

IN THE COURT OF APPEALS OF IOWA

No. 9-581 / 08-0913
Filed September 2, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DALE LEE SHORTER,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, J. Hobart Darbyshire,
Judge.

Dale Shorter appeals his conviction of possession of cocaine base.

REVERSED AND REMANDED FOR DISMISSAL.

Mark C. Smith, State Appellate Defender, and David Arthur Adams,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, Michael J. Walton, County Attorney, and Robert E. Weinberg, Assistant
County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Mansfield, J., and Zimmer, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

ZIMMER, S.J.

Dale Shorter appeals his conviction following a jury trial of possession of cocaine base. He contends there was not sufficient evidence to support a finding that he constructively possessed a controlled substance. We agree and therefore reverse and remand for dismissal.

I. Background Facts and Proceedings.

The following facts are supported by the evidence presented at trial: At about 5:15 p.m. on January 14, 2008, a team of law enforcement officers executed a search warrant at the home of Robert Randolph. Randolph lived in the home with Debbie Cole and Les Broom. Randolph's home was a known drug house. When the warrant was executed, the following five people were present in the home: Randolph, his son Terrance Davis, Debbie Cole, Limmie Brown, and the defendant, Dale Shorter.

One or more of the occupants of Randolph's home observed the officers approaching the residence. As officers got close to the front door they heard someone yell that the "cops are here." Davenport Police Officer Michael Greenleaf was the first to enter the residence. He saw Randolph seated in a chair and ordered him to the floor. Greenleaf then observed Shorter "run from [the] hallway and duck into a bedroom." Shorter was found in the northeast bedroom of the residence. At Shorter's trial, Greenleaf testified that Terrance Davis was found in the basement, Limmie Brown "was coming out of the kitchen,"¹ and Debbie Cole was in the northwest bedroom.²

¹ Sergeant Kevin Smull testified Limmie Brown was located in the living room.

² Sergeant Smull and Cole both testified Cole was located in the northeast bedroom.

After the residence and its occupants were secured, the officers searched the premises. Officer Matthew Allers (a special agent with the Iowa Department of Public Safety, Iowa Division of Narcotics Enforcement) found a plastic bag in the toilet containing crack cocaine. The bag contained nine individually wrapped rocks of cocaine base. The bathroom was off the hallway about five or six feet from the door to the northeast bedroom.³

Debbie Cole and Limmie Brown were called as defense witnesses at trial. Cole testified that she lived at the Randolph residence in the northeast bedroom, which she shared with Les Broom. She stated she was in her bedroom the day of the search. Cole further testified that Shorter had come to the house and asked for Broom. According to Cole, Shorter was sitting on the bed in the northeast bedroom waiting for Broom to return when the officers entered the residence.

Limmie Brown testified that she was at the Randolph residence on the day of the search. She testified Shorter asked for Broom and then went directly to the northeast bedroom when he arrived at the residence. Brown testified that Shorter was in the bedroom talking to Cole when the police arrived. Brown stated she was sitting in the living room, as were Randolph and Terrance Davis, when the police came to the door. She testified Davis saw the police and “got up and he ran to the basement.” Brown went to the kitchen and then came back and sat down.

³ During trial, the witnesses made frequent reference to a diagram of the house while testifying. The diagram is not part of the record, and we are thus without its benefit.

Based on the results of the search, the State filed a three-count trial information naming Robert Randolph and Dale Shorter as defendants. Count I charged Randolph with sponsoring a gathering for use of controlled substances. Count II charged Randolph with possession of a controlled substance. Only Count III applied to the defendant, Dale Shorter. That count charged Shorter with possession with intent to deliver cocaine base.

Shorter's case proceeded to trial,⁴ and he was convicted of the lesser-included offense of possession of cocaine base. At the close of the State's evidence, Shorter's attorney moved for a judgment of acquittal alleging that the State had failed to prove Shorter had actual or constructive possession of the drugs found in the bathroom. The court denied the motion. Shorter renewed his motion at the close of all the evidence, and the motion was again denied by the court. This appeal followed. Shorter contends the district court erred in finding there was sufficient evidence to support his conviction for possession of cocaine base.

II. Scope and Standard of Review.

We review sufficiency of the evidence claims for errors at law. Iowa R. App. P. 6.4. We uphold a verdict if substantial evidence supports it. *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003). "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *State v. Biddle*, 652 N.W.2d 191, 197 (Iowa 2002). We consider all record evidence, not just the evidence supporting guilt, when making sufficiency of the evidence determinations. *State v. Quinn*, 691 N.W.2d 403, 407 (Iowa

⁴ Randolph pleaded guilty to possession of a controlled substance.

2005). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 6.14(6)(p). We 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.” *Biddle*, 652 N.W.2d at 197. “The State must prove every fact necessary to constitute the crime with which the defendant is charged.” *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002).

III. The Merits.

Unlawful possession of a controlled substance requires proof that the defendant: (1) exercised dominion and control over the contraband, (2) had knowledge of its presence, and (3) had knowledge that the material was a controlled substance. *State v. Reeves*, 209 N.W.2d 18, 21 (Iowa 1973). Possession can be either actual or constructive. *State v. Maghee*, 573 N.W.2d 1, 10 (Iowa 1997). Actual possession occurs when the controlled substance is found on the defendant’s person. *State v. Atkinson*, 620 N.W.2d 1, 3 (Iowa 2000). Constructive possession occurs when the defendant has knowledge of the presence of the controlled substance and has the authority or right to maintain control of it. *Webb*, 648 N.W.2d at 81.

It is undisputed that Shorter⁵ did not have actual possession of the cocaine base because the officers did not find the controlled substance on his person. The question, then, is whether the defendant had constructive possession of the plastic bag found in the toilet of Randolph’s home.

⁵ Shorter argues that it is far more likely that Davis, who had first seen the police approach, deposited the drugs in the toilet before going to the basement to hide.

Our supreme court discussed the concept of constructive possession in

Reeves. The court stated:

(4) But dominion and control . . . by the accused over the narcotic does not mean the narcotic needs to be found on his person nor does it mean that he must have had sole and exclusive use of the premises on which drugs are found.

(5) Constructive possession is all that is necessary and occurs when the accused maintains control or a right to control the narcotic; *possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control, or to the joint dominion and control of the accused and another.*

(6) If the premises on which the drugs are found are exclusively accessible to the accused and subject to his use, possession or control, knowledge of their presence on such premises . . . coupled with his ability to maintain dominion and control . . . may be inferred.

(7) Even if the accused does not have exclusive control of the hiding place possession may be imputed if he has not abandoned the narcotic and no other person has obtained possession.

(8) Knowledge of the narcotic character . . . of the drug, as well as of their presence . . . may be shown by the conduct, behavior and declarations of the accused.

Reeves, 209 N.W.2d at 22 (emphasis added). The *Reeves* court further noted:

[W]here the accused has not been in exclusive possession of the premises but only in joint possession, knowledge of the presence of the substances on the premises and the ability to maintain control over them by the accused will not be inferred but must be established by proof. Such proof may consist either of evidence establishing actual knowledge by the accused, or evidence of incriminating statements or circumstances from which a jury might lawfully infer knowledge by the accused of the presence of the substances on the premises.

Id. at 23.

The *Reeves* court also observed that where circumstantial evidence alone is relied on for an essential element of a possession charge, “the circumstances must be entirely consistent with defendant’s guilt, wholly inconsistent with any

rational hypothesis of his innocence, and so convincing as to exclude any reasonable doubt that defendant was guilty of the offense charged.” *Id.* at 21. Proof of opportunity of access to the place where contraband is found will not, without more, support a finding of unlawful possession. *Id.* at 22.

Shorter contends there was not sufficient evidence to conclude he had constructive possession of the cocaine base found in the bathroom of Randolph’s home. The State argues that Shorter’s possession of the drugs found in the toilet can be inferred from his presence in the hallway, his proximity to the bathroom, and his “flight when he saw Detective Greenleaf.” The law is clear that a jury verdict of guilty can be supported by circumstantial evidence alone. *State v. Moses*, 320 N.W.2d 581, 586 (Iowa 1982); *State v. O’Connell*, 275 N.W.2d 197, 205 (Iowa 1979). However, this in no way relieves the State of its burden of proof, which is beyond a reasonable doubt. In determining whether Shorter has constructive possession of a controlled substance, we are guided by several factors, including (1) incriminating statements made by the defendant, (2) the defendant’s incriminating actions, (3) any fingerprints on the packages containing the controlled substances, and (4) any other circumstances linking the defendant to the controlled substances. *Webb*, 648 N.W.2d at 79.

For the reasons that follow, we do not believe the evidence presented at trial rose to the level necessary to convict Shorter. The house searched by the police did not belong to Shorter, and he did not live there. Shorter arrived at the residence approximately one-half hour before the police approached the home to execute the warrant. Police were aware there was drug activity in the home before Shorter arrived. Both Cole and Brown testified Shorter went into the

northeast bedroom upon his arrival to wait for Les Broom, and that he was there when the police arrived. No direct evidence was presented at trial to establish Shorter had possession of the cocaine base prior to the raid. The drugs at issue here were not in plain view. Neither Greenleaf nor any other officer observed any items being thrown into the toilet during the search by Shorter, or any other person. Greenleaf testified he could not see the entrance to the bathroom from his position in the living room. No one observed Shorter in the bathroom. The evidence does not establish how long the drugs had been in the toilet. The officers were not able to testify that the water was swirling or that the tank was filling when the drugs were discovered. No fingerprints were found on the outer bag or any of the smaller plastic bags. Shorter made no statements acknowledging a connection to the drugs. Others in the house were in motion in the home when the police arrived and could have thrown the drugs in the toilet.

To support a conviction, “evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture.” *Webb*, 648 N.W.2d at 76. We conclude the evidence presented in this case does not allow a reasonable inference that the defendant had control and dominion over the contraband he was charged with possessing. Because the evidence was insufficient to prove that Shorter had constructive possession of cocaine base, we reverse the judgment of conviction and sentence on the charge of possession and remand for an order of dismissal.

REVERSED AND REMANDED FOR DISMISSAL.