

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1069

STATE OF LOUISIANA

VERSUS

MICHAEL A. ANDRUS

Handwritten initials and signature

Judgment Rendered: DEC 22 2010

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 449393

Honorable Richard A. Swartz, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.
Whipple, J. concurs

McCLENDON, J.

The defendant, Michael A. Andrus, was charged by bill of information with possession or introduction of contraband into a penal institution, a violation of LSA-R.S. 14:402. He pled not guilty. Following a jury trial, the defendant was convicted as charged. He moved for new trial, but the motion was denied. The state filed a multiple offender bill of information seeking to have the defendant sentenced as a habitual felony offender under LSA-R.S. 15:529.1. The defendant admitted the allegations in the multiple offender bill and was adjudicated a second-felony habitual offender. The defendant was sentenced to imprisonment at hard labor for two years and six months. The defendant now appeals, urging in a single assignment of error that the evidence is insufficient to support the conviction. Finding merit in the defendant's argument, we reverse the conviction, habitual offender adjudication and sentence and order the defendant released.

FACTS

On May 16, 2008, Deputy Adam Maillho, of the St. Tammany Parish Sheriff's Office, went to the Washington Parish Jail for the purpose of transporting the defendant to the St. Tammany Parish Jail. For reasons that were never fully established in the record, the defendant had been arrested and taken into the Washington Parish Jail. After the defendant arrived at Washington Parish Jail, the officials there learned that there were active attachments on him in St. Tammany Parish.

Upon arriving at the Washington Parish Jail, Deputy Maillho advised the defendant of the attachments, read him his **Miranda** rights, and restrained him with handcuffs. Pursuant to jail policy, Deputy Maillho was given the defendant's personal property, which consisted of a toiletry bag. Deputy Maillho transported the restrained defendant and his possessions to St. Tammany Parish Jail. Inside the St. Tammany Parish Jail intake area, Deputy Maillho searched the defendant's toiletry bag and found approximately sixty pills, later determined to contain hydrocodone, a Schedule III drug.

Corporal Alex Dantagnan, of the St. Tammany Parish Sheriff's Office Criminal Patrol Division, was called to the jail to handle the matter. Deputy Maillho turned the pills over to Cpl. Dantagnan. The defendant was again advised of his **Miranda** rights. According to Cpl. Dantagnan, the defendant admitted that the hydrocodone pills belonged to him and indicated he had a prescription for them.¹

SUFFICIENCY OF THE EVIDENCE

In his sole assignment of error, the defendant argues there was insufficient evidence presented at the trial of this matter to support the jury's finding that he possessed, introduced, or attempted to introduce contraband into the St. Tammany Parish Jail. Specifically, he argues that the state failed to prove that he had custody or control over his toiletry bag as he was being transferred from the Washington Parish Jail.

In reviewing claims challenging the sufficiency of the evidence, this Court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." **Jackson v. Virginia**, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also LSA-C.C.P. art. 821 B; **State v. Mussall**, 523 So.2d 1305, 1308-09 (La. 1988).

Louisiana Revised Statutes 14:402(E) provides, in pertinent part:

It shall be unlawful to possess or to introduce or attempt to introduce into or upon the premises of any municipal or parish prison or jail or to take or send or attempt to take or send therefrom, or to give or to attempt to give to an inmate of any municipal or parish prison or jail, any of the following articles which are hereby declared to be contraband for the purpose of this Section, to wit:

* * * *

(5) Any narcotic or hypnotic or excitive drug or any drugs of whatever kind or nature, including nasal inhalators of any variety, sleeping pills or barbiturates of any variety that create or may create a hypnotic effect if taken internally, or any other controlled dangerous substance as defined in R.S. 40:961, et seq.

¹ At trial, there was argument regarding the existence of a prescription for the hydrocodone pills. Defense counsel noted that the state provided a copy of a prescription with its discovery response. The prosecutor denied providing the document. The trial court agreed to allow questioning regarding the existence of the prescription, but did not allow the document to be introduced into evidence at the trial.

The possession of contraband is analogous to the possession of a controlled dangerous substance. One need not physically possess a controlled dangerous substance to violate the prohibition against possession; constructive possession is sufficient. **State v. Converse**, 529 So.2d 459, 464-65 (La.App. 1 Cir.), writ denied, 533 So.2d 355 (La. 1988). A person is considered to be in constructive possession of a controlled dangerous substance if it is subject to his dominion and control, regardless of whether or not it is in his physical possession. However, the mere presence in the area where narcotics are discovered or mere association with the person who does control the drug or the area where it is located is insufficient to support a finding of constructive possession. **State v. Smith**, 03-0917, pp. 5-6 (La.App. 1 Cir. 12/31/03), 868 So.2d 794, 799.

In the instant case, although we have considered the evidence in the light most favorable to the prosecution, we find that any rational trier of fact could not have concluded beyond a reasonable doubt that the state proved the essential elements required to convict the defendant of the charged offense. At the trial, the state's evidence regarding the introduction of the hydrocodone pills into the St. Tammany Parish Jail was presented through the testimony of Deputy Maillho. Deputy Maillho testified that he picked the defendant up from the intake area at the Washington Parish Jail, **Mirandized** him, and immediately placed him in restraints. Deputy Maillho then received, directly from the personnel at the Washington Parish Jail, the defendant's personal belongings, which consisted of a toiletry bag that he apparently had on his person when he was initially brought to the Washington Parish Jail.² Deputy Maillho testified he transported the defendant directly to the St. Tammany Parish Jail and entered through the secured sally port area of the facility. He then removed the defendant from the vehicle and grabbed the toiletry bag. The defendant remained restrained. Deputy Maillho testified he asked the defendant if he had any contraband on his

² The defendant was not charged with possession or introduction of contraband in regard to the Washington Parish Jail.

person or in his toiletry bag. The defendant informed Deputy Maillho that there were razor blades inside the bag. Once they reached the intake area, Deputy Maillho removed the razor blades from the toiletry bag and disposed of them. While searching for the razor blades, Deputy Maillho observed a raisin box inside the bag. He opened the box and found the hydrocodone pills.

The aforementioned testimony established that the toiletry bag containing the hydrocodone pills, although belonging to the defendant, was under the control of Deputy Maillho as it was introduced into the St. Tammany Parish Jail. The defendant, who was restrained in handcuffs, had absolutely no control over the bag and/or its contents during the transport or while at the St. Tammany Parish Jail. Deputy Maillho testified that the defendant never had access to his personal property at the jail. Rather, the bag was simply "transported with him." Deputy Maillho further explained that when inmates are booked into the jail, their personal property goes into a property locker. The inmate does not have access to their personal property while they are at the jail. The property is only returned to the inmate upon release. Therefore, the defendant would not and did not have access to the toiletry bag at the **St. Tammany Parish Jail**. We find this evidence to be insufficient to prove possession and/or introduction of the toiletry bag and its contents into the St. Tammany Parish Jail by the defendant. The defendant cannot be convicted of possessing and/or introducing any items of which he had no custody or control.

In its brief, the state cites **State v. Samuel**, 08-100 (La.App. 3 Cir. 5/28/08), 984 So.2d 256, writs denied, 2008-1419, 2008-1487 (La. 2/20/09), 1 So.3d 493, 495, and argues that a defendant's admission of ownership of contraband is sufficient to prove constructive possession. In **Samuel**, the package containing the illegal drugs that the defendant was charged with possessing was found on the bed where the defendant was sleeping. Thereafter, the defendant confessed that the package belonged to him. Under these facts, the location of the package, which was clearly under the defendant's dominion and control, along with the testimony indicating that the defendant

admitted ownership of the package, supported the finding that the defendant constructively possessed the items contained in the package. The instant case is distinguishable. As previously noted, the requisite elements of dominion and control are lacking herein.

The state also cites **State v. McMillan**, 02-181 (La. App. 3 Cir. 6/12/02), 819 So.2d 503, wherein the defendant was charged with possessing or introducing contraband into a penal institution. In **McMillan**, the defendant was arrested and searched for weapons, but no weapons were found. Later, after being transported to the parish jail, the defendant became involved in a physical struggle with the police officers. When the defendant was forced onto the ground, a weapon, concealed on the defendant's person, discharged. We note, as does the state, that what makes **McMillan** distinguishable from the instant case is the fact that the contraband (the handgun) was in the defendant's actual physical possession when he entered the penal institution. In the instant case, the contraband at issue was not in the defendant's actual or constructive possession.

Considering the foregoing, we find the state failed to prove beyond a reasonable doubt that the defendant possessed, introduced, or attempted to introduce contraband into the St. Tammany Parish Jail. The defendant's conviction, habitual offender adjudication, and sentence are reversed, and he is ordered discharged as to this offense.

CONVICTION, HABITUAL OFFENDER ADJUDICATION, AND SENTENCE REVERSED.