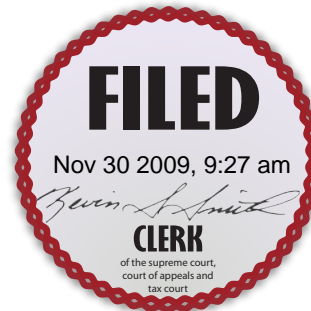


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

TONY BRANCH,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0905-CR-396

APPEAL FROM THE MARION COUNTY SUPERIOR COURT
The Honorable Steven R. Eichholtz, Judge
Cause No. 49G23-0805-FA-116252

November 30, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-defendant Tony Branch appeals the trial court's denial of his motion for involuntary dismissal pursuant to Indiana Trial Rule 41(B). Specifically, Branch argues that the State failed to present sufficient evidence to support his convictions for Dealing in Cocaine,¹ a class A felony; Possession of Cocaine and a Firearm,² a class C felony; and Dealing in Marijuana,³ a class D felony. Finding that the State presented sufficient evidence, we conclude that the trial court did not err when it denied Branch's Rule 41(B) motion.

FACTS

After receiving information that Branch was dealing drugs from a duplex located in Indianapolis, Detective Jayson Campbell of the Indianapolis Metropolitan Police Department (IMPD) began conducting surveillance on the duplex three or four times a week.⁴ During the surveillance, Detective Campbell observed that Branch would leave the duplex on foot or on a moped, meet with different people, and then return to the duplex. In addition, Detective Campbell noticed that people would enter the duplex through the rear door, stay approximately two or three minutes, and then exit through the rear door. Branch was the only person who stayed at the duplex, and he chain-locked his moped to the side of the

¹ Ind. Code § 35-48-4-1.

² I.C. § 35-48-4-6.

³ I.C. § 35-48-4-10.

⁴ The record is unclear as to exactly when Detective Campbell received the information or for how many weeks he conducted surveillance.

duplex at night.

On May 15, 2008, Detective Campbell and approximately six other IMPD detectives executed a “no-knock”⁵ search warrant on the side of duplex where Branch had been observed. Tr. p. 101. Because Detective Campbell knew that the rear door was barricaded, the detectives entered through the front door, where they found Branch standing at the entry between the living room and kitchen, within arm’s length of a loaded handgun, and Rodney Davis sitting in a chair. When Detective Campbell asked Branch “where is the dope,” Branch indicated that there was a little bit of marijuana and cocaine in the kitchen. Id. at 36-37, 105.

In an open kitchen cabinet, the detectives found another semi-automatic handgun, a bag of cocaine, and a paper sack with marijuana, all of which were in plain view. Also in plain view on the kitchen counter was a bottomless can containing several bindles of crack cocaine.⁶ A scale was found nearby along with a key to the duplex. On the other side of the kitchen counter, the detectives found a second scale and a razor blade inside a drawer. In an open pantry, the officers discovered another bottomless can with thirty bindles of crack cocaine. A loaded assault rifle was found in a storage closet in the kitchen.

⁵ Detective Campbell testified that a no-knock search warrant permits the police to enter the target of the search warrant without first knocking and announcing their presence. Detective Campbell explained that to obtain a no-knock search warrant, the police must establish “a degree of danger for the officers to make entry.” Tr. p. 101.

⁶ Detective Joshua Harpe testified that a “bindle” is “basically a bag full of single servings” of crack cocaine. Tr. p. 122.

The detectives discovered more marijuana in a bedroom dresser drawer. In addition, a crack spoon and a crack pipe were found on a shelf in the basement. Branch was in possession of a prepaid cell phone and a second prepaid cell phone was located in the kitchen. In all, 7.7785 grams of cocaine and 32.36 grams of marijuana were seized. The officers did not find any mail in the house and there was very little food or personal belongings.

On May 16, 2008, the State charged Branch with dealing in cocaine, a class A felony; possession of cocaine within 1,000 feet of a park, a class A felony; possession of cocaine and a firearm, a class C felony; dealing in marijuana, a class D felony; and possession of marijuana, a class D felony. The State subsequently dismissed the charge of possession of cocaine within 1,000 feet of a park.

Branch's bench trial commenced on March 18, 2009. After the State presented its case-in-chief, Branch moved for the involuntary dismissal of all charges under Rule 41 (B) on the grounds that the State had failed to prove its case. The trial court denied Branch's motion and found Branch guilty on all counts.

At Branch's April 6, 2009, sentencing hearing, the trial court merged the conviction for possession of marijuana into the conviction for dealing in marijuana. Branch was sentenced to thirty years, with ten years suspended, for dealing in cocaine. In addition, the trial court sentenced Branch to four years for possession of cocaine and a firearm, to be served concurrently with his thirty-year term. Finally, Branch was sentenced to a concurrent term of 545 days for dealing in marijuana, for an aggregate term of thirty years with ten years

suspended. Branch now appeals.

DISCUSSION AND DECISION

Branch's sole argument on appeal is that the trial court erred when it denied his motion for involuntary dismissal under Indiana Trial Rule 41(B), which provides:

After the plaintiff or party with the burden of proof upon an issue, in an action tried by the court without a jury, has completed the presentation of his evidence thereon, the opposing party, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the weight of the evidence and the law there has been shown no right to relief.

In a criminal case, a Rule 41(B) motion is “essentially a test of the sufficiency of the State’s evidence.” Workman v. State, 716 N.E.2d 445, 448 (Ind. 1999). Our review of the trial court’s denial of the motion is limited to the State’s evidence presented during its case-in-chief. Williams v. State, 892 N.E.2d 666, 670-71 (Ind. Ct. App. 2008), trans denied. We will not reweigh the evidence or judge the credibility of witnesses. Id. at 670. This court will reverse the trial court’s decision only if it was clearly erroneous. Todd v. State, 900 N.E.2d 776, 778 (Ind. Ct. App. 2009).⁷

Branch contends that the State produced insufficient evidence in its case-in-chief to

⁷ The State argues that Branch waived his Rule 41(B) argument because he presented evidence after the trial court denied his motion and that this court should consider Branch’s argument as a challenge to the sufficiency of the evidence. This court’s review of recent case law, however, indicates that both our Supreme Court and this court have addressed the defendant’s Rule 41(B) argument even though the defendant presented evidence after the trial court denied the motion. See Workman, 716 N.E.2d at 447-48 (addressing the defendant’s Rule 41(B) argument even though the defendant subsequently presented evidence); Todd, 900 N.E.2d at 778-79 (same). In any event, as discussed in the main text, our Supreme Court has stated that a criminal defendant’s Rule 41(B) motion “is essentially a test of the sufficiency of the State’s evidence.” Workman, 716 N.E.2d at 448.

show that he possessed the cocaine, marijuana, firearms, and other contraband (collectively, “the contraband”), which was necessary to convict Branch of the alleged offenses. See I.C. § 35-48-4-1(a)(2)(C) (requiring that the defendant possess cocaine with intent to deliver); I.C. § 35-48-4-6(b)(1)(B) (requiring possession of cocaine while also in possession of a firearm); I.C. § 35-48-4-10(a)(2)(C) (requiring that the defendant possess marijuana with the intent to deliver). When the State must show that the defendant possessed contraband, it may satisfy this burden by showing either actual or constructive possession. Deshazier v. State, 877 N.E.2d 200, 204 (Ind. Ct. App. 2007), trans. denied. Here, the State proceeded under the theory of constructive possession.

Constructive possession can be shown by establishing that the defendant had the intent and the capability to maintain dominion and control over the contraband. Id. at 205. To establish the intent element, the State must show that the defendant had knowledge of the presence of the contraband. Goliday v. State, 708 N.E.2d 4, 6 (Ind. 1999). A defendant’s capability to maintain dominion and control is established by evidence that the defendant is able to reduce the contraband to his personal possession. Id. Evidence of a possessory interest in the premises in which the contraband is found is sufficient to show the capability to maintain dominion and control. Id. Nevertheless, when the defendant’s control over the premises is nonexclusive, as in the instant case, intent to maintain dominion and control may be inferred from additional circumstances indicating that the defendant knew of the presence of the contraband. Grim v. State, 797 N.E.2d 825, 831 (Ind. Ct. App. 2003). These additional circumstances include:

(1) incriminating statements by the defendant, (2) attempted flight or furtive gestures, (3) location of substances like drugs in settings that suggest manufacturing, (4) proximity of the contraband to the defendant, (5) location of the contraband within the defendant's plain view, and (6) the mingling of the contraband with other items owned by the defendant.

Henderson v. State, 715 N.E.2d 833, 836 (Ind. 1999) (citing Carnes v. State, 480 N.E.2d 581, 586 (Ind. Ct. App. 1985)).

In support of Branch's argument that the State failed to prove that he had constructive possession over the contraband, he directs us to Moore v. State, 613 N.E.2d 849 (Ind. Ct. App. 1993). In Moore, after the police had received information that drugs were being sold from an apartment, a police informant was sent to purchase cocaine. Id. at 850. Thirty minutes later, the police executed a search warrant on the apartment where they found crack cocaine in plain view on a cocktail table. Id. The defendant was lying on a couch approximately four feet from the cocktail table and appeared to be intoxicated and disoriented. Id. at 850-51. The defendant was subsequently convicted of dealing in cocaine and possession of cocaine. Id. at 850.

On rehearing, this court reversed the defendant's convictions, concluding that the State had failed to make any connection between the defendant and the premises where the contraband was seized other than the defendant's mere presence in the apartment. Id. at 853. We reasoned that the State's evidence indicated that the apartment belonged to someone other than the defendant and that the State had failed to show that the defendant had the capability to maintain dominion and control over the contraband. Id. Consequently, the State had failed to prove that the defendant had constructive possession of the contraband. Id.

By contrast, in Matthews v. State, a different panel of this court affirmed the defendant's convictions for possession of cocaine and marijuana, concluding that the State had produced sufficient evidence that the defendant constructively possessed the contraband. 792 N.E.2d 934, 935 (Ind. Ct. App. 2003). In Matthews, the police had been conducting a narcotics investigation, which included surveillance on a house. Id. The police observed that the front and rear doors were barricaded, and over a two-day period, the police observed several people entering and exiting the house through the rear door. Id. Upon executing a search warrant on the house, the police saw the defendant and two others located in the family room. Id. There was a plastic bag containing cocaine on the floor and a plastic bag containing marijuana on top of the television. Id.

This court distinguished Moore, noting that the defendant and two other individuals were found in a partially vacant house with barricaded doors and neither the defendant nor the other individuals either owned or lived in the house. Id. at 937. In addition, the defendant in Matthews testified that he was at the house visiting his cousin, while the defendant in Moore had never met the occupant of the apartment until the day of the raid. Id. at 937-38. We further reasoned that the defendant's close proximity to the contraband, which was in plain view, was an additional circumstance supporting that inference that the defendant constructively possessed the contraband. Id. at 938.

We conclude that the instant case is more analogous to Matthews than to Moore. Specifically, neither Branch nor Davis owned or lived in the partially-vacant duplex. In addition, when the police entered the duplex, Branch was within arm's reach of a loaded

handgun and was close to the kitchen, where most of the contraband was located. Indeed, when Branch was asked by Detective Campbell where the drugs were located, he answered that there was “a little bit of marijuana and cocaine in the kitchen.” Tr. p. 36. Furthermore, much of contraband was in plain view, either on the kitchen counter or in an open kitchen cabinet.

Perhaps even more compelling, Branch was observed by police surveillance at the duplex many times, whereas Davis had never been seen at the duplex until the search warrant was executed. Similarly, while Detective Campbell saw other individuals quickly entering and leaving the duplex, Branch remained inside for extended periods of time and tied his moped to the side of duplex. Moreover, the fact that Branch did not live in the duplex is not dispositive, inasmuch as Detective Joshua Harpe testified that it is common for cocaine dealers to use what is referred to as a “trap house,” which “is a place where [dealers] sell their product but do not normally live.” Id. at 117. Detective Harpe explained that the purpose is to give “a person attempting to sell cocaine an opportunity to sell their product without being tied to a house.” Id. at 117-18. In other words, drug dealers distribute drugs from a location where they do not live in an attempt to hide any connection between themselves and any contraband that may be found inside that particular location. In light of these circumstances, we cannot conclude that the State failed to present sufficient evidence that Branch constructively possessed the contraband, and, accordingly, the trial court did not err when it denied Branch’s Rule 41(B) motion for involuntary dismissal of the charges against him.

The decision of the trial court is affirmed.

FRIEDLANDER, J., and RILEY, J., concur.