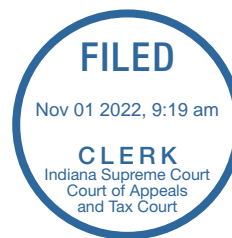


MEMORANDUM DECISION

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

K.T.,
Appellant-Respondent,

v.

State of Indiana,
Appellee-Petitioner.

November 1, 2022

Court of Appeals Case No.
22A-JV-386

Appeal from the Marion Superior
Court

The Honorable Geoffrey A.
Gaither, Judge

The Honorable Duane E.
Merchant, Magistrate

Trial Court Cause No.
49D09-2109-JD-7609

Mathias, Judge.

- [1] The Marion Superior Court adjudicated K.T. a delinquent child for committing dangerous possession of a firearm and carrying a handgun without a license. K.T. appeals his delinquency adjudication and argues that the State failed to prove that he constructively possessed the firearms at issue.
- [2] Concluding that K.T. constructively possessed only one of the three firearms at issue, we affirm in part, reverse in part, and remand for proceedings consistent with this opinion.

Facts and Procedural History

- [3] On September 1, 2021, Indianapolis police officers observed “a few gentlemen” enter a gas station at the corner of 46th Street and Arlington. Tr. p. 14. The men were masked but it was difficult to determine if they were masked due to COVID or if they were planning to rob the gas station. *Id.* at 15. One of the men had a handgun. Police officers “ran the plate” of the vehicle the men arrived in and confirmed that the license plate on the vehicle was expired. *Id.*
- [4] The men exited the gas station and returned to their vehicle, a four-door sedan. The driver of the vehicle failed to use the turn signal when he exited the gas station parking lot, and an officer began to follow the vehicle. The officer initiated a traffic stop of the vehicle after the driver exceeded the speed limit. Officer Andrew Hibschman assisted with the traffic stop and when he approached the vehicle he detected the “distinct [odor] of raw marijuana coming from the vehicle.” *Id.* Therefore, the officers asked the vehicle’s occupants to exit the vehicle.

[5] There were six people in the vehicle: the driver, the front-seat passenger, and four passengers in the back seat. The driver was the vehicle's owner. After Officer Hibsichman removed the rear passenger, who was seated behind the driver's seat, from the vehicle, he saw an AR-style pistol in plain view where the passenger's feet had been on the floorboard behind the driver's seat. Officer Hibsichman placed the passenger in handcuffs and advised the other officers on the scene that there was a gun in the vehicle. The remaining occupants were removed from the vehicle one at a time.

[6] K.T. was a back-seat passenger and he was seated in the middle of the seat, closer to the passenger-side door, but not next to it. There was one other passenger seated between K.T. and the rear passenger-side door and two passengers seated between K.T. and the rear driver's-side door.

[7] The officers searched the vehicle after its occupants were removed and secured. In addition to the AR-style pistol found on the floorboard behind the driver's seat, officers found a tan Glock handgun and a black handgun in a holster underneath the front passenger seat. The tan handgun was closer to the rear passenger seat floorboard than the black handgun. Ex. Vol. State's Ex. 4. The tan and black handguns were not in plain view.

[8] Based on the orientation of the black handgun, Officer Hibsichman believed that the front seat passenger placed the black handgun underneath the front passenger seat. Tr. p. 28. The person the officers saw with the black handgun at the gas station was wearing all black. K.T. was wearing a yellow tie-dyed

hoodie. When he was removed from the vehicle, K.T. gave the officer a false name. Tr. p. 36.

[9] The officer believed that K.T. would have been able to access all three handguns. None of the six occupants of the vehicle claimed ownership of any of the three handguns. And the officers did not observe any of the vehicle's occupants making furtive movements. Tr. p. 34.

[10] On September 3, the State filed a petition alleging that K.T. was a delinquent child. In pertinent part, the State alleged that K.T. had committed Class A misdemeanor dangerous possession of a firearm and carrying a handgun without a license, a Class A misdemeanor if committed by an adult. The petition did not specifically allege which firearm K.T. possessed for each count.

[11] The trial court held a fact-finding hearing on September 27. After considering Officer Hibsichman's testimony and viewing photographs of the locations of the firearms in the vehicle, the trial court entered a true finding for both dangerous possession of a firearm and carrying a handgun without a license. The court gave the following reasons for its decision:

[H]aving looked at the actual exhibit, the—what I'll call the AR firearm, the thing is technically a pistol but it's huge. I consider myself something of a firearm person and I . . . have a basic understanding of the ATF regulations and whatnot, but that is by no means to be . . . confused with a small handgun, that's an extremely large handgun, it's right there on the floor. I can't see how anyone could not be totally observant of that fact and frankly, [] anyone in the backseat would have had easy access to that thing as big as it is. Additionally, we have the other, a tan

handgun in particular, that appears to have been stuck underneath the front seat. From the Court's interpretation of the photo, it appears that it was placed with a forward motion as opposed to being tucked from the rear as if I was sticking it down beneath me. If I was, I would expect the barrel to be pointing to the rear []. . . . It seems really . . . apparent to the Court that this young man knew that there were weapons in . . . this car, the AR, but I think that the Glock is not excluded by any stretch of the imagination.

Tr. pp. 46-47.

[12] The court held K.T.'s dispositional hearing on January 25, 2022. The trial court placed him on probation with a suspended commitment to the Department of Correction. The court also imposed several special conditions of probation.

[13] K.T. now appeals.

Standard of Review

[14] K.T. argues that the State failed to prove that he constructively possessed any of the handguns found in the vehicle; therefore, his juvenile adjudications for dangerous possession of a firearm and carrying a handgun without a license are not supported by the evidence. When we review a juvenile adjudication, we apply the same sufficiency standard we use in criminal cases. *A.E.B. v. State*, 756 N.E.2d 536, 540 (Ind. Ct. App. 2001).

We neither reweigh the evidence nor judge the credibility of witnesses. The State must prove beyond a reasonable doubt that the juvenile committed the charged offense. We examine only the evidence most favorable to the judgment along with all

reasonable inferences to be drawn therefrom. We will affirm if there exists substanti[al] evidence of probative value to establish every material element of the offense. Further, it is the function of the trier of fact to resolve conflicts in testimony and to determine the weight of the evidence and the credibility of the witnesses.

J.C. v. State, 131 N.E.3d 610, 612 (Ind. Ct. App. 2019) (citation omitted). We will affirm a juvenile delinquency adjudication unless no reasonable factfinder could have found the respondent guilty beyond a reasonable doubt. *B.T.E. v. State*, 108 N.E.3d 322, 326 (Ind. 2018).

Constructive Possession

- [15] To prove K.T. committed dangerous possession of a firearm, the State had to prove K.T. was less than eighteen years of age and knowingly, intentionally, or recklessly possessed a firearm for any purpose other than a purpose described in [Indiana Code section 35-47-10-1](#). [Ind. Code § 35-47-10-5\(a\)](#); *see also* [I.C. § 35-47-10-3](#); [I.C. § 31-37-1-2](#) (providing that a child who commits an act in violation of [Indiana Code section 35-47-10-5](#) commits a delinquent act).
- [16] On the date of K.T.’s offense, to prove that K.T. carried a handgun without a license,¹ the State had to establish that he knowingly or intentionally carried “a

¹ The General Assembly amended this statute effective July 1, 2022, to remove the handgun licensing requirements for adults as well as the criminal penalty for violating these requirements. *See* [Ind. Code § 35-47-2-1](#). The General Assembly has also added a new section, [Indiana Code section 35-47-2-1.5](#), outlining the new crime of “unlawful carrying of a handgun,” which makes it a crime (either a class A misdemeanor or a level 5 felony) for certain individuals, including persons who are less than eighteen years of age, to knowingly or intentionally carry a handgun.

handgun in any vehicle or on or about” his body without being licensed under [Indiana Code chapter 35-47-2](#). *See Ind. Code § 35-47-2-1*.

- [17] The officers did not observe K.T. in actual possession of a firearm. “Actual” possession of contraband, whether a handgun or an illegal substance, occurs when a person has direct physical control over the item. *B.R. v. State*, 162 N.E.3d 1173, 1176 (Ind. Ct. App. 2021).
- [18] K.T. argues the State did not prove he constructively possessed any of the three firearms that the officers found in the vehicle. When the State cannot prove actual possession, as is the case here, it may nonetheless prevail on proof of “constructive” possession. *Id.* at 1177. “A person constructively possesses [an item] when the person has (1) the capability to maintain dominion and control over the item; and (2) the intent to maintain dominion and control over it.” *Id.* (citation omitted).
- [19] The capability requirement is met when the State shows the defendant can reduce the contraband to the defendant’s personal possession. *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999). The law infers that a party in possession of premises is capable of exercising dominion and control over all the items on the premises. *Gee v. State*, 810 N.E.2d 338, 340-41 (Ind. 2004). This is so whether possession of the premises is exclusive or not. *Id.* at 341. Five other males were in the vehicle with K.T. But the capability element was established here because the AR-style pistol on the floorboard behind the driver’s seat and the black handgun and tan Glock pistol found underneath the front passenger seat were

all within K.T.'s reach. See *Goliday*, 708 N.E.2d at 6 (explaining that State must show “that the defendant is able to reduce the [item] to the defendant’s personal possession”).

[20] To prove intent when possession is not exclusive, the State must show evidence of additional circumstances pointing to the defendant’s knowledge of the presence of the contraband. *K.F. v. State*, 961 N.E.2d 501, 510 (Ind. Ct. App. 2012), *trans. denied*. Such knowledge may be inferred from the exclusive dominion and control over the premises containing the item. *Grim v. State*, 797 N.E.2d 825, 831 (Ind. Ct. App. 2003).

[21] However, if control of the premises is nonexclusive, the inference of intent to maintain dominion and control over the item must be supported by evidence of additional circumstances indicating the accused’s knowledge of the nature of the item and its presence. *Cannon v. State*, 99 N.E.3d 274, 279 (Ind. Ct. App. 2018), *trans. denied*. When the item is a firearm, these additional circumstances have been found to include: (1) incriminating statements by the accused; (2) attempted flight or furtive gestures; (3) proximity of the firearm to the accused; (4) location of the firearm within the accused’s plain view; and (5) mingling of the firearm with other items owned by the accused. *Deshazier v. State*, 877 N.E.2d 200, 206 (Ind. Ct. App. 2007), *trans. denied*. In *Deshazier*, our court observed that “Indiana courts have been far more likely to find sufficient evidence [of constructive possession] where evidence suggests that a vehicle’s passenger could see the handgun, was in the best position to access the gun, and

no evidence clearly indicates the gun belonged to or was under the control of another occupant of the vehicle.” *Id.* at 208.

[22] In support of his argument that he did not constructively possess the handguns in the vehicle, K.T. directs our attention to *D.C.C. v. State*, 695 N.E.2d 1015 (Ind. Ct. App. 1998), and *E.D. v. State*, 905 N.E.2d 505 (Ind. Ct. App. 2009). In *D.C.C.*, a police officer, responding to a call that shots had been fired at a nightclub, stopped a vehicle leaving the parking lot of that club because the car did not have its headlights on. *Id.* at 1015. The driver of the vehicle was a seventeen-year-old, and fourteen-year-old D.C.C. was in the passenger seat. An open bottle of cognac was situated between the driver and D.C.C. *Id.* at 1016. Both the driver and D.C.C. were arrested for curfew violations and possession of alcohol by a minor. The officer then searched the vehicle and found a gun underneath D.C.C.’s seat. *Id.* The gun was positioned far underneath the seat and could not be seen by D.C.C. *Id.*

[23] D.C.C. was adjudicated a delinquent child and he appealed. Our court concluded that the evidence was insufficient to support the trial court’s finding that D.C.C. carried a handgun without a license. *Id.* Specifically, there was no evidence of additional circumstances that would establish that D.C.C. knew the gun was in the vehicle. *Id.* at 1016-17.

[24] In *E.D.*, an officer initiated a traffic stop of a vehicle with a missing headlight. E.D. was one of four passengers in the car and seated in the backseat between two other male passengers. 905 N.E.2d at 506. Because the driver did not have

a license, the officer decided to have the car towed. He conducted an inventory search of the vehicle before it was towed and found a handgun in the pocket behind the driver's seat. The officer also found a baggie of marijuana and a blunt in the vehicle. *Id.*

[25] E.D. was found to be a delinquent child for carrying a handgun without a license and he appealed. *Id.* We reversed the adjudication because “other than E.D.’s proximity to the gun, there was no other evidence to suggest that E.D. had capability to maintain control and dominion of the gun.” *Id. at 507*. The State also failed to prove whether the gun was in plain view and there was no evidence of any additional circumstances to prove that E.D. had intent to maintain dominion and control over the gun. *Id. at 507-08*.

[26] In this case, the State relies on K.T.’s proximity to the firearms found in the vehicle to argue both his capability to maintain dominion and control of the firearms and his intent to do so. But as we held in *D.C.C.* and *E.D.* proximity is not sufficient to establish intent to maintain dominion and control when multiple individuals have the capability to maintain control and dominion over the firearms.

[27] However, the AR-style firearm was also in K.T.’s plain view as it was laying on the floorboard behind the driver’s seat. Although K.T. was not seated directly behind the driver’s seat, the large firearm was plainly visible and it was within K.T.’s reach. Moreover, “[p]ossession of contraband by the defendant need not be exclusive and it can be possessed jointly.” See *Massey v. State*, 816 N.E.2d

979, 989 (Ind. Ct. App. 2004) (quoting *Iddings v. State*, 772 N.E.2d 1006, 1015 (Ind. Ct. App. 2002), *trans. denied*). For these reasons, we conclude that the State proved that K.T. constructively possessed the AR-style firearm.

[28] Turning now to the tan Glock pistol, the gun was located underneath the front passenger seat. Although it was also within K.T.'s reach, it was completely beneath the passenger seat and not in plain view. The State argues that the evidence is sufficient to support constructive possession because the handgrip of the gun was angled toward the rear passenger seat. But there is no evidence to establish when the tan handgun was placed under the front passenger seat or who placed the gun under the seat. And there is no evidence of any additional circumstances that would establish that K.T. had intent to maintain control and dominion of the tan Glock handgun.² We therefore conclude that the State failed to prove that K.T. constructively possessed the tan Glock pistol.

[29] Finally, the State argues that the evidence is sufficient to prove that K.T. possessed the black handgun. But this argument fails for the same reasons we conclude that K.T. did not constructively possess the tan Glock pistol. The black handgun was located completely underneath the front passenger seat and not in plain view. In addition, the black handgun was situated closer to the

² The State argues that the fact that K.T. provided a false name to the officers is an additional circumstance establishing that he had intent to maintain control and dominion of the handgun. But K.T. was in violation of his home detention, and his decision to provide a false name is likely attributable to an attempt to avoid the consequences of that violation. K.T. did not make any incriminating statements concerning the handguns and did not act in a furtive manner.

front of the vehicle than the tan Glock pistol. When discussing the evidence presented at the delinquency fact-finding hearing, the trial court concluded that the State presented sufficient evidence that K.T. possessed the AR-style firearm and the tan Glock pistol but did not reference the black handgun. *See* Tr. pp. 46-47. For these reasons, we conclude that the State did not present sufficient evidence that K.T. constructively possessed the black handgun.

Conclusion

- [30] Three firearms were found in the vehicle in which K.T. was one of six occupants. The State presented sufficient evidence to prove only that K.T. constructively possessed the large AR-style firearm located on the floorboard behind the driver's seat in plain view. Therefore, we affirm K.T.'s delinquency adjudication for dangerous possession of a firearm, but we remand this case to the trial court with instructions to vacate K.T.'s delinquency adjudication for carrying a handgun without a license. *Cf. J.R. v. State*, 100 N.E.3d 256 (Ind. 2018) (per curiam).
- [31] Affirmed in part, reversed in part, and remanded for proceedings consistent with this opinion.

Robb, J., and Foley, J., concur.