

Bobby D. Hawkins appeals his convictions for Dealing in Cocaine,¹ as a class A felony, and Possession of Marijuana,² as a class A misdemeanor. He presents the following issues for review:

1. Did the trial court properly admit evidence found during the execution of the search warrant?
2. Did the State present sufficient evidence of constructive possession to support Hawkins's convictions for dealing in cocaine and possession of marijuana?

We affirm.

On August 2, 2007, officers of the Goshen Police Department and the Elkhart County Interdiction and Covert Enforcement Unit executed a search warrant at 1718 S. 10th Street in Elkhart County, Indiana. Hawkins was not present at the time of the search. The only occupant was a man named William Engel, who purportedly lived in the basement of the residence.

In the dining room of the residence, officers found a digital scale, a letter addressed to Hawkins at 1718 S. 10th Street, and two prescription medication bottles with Hawkins's name. In the northwest bedroom,³ officers found other items linking Hawkins to the residence. Specifically, in the top drawer of the dresser in this bedroom, officers discovered a piece of mail from Founder Insurance Company addressed to Bobby D. Hawkins at 1718 S. 10th Street and a separate handwritten letter to O.G. (a street name Hawkins was known to go

¹ Ind. Code. Ann. § 35-48-4-1 (West, PREMISE through 2009 Public Laws approved and effective through 4/20/2009).

² I.C. § 35-48-4-11 (West, PREMISE through 2009 Public Laws approved and effective through 4/20/2009).

³ There was another bedroom in the residence, as well as a make-shift bedroom in the basement, but the northwest bedroom was the only room in the residence found to contain cocaine or marijuana.

by) from an incarcerated friend. From this same drawer, officers recovered a plastic baggie containing marijuana. On the floor next to the dresser, officers found a plastic baggie containing over seven grams of cocaine. Among other things, officers also found another prescription bottle with Hawkins's name and a digital scale in the northwest bedroom.

On November 20, 2007, the State charged Hawkins with class A felony dealing in cocaine (Count I), class B felony dealing in cocaine (Count II), and class A misdemeanor possession of marijuana (Count III). Count II related to a controlled buy that took place the day before the search warrant was executed. Hawkins unsuccessfully sought to have the evidence that was seized as a result of the search warrant suppressed at trial. Following a bench trial, he was convicted as charged. On appeal, Hawkins challenges his convictions on Counts I and III.

1.

Hawkins initially challenges the admission of evidence obtained as a result of the search of the residence at 1718 S. 10th Street. Specifically, he argues that “the hearsay attained from the concerned citizens and CS 07-030 was not sufficient to support the probable cause necessary for a search.” *Appellant's Brief* at 5.

In deciding whether to issue a search warrant, “[t]he task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit ... there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The duty of the reviewing court is to determine whether the magistrate had a “substantial basis” for concluding that probable cause existed. It is clear that a substantial basis requires the reviewing court, with significant deference to the magistrate's determination, to focus on whether reasonable inferences drawn from the totality of the evidence support the determination of probable cause.

A “reviewing court” for these purposes includes both the trial court ruling on a motion to suppress and an appellate court reviewing that decision.

Query v. State, 745 N.E.2d 769, 771 (Ind. 2001) (some citations omitted).

The affidavit for the search warrant in the instant case requested permission to search the residence at 1718 S. 10th Street in Elkhart for evidence involved in the commission of drug offenses. The affidavit provided in relevant part as follows:

3. CS07-009 has been working with the Elkhart Count Interdiction and Covert Enforcement Unit (“I.C.E.”). CS07-009 has assisted the I.C.E. Unit with approximately three (3) purchases of cocaine and or marijuana from two different individuals. CS07-009 has also provided other information to the I.C.E. Unit which has been found to be accurate. Based on this, CS99-023 [sic] has been found to be credible and reliable.

4. On June 8, 2007, the Elkhart Police Department tip line received a call from a concerned citizen advising of a possible drug house located at 1518 Cleveland. The caller advised that the subjects dealing from the residence are Leroy and Tina. The caller also advised that there is a red four door Tahoe and a silver and maroon Cadillac parked at the residence. Based on the description, the correct address was found to be 1718 S. 10th Street. The ICE Unit discovered that the address of 1518 Cleveland does not exist. The vehicles matching the caller’s description were found at 1718 10th Street which intersects with Cleveland. The vehicle that was described as a Cadillac was actually an Oldsmobile.

5. On June 13, 2007, the [I.C.E.] received a call from a concerned citizen. The caller advised that crack cocaine is being sold at 1718 S. 10th Street in Elkhart. According to the caller, Leroy and Peanut are the dealers at the location. The caller also advised that a red Suburban and a maroon and tan Cadillac are parked at the residence. The caller stated that there are guns in the residence and subjects serve as lookouts through the windows.

6. On June 16, 2007, the [I.C.E.] received a call from a concerned citizen. The caller advised that a subject by the name of Leroy is dealing crack cocaine out of 1718 S. 10th Street in Elkhart. The caller advised that a red Suburban is parked at the residence. The caller also advised that guns and drugs are kept in the residence.

7. On June 27, 2007, UC193 met with CS07-009 at a prearranged location. The CS advised that the CS could purchase crack cocaine from a female subject the CS knows as Mickie Rhymer. The CS advised that Mickie lives on Oakland Ave. near Indiana Ave. in Elkhart. The CS advised that earlier in the day, the CS had spoken with Mickie who advised the CS to come to her residence later in the day.

8. [Details of preliminary controlled buy procedures set out.]

9. UC193 and CS07-009 then drove to Mickie's residence which was found to be 706 Oakland Ave. in Elkhart. The CS exited the vehicle and spoke with Mickie in the yard of the residence. Mickie then placed a call to her supplier and advised that she needed a ball of crack, which is one eighth of an ounce. The subject advised her that he was "cooking it up" and for her to try back in about an hour. UC193 and the CS then left the residence. UC193 maintained control of the CS after leaving the residence and returning later.

10. Approximately forty five minutes later, the CS and UC193 returned to the 706 Oakland residence. Mickie Rhymer exited the residence and entered the passenger side rear seat of the UC vehicle. Mickie then advised UC193 that UC193 needed to drive her to go pick up the crack cocaine from her supplier. Mickie began to give directions to UC193. She stated that the residence was off of Wolf St. UC193 advised that UC193 did not want to send the money with her unless UC193 knew where she was going. Mickie then instructed UC193 to turn northbound on 10th St from Wolf. She then pointed at a residence on the east side of 10th St and advised UC193 that is the residence where she is going. Mickie then instructed UC193 to park beside a fence with [sic] is on the north side of the residence she pointed at.

11. UC193 then handed Mickie \$170.00 of photocopied money before Mickie exited the vehicle. UC193 observed as Mickie walked through the front yard of the residence, later identified as 1718 S. 10th St. and approached the front door. As UC193 and the CS were waiting for Mickie to return, UC193 observed two other vehicles pull up in [sic] directly in front of the residence with black male subjects approaching the vehicles. A few minutes later, Mickie exited the residence and returned to the UC vehicle. UC193 then pulled away as Mickie removed a clear tied baggie corner containing a white rock like substance from her mouth and handed the bag to CS07-009.... UC193 drove back to 706 Oakland Ave and dropped Mickie off at the residence.

12. The whitish rock like substance was field tested... and tested positive for

cocaine. The substance was also weighed and had a total aggregate weight of 3.08 grams....

14. On June 12, 2007,^[4] UC193 met with CS07-009 at a prearranged location. The CS advised UC193 that the CS had spoken with Mickie Rhymer earlier in the day. The CS advised Mickie that UC193 wanted to purchase one eight ball...of crack cocaine. Mickie advised the CS to come to her house later in the day with UC193.

15. UC193 was equipped with a body mic/recording device and was in possession of \$180.00 of previously photocopied I.C.E. Unit funds.... UC193 and CS07-009 drove to 706 Oakland Ave. and met with Mickie Rhymer on the front porch to the residence. Mickie advised that her guy would be there shortly to drop of [sic] the crack. A few minutes later, UC193 observed a maroon and silver two door passenger car in the alley directly behind the residence. The vehicle was possibly an Oldsmobile Cutlass, which is associated with 1718 S. 10th St.... Mickie advised that is her guy at which time UC193 handed Mickie the \$180.00 of photocopied money. Mickie then walked to the car and returned a few moments later. Mickie handed UC193 a clear tied baggie corner containing a whitish rock like substance. UC193 and the CS then left the residence.

16. The whitish rock like substance was field tested using the Cocaine Quick Check test kit and field tested positive for cocaine. The substance was also weighed and had a total aggregate weight of 3.66 grams....

17. On August 1, 2007, ICE Unit officer #120 met with a separate cooperating source who has been assigned an identification number of CS07-030. This CS indicated there was a residence located on 10th Street between Cleveland and Wolf where a subject with the street name of O.G. was living; that the CS knew that O.G. was selling crack cocaine from the residence. The CS indicated that he/she could make a controlled purchase of crack cocaine from O.G. from that residence.

18. The ICE Unit was aware that O.G. was the street name for Bobby Hawkins, born January 19th, 1976. A photograph was shown to the CS and he/she positively identified Bobby Hawkins as O.G. the person that the CS knew was selling crack cocaine. The CS has assisted the ICE Unit in the past. His/her information and cooperation has led to more than five (5) controlled

⁴ We agree with the State that this is likely a scrivener's error and the affiant most likely intended to write July 12, 2007. This July date is consistent with the chronological order of the rest of the affidavit.

purchases of illegal narcotics. The CS has also introduced an undercover officer to several individuals suspected of selling illegal drugs. The information supplied by the CS has been corroborated by independent police investigation and intelligence gathered from other individuals, his/her information has been deemed as reliable and accurate.

19. The CS and his/her vehicle were searched by members of the ICE Unit, the CS possessed nothing illegal. The CS was then fitted with a transmitting/recording device. The CS believed that he/she could take an undercover officer along with him/her to purchase crack cocaine. ICE Unit officer #120 sat in the passenger seat of the cooperating source's vehicle. The CS contracted Bobby Hawkins by calling his cellular phone number of [XXX-XXXX]. Hawkins answered the phone and instructed the CS to meet him at the corner of 11th and Wolf Street. ICE Unit officer 119 and 334 were watching the residence located at 1718 S. 10th Street when the phone call was made. Shortly after the phone call the surveillance officers witnessed Bobby Hawkins exiting from the front door of the residence; he entered into a silver and maroon Oldsmobile....

20. The surveillance officers watched Bobby Hawkins drive to the area of 11th and Wolf. Bobby Hawkins drove up to the CS vehicle and spoke briefly with the CS. Bobby Hawkins did not want to deliver the crack cocaine to the CS until the CS got rid of the undercover officer. The CS parked a block away on Oakland Avenue; he/she then called Bobby Hawkins and told him that he/she would walk down the alley to meet him. Surveillance officers witnessed the CS walking to the east in a mid-block alley. The CS then met with Hawkins at the corner of 11th and Cleveland. The CS entered into Hawkins' vehicle at which time Hawkins sold the CS an eight-ball of crack cocaine for \$135.00 dollars (eight ball is a street term meaning 3.5 grams).

21. ...Hawkins drove the CS to 11th and Wolf Street, he stopped the car and the CS exited the vehicle and walked directly back to the undercover officer who was waiting in the CS vehicle parked on Oakland. The CS handed the substance to the undercover officer. The CS was then searched and there was nothing illegal possessed by the CS. The substance purchased from Hawkins later field-tested positive as crack cocaine and it had an approximate weight of 2.9 grams.

* * * *

Appendix at 27-29.

We agree with the State that the information contained in the lengthy, detailed

affidavit provided ample probable cause to search the residence in question. The affidavit reveals that after several reports by concerned citizens about cocaine being dealt out of the residence, police initiated a thorough investigation of the matter. In totality, the investigation, which included three controlled drug buys, clearly linked the residence (as well as Hawkins and a specific vehicle at the residence) to illegal drug activity. The trial court did not err by admitting the evidence seized as a result of the search.

2.

Hawkins also challenges the sufficiency of the evidence with respect to his convictions for Counts I and III. Specifically, he claims the State failed to establish that he constructively possessed the contraband because there was no evidence that he was a resident of the home at the time of the search or that any of his personal possessions were mingled with the contraband.

When reviewing the sufficiency of the evidence, we will not reweigh the evidence or judge the credibility of witnesses. *Alkhalidi v. State*, 753 N.E.2d 625 (Ind. 2001). We consider only the evidence most favorable to the judgment and the reasonable inferences that can be drawn therefrom. *Corbin v. State*, 840 N.E.2d 424 (Ind. Ct. App. 2006). Moreover, we will 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. *Alkhalidi v. State*, 753 N.E.2d 625.

A conviction for possession of contraband may rest upon proof of either actual or constructive possession. *See Britt v. State*, 810 N.E.2d 1077 (Ind. Ct. App. 2004). “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.” *Id.* at 1082. Here, we are presented with the issue of constructive possession.

To demonstrate that the defendant was capable of maintaining dominion and control, the State must show that the defendant was able to reduce the controlled substance to his personal possession. *Grim v. State*, 797 N.E.2d 825 (Ind. Ct. App. 2003). Proof of a possessory interest in the premises in which contraband is found is adequate to show the capability to maintain dominion and control over the items in question. *Massey v. State*, 816 N.E.2d 979 (Ind. Ct. App. 2004). *See also Gee v. State*, 810 N.E.2d 338, 340-41 (Ind. 2004) (even where possession of the premises is non-exclusive, “the law infers that the party in possession of the premises is capable of exercising dominion and control over all items on the premises”).

To establish the intent element where possession of the premises is non-exclusive, the State must demonstrate the defendant’s knowledge of the presence of the contraband, which may be inferred from evidence of additional circumstances pointing to the defendant’s knowledge of the presence of the contraband. *Massey v. State*, 816 N.E.2d 979. These additional circumstances have been found to include, among other things: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the drugs; (5) drugs in plain view; and (6) location of the drugs in close proximity to items owned by the defendant. *Id.*; *Ladd v. State*, 710

N.E.2d 188 (Ind. Ct. App. 1999). In each of these instances, “there exists the probability that the presence and character of the contraband was noticed by the defendant.” *Ladd v. State*, 710 N.E.2d at 190.

Here, the evidence favorable to the conviction reveals that Hawkins was living at the residence in question with at least two other individuals. Not only did he have personal items at the residence, he had received mail at the address during the week preceding the search and had been seen exiting the residence approximately six hours before the search. Further, the contraband was found in the bedroom apparently used by Hawkins and in close proximity to items owned by him. In fact, the marijuana was found in a dresser drawer that also contained a piece of mail addressed to Bobby D. Hawkins at 1718 S. 10th Street and a separate handwritten letter to O.G. (a known street name for Hawkins). The cocaine was found in plain view on the floor next to the dresser, with a digital scale on top of the dresser. Based upon the totality of the evidence, a reasonable trier of fact could determine that Hawkins had the intent and capability to maintain dominion and control of the drugs found in the residence, all of which were found in the same bedroom.

Judgment affirmed.

BAKER, C.J., and RILEY, J., concur.