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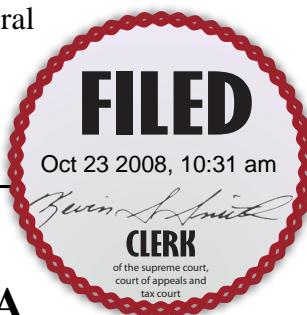
ATTORNEY FOR APPELLANT:

JOHN PINNOW
Greenwood, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

JANINE STECK HUFFMAN
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

ZACHARIAH JAMES,)
Appellant-Defendant,)
vs.) No. 49A02-0804-CR-323
STATE OF INDIANA,)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Steven Eichholtz, Judge
Cause No. 49G23-0703-FC-46822

October 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

Zachariah James appeals his convictions for class C felony possession of cocaine and a firearm and class D felony possession of cocaine. We affirm the former and remand with instructions to vacate the latter.

Issues

- I. Did the State present sufficient evidence that James possessed cocaine?
- II. Should James's class D felony conviction be vacated as an included offense of his class C felony conviction?

Facts and Procedural History

The relevant facts most favorable to the jury's verdict indicate that at approximately 6:00 a.m. on March 15, 2007, police officers served an arrest warrant on James at the small Indianapolis apartment he rented and shared with Lakia Moore. The officers knocked and announced their presence. When they did not receive a response, they entered the apartment and found James and Moore in the bedroom at the back of the residence. The officers found a shotgun, a rifle, a bulletproof vest, plastic baggie corners, and a pair of jeans on the bedroom floor. The jeans contained James's identification, over \$500 in cash, and a plastic baggie with 3.86 grams of marijuana. The officers saw a digital scale on the living room table. The scale had a white, powdery residue that was later identified as cocaine. Digital scales are often used to weigh small amounts of narcotics, which are then placed in plastic baggie corners for distribution. Tr. at 80 (testimony of Detective Sergeant Leo George).

Police obtained and executed a search warrant for James's apartment. In a kitchen drawer, officers found a digital scale with a less noticeable residue that was later identified as

containing both marijuana and cocaine. In the kitchen, the officers also found a sawed-off semiautomatic rifle, a revolver, ammunition, .26 grams of marijuana, and electric bills addressed to James at that residence. They also found two open boxes of baking soda, which may be used to cut cocaine or to manufacture crack cocaine. *Id.* at 123 (testimony of Detective Sergeant George).

The State charged James with class C felony possession of cocaine and a firearm, class D felony possession of cocaine, class A misdemeanor possession of marijuana, and class A misdemeanor possession of paraphernalia.¹ On February 27, 2008, a jury found James guilty on the first three counts and not guilty on the fourth. The trial court entered judgment of conviction on the first three counts. James now appeals his cocaine-related convictions.

Discussion and Decision

I. Sufficiency of Evidence

James asserts that the State failed to present sufficient evidence that he possessed the cocaine that was found on the digital scales in his apartment.² Our standard of review is well settled:

[W]e neither reweigh the evidence nor reassess the credibility of witnesses. Instead, we consider the evidence most favorable to the verdict and draw all reasonable inferences supporting the ruling below. We will affirm the conviction if there is probative evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. A conviction may

¹ The State also filed a class D felony enhancement of the marijuana charge based on James's prior conviction for a drug-related offense. The trial court dismissed this count on the State's motion after trial.

² James acknowledges that the State was required to prove only that he possessed an "identifiable," rather than a "useable," amount of cocaine. Appellant's Br. at 5 (citing *Beeler v. State*, 807 N.E.2d 789, 792 (Ind. Ct. App. 2004), *trans. denied*).

be sustained on circumstantial evidence if such evidence supports a reasonable inference of guilt.

Rush v. State, 881 N.E.2d 46, 53 (Ind. Ct. App. 2008) (citations omitted).

“[A] conviction for possession may rest on proof of actual or constructive possession.

Actual possession occurs when a person has direct physical control over the items.”

Bradshaw v. State, 818 N.E.2d 59, 62 (Ind. Ct. App. 2004) (citation omitted). James did not have actual possession of the cocaine at issue. To establish constructive possession,

the State must show that the defendant had (1) the intent to maintain dominion and control over the drugs and (2) the capability to maintain dominion and control over the drugs. To prove intent, the State must establish the defendant’s knowledge of the contraband, which may be inferred from either the exclusive dominion and control over the premises or, when control is non-exclusive, from evidence of additional circumstances indicating the defendant’s knowledge of the contraband and its presence. *Such additional circumstances include, but are not limited to*, the following: (1) incriminating statements made by the defendant; (2) attempted flight or furtive gestures; (3) a manufacturing setting; (4) proximity of the defendant to the contraband; (5) location of the contraband within the plain view of the defendant; and (6) location of the contraband within close proximity of items owned by the defendant.

Bradley v. State, 765 N.E.2d 204, 212 (Ind. Ct. App. 2002) (citations omitted) (emphasis added).

James shared his apartment with Moore, and thus his control over the premises was not exclusive. Inside the apartment, police found white, powdery cocaine residue on a digital scale on a living room table, as well as a less noticeable residue of cocaine and marijuana on a digital scale in a kitchen drawer. Police also found a bulletproof vest and several firearms, over \$500 in cash in James’s jeans, as well as plastic baggie corners and two open boxes of baking soda, all of which are consistent with a drug manufacturing environment. The State

established that James had rented the apartment for seven months prior to the search and that the living area encompassed only 500 to 600 square feet. Taken together, this evidence is sufficient to support a reasonable inference that James had both the intent and the capability to maintain dominion and control over the cocaine. In other words, the State presented sufficient evidence to establish that James constructively possessed the cocaine.

II. Vacation of Class D Felony Conviction

James contends, and the State concedes, that his conviction for class D felony possession of cocaine should be vacated pursuant to Indiana Code Section 35-38-1-6, which provides, “Whenever: (1) a defendant is charged with an offense and an included offense in separate counts; and (2) the defendant is found guilty of both counts; judgment and sentence may not be entered against the defendant for the included offense.” An “included offense” is an offense that “is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged.” Ind. Code § 35-41-1-16(1). Indiana Code Section 35-38-1-6 “protects defendants charged with an offense and a lesser-included offense from being found guilty of both charges because this would be tantamount to convicting a defendant twice for the same conduct.” *Smith v. State*, 881 N.E.2d 1040, 1046 (Ind. Ct. App. 2008).

Here, James’s class D felony possession of cocaine offense is established by proof of less than all the material elements required to establish the commission of class C felony possession of cocaine and a firearm and therefore is an included offense. *Compare* Ind. Code § 35-48-4-6(a) (“A person who ... knowingly or intentionally possesses cocaine (pure or adulterated) ... commits possession of cocaine ..., a Class D felony, except as provided in

subsection (b).”) *with* Ind. Code § 35-48-4-6(b) (“The offense is: (1) a Class C felony if: ... (B) the person was also in possession of a firearm”); *see Hardister v. State*, 849 N.E.2d 563, 575 (Ind. 2006) (“[B]ecause possession of a firearm serves only to enhance the penalty for Class D possession of cocaine that is committed without possession of a firearm, possession of a firearm does not establish a separate crime.”). Therefore, we remand with instructions to vacate James’s conviction for class D felony possession of cocaine. We affirm his conviction for class C felony possession of cocaine and a firearm.

Affirmed in part and remanded in part.

KIRSCH, J., and VAIDIK, J., concur.