IN THE COURT OF APPEALS OF IOWA

No. 2-550 / 11-1734
Filed August 22, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JONATHAN DAVID DOLPH,
Defendant-Appellant.

Appeal from the Iowa District Court for Dallas County, Randy V. Hefner, Judge.

A defendant challenges the sufficiency of the evidence supporting a jury's findings of guilt on charges of possession of methamphetamine with intent to deliver and possession of marijuana. **REVERSED.**

Christopher R. Kemp of Kemp, Sease & Dyer, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kyle P. Hanson, Assistant Attorney General, Wayne Reisetter, County Attorney, and Sean Wieser, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

VAITHESWARAN, P.J.

Jonathan Dolph challenges the sufficiency of the evidence supporting a jury's findings of guilt on charges of possession of methamphetamine with intent to deliver and possession of marijuana.

I. Background Facts and Proceedings

Two police officers investigated a complaint of a suspicious odor coming from an apartment in Perry. They determined that Jonathan Dolph and his girlfriend occupied the apartment. Dolph's girlfriend did not allow the officers to search the apartment.

As the officers left the building, they noticed a minivan moving onto the street. One of the officers ran the license plate and learned that the vehicle was registered to Jonathan Dolph's father, Rick Dolph, whose license was recently reinstated following a drug-related suspension. The officers noticed that the front license plate was askew and decided to stop the minivan for the equipment violation. The driver of the vehicle was Jonathan Dolph's brother, Michael Dolph. Jonathan Dolph was the only passenger, and he was seated in the front of the vehicle.

When the officers stopped the vehicle, Michael Dolph leaned out of the window and yelled obscenities at them. The officer had him step out of the vehicle and asked if they could search it. Michael Dolph denied them permission.

Meanwhile, Jonathan Dolph was also asked to exit the vehicle. One of the officers called for a drug-sniffing dog. The dog circled the vehicle, was then allowed inside, and alerted on a coat situated on the floor between the driver and

front-passenger seats. Inside the coat were glass pipes, metal spoons, a drill bit, a small metal pipe, and baggies methamphetamine. Some of the items were laced with methamphetamine and marijuana residue. Jonathan Dolph denied the coat was his.

The officers arrested Jonathan Dolph and charged him with three drug-possession crimes. A jury found him guilty of all the crimes, but the district court granted the defense motion for judgment of acquittal on one of the charges. The court imposed sentence on the remaining two charges, possession of methamphetamine with intent to deliver and possession of marijuana. This appeal followed.

II. Analysis

The sole issue before us is whether there was sufficient evidence to support the jury's findings that Jonathan Dolph "possessed" the drugs. Our review is for errors of law, with the jury's findings of guilt binding us if supported by substantial evidence. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997).

The jury was instructed on "possession" as follows:

> The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may have sole or joint possession.
>
> A person who has direct physical control over everything on his person is in actual possession of it.
>
> A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is in constructive possession of it. A person's mere presence at a place where a thing is found or proximity to the thing is not enough to support a conclusion that the person possessed the thing.
>
> If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of the thing, possession is joint.

> Whenever the word "possession" has been used in these instructions, it includes actual as well as constructive possession and sole as well as joint possession.

It is undisputed that Dolph did not have actual possession of the drugs, as he was not wearing the coat in which the drugs were found. The case turns on whether he had constructive possession of the coat and the drugs within it.

We begin by noting the obvious: Jonathan was not the only person in the car who had access to the coat. Michael also was in the car and was within arm's reach of the coat. For that reason, we cannot infer that Jonathan was in exclusive possession of the coat or that he had knowledge of the coat's contents and the ability to maintain control over them. *See State v. Cashen*, 666 N.W.2d 566, 570 (Iowa 2003).

Our inability to make such an inference of possession is highlighted by the State's DNA analysis of the coat. The analysis was proffered to establish Jonathan's exclusive ownership of the coat. In the end, the analysis undermined that assertion. First, the analysis only resulted in a weak partial DNA profile based on the development of eight out of fifteen loci. The DNA analyst conceded that at least ten loci would have to be developed to include the sample in a law enforcement database. The analyst also conceded the sample on the coat was "a mixture of DNA" and there could have been more than one wearer of the coat. And, she acknowledged that her statistical analysis finding the profile consistent with a known sample of Jonathan's DNA was based on a comparison of unrelated individuals in the population. She stated related individuals would more likely have similar DNA. She also stated that, had she received a known sample from related individuals like Michael and Rick Dolph, she could have

determined "whether or not it also matched them or whether they could be eliminated." Police did not obtain DNA samples from Michael or Rick Dolph.

The State also suggests the coat was Jonathan's because he was not wearing a coat when he got out of the vehicle and it was a "cold November night." In fact, the outside temperature was a less-than-frigid forty-three degrees, or thirty-nine degrees with wind chill factored in; Jonathan was wearing a thermal shirt; and he did not complain about the temperature when he accepted an officer's invitation to sit in the squad car.

We turn to several factors that the Iowa Supreme Court has deemed important in determining whether one of several people who had access to contraband constructively possessed that contraband.

The first factor is whether the contraband was found "on the same side of the car seat as the accused or immediately next to him." *State v. Carter*, 696 N.W.2d 31, 39 (Iowa 2005). As noted, the coat was between the front seats. This factor, therefore, does not support a finding that Jonathan constructively possessed the coat.

We also consider whether the contraband was found with the defendant's personal effects. *Id.* None of Jonathan's personal possessions were in the coat. Moreover, the parties stipulated that a cigarette butt in the coat belonged to Michael Dolph.[1] This factor, therefore, also does not support a finding that Jonathan constructively possessed the coat. Notably, Michael, not Jonathan,

[1] The State offered testimony that it is not uncommon for drug users to share paraphernalia, and cigarette filters can be used for various drug-related purposes. This attempt to tie Jonathan to the cigarette butt and, in turn to the drugs in the coat, amounts to pure speculation. *Carter*, 696 N.W.2d at 36 (stating evidence must do more than raise suspicion or speculation).

acted up when police stopped the vehicle, and, Michael, not Jonathan, was found with $1000 of cash in crisp $20 bills.[2]

Another important factor is who owned the vehicle. *Id.*; *Cashen*, 666 N.W.2d at 572. As noted, the vehicle was not owned by Jonathan but by his father, Rick, whose license had just been reinstated following a drug-related suspension.

Also relevant is whether Jonathan engaged in suspicious activity. *Carter*, 696 N.W.2d at 39. The evidence here is mixed. On the one hand, Jonathan denied the coat was his. *See State v. Bash*, 670 N.W.2d 135, 139 (Iowa 2003) (citing the absence of evidence that the defendant shared ownership of a box containing marijuana). He did not attempt to hide the coat prior to or during the vehicle stop. *C.f. Carter*, 696 N.W.2d at 40 (noting defendant engaged in furtive movements including rummaging to the right of him where contraband was located and veering across three lanes of traffic); *State v. Atkinson*, 620 N.W.2d 1, 5–6 (Iowa 2000) (declining to find from defendant's movements in the car that she exercised control over fanny a pack). And, when an officer asked him why the dog wanted to get into the vehicle so badly, Jonathan did not respond.

On the other hand, an officer testified that Jonathan slouched and sighed when the coat was found, went from being "pretty stoic" to "nervous" when he was told the dog would enter the vehicle, and said his past had caught up with him. Additionally, Jonathan sent his girlfriend a text message that said "no coat,"

[2] The State offered testimony that the bills would have been crumpled if Michael was obtaining them from drug-purchasers and would have been in various denominations. But the officer also stated, "[I]f someone has that kind of cash, we would normally think of narcotics trafficking when we find narcotics."

which the State suggests was his way of tipping off his girlfriend that she should not link him to the coat.

While, at first blush, this last set of actions would appear to support the jury's findings of guilt, the conduct at best reveals that Jonathan had knowledge of the drugs in the vehicle. *See Cashen*, 666 N.W.2d at 571; *Atkinson*, 620 N.W.2d at 4 (stating evidence supported finding that defendant knew of drugs in a fanny pack in vehicle). As our case law emphasizes, knowledge of the presence of contraband is not enough to establish constructive possession of the contraband. *Carter*, 696 N.W.2d at 39–40; *Atkinson*, 620 N.W.2d at 4. Control over the contraband is the key. *Atkinson*, 620 N.W.2d at 4.

The record does not contain substantial evidence to establish that Jonathan had control over the coat in which the drugs were found. *Cashen*, 666 N.W.2d at 571 (declining to infer from defendant's possession of rolling papers alone that he "had authority or the ability to exercise unfettered influence over" drugs in vehicle); *Atkinson*, 620 N.W.2d at 4 (stating there was no evidence that the defendant had the right to exercise control over the fanny pack). While he was near the coat, the jury was clearly instructed that "[a] person's mere presence at a place where a thing is found or proximity to the thing" was not enough to establish possession. And, while he had the power to exercise dominion over the coat, he expressed no intention to do so.

We find insufficient evidence to support the jury's findings that Jonathan Dolph possessed the methamphetamine and marijuana in the coat. Accordingly,

we reverse the district court's judgment of conviction and sentences on the charges.

REVERSED.