

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.

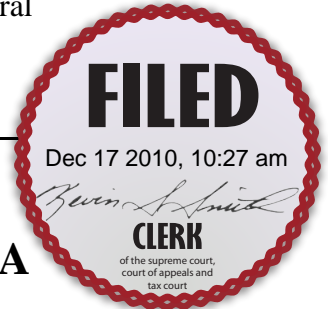
ATTORNEY FOR APPELLANT:

MARK A. BATES
Office of the Lake County Public Defender
Crown Point, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

WADE JAMES HORNbacher
Deputy Attorney General
Indianapolis, Indiana



**IN THE
COURT OF APPEALS OF INDIANA**

DONALD DAVIS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)
)
)
)

No. 45A04-1003-CR-168

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Diane Ross Boswell, Judge
Cause No. 45G03-0901-FA-4

December 17, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary and Issues

In this case, police worked with a confidential informant to set up three purchases of drugs from a suspected dealer. After the third purchase, the police searched the dealer's home and found cocaine in a bedroom closet. The dealer was arrested and charged with dealing, possession, and maintaining a common nuisance. During a pre-trial conference, the defendant/dealer asked the trial court to fire his court-appointed counsel and to allow him to represent himself. The trial court eventually granted his request, and he represented himself at trial. The jury convicted him as charged.

Donald Davis now appeals, claiming that the trial court failed to ensure that he understood the consequences of waiving his right to counsel. He also challenges the sufficiency of evidence to support his conviction for cocaine possession. Finding no error, we affirm.

Facts and Procedural History

On January 24, 26, and 28, 2009, the Gary Police Department worked with a confidential informant to conduct three controlled buys of cocaine and/or heroin from Davis at his home. After the third buy, police searched Davis's home pursuant to a search warrant and found drug paraphernalia that included scales, bags, and razor blades covered with a white powder residue. In a bedroom closet, they found two rocks of cocaine inside the pockets of two shirts. In that same bedroom, they found bills addressed to Davis. Although a woman was also present in Davis's home at the time of the search, it is unclear whether the woman was a visitor or a resident.

On January 29, 2009, the State charged Davis with two counts of class A felony dealing in cocaine, three counts of class A felony dealing in narcotics, one count of class B felony cocaine possession, and one count of class D felony maintaining a common nuisance. At a December 11, 2009 pretrial conference, Davis expressed dissatisfaction with his court-appointed counsel and asserted his constitutional right to represent himself. When the trial court denied his request, he re-asserted his request for “self representation which is guaranteed due process by the 6th Amendment.” PTC Tr. at 5.¹ He then stated, “I do not want this man to represent me I want him fired. I asked the court today to represent myself.” *Id.* at 6, 8. The trial court told him that if he represented himself he would be held to the same standards as a licensed attorney and would need to know all applicable court rules. Davis indicated that he understood, and the trial court granted his request.

At supplemental hearings on January 6 and January 8, 2010, Davis acted pro se, but the trial court appointed standby counsel. At the pretrial conference on the first day of trial, the trial court asked Davis if he was sure he wanted to represent himself, and Davis answered affirmatively. The trial court reiterated that Davis would be held to the same standard as a trained attorney, and Davis confirmed that he understood this and that he understood the seriousness of the charges against him. The trial court gave him a waiver of counsel form and instructed him to review and to “sign that for me, if you choose to proceed to trial after

¹ Davis has submitted numerous volumes of transcript on appeal. The transcripts of the December 11, 2009 and January 11, 2010 pretrial conferences shall be cited as “PTC Tr.” The transcripts of the supplemental hearings held on January 6, 2010, and January 8, 2010, shall be cited as “Supp. Tr.” The transcript of the jury trial shall be cited as “Tr.”

reading it, wit[h]out an attorney.” PTC Tr. at 27. Davis read the form, signed it, and represented himself at trial, with standby counsel present.

On January 15, 2010, the jury found Davis guilty as charged. This appeal ensued. Additional facts will be provided as necessary.

Discussion and Decision

I. Waiver of Right to Counsel

Davis contends that the trial court erred in failing to conduct an adequate inquiry into whether he knowingly, willingly, and intelligently waived his right to counsel. Although the trial court is in the best position to assess whether the defendant has made a knowing and intelligent waiver, we nevertheless review the validity of such waiver using a de novo standard. *Drake v. State*, 895 N.E.2d 389, 393 (Ind. Ct. App. 2008).

A criminal defendant’s Sixth Amendment right to counsel is essential to the fairness of a criminal proceeding. Implicit in the right to counsel is the right to self-representation. Because a criminal defendant gives up many benefits when the right to counsel is waived, the accused must knowingly and intelligently forgo those relinquished benefits. Furthermore, when a defendant asserts his or her right to self-representation, the trial court should advise the defendant of the dangers and disadvantages of self-representation.

Id. at 392 (citations and internal quotation marks omitted). When determining whether a defendant has made a knowing and intelligent waiver, we examine four factors: (1) the extent of the court’s inquiry into the defendant’s decision, (2) other evidence in the record that establishes whether the defendant understood the dangers and disadvantages of self-representation, (3) the defendant’s background and experience, and (4) the context of his decision to proceed pro se. *Id.*

Here, Davis’s repeated and well-articulated assertions of his right to self-representation, coupled with the trial court’s continued inquiry and other evidence in the record, indicate that Davis made a knowing and intelligent waiver of counsel. The specificity of his requests indicated a familiarity with the system and the law. For example, when he first raised the matter at the December 11, 2009 hearing, he specifically invoked the Constitution, stating that he wanted “self representation which is guaranteed due process by the 6th Amendment.” PTC Tr. at 5. He also demonstrated that he understood the burden of proof when he acted pro se at the January 6, 2010 pretrial hearing, stating, “[T]he burden is not on me to prove anything. The burden is on the State to prove whatever that they say that I’ve done.” Supp. Tr. at 9. Davis’s former counsel described him as a “very intelligent” person who is knowledgeable about his case. PTC Tr. at 9. Moreover, Davis’s lengthy criminal record indicates his familiarity with and experience within the criminal system.²

Placed in context, Davis initially asserted his right to self-representation because he was dissatisfied with the performance of his court-appointed counsel. However, his persistence throughout the proceedings indicates that he was not merely reacting emotionally when he requested the right to proceed pro se, but that he truly believed he could effectively represent himself. Initially, at the December 11, 2009 pretrial conference, he told the trial court that he wanted his counsel fired and wanted to represent himself. The reticent trial court initially refused his request based the severity of the charges against him. When Davis

² Davis’s criminal record includes felony convictions for aggravated robbery, possession of a controlled substance, and unlawful use of a weapon by a felon, as well as misdemeanor convictions for aggravated assault, criminal trespass, and criminal mischief.

continued to press the matter, the trial court finally relented and warned him, “You understand Mr. Davis that by representing yourself you are held to the standard of any other lawyer in this courtroom?” PTC Tr. at 11. Davis answered affirmatively. At subsequent pretrial hearings, Davis reasserted his right to represent himself, and the trial court allowed him to proceed pro se, but appointed standby counsel. Moreover, at a pretrial conference on the day of trial, the court again addressed the seriousness of the charges and made further inquiry into whether Davis intended to proceed pro se. When Davis responded affirmatively, the trial court admonished him, “You also understand that you’re going to be held to the same standards [as a licensed attorney]. Now during trial, I won’t be taking time to explain these rules and things to you. I’m going to rule on any objections ... just as if you were an attorney You’re going to be held to the same standard.” *Id.* at 26. Again, Davis indicated that he understood.

Other evidence in the record establishes that Davis understood the standard to which he would be held if he persisted in his request to proceed pro se. At the pretrial conference, the trial court presented Davis with the detailed waiver of counsel form and instructed him, “I want you to *review* that Waiver Of Counsel form and sign that for me, *if* you choose to proceed to trial after reading it, wit[h]out an attorney.” *Id.* at 27 (emphases added). Davis read and signed the waiver form in the courtroom. *See id.* at 28 (Davis stating, “I’m listening, even though I’m reading this, I’m listening”). The form explained the charges as well as the individual and aggregate sentence exposure, including incarceration and fines. The form also advised Davis of the standard he would be expected to meet if he acted as his

own counsel, explaining that attorneys possess education, training, and expertise in the following areas:

(1) Investigating and interrogating witnesses; (2) Gathering appropriate documentary evidence; (3) Obtaining favorable defense witnesses; (4) Preparing and filing pre-trial motions; (5) Conducting discovery, including depositions of witnesses; (6) Preparing appropriate written instructions of the jury; (7) Presenting favorable opening and closing statements; (8) Examining and cross examination of witnesses at trial; and (9) Recognizing objectionable, prejudicial evidence and testimony and making proper objections thereto.

Appellant's App. at 31. Thus, the form clearly indicated to Davis the perils associated with an untrained person attempting to perform such complicated tasks in the course of self-representation. Nonetheless, Davis, by his signature, acknowledged that he had "been informed of his constitutional right to be represented by an attorney . . . [and] still desire[d] to proceed pro se in this cause." *Id.*

In sum, Davis articulately and persistently asserted his right to represent himself despite numerous verbal and written admonitions. As such, we conclude that he knowingly and intelligently waived his right to counsel.

II. Sufficiency of Evidence

Davis challenges the sufficiency of evidence to support his conviction for cocaine possession. When reviewing the sufficiency of the evidence to support a conviction, we neither reweigh evidence nor judge witness credibility. *Harrison v. State*, 901 N.E.2d 635, 638 (Ind. Ct. App. 2009), *trans. denied*. Rather, we consider only the probative evidence and reasonable inferences most favorable to the verdict. *Id.* We will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable

doubt. *Id.* The evidence need not overcome every reasonable hypothesis of innocence. *Id.* Instead, the evidence is sufficient if an inference may reasonably be drawn from it to support the verdict. *Id.*

Indiana Code Section 35-48-4-6 states that a person who, without a valid prescription or doctor's order, knowingly or intentionally possesses cocaine, commits possession of cocaine, a class B felony if he possesses it within one thousand feet of a school.³ On appeal, Davis asserts that the State failed to establish that he constructively possessed the two rocks of cocaine found in the closet. "In the absence of actual possession of drugs, our court has consistently held that constructive possession may support a conviction for a drug offense." *Jones v. State*, 807 N.E.2d 58, 65 (Ind. Ct. App. 2004) (citation and quotation marks omitted), *trans. denied*. Constructive possession is the actual knowledge of the presence and illegal character of contraband, plus the intent and capability to maintain dominion and control over it. *Washington v. State*, 902 N.E.2d 280, 288 (Ind. Ct. App. 2009), *trans. denied*.

In cases where the defendant has exclusive possession over the premises on which the contraband is found, an inference is permitted that the defendant knew of its presence and was capable of controlling it. When possession is nonexclusive, however, additional circumstances must be present to support the inference that the defendant intended to maintain dominion and control over the contraband and that the defendant had actual knowledge of its presence and illegal character. Such additional circumstances include, but are not limited to, the following: (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

³ The front door of Davis's residence is 266 feet from a school.

defendant.

Washington, 902 N.E.2d at 288 (citations omitted).

Here, Davis sold cocaine from the house that he rented. Police searched the house just after the third controlled buy and found razor blades, baggies, a scale covered with a white powdery substance later determined to be cocaine, and two rocks of cocaine inside shirt pockets in a bedroom closet. In that same bedroom were several bills addressed to Davis. Thus, Davis's cocaine sale on the premises that day, the presence of cocaine-related paraphernalia, and the close proximity of Davis's mail to the cocaine rocks indicate that he had both the intent and capability to maintain dominion and control over the cocaine rocks. To the extent Davis relies on the fact that a woman was present in his home at the time of the search and that the shirts appeared to be women's shirts, he merely invites us to reweigh evidence, which we may not do. The evidence and inferences most favorable to the verdict support the jury's conclusion that Davis constructively possessed cocaine. Accordingly, we affirm.

Affirmed.

KIRSCH, J., and BRADFORD, J., concur.