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IN THE
INDIANA TAX COURT

ANTHONY PACE, Petitioner, v. INDIANA DEPARTMENT OF STATE REVENUE[1], Respondent.	)	Cause No. 71T10-0103-TA-26

ON APPEAL FROM A FINAL DETERMINATION OF
THE INDIANA DEPARTMENT OF STATE REVENUE

NOT FOR PUBLICATION
July 13, 2005

FISHER, J.

Anthony Pace (Pace) appeals the final determination of the Indiana Department of State Revenue (Department) assessing him with controlled substance excise tax

[1] Along with the Department, Pace also initially named the Indiana Attorney General as a respondent. However, other than providing legal representation to the Department, the Attorney General has no role in administering the CSET. Accordingly, the Attorney General is now removed as a party to this appeal. (*See* Resp't Br. at 7; Oral Argument Tr. at 15-16.)

(CSET). The issue for this Court to decide is whether Pace possessed the marijuana in question, thereby making him liable under the CSET statute.

FACTS AND PROCEDURAL HISTORY

The Department based its imposition of CSET upon the following facts[2]:

In August of 1995, Tony Reeves, a friend of Pace's, went to Pace to purchase marijuana. During the course of their conversation, Pace asked Reeves if he could receive a package at Reeves' grandmother's house at 324 W. Mishawaka Avenue where Reeves was living at the time. Pace offered to give Reeves $50.00 in exchange for allowing this.

That same month, police in McAllen, Texas intercepted a package of marijuana addressed to Ronnie Rowe, 324 W. Mishawaka Avenue, South Bend, IN 46545. The McAllen authorities forwarded the package to the South Bend Police Department. On August 24, 1995, Captain Terry Miller of the South Bend Police Department posed as a UPS delivery person and delivered the package to the house at 324 W. Mishawaka Avenue. Both Reeves and Pace were in the house at the time of the delivery. Reeves answered the door and accepted the package from Captain Miller. Before doing so, however, he first asked Pace if he had been expecting a package. Pace told Reeves to go ahead and sign for the box. Reeves signed for it and, together, he and Pace moved the box into the kitchen. There, they opened the box and removed its contents which were bundled and wrapped in duct tape. They did not open this interior packaging.

[2] Many of the facts in this case are in dispute. The facts recited in this section reflect the facts as argued by the Department, and do not necessarily reflect Pace's version of the facts. Factual disputes will be addressed later in the opinion

Approximately fifteen minutes after the package was delivered, a police entry team arrived at the house with a search warrant. Police discovered Pace in the kitchen with the opened box. After being advised of his rights, Pace was questioned by Captain Gary Horvath of the South Bend Police Department. During the course of this questioning, Pace first denied that he had touched the box, then admitted that he had touched it. He also initially denied that he had looked at the address label on the box, then later admitted that he had looked at it. In addition, Pace first admitted that certain papers the police had located during the search were drug ledgers, then later stated that they were actually ledgers for drywall work he had done.[3] No fingerprints of evidentiary value were found on the box.

The Indiana State Police laboratory confirmed that the package contained 9156.5 grams of marijuana. Based on that amount, the Department assessed Pace with CSET (and penalties) in the amount of $732,520.00. Pace protested the assessment and the Department scheduled an administrative hearing on March 16, 2000. Pace did not appear for the hearing and the protest was therefore denied. Pace subsequently sought a rehearing, which was granted. On September 1, 2000, the Department issued a Supplemental Letter of Findings (LOF) again denying Pace's protest.

Pace initiated an original tax appeal on February 28, 2001. The Court conducted a trial on November 9, 2001, and heard the parties' oral arguments on April 5, 2002. Additional facts will be provided as necessary.

[3] Pace was employed at the time as a painter and plasterer. (*See* Trial Tr. at 14.)

ANALYSIS AND OPINION

Standard of Review

This Court reviews final determinations of the Department *de novo*. IND. CODE ANN. § 6-8.1-5-1(h) (West Supp. 2004-2005). Accordingly, it is bound by neither the evidence nor the issues presented at the administrative level. *Snyder v. Indiana Dep't of State Revenue*, 723 N.E.2d 487, 488 (Ind. Tax Ct. 2000), *review denied*.

Discussion

The CSET is imposed on controlled substances that are, among other things, possessed in Indiana in violation of Indiana Code § 35-48-4 or 21 U.S.C. 841 through 21 U.S.C. 852. IND. CODE ANN. § 6-7-3-5 (West 2005). Pace argues that the CSET assessment against him is erroneous because he never possessed the marijuana in question.

Possession may be actual or constructive. *Hurst v. Indiana Dep't of State Revenue*, 721 N.E.2d 370, 374 (Ind. Tax Ct. 1999). Actual possession occurs when the taxpayer has direct physical control over the controlled substance, whereas constructive possession occurs when the taxpayer has the intent and capability to maintain control over the item even though actual physical control is absent. *See Britt v. State*, 810 N.E.2d 1077, 1082 (Ind. Ct. App. 2004). Both require that the possession be knowing or intentional. *See* IND. CODE ANN. § 35-48-4-11 (West 2005).

I. Actual Possession

The Department states that the CSET assessment against Pace was issued on the basis of actual possession. Specifically, the Department argues that Pace actually

possessed the marijuana during the "brief period of time" when he helped Reeves move the package into the kitchen and open it. (Resp't Br. at 4.) The Court disagrees.

By his own admission, Pace did in fact have physical *contact* with the package of marijuana during this brief interval. (*See* Trial Tr. at 17.) Nevertheless, mere contact with the substance is not enough to show actual possession; rather, the taxpayer must have the substance under his *control* with the intent to exclude others from such control. *See Loudermilk v. State*, 523 N.E.2d 769, 770-71 (Ind. Ct. App. 1988) (emphasis added). Helping another person move and open a package containing marijuana does not rise to this level of control.[4] Furthermore, the time period during which Pace allegedly possessed the marijuana is simply too brief to constitute actual possession. *See id*. at 771 ("At most the State proved that [the defendant] held the plastic bag containing the marijuana for a brief period of seven seconds before passing it to another individual. This evidence does not constitute possession. Something more is necessary.") Accordingly, there is insufficient evidence to uphold the Department's assessment of CSET against Pace on the basis of actual possession.

II. Constructive Possession

There being no actual possession of the marijuana by Pace, the Court must therefore turn its analysis to the issue of constructive possession. Constructive possession may be shown by direct or circumstantial evidence. *Hurst*, 721 N.E.2d at 374. "Mere proximity to the drug, mere presence on the property where it is located, or

[4] The Court notes that Pace denies helping Reeves open the package. (Trial Tr. at 17.) Nevertheless, this factual dispute need not be resolved since the Court finds that there was no actual possession.

mere association, without more, is insufficient to support a finding of [constructive] possession." *Id*. at 374-75.

When possession is non-exclusive, the taxpayer's intent and ability to maintain dominion and control over the substance may be inferred if additional circumstances are present that would support such an inference. *Id*. at 375. The inference of intent must be supported by additional circumstances demonstrating the taxpayer's knowledge of the presence and nature of the substance. *Id*. Some circumstances that imply such knowledge include: (1) incriminating statements by the taxpayer; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the taxpayer to the drugs; (5) drugs in plain view; and (6) location of the drugs in proximity to items owned by the taxpayer. *Id*. In addition, evidence of some factor indicating that the taxpayer had the authority or the ability to exercise control over the substance must be introduced as proof of possession. *Id*.

In the present case, the alleged possession is non-exclusive, as Reeves was present in the house with Pace and was the one who actually accepted the package. Accordingly, additional circumstances must be present which would imply that Pace had knowledge of the marijuana's presence and an intent and ability to maintain dominion and control over the marijuana.

The Department argues that there are numerous circumstances supporting such an inference, including: (1) the arrangements Pace made with Reeves to have a package delivered to Reeves' grandmother's house; (2) the fact that Pace was at the house when the package was delivered; (3) Pace's instruction to Reeves to sign for the package; (4) his statement that this was the package he had been expecting; (5) the

fact that he was in the kitchen with the package when the police arrived; (6) his denial and subsequent admission that he had touched the package and looked at the address label; and (7) his admission and subsequent denial that papers found by police were drug ledgers. The Court will deal with each item of evidence in turn.

(1) Delivery Arrangements

The Department contends that Pace made arrangements with Reeves to have a package delivered to Reeves' grandmother's house in exchange for $50.00. (Resp't Br. at 4.) Pace, however, has denied ever having this conversation with Reeves. (Trial Tr. at 48.) Even assuming that such a conversation did take place, there is no evidence indicating what the package was to contain or that the package at issue here was the subject of that conversation. Indeed, in his testimony on the matter, Reeves stated that "[Pace] did say something about" receiving a package at his grandmother's house, "[b]ut he [] never said anything about the marijuana. I really think we were both surprised about that much marijuana coming through the mail." (Trial Tr. at 39-40.) When pressed as to whether he thought Pace was surprised the package contained marijuana at all, Reeves only responded, "I don't know[.]" (Trial Tr. at 40.) The Court is not persuaded by this evidence that Pace arranged for the delivery or knew what the package contained.

(2) Presence at 324 W. Mishawaka Avenue

Likewise, the fact that Pace happened to be at Reeves' grandmother's house the day the package was delivered does not tend to prove that he organized the delivery, as the Department suggests. (*See* Resp't Br. at 5.) Pace claims he was at the house because he was collecting money for a paint job he had done there. (Trial Tr. at 14.)

Reeves' testimony confirms that Pace had done some work on the house. (*See* Trial Tr. at 47.) Furthermore, both Pace and Reeves testified that they were old acquaintances and were sitting in the house visiting on the day of the delivery. (*See* Trial Tr. at 16, 37.) Thus, it is not necessarily remarkable that Pace was at the house or that he was there for an extended period of time. His presence at the house that day could be no more than mere coincidence.

(3) Instruction to Reeves to Sign for the Package

The Department also notes that before Reeves accepted the package, he first asked Pace whether he had been expecting anything. Pace responded by telling Reeves to go ahead and sign for the package. (*See* Resp't Br. at 4.) This, the Department argues, indicates that Pace knew what the package contained and was expecting the delivery.

There is conflicting evidence, however, as to whether Pace actually made this statement. Although Reeves testified at trial that Pace told him to sign for the package (*see* Trial Tr. at 38), Captain Miller's testimony does not mention this. Miller stated, "I knocked on the door and [Reeves] [] answered the door[.] I had him sign a delivery slip that the package was accepted." (Trial Tr. at 7.) Miller does not indicate that Reeves hesitated in accepting the package or asked Pace whether he had been expecting anything. (*See* Trial Tr. at 7.)

Nonetheless, even if Pace did make the statement, it does not indicate that he knew what was in the package or that he had arranged for the delivery. Pace did not answer Reeves in the affirmative and tell him that he was expecting a package. Rather,

he only told him to go ahead and sign for it. This does not demonstrate that Pace knew what the package contained.

(4) Statement That Pace Had Been Expecting the Package

There is also insufficient evidence to show that, after Reeves accepted the package, Pace then stated that this was the package he had been expecting. Indeed, Reeves' recollection of the statement is sketchy at best. When asked at trial about the statement, the following exchange took place between Reeves and counsel for the Department:

> Q: Didn't [Pace] [] say, "This is what I've been expecting"?
> A: It's been so long I really can't recall.
> Q: . . . Didn't you give a statement to the police where you said that Tony Pace said that this was a package that he had been [ex]pecting?
> A: Yes, I probably did say that, if you got that written down.

(Trial Tr. at 39.) This uncertain testimony does not persuasively demonstrate that Pace made such a statement.

(5) Presence in the Kitchen with the Package

The Department argues that Pace's presence in the kitchen with the marijuana when the police arrived is further evidence that he possessed the marijuana. (*See* Resp't Br. at 2.) Mere proximity to the controlled substance, however, is insufficient to support a finding of possession. *See Hurst,* 721 N.E.2d at 374-75; *Hall v. Indiana Dep't of State Revenue*, 720 N.E.2d 1287, 1290 (Ind. Tax Ct. 1999). Furthermore, in order to be illegally in possession of a controlled substance (whether actual or constructive), the taxpayer must have knowledge of the nature of the substance. *See Howard v. State*, 422 N.E.2d 440, 443 (Ind. Ct. App. 1981). *See also* A.I.C. § 35-48-4-11. The evidence

here only establishes that Pace was knowingly in the presence of a cardboard box; it does not establish that he knew what was inside the box. Indeed, Captain Miller testified that there was nothing about the package – "a standard cardboard box taped close . . . with brown shipping tape" – that indicated it contained marijuana. (Trial Tr. at 10.) Even after the package was opened, the contents remained wrapped in duct tape and therefore were not readily identifiable as marijuana. (*See* Trial Tr. at 29.) Consequently, Pace's presence in the kitchen with the package does not tend to prove that he knowingly or intentionally possessed marijuana.

(6) Whether Pace Touched the Package or Looked at the Label

When the police questioned Pace on the day of the delivery, he first told them that he had never touched the box containing the marijuana or looked at the label to see to whom the package was addressed. (*See* Trial Tr. at 30; Resp't Br. at 5.) After further questioning, however, Pace later admitted that he may have touched the bottom and sides of the box and did look at the address label.[5] (*See* Trial Tr. at 30; Resp't Br. at 5.) The Department argues that Pace's changed responses are "suspicious" and "show that [he] was trying to distance himself from the package he knew contained marijuana." (Resp't Br. at 5.) In his defense, Pace claims that he "was so nervous" at the time of the questioning that, even six years later as he testified at trial on this matter, he was not sure what he had told the police that day.[6] (*See* Trial Tr. at 22 (footnote added).)

[5] At trial, Pace reversed himself once again and stated that he did *not* look at the address label. (Trial Tr. at 23.)

[6] More specifically, Pace claims that the circumstances surrounding the police entry into the home were "scary" and caused his nervousness that day. (*See* Trial Tr. at 17.) He testified that the officers "kicked the door in . . . [a]nd then they came running in

The Court agrees with the Department that Pace's changing responses do arouse some suspicion. Nevertheless, the Court cannot entirely discount Pace's testimony that the stress of the situation and his resulting nervousness lead to the inconsistencies. Furthermore, whether Pace touched the box or looked at the address label are relatively minor details in comparison to the more important matters on which he has remained completely consistent (i.e., that he did not arrange for the delivery, did not know what was in the package, and did not possess the marijuana). (*See* Trial Tr. at 31.) Without any other evidence to support either Pace's or the Department's arguments, the Court can only agree that Pace's responses do not automatically lead to the conclusion that he was lying in order to conceal his guilt.

(7) Drug Ledgers

Finally, the Department contends that certain papers found by the police during their search were drug ledgers.[7] When the police questioned Pace about these papers, he first admitted that they were drug ledgers, but said that they reflected old drug debts. (*See* Trial Tr. at 30-31; Resp't Br. at 2, 5.) Pace later changed his story, however, and told the police that they were actually ledgers for drywall work he had done. (*See* Trial Tr. at 31; Resp't Br. at 2, 5.)

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there. [They] threw me on the ground, [and] placed Tony Reeves on the ground." (Trial Tr. at 17.) Officer Horvath's testimony confirms this account, further adding that Reeves and Pace were ordered to the ground at gunpoint and handcuffed. (*See* Trial Tr. at 29.)

[7] These papers include: (1) a scrap of paper with handwritten notes containing a name, address, phone number, and specifications for a paint job; (2) photocopies of pages from Pace's address book; (3) two business cards with various names and numbers written on the back; and (4) a scrap of paper (with a letterhead reading "Re-Elect Dan KOONTZ") with various numbers handwritten on it. (*See* Pet'r Ex. A-D, H.)

At trial, neither Captain Miller nor Captain Horvath were able to state with certainty that the papers were drug ledgers, instead referring to them as "possibl[e] drug ledgers" (Trial Tr. at 11) and "suspected drug ledgers" (Trial Tr. at 30.) Nevertheless, even assuming arguendo that the papers are drug ledgers, Pace claimed (before changing his story) that they refer to old drug debts, not the marijuana at issue here. (*See* Trial Tr. at 30-31.) What Pace did in the past, however, does not place him within the purview of the CSET statute. *Hurst*, 721 N.E.2d at 374 n.14. Therefore, even if the papers in question are in fact drug ledgers, they cannot now be used against Pace as evidence of possession.

CONCLUSION

The evidence in this case consists entirely of testimony, much of it conflicting. As the Department correctly states, this Court's decision must therefore come down to whose story it believes. (*See* Oral Argument Tr. at 10.) Nevertheless, the Department has not given the Court sufficient cause to disbelieve Pace.[8] Whether viewed individually or collectively[9], the evidence in this case simply does not establish that Pace had the intent as well as the ability to exercise dominion and control over the marijuana at issue. Accordingly, the Court is not persuaded by a preponderance of the

[8] Although it is not critical to the Court's decision in this case, the Court notes that Reeves' credibility has been called into question. Specifically, Pace's counsel noted that at the time the package was delivered in 1995, Reeves was serving two years probation for dealing in marijuana. Accordingly, Pace argues that Reeves had incentive to lie since, "had he made statements implicating himself . . . he might have subjected himself to not only a new charge but probation revocation." (Oral Argument Tr. at 3.) Nevertheless, even assuming arguendo that Reeves was a credible witness, his testimony still failed to persuasively demonstrate that Pace possessed the marijuana.

[9] The Court is not required to consider the evidence in fragmentary parts but, rather, as a whole. *See Wedmore v. State*, 143 N.E.2d 649, 652 (Ind. 1957).

evidence that Pace possessed the marijuana and the Department's final determination is therefore REVERSED.[10]

[10] By reason of its holding here, the Court is by no means expressing that it has full confidence in Pace's purported innocence. Nonetheless, the Court can base its decision only upon the evidence presented and that evidence does not sufficiently establish Pace's intent and ability to maintain dominion and control over the marijuana. *See Hall v. Indiana Dep't of State Revenue*, 720 N.E.2d 1287, 1292 (Ind. Tax Ct. 1999).