IN THE COURT OF APPEALS OF IOWA

No. 9-095 / 08-0615
Filed March 26, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARTY ANGEL DIAZ,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick, Judge.

Marty Diaz appeals from judgment and sentence entered upon his convictions of possession with intent to deliver marijuana and failure to affix a drug tax stamp. **REVERSED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly Cunningham, Assistant County Attorney, for appellee.

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

MAHAN, P.J.

Defendant Marty Diaz appeals from judgment and sentence entered upon his convictions of possession with intent to deliver marijuana and failure to affix a drug tax stamp. Because we find the evidence that Diaz possessed marijuana insufficient, we reverse.

I. Background Facts and Proceedings.

Viewed in the light most favorable to the State, the jury could have found the following facts:

During the first week of November 2007, Marty Diaz, Vance Dokes, Daniel Woloszyn, Pamela Williams, Florentino Lujano, and Juan Macias embarked on a cross-country trip from Los Angeles, California, to Chicago, Illinois. The group traveled in two vehicles, a rented tan Ford Escape and a silver Jeep Cherokee owned by Williams.

On November 7, 2007, special agents for the Quad Cities Metropolitan Enforcement Group (MEG)[1] set up a ruse drug checkpoint near Davenport, Iowa. Three signs were placed in eastbound lanes of Interstate 80 a couple miles west of the rest area located at mile marker 300. The signs read something to the effect of "be prepared to stop," "drug checkpoint two miles ahead," and "all vehicles subject to search." Rather than having an actual checkpoint, however, MEG agents were stationed at the eastbound mile marker 300 rest area waiting to observe exiting vehicles.

[1]MEG agents are employed by various police agencies in the Quad Cities in both Iowa and Illinois, and they have the authority to investigate in both states regardless of what their home state happens to be.

Special Agent Epigmenio Canas and Special Agent Ken Koehler were stationed at the rest area that had a restroom facility, a vending machine shelter, picnic tables, a pet walking area, and separate parking areas for semi trailers and passenger vehicles. Agent Canas sat on a picnic table about twenty feet behind the vending machines to the west of the restrooms while Agent Koehler remained in the unmarked pick-up truck parked in front of the vending machines, allowing them to observe the rest area from different angles. The two agents kept in touch with each other via cell phone. Two other agents, Special Agent Joe Caffery and Special Agent Brian Yuska, were assisting with an unrelated matter about six miles east of the rest area.

At about 11:20 a.m., Agents Canas and Koehler observed a tan Ford Escape exit the interstate and enter the rest area. Shortly after, a silver Jeep Cherokee also entered the rest area. The two vehicles parked next to each other three to four spaces away from the vending machine, even though closer non-handicap spaces were available. The vehicles parked in the vicinity of the picnic table on which Agent Canas was sitting. Each vehicle had three occupants. In the Escape, Dokes was driving, Diaz was the front passenger, and Woloszyn was the rear passenger. In the Jeep, Williams was driving, Macias was the front passenger, and Lujano was the rear passenger. The vehicles appeared to be traveling together. The Escape had a New Jersey license plate, while the Jeep had a California license plate. The agents found the circumstances supported

the implication of drug trafficking[2] and decided to watch the vehicles more closely.

Dokes, Williams, and Diaz exited their respective vehicles and stood in front of the Escape, where they talked to each other, smoked, and made calls on their cell phones. Dokes and Diaz walked to the restroom and upon their return Agent Canas overheard Diaz "say something about the drug checkpoint signs." When Dokes and Diaz got back to the Escape, Woloszyn exited the Escape and went to the restroom. After Woloszyn returned, Williams went to the restroom.[3] Lujano and Macias remained in the Jeep.

Once all members of the group had returned from the restroom, Diaz got in the driver's seat of the Jeep. Williams got in the driver's seat of the Escape and Dokes got in the front passenger seat. Woloszyn returned to the back seat of the Escape. Diaz, Lujano, and Macias drove out of the rest area in the Jeep, and proceeded eastbound on I-80. The Escape remained parked, and Williams and Dokes were observed talking on their cell phones.[4]

Agent Koehler telephoned Agents Caffery and Yuska and told them to watch for the Jeep that was headed their way so they could follow it.

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[2] The agents testified that drug traffic tends to flow from source states in the southwest to destination cities in the north and east; the vehicles fit that criteria because one was from a source state and the other was from a destination state. They also testified that two vehicles traveling together may indicate that one could be serving as a lead or tail vehicle watching for law enforcement or checkpoints for the other vehicle.

[3] The agents testified that these actions aroused suspicions. In the agents' experience, "normal" motorists go to the restroom or vending machines at the same time together rather than going individually, do not all talk on cell phones at the same time, and do not discuss drug checkpoint signs.

[4] The agents believed the Jeep was serving as a lookout for the Escape and the occupants of the two vehicles were calling each other to stay updated.

At a point when Williams and Dokes were not on their cell phones, Agents Canas and Koehler approached the Escape; Agent Canas approached the passenger side, and Agent Koehler went to the driver's side. They displayed their badges and asked to speak with the occupants of the Escape. Agent Canas first spoke with Dokes and then with Woloszyn. During his conversation with Woloszyn, Agent Canas noticed Woloszyn was shaking from the cold. Woloszyn reported he did not have a coat in the car, even though he stated his intended destination was Chicago in November.[5] The agents learned that the Escape had been rented, but not by any of the occupants of the Escape or the Jeep.[6] Agent Koehler explained to Williams and Dokes that he was focused on preventing interstate transportation of drugs or cash and asked if there were any narcotics or large amounts of cash in the Escape. He stated that if there was only a small amount of drugs in the car, then he would be able to work something out with them, such as a citation. At this point, Dokes told Williams to retrieve the small amount of marijuana from her purse and to give it to Agent Koehler. Williams retrieved an unlabeled prescription pill bottle containing marijuana from her purse. Agent Koehler asked Williams and Dokes if the agents could search the car, and both consented.

Agent Koehler went to the rear of the Escape and opened the hatchback where he saw two suitcases—a large black suitcase and a smaller red suitcase.

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[5] This was consistent with Agent Canas's experience with drug traffickers because they tend to make quick trips and do not stay in destination city much longer than it takes to deliver the drugs.

[6] Agent Canas testified traffickers tend to use rented vehicles because they are more reliable, they cause less wear and tear on personal vehicles, they are harder to trace, and they cannot be seized and forfeited if the traffickers get caught.

There was no evident odor. He touched the outside of the black suitcase and felt what he believed to be bundles of narcotics. He unzipped the suitcase and discovered four large bundles of marijuana; he then opened the red suitcase and found another bundle. The five bundles were wrapped tightly in shrink wrap and fabric softener sheets, masking the smell of the drugs. In total, the five bales of marijuana weighed about 101 pounds. None of the bales had a drug tax stamp affixed to it. In addition to the marijuana, the red suitcase contained a cell phone charger, a tube of toothpaste, and some DVDs, some of which bore Woloszyn's fingerprints. Agents also recovered from the Escape a new Garmin GPS satellite navigation system. The "home" address entered into the GPS was that of Dokes. A camera was recovered from the center console of the Escape, and agents developed the film. The resulting photos show mountainous scenery and images of Diaz, Woloszyn, Macias, and Lujano. One photo shows Diaz in the driver's seat of the Ford Escape.

While Agents Canas and Koehler were inspecting the Escape, Agents Caffery and Yuska were on I-80 a few miles east of the rest area. A Jeep matching the description relayed by Agent Koehler passed a few minutes later, and the agents noticed the Jeep had no front license plate. The agents, who were driving an unmarked minivan, merged into traffic and followed the Jeep from a few cars behind. The Jeep continued for about six miles before it crossed the bridge into Illinois. Agent Yuska received a call from Agent Koehler informing him of the discovery of marijuana in the Escape at the rest area. Agent Yuska contacted local police dispatchers to request assistance from a marked police vehicle to conduct a traffic stop on the Jeep. The agents continued to follow as

they waited for a marked unit to arrive in the area. The Jeep proceeded about seven miles into Illinois and took an exit in a rural part of Henry County. Diaz turned the Jeep east onto Wolfe Road; after eight to ten miles on Wolfe Road, Diaz signaled and turned into a residential area. The agents knew the residential area had only one entrance and exit. Diaz turned the Jeep around and upon returning to Wolfe Road, he did not turn back toward I-80, but continued to the east. Diaz later turned the Jeep into a gas station.[7]

Agents Caffery and Yuska approached the stopped Jeep and identified themselves as police officers. Agent Yuska had Diaz step out from the driver's seat and patted him down, finding no weapons. Agent Yuska asked Diaz where he was coming from and where he was going. Diaz responded that he was going to Chicago from Los Angeles and acknowledged he was traveling with the people in the Ford Escape at the rest area. A search of the Jeep found some bags and loose clothing, but no drugs. Six cell phones were seized from the two vehicles; additional cell phones were not seized.

Diaz was charged and convicted of possession with intent to deliver and failure to affix drug tax stamps.[8] On appeal, he contends the evidence of possession was insufficient as a matter of law to sustain either conviction.[9] The State contends Diaz failed to preserve his claim with respect to the aiding and

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[7] Agent Yuska testified that despite the meandering path taken by Diaz, he did not believe Diaz was lost. Agent Yuska testified it appeared as if Diaz was looking for law enforcement trailing him.

[8] Woloszyn was tried with Diaz. The jury was unable to reach a verdict with respect to Woloszyn, and the district court declared a mistrial with respect to him.

[9] Possession is an element of both offenses, *see* Iowa Code sections 124.401(1)(d) and 453B.3, .12 (2007), and therefore if the evidence of possession is found to be insufficient, both convictions must be set aside.

abetting alternative of the possession charge. To the extent this claim was not preserved, Diaz argues trial counsel was ineffective.

II. Scope and Standard of Review.

> We review sufficiency-of-the-evidence claims for correction of errors at law. We uphold a verdict if substantial evidence supports it. Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. Substantial evidence must do more than raise suspicion or speculation. We consider all record evidence not just the evidence supporting guilt when we make sufficiency-of-the-evidence determinations. However, in making such determinations, we also view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence. We review ineffective-assistance-of-counsel claims de novo.

State v. Williams, 695 N.W.2d 23, 27 (Iowa 2005) (internal quotations and citations omitted).

III. Applicable Legal Principles.

"In the realm of controlled substance prosecutions, possession can be either actual or constructive." *State v. Cashen*, 666 N.W.2d 566, 569 (Iowa 2003). Actual possession is shown if the defendant has direct physical control over the drugs. *Id.* In the case before us, Diaz did not have actual possession of the marijuana. Therefore, we must consider whether the evidence supports a finding of constructive possession. *See id.; State v. Webb,* 648 N.W.2d 72, 79 (Iowa 2002).

Possession is constructive where the defendant has knowledge of the presence of the drugs and has the authority or right to maintain control of them. *Cashen*, 666 N.W.2d at 569. Proof of opportunity of access to a place where narcotics are found will not, without more, support a finding of unlawful

possession. *Webb*, 648 N.W.2d at 77. In determining whether a defendant had constructive possession, we consider a number of factors, including: incriminating statements made by the defendant, incriminating actions of the defendant upon the police's discovery of drugs among or near the defendant's personal belongings, the defendant's fingerprints on the packages containing drugs, and any other circumstances linking the defendant to the drugs. *Id.* at 79. When drugs are found in a motor vehicle, additional factors include: whether the contraband was in plain view, whether it was with the defendant's personal effects, whether it was found on the same side of the car seat as the defendant or immediately next to the defendant, whether the defendant was the owner of the vehicle, and whether there was suspicious activity by the defendant. *Cashen*, 666 N.W.2d at 572. Even if some of these facts are present, we are still required to determine whether all of the facts and circumstances, including those not listed above, allow a reasonable inference that the defendant knew of the drugs' presence and had control and dominion over the contraband. *Id.* at 569. "The existence of constructive possession turns on the peculiar facts of each case." *Webb*, 648 N.W.2d at 79.

IV. Merits.

We address the various factors deemed pertinent by our case law. (1) Incriminating statements made by the defendant, *see id.*: The State points out that Agent Canas overheard Diaz "say something about the drug checkpoint signs" and that the jury was thus free to infer that Diaz was "concerned by the signs for some reason, possibly because he knew there was 101 pounds of marijuana in the Escape." Standing alone, however, saying "something about

drug checkpoint signs" is so ambiguous as to be minimally relevant. We find the State's characterization of the ambiguous statement too speculative to support a finding of knowledge.[10] (2) Incriminating actions of the defendant upon the police's discovery of drugs among or near the defendant's personal belongings, *see id.*: Diaz was not present when the marijuana was located in the suitcases in the rear of the Escape, and no evidence was presented that would indicate either suitcase belonged to Diaz. (3) The defendant's fingerprints on the packages containing drugs, *see id.*: Diaz's fingerprints were not on the packages containing drugs. (4) Whether the contraband was in plain view in a vehicle, *see Cashen*, 666 N.W.2d at 572: The marijuana was not in plain view. (5) Whether it was with the defendant's personal effects, *see id.*: as already noted, no evidence suggests the marijuana was with Diaz's personal effects. (6) Whether it was found on the same side of the car seat as the defendant or immediately next to the defendant, *see id.*: The marijuana was not found immediately next to Diaz. Rather, it was in the rear of the Escape. (7) Whether the defendant was the owner of the vehicle, *see id.*: Diaz was not the owner of either the Escape or the Jeep. Despite the dearth of evidence on these relevant factors, the State argues that "suspicious activity" links Diaz to the drugs. *See Webb*, 248 N.W.2d at 79 ("any other circumstances linking the defendant to the drugs"); *Cashen*, 666 N.W.2d at 572 ("was there suspicious activity by the defendant").

[10] We are unconvinced that the "normal" traveler would not express some interest in drug checkpoint signs.

In *State v. Carter*, 696 N.W.2d 31, 40-41 (Iowa 2005), our supreme court found sufficient "suspicious activity" to support an inference of proprietary interest.

> The controlled substances were found on the driver's side of the console; they were within close reach of [defendant] while he was operating the Blazer. Although the controlled substances were not in plain view, their container—a baggie—was. Baggies are known for their use in the drug trade, and Wissink has seen baggies used for holding narcotics. The baggie was in a location where one would not ordinarily leave a plastic baggie—underneath an ashtray. The place where the controlled substances were found is the same place toward which [defendant] was rummaging while the police were attempting to stop the vehicle. Neither officer saw the passenger making any furtive movements. Following the stop, the passenger denied the controlled substances were his and cooperated with the police. *Cf. State v. Henderson,* 696 N.W.2d 5, 9 (Iowa 2005) (drugs were found on premises occupied by the defendant and her guest; defendant was belligerent towards police whereas guest was cooperative, acted like she had nothing to hide, and denied the drugs were hers; such disparate reactions supported permissible inference that the drugs belonged to the defendant).
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> Viewing all of the evidence in the light most favorable to the State, we think the district court could reasonably infer that [defendant] Carter was exhibiting a proprietary interest in the controlled substances by desperately trying to hide them while the police were pursuing him, resulting in his losing control of the Blazer. Moreover, Carter's furtive movements in contrast to the passenger's lack of such movements would further support such an inference. Wissink's explanation of what happened is a reasonable one:
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> > I believe he was placing narcotics under the ashtray trying to conceal them. And when the vehicle struck the curb, he didn't have enough time to stick the baggie down in there, leaving the two inches out of it. That's why he exited the vehicle. If he had the opportunity, he would have run off with it.
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> All in all, we think this evidence was sufficient for the district court to reasonably infer that [defendant] knew of the controlled substances' presence and exercised control and dominion over them.

The State points to the following "suspicious activity" to support Diaz's convictions: Diaz was photographed in the driver's seat of the Escape; the

Escape pulled into a rest area after passing signs of an upcoming drug checkpoint (Diaz was in the front passenger seat); a Jeep pulled into the rest area and parked next to the Escape; both vehicles parked away from the restrooms, even though there were spots closer; the occupants of the rental car and the Jeep converged in front of the rental car and spoke to one another and on their cell phones; Diaz and Dokes (who had been driving the Escape) went to the restroom; Williams, who had been driving the Jeep stayed with the Escape until Diaz and Dokes returned and only then went to the restroom; Diaz was overheard saying "something about the drug checkpoint signs"; Diaz transferred to the Jeep, still occupied by Lujano and Macias, and drove away from the rest area, but the Escape remained parked; when searched, bales of marijuana were found in two suitcases in the rear compartment of the Escape; the Jeep—driven by Diaz—exited the highway shortly after crossing into Illinois and drove some eight to ten miles, turned into a residential area and then back out to the road, and then later turned into a gas station; when approached by officers, Diaz stated he was traveling to Chicago from Los Angeles; Diaz acknowledged he was traveling with the people in the Escape at the rest area; the two vehicles contained more cell phones than people. The State argues that these circumstances are sufficient to establish that "several people jointly possessed marijuana and set about transporting it across the country." Even if this general statement is true, it is not sufficient to establish that Diaz knew of the presence of the marijuana.

There is no evidence linking Diaz, specifically, to the marijuana. We have nothing but speculation from which we can infer Diaz had knowledge of the

marijuana in the Escape. Speculation is not sufficient to support a conviction. *Williams*, 695 N.W.2d at 27 ("Substantial evidence must do more than raise suspicion or speculation."). We conclude there is not substantial evidence of Diaz having knowledge of the presence of the drugs or the authority or right to maintain control of them which could support the convictions.

The State argues the convictions can be sustained under an aiding and abetting theory. However, to prove Diaz guilty under a theory of aiding and abetting, the State would have to show that Diaz "assented to or lent countenance and approval to the criminal act by active participation in it or in some manner encouraging it prior to or at the time of its commission." *State v. Miles*, 346 N.W.2d 517, 520 (Iowa 1984). One might speculate that Diaz was aware of the presence of the marijuana in the Escape, but that is not sufficient. Nothing links Diaz to the luggage in the Escape. The State does not establish that Diaz was aware of the presence of the marijuana. No odor emanated from the luggage, which would allow an inference of awareness. Neither vehicle was owned by Diaz. This record does not support an inference that Diaz assented to or lent countenance and approval to the possession of marijuana with intent to deliver.

The evidence was insufficient to prove beyond a reasonable doubt that Diaz knew of or had dominion and control over the marijuana. The district court should have sustained Diaz's motion for judgment of acquittal as to the two drug charges. It was reversible error not to do so. We reverse the district court's judgment of convictions and sentences.

REVERSED.