IN THE COURT OF APPEALS OF IOWA

No. 8-811 / 07-0950
Filed October 29, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

FRANCISCO ALVAREZ ALATORRE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Francisco Alvarez Alatorre appeals following conviction and sentence for possession of a controlled substance with intent to deliver and failure to possess a tax stamp. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Mahan and Miller, JJ.

MAHAN, J.

Francisco Alvarez Alatorre appeals following conviction and sentence for possession of a controlled substance with intent to deliver and failure to possess a tax stamp. He asserts the following on appeal: (1) the district court erred in failing to grant his motion for judgment of acquittal when there was insufficient evidence to support his conviction on the drug possession charge; (2) the court erred in applying the wrong standard and in failing to grant his motion for a new trial; and (3) his trial counsel was ineffective in failing to move for judgment of acquittal on the tax stamp charge. We affirm.

I. Background Facts and Proceedings.

On November 30, 2006, the Des Moines Police Department received details from a confidential informant that a drug deal was imminent. In an unmarked police car, Officer Brian Mathis followed a car driven by Miguel Diaz as Diaz picked up a passenger and drove to Marshalltown.[1] Officer Mathis stopped Diaz's car on its way back to Des Moines and conducted a consent search, but no drugs were found.

The confidential informant called Officer Mathis again on November 30, 2006, and informed him that the drug deal would occur later that evening. During the drug deal, the informant was to drive an unmarked Chevy Tahoe owned by the police department. The informant and the car were searched before the informant left to meet the dealer. Officer Mathis instructed the informant to call when drugs were in the car.

[1] Miguel Diaz was a drug dealer the Des Moines police were targeting.

The informant first picked up Diaz, but did not call Officer Mathis. The informant next stopped at a Hy-Vee parking lot and picked up Alatorre. At that time, the informant called Officer Mathis. Officer Mathis was parked near the Hy-Vee parking lot and watched as Officer Kelly Evans stopped the informant's car.

When Officer Evans stopped the car, he found Diaz sitting in the front seat and Alatorre sitting in the backseat behind Diaz. Officer Evans ordered the men out of the car and saw an opaque plastic bag wedged under the front seat from the backseat where Alatorre had been sitting. The bag was halfway under the front seat, but was sticking out onto the backseat floorboard and contained a one-kilo brick of cocaine powder. The bag did not contain a tax stamp.

Alatorre was charged with possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp. He elected a jury trial and was convicted as charged. He was sentenced to a term of imprisonment not to exceed fifty years for the drug charge and up to five years on the tax stamp charge, to be run concurrently. Alatorre now appeals.

II. Scope and Standard of Review.

We conduct a de novo review of alleged constitutional violations. *State v. Decker*, 744 N.W.2d 346 (Iowa 2008). We therefore conduct a de novo review of ineffective assistance of counsel claims. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). Unless the record on direct appeal is adequate to address these issues, a claim of ineffective assistance of counsel is generally preserved for postconviction proceedings. *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008).

In all other matters, we review the court's actions for corrections of errors at law. Iowa R. App. P. 6.4; *State v. Keeton*, 710 N.W.2d 531, 532 (Iowa 2006).

In reviewing challenges to the sufficiency of the evidence supporting a guilty verdict, we consider all of the evidence in the record in the light most favorable to the State and make all reasonable inferences that may fairly be drawn from the evidence. *Keeton*, 710 N.W.2d at 532. A jury's verdict is binding on appeal if it is supported by substantial evidence. Evidence is substantial when a reasonable mind would recognize it sufficient to reach the same findings. *State v. Moorehead*, 699 N.W.2d 667, 671 (Iowa 2005). We also review the district court's denial of a new trial for correction of errors at law. Iowa R. App. P. 6.4. Ultimately, we determine whether the court abused its discretion in its ruling. *State v. Belt*, 505 N.W.2d 182, 184 (Iowa 1993).

III. Merits.

A. Sufficiency of the Evidence.

Alatorre argues there was insufficient evidence to support his conviction on the drug possession charge and the district court therefore erred in failing to grant his motion for judgment of acquittal. The State must prove beyond a reasonable doubt all of the following elements of possession of a controlled substance with the intent to deliver: The defendant (1) knowingly possessed a controlled substance, (2) knew the substance was a controlled substance, and (3) had the specific intent to deliver it. Iowa Code § 124.401(1)(c) (Supp. 2006). Alatorre contends there was insufficient evidence to prove that he had actual or constructive possession of the cocaine or that he knew what was in the package.

Possession can be actual or constructive. *State v. Maxwell*, 743 N.W.2d 185, 193 (Iowa 2008). Possession is actual when the controlled substance is found on the defendant's person, and possession is constructive when the

defendant has knowledge of the presence of the controlled substance and the authority or right to maintain control over it. *See State v. Carter*, 696 N.W.2d 31, 38 (Iowa 2005); *State v. Bash*, 670 N.W.2d 135, 138 (Iowa 2003).

The peculiar facts of each case determine whether the defendant had constructive possession of the controlled substance. *State v. Webb*, 648 N.W.2d 72, 79 (Iowa 2002). Inferences are also often used to establish constructive possession. *Id*. at 76-79. If the controlled substance was found in premises exclusively within the defendant's control, the defendant's knowledge of its presence and the defendant's ability to maintain control over it can be inferred. *State v. Reeves*, 209 N.W.2d 18, 23 (Iowa 1973). If the premises are not exclusively within the defendant's possession, however, no inferences can be made and constructive possession must be proven. *Id*. Constructive possession can be proven by (1) the defendant's incriminating statements, (2) the defendant's incriminating actions upon discovery of the controlled substance, (3) the defendant's fingerprints on the packaging of the controlled substance, and (4) any other circumstances linking the defendant to the controlled substance. *State v. Kemp*, 688 N.W.2d 785, 789 (Iowa 2004).

The Chevy Tahoe the informant was driving was owned by the Des Moines Police Department and was searched, as was the informant, before the informant picked up Diaz and Alatorre. The informant was instructed to call Officer Mathis when the drugs were in the vehicle. Diaz was picked up first and was seated in the front of the vehicle. The informant did not call Officer Mathis upon picking up Diaz. The informant next picked up Alatorre who sat in the back of the vehicle. The informant called Officer Mathis once Alatorre was in the

vehicle. The vehicle was stopped by Officer Evans, and a plastic bag was discovered wedged halfway under the front seat but sticking out onto the backseat floorboard.

In this case, Alatorre's constructive possession of the cocaine is evidenced by the above facts, including the fact that Alatorre was the only passenger in the backseat. Alatorre contends that Diaz, the front seat passenger, could have placed the cocaine under the seat. However, the officer who found the cocaine in the vehicle testified at trial as follows regarding his discovery of the cocaine:

> Prosecutor: Officer, you observed this vehicle; is that right?
> Officer: Yes.
> Prosecutor: In the area where you located the cocaine, how would the front seat passenger access that area?
> Officer: Front seat passenger would not have access to that area. Reason being, the Tahoe is set up with power seats. There is a bar going through the middle, underneath the seat. There [are] also three canisters that are affixed to that seat. So the only way that product could have got there is from the backseat, pushed under.
> Prosecutor: In that Tahoe, is it possible to reach your arm around from the front passenger seat and get the cocaine into the area where you found it?
> Officer: It would be very difficult to do that.
> Prosecutor: And certainly from a sitting position, it would be difficult to do.
> Officer: That is correct.

We find substantial evidence supports the verdict in this case. Accordingly, we affirm as to this issue.

B. Motion for New Trial.

Alatorre argues the court failed to apply the proper standard in ruling on his motion for a new trial. Specifically, he contends the court failed to apply the "weight of the evidence" standard set out by the supreme court in *State v. Ellis*,

578 N.W.2d 655, 659 (Iowa 1998). A trial court may grant a new trial when "the verdict is contrary to law or evidence." Iowa R. Crim. P. 2.24(2)(*b*)(6). "Contrary to the evidence" means "contrary to the weight of the evidence." *State v. Ellis*, 578 N.W.2d at 659. A verdict is contrary to the weight of the evidence when one side of the issue is supported by a greater amount of evidence than the other side. *Id.* at 658. This standard is broader than the sufficiency of the evidence standard. *State v. Nicher*, 720 N.W.2d 547, 559 (Iowa 2006).

In its order denying Alatorre's motion for a new trial, the district court determined the following:

> The Court has reviewed the defendant's pro se motions, his attorney's motion for a new trial, and the State's resistance. Iowa Rule of Criminal Procedure 2.24(2)(*b*)(6) does set forth that the Court shall grant a motion for a new trial when the verdict is contrary to the law or evidence. The Court believes that the evidence in this case and the verdict of the jury, based on that evidence and the law applicable, is not contrary to the law or evidence based upon the evidence that was presented by the State to establish beyond a reasonable doubt that the defendant was guilty of the crimes for which the jury returned verdicts of guilty.

Contrary to Alatorre's allegations, we conclude the district court used the correct standard in ruling on his motion for a new trial. We further find the court did not abuse its discretion in denying the motion, and we therefore affirm as to this issue.

C. Ineffective Assistance of Counsel.

Alatorre argues his counsel was ineffective (1) in failing to move for judgment of acquittal on the drug tax stamp charge and (2) in failing to object to

the standard the court used in denying his motion for a new trial.[2] Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings to allow the facts to be developed and give the allegedly ineffective attorney an opportunity to explain his or her conduct, strategies, and tactical decisions. *See Bearse*, 748 N.W.2d at 214; *State v. DeCamp*, 622 N.W.2d 290, 296 (Iowa 2001). Because we find the record is sufficient to address Alatorre's ineffective assistance of counsel claims on direct appeal, we now address those claims and find them to be without merit.

We therefore affirm Alatorre's convictions.

AFFIRMED.

[2] Alatorre alleged this second ineffective assistance of counsel claim as an alternative argument to the contention we addressed above that the district court erred in applying the wrong standard and in failing to grant him a new trial.