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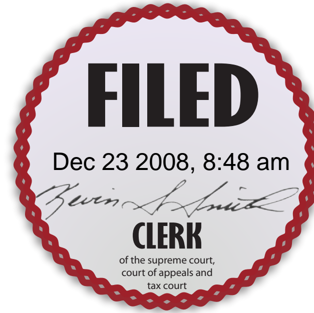

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IN THE
COURT OF APPEALS OF INDIANA

LARRY L. MARTIN, Appellant-Defendant, vs. STATE OF INDIANA, Appellee-Plaintiff.	)	No. 27A02-0807-CR-605

APPEAL FROM THE GRANT SUPERIOR COURT
The Honorable Jeffrey D. Todd, Judge
Cause No. 27D01-0602-FB-38

December 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Larry L. Martin appeals his conviction for Possession of a Firearm by a Serious Violent Felon, a Class B felony, following a jury trial.[1] Martin raises one issue for our review, namely, whether the State presented sufficient evidence to support his conviction.

We affirm.

FACTS AND PROCEDURAL HISTORY

On February 21, 2006, Janet Barron asked Martin to take her car to a shop in Fort Wayne and have the brakes checked. Barron was the last person inside her car before Martin took it. She did not leave any personal items in the car. She did not have any bags, firearms, or marijuana in the car.

Later that evening, Officer Nathan McBee of the Marion Police Department initiated a traffic stop of Barron's car for nonworking taillights. Martin was driving the car and was accompanied by a male passenger, who sat next to Martin in the front of the vehicle. Martin informed Officer McBee that his driver's license was currently suspended, which Officer McBee subsequently confirmed. Officer McBee noticed the smell of both burnt and raw marijuana inside the vehicle, and he saw a large duffel bag on the rear floorboard that contained "a greenish-brown leafy substance." Transcript at 144. That substance field tested positive for marijuana, and Martin later admitted the bag belonged to him.

Officer McBee arrested Martin for driving with a suspended license. Officer McBee then performed a search of the driver's area incident to that arrest and located a

[1] Martin does not appeal his other convictions or his sentence.

.380 caliber silver handgun in a black nylon holster under the driver's seat. At no point had Martin displayed "furtive movements or gestures" toward the firearm. Id. at 161-62. Because Martin's passenger also did not have a valid license, Officer McBee had Barron's vehicle towed.

On February 23, the State charged Martin with possession of a firearm by a serious violent felon, a Class B felony, along with multiple drug charges. At his subsequent trial, Martin introduced the affidavit of Marlin J. Hill, who claimed to have left the .380 caliber handgun underneath the driver's seat of Barron's vehicle after having cleaned that vehicle for Barron in February of 2006. A jury found Martin guilty of the Class B felony and two drug-related misdemeanors. The trial court sentenced Martin to an aggregate term of ten years, with two years suspended to formal probation. This appeal ensued.

DISCUSSION AND DECISION

Martin argues that the State did not present sufficient evidence that he was a serious violent felon who knowingly or intentionally possessed a firearm. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

To prove that Martin possessed a firearm here, the State was required to prove beyond a reasonable doubt that Martin was "[a] serious violent felon who knowingly or intentionally possesse[d] a firearm." Ind. Code § 35-47-4-5(c) (2005). Martin does not dispute that he was a serious violent felon. Rather, Martin argues only that the State did not demonstrate that he knowingly or intentionally possessed the firearm found under the driver's seat of Barron's vehicle when he was arrested for illegally driving that vehicle.

Possession of contraband, such as a firearm by a serious violent felon, may be either actual or constructive. See Henderson v. State, 715 N.E.2d 833, 835 (Ind. 1999). As our Supreme Court has explained:

> Actual possession occurs when a person has direct physical control over the item. Walker v. State, 631 N.E.2d 1, 2 (Ind. Ct. App. 1994). Constructive possession occurs when somebody has "the intent and capability to maintain dominion and control over the item." Id. We suggested in Woods that knowledge is a key element in proving intent:
>
> > When constructive possession is asserted, the State must demonstrate the defendant's knowledge of the contraband. This knowledge may be inferred from either the exclusive dominion and control over the premise[s] containing the contraband or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband.
>
> [Woods v. State, 471 N.E.2d 691, 694 (Ind. 1984)] (citations omitted). Proof of dominion and control of contraband has been found through a variety of means: (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. Carnes v. State, 480 N.E.2d 581, 586 (Ind. Ct. App. 1985).

Id. at 835-36.

Here, Martin asserts that the State failed to demonstrate that he constructively possessed the firearm. Specifically, Martin maintains that "there were two people in the vehicle . . . , so the dominion and control . . . was not exclusive to Martin," "Officer McBee . . . saw no furtive movements by anyone in Martin's vehicle[,] . . . the gun was not in plain view," and "proximity to the gun alone is not enough to prove Martin constructively possessed the gun." Appellant's Brief at 8-11. Martin also alleges that Hill's affidavit demonstrates that the gun belonged to another person. We cannot agree with Martin's selective review of the evidence.

Despite Martin's contentions to the contrary, a number of factors support his conviction. Barron, the owner of the vehicle, testified that she had no personal items in her car when Martin took it. Barron also testified that there was not a handgun in the car at that time. Barron authorized Martin to take her car only to a service station in Fort Wayne. Yet, by the time Officer McBee pulled over Martin in Marion, Martin had a passenger in the front, a bag full of marijuana in the back, and a firearm under his seat. Martin was driving the vehicle in which the firearm was found, and, while Martin did not display furtive gestures and the gun was not in plain view, the firearm was directly beneath the seat in which he was sitting and just in front of the duffel bag full of marijuana that he admitted belonged to him. And Martin does not assert that another person drove the vehicle after Barron lent it to him; rather, he sought to establish ownership of the firearm by introducing Hill's affidavit, in which Hill stated that he had placed the gun in the hidden location while he was cleaning the car sometime before

Barron lent the car to Martin. But the jury was free to not believe Hill's affidavit and to believe Barron's statements, and we will not reassess the credibility of that evidence.

Finally, Martin suggests that the fact that he did not engage in any furtive movements is dispositive of the question of whether he constructively possessed the firearm. In support, he cites Henderson, where our Supreme Court reversed a conviction for unlawful possession of a firearm when the defendant, a passenger in a car, knew there was a firearm at his feet and could have picked it up. But that firearm was owned by the driver of the vehicle, who had a permit for it and was likewise within reach of the gun. Those facts do not extend here, where neither of the vehicle's occupants owned the firearm and there is no evidence to suggest that the passenger could have easily reached the firearm. Accordingly, Martin's reliance on Henderson and similar case law is misplaced.

Affirmed.

BAKER, C.J., and KIRSCH, J., concur.