To establish constructive possession, the State must prove that: (1) defendant knew that the firearm was within his presence; (2) defendant had the ability to maintain control over it; and (3) defendant knew of the illicit nature of the firearm." Gonzalez v. State, 832 So. 2d 898, 899 (Fla. 3d DCA 2002) (citing Williams v. State, 724 So. 2d 1214, 1215 (Fla. 4th DCA 1998)). Cusamano does not dispute that he knew the firearms were in his presence or that he was not allowed to possess them. Rather, he contends that he lacked any control over the weapons because they belonged to and were being carried by other men in the vehicle he was driving. Proximity alone does not establish the control element of constructive possession. See Watson v. State, 961 So. 2d 1116, 1117 (Fla. 2d DCA 2007) (reversing firearm possession conviction where only evidence of defendant's control over gun in a jointly occupied vehicle was his proximity to it); Smith v. State, 687 So. 2d 875, 878 (Fla. 2d DCA 1997) ("If the contraband is found in a vehicle over which the accused has joint possession, the accused's . . . ability to control it will not be inferred but must be established by independent proof." (citing Moffatt v. State, 583 So. 2d 779 (Fla. 1st DCA 1991))).

Here, the passengers in the vehicle driven by Cusamano were carrying their own firearms on or near their persons. Testimony revealed that one particular weapon, an AR-15, was either slung across a passenger's chest or stowed somewhere behind the front seats. Without more, these facts only establish proximity and are insufficient to demonstrate Cusamano's control of the weapons, especially because he was unarmed and driving a vehicle he did not own. Cf. Gonzalez, 832 So. 2d at 899 (holding that a partially visible firearm stowed behind the driver's seat of a truck with two passengers, without more, does not prove that the driver had knowledge of or dominion over the weapon); Smith v. State, 175 So. 3d 900, 904 (Fla. 1st DCA 2015) (holding that State offered insufficient proof to establish constructive possession of ammunition by vehicle driver, a convicted felon, where ammunition bag was within his ready reach as well as within reach of other passengers, no independent evidence other than proximity tied bag to defendant, and defendant was not the owner of the vehicle).

The State relies on Brown v. State, 428 So. 2d 250 (Fla. 1983), arguing that the trial court could infer Cusamano's control over the weapons because at least some of them were plainly visible and Cusamano was aware that they were in the vehicle he was driving. In Brown, the Florida Supreme Court held that control over illegal drugs could be inferred where they were plainly visible in the common areas of a home occupied by the defendant. Id. at 252. This was because the defendant, "as resident owner of his home, had control over the common areas." Id. But in this case, Cusamano did not have control over the "common areas" of the vehicle. Indeed, the evidence showed that he was an employee and did not own the vehicle. Nor was there evidence that he had any authority over the armed men who were his passengers. The

State has thus failed to prove the second element of constructive possession, and it was error for the trial court to find Cusamano in violation of probation for possessing firearms.

In light of these considerations, we reverse the revocation order. Because we do not know whether the trial court would have revoked Cusamano's probation but for the firearm violation, we remand for the trial court to reconsider whether to revoke his probation based on the remaining violations and the duration of any resulting sentence. See Malone v. State, 146 So. 3d 155, 158 (Fla. 1st DCA 2014).

Reversed and remanded.

VILLANTI and BLACK, JJ., Concur.