IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. VICTOR VICTOROVICH TOKARENKO, Appellant.	)	No. 65331-8-I DIVISION ONE UNPUBLISHED OPINION FILED: May 9, 2011

Appelwick, J. — Tokarenko appeals his conviction for possession of cocaine with intent to deliver. He argues that the evidence was insufficient to support the jury's verdict and further contends a police search of his car was illegal under Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), because a narcotics dog was used to establish probable cause for the warrant. The State presented evidence that Tokarenko had dominion and control over the vehicle in which the cocaine was found, actually handled the cocaine's container, carried related contraband on his person, and appeared to be working with the car's driver. This evidence supported the jury's verdict. Tokarenko made no motion to suppress in the trial court. As a result, the record does not contain the search warrant affidavit and was not sufficiently developed

for Tokarenko to bring his claim of an unlawful search for the first time here on appeal. We affirm.

FACTS

On September 23, 2009, members of a police plainclothes proactive unit were searching for the defendant Victor Tokarenko and Tokarenko's girlfriend and roommate Kalley McNae. Tokarenko and McNae each had outstanding arrest warrants. Officers located Tokarenko's gold Mercedes sport utility vehicle in the parking lot of the apartment complex where Tokarenko and McNae lived. The officers positioned themselves to watch the vehicle without being seen.

Eventually, Tokarenko and McNae came out to the Mercedes and began loading it. McNae placed shopping bags into the driver's side of the back seat. Tokarenko loaded a vacuum cleaner and black duffel bag into the rear hatch. While Tokarenko was loading the car, he was looking "all over the parking lot" as if "his head was on a swivel," which the observing officer found consistent with the behavior of persons concerned that they are being watched.

The pair finished loading the vehicle and got inside. McNae was driving and Tokarenko was in the passenger's seat. The plainclothes officers instructed a uniformed officer in a marked patrol car on a nearby street to stop the vehicle as it drove out of the parking lot. The officer in the patrol car drove up to the Mercedes, but before he could initiate the stop, he saw Tokarenko and McNae look at each other and briefly converse. McNae then threw the vehicle into reverse. The officer was nonetheless able to block the Mercedes in the lot. As he walked up to the Mercedes, he instructed the occupants to show their hands.

McNae complied, but Tokarenko did not, instead appearing agitated and putting his hands in his pockets. The officer again told Tokarenko to show his hands, but Tokarenko emptied his pockets of credit cards and money and attempted to reach behind his seat. The officer then pulled his weapon out and again ordered Tokarenko to show his hands, which he finally did.

Tokarenko was taken out of the car and searched. Tokarenko had a glass drug pipe in one of his pockets, along with a student identification card bearing Tokarenko's picture and a false name. After being advised of his Miranda rights, Tokarenko said he did not know why his picture was on the false identification, did not know why he began emptying his pockets when first stopped, and said it had been a year since he had worked. Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Tokarenko was sweating profusely during this conversation and appeared very nervous.

The officers did not enter the Mercedes. From outside, they could see cash, credit cards, and crumpled balls of aluminum foil on the seat and floor. Based on their observations, they called an officer with a narcotics dog to the location. Without entering the Mercedes, the dog and handler walked around the exterior of the vehicle. The dog alerted on the back area of the vehicle. An officer experienced in narcotics investigations then impounded the Mercedes and sought and obtained a search warrant authorizing a search of the vehicle.

Officers executed the search warrant the next day. They found the foil balls, which they associated with drug use and possession, credit cards, and approximately $200 in cash in the front seat area. They also found that the front

passenger airbag had been removed, leaving the airbag compartment empty. When brought inside the car, a narcotics dog alerted to that compartment, suggesting that narcotics had previously been stored there.

In the area of the back seat, officers found a roll of foil and a digital scale of a type commonly used to weigh narcotics. An expandable baton was in the pocket behind the front passenger seat.

The officers removed the duffel bag and vacuum cleaner from the rear of the car. Inside the duffel bag, wrapped inside of men's and women's clothing, was a brick of cocaine that weighed almost 130 grams, an amount inconsistent in the officer's experience with personal use and worth somewhere between $2,500 and $4,500. In addition, the brick appeared not to have been adulterated with other substances as is typical for cocaine that is to be directly used. The duffel bag also contained handcuffs, a pill bottle, a pill cutter, and two prepaid cell phones with no call or text history. Officers testified such phones are used by drug sellers to avoid tracing. Inside the vacuum cleaner, wrapped in a blue bandana, was a loaded .380 caliber semi-automatic handgun.

Tokarenko was initially charged with one count of possession of cocaine with intent to deliver while armed with a firearm and one count of possession of oxycodone. The second count was dismissed by the State before trial.

At trial, the jury found Tokarenko guilty of possession of cocaine with intent to deliver but did not find he was armed with a firearm at the time. Tokarenko received a standard range sentence and now appeals.

DISCUSSION

I. Sufficiency of the Evidence

Tokarenko first contends there was insufficient evidence to support his conviction for possession of a controlled substance with intent to deliver, specifically challenging the sufficiency of the evidence of possession. Evidence is sufficient if, when viewed in the light most favorable to the State, any reasonable trier of fact could find guilt beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980). When a criminal defendant challenges the sufficiency of the evidence, he admits the truth of the States evidence, and all reasonable inferences therefrom are drawn in favor of the State. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). Criminal intent may be inferred from conduct, and circumstantial evidence is as reliable as direct evidence. State v. Varga, 151 Wn.2d 179, 201, 86 P.3d 139 (2004).

Possession may be either actual or constructive. State v. Summers, 107 Wn. App. 373, 389, 28 P.3d 780, 43 P.3d 526 (2001). Actual possession requires the item to be in the physical custody of the person charged. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). Constructive possession occurs when the person has dominion and control over the item enabling that person to immediately convert the item to actual possession. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). However, knowledge of the presence of a drug is by itself insufficient to prove dominion and control. State v. George, 146 Wn. App. 906, 923, 193 P.3d 693 (2008). In addition, mere proximity to the contraband is insufficient to show constructive possession. State v. Spruell, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990); State v.

McCaughey, 14 Wn. App. 326, 329, 541 P.2d 998 (1975).

Courts determine dominion and control in light of all the circumstances. State v. Partin, 88 Wn.2d 899, 906, 567 P.2d 1136 (1977). Dominion and control over premises raises a rebuttable presumption of dominion and control over objects in the premises. State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996); State v. Tadeo-Mares, 86 Wn. App. 813, 816, 939 P.2d 220 (1997). Dominion and control need not be exclusive. Summers, 107 Wn. App. at 389; State v. Cote, 123 Wn. App. 546, 549, 96 P.3d 410 (2004).

Tokarenko asserts that the State merely established his proximity to the drugs and momentary handling, which he argues does not prove constructive possession. But, the evidence showed more than mere proximity and momentary handling. First, Tokarenko was the owner of the vehicle, thus raising a rebuttable presumption of dominion and control over its contents. Cantabrana, 83 Wn. App. at 208. This fact alone distinguishes this case from the circumstances in Spruell, Callahan, and Cote, which Tokarenko cites. Moreover, in this case the presumption was further supported by additional circumstantial evidence.

The jury could infer from the evidence about the front airbag's removal that the car had been modified specifically to create a space for carrying contraband. As the vehicle's owner, it is logical to conclude that Tokarenko was aware of that fact. The nature and size of the brick of cocaine from the duffel bag suggested that the cocaine was intended for distribution. Police found other items consistent with drug sales, such as the scales, the foil, cell phones, and

the baton, in multiple locations within the vehicle, further suggesting that Tokarenko knew of the cocaine in the duffel bag.

Finally, Tokarenko's demeanor, both while loading the vehicle and after he was confronted by police, provided additional evidence of his guilty knowledge.

Tokarenko emphasizes that the cocaine brick was directly wrapped in a woman's sweater. He matches this with the fact that McNae was driving and argues that the evidence is more consistent with McNae's guilt than his own. But, dominion and control need not be exclusive, and evidence suggested McNae and Tokarenko were working in concert. The duffel bag was filled with men's and women's clothing. And, it appeared that McNae exchanged words with Tokarenko when the patrol officer first attempted to stop the Mercedes before McNae made her brief attempt to avoid the stop.

In sum, the totality of the evidence, construed in a light most favorable to the State, was sufficient to support the jury's verdict.

II. Suppression of the cocaine.

Tokarenko next contends that the search of the vehicle was the fruit of an unlawful search incident to arrest under Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). The State contends that Tokarenko cannot show the claim of error is a manifest constitutional error he may raise for the first time on appeal under RAP 2.5(a)(3), because the record is insufficient to determine whether a motion to suppress should have been granted. Because we conclude that the record is insufficient to evaluate the merits of the claimed

constitutional error, review of this issue is not warranted under RAP 2.5(a)(3).

Generally, we will not consider a claim of error raised for the first time on appeal unless the defendant shows it is a "manifest error affecting a constitutional right". RAP 2.5(a), 2.5(a)(3); State v. O'Hara, 167 Wn.2d 91, 98, 217 P.3d 756 (2010); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). The manifest constitutional error exception to the general rule is narrow. State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). RAP 2.5(a)(3) is not meant to allow defendants to obtain a new trial "whenever they can identify some constitutional issue not raised before the trial court." McFarland, 127 Wn.2d at 333. To show manifest error under RAP 2.5(a)(3), the defendant must identify a constitutional error and show how, in the context of trial, the claimed constitutional error actually affected the defendant's rights. McFarland, 127 Wn.2d at 333. If the record is insufficient to determine the merits of the constitutional claim and the facts necessary to adjudicate the claimed error are not in the record, "no actual prejudice is shown and the error is not manifest" under RAP 2.5(a)(3). McFarland, 127 Wn.2d at 333.

First, while Tokarenko contends that the narcotics dog's alert on the back of his vehicle constituted an unlawful search, no Washington court has yet held that a trained dog's sniff around the exterior of a vehicle necessarily constitutes a search under article I, section 7 of the Washington State Constitution. See State v. Neth,165 Wn.2d 177, 181, 196 P.3d 658 (2008).[1]

[1] Cases from this court suggest otherwise. See, e.g., State v. Hartzell, 153 Wn. App. 137, 149, 221 P.3d 928 (2009), adhered to on remand on other grounds, 156 Wn. App. 918, 237 P.3d 928 (2010). Tokarenko cites Neth's companion

But, even if such authority existed, the record would be insufficient to adjudicate Tokarenko's claim here. Because Tokarenko made no motion to suppress, the search warrant and affidavit supporting the warrant are not part of the record. It appears the officers recognized that the vehicle contained drug paraphernalia even before the canine officer was summoned to the scene. Accordingly, this court has no way to determine whether the search warrant was supported by probable cause regardless of the information from the canine alert.

Tokarenko also makes a conclusory claim of ineffective assistance for his counsel's failure to bring a suppression motion. That claim of error, however, is not manifest here for the same reason as his suppression claim is not manifest. McFarland, 127 Wn.2d at 333-34 (where the claimed error is based on trial counsel's failure to move to suppress, the defendant must show from the available record that the trial court would have likely granted the motion).

We are mindful of our Supreme Court's recent decision in the

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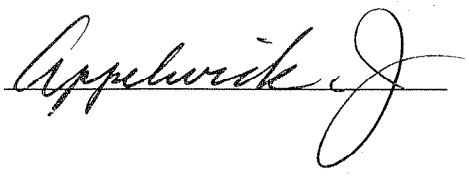
case, State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009) for the proposition that a canine sniff of the exterior of a vehicle is a search, but that issue was not before the court in Valdez. The only involvement of a canine in Valdez was as part of the search of the interior of a vehicle after the search had already begun incident to the driver's arrest. The Supreme Court explained in Neth that it originally took review of that case to answer the question of whether a dog's sniff of the exterior of a vehicle constituted a search, but ultimately found the question of the dog sniff was not properly before the court. 165 Wn.2d at 181. As commentators have observed, the issue is significant because the United States Supreme Court has rejected the proposition such police activity is a search under the Fourth Amendment, Illinois v. Caballes, 543 U.S. 405, 409, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005), and a contrary holding under article I, section 7 would have substantial public policy repercussions. See David J. Perkins, Capsized by the Constitution: Can Washington State Ferries Meet Federal Screening Requirements and Still Pass State Constitutional Muster?, 79 Wash. L.Rev. 725, 738-39 (2004). We note the briefing in this case would be inadequate for us to address the issue here in any event.

consolidated cases in State v. Robinson, No. 83525-0 (Wash. April 14, 2011). Under Robinson, some defendants seeking to bring claims similar to Tokarenko's for the first time on appeal will be entitled to a remand to bring a motion to suppress based on Gant and similar cases. Tokarenko, however, clearly is not entitled to such a remedy because one of the requirements for such relief under Robinson is that "the defendant's trial was completed prior to the new interpretation." Robinson, No. 83525-0, slip op. at 14. The cases Tokarenko seeks to rely on, Gant, State v. Patton, 167 Wn.2d 379, 219 P.3d 651 (2009), and State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009), were all decided in 2009 and Tokarenko's trial began and ended in 2010.

Affirmed.



WE CONCUR: