COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2469 **Cir. Ct. No. 2012CV13561**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN EX REL. QUINELL SMITH,

PETITIONER-APPELLANT,

V.

DAVID SCHWARZ ADMINISTRATOR,
DIVISION OF HEARINGS AND APPEALS,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Reversed and cause remanded with directions*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Quinell Smith appeals a trial court order affirming a decision of the Administrator of the Division of Hearings and Appeals that revoked Smith's probation. We reverse and remand to the Division for further proceedings.

BACKGROUND

¶2 On June 14, 2012, police responded to a call from a citizen, Deshulon Williams, regarding a disturbance in the area of 3286 N. 25th Street, Milwaukee, Wisconsin. Williams told police that people associated with that address threatened her with guns. Police stopped and questioned several men in the area, including Smith, who Williams said participated in the disturbance. Police also conducted a protective sweep of the residence at 3286 N. 25th Street. No one was inside, but police found a handgun in the living room. Smith admitted that he lived at the residence, and police took him into custody.

¶3 At the time of Smith's arrest, Smith was serving a term of probation for possessing a firearm as a felon, and so, while he was in custody, he gave a written statement to his probation agent. In the statement, Smith denied that he had any guns. He acknowledged that, on June 14, 2012, he was living with relatives at 3286 N. 25th Street and that he slept there that day. Smith also acknowledged that he then went outside and saw his uncle arguing with a neighbor. Smith said that after the argument "slowed down," he went to visit his aunt, then rode back with her "to check on [his] uncle." Smith went on to address a variety of other matters, including his consumption of alcohol and his use of controlled substances while on probation.

¶4 The Division of Community Corrections sought revocation of Smith's probation on the ground that Smith violated his rules of probation because he allegedly: (1) drank alcohol in April 2012; (2) used marijuana in May 2012; (3) was party to the creation of a disturbance on June 14, 2012; and (4) was party to the possession of a firearm on June 14, 2012. Smith admitted that he drank

alcohol and used marijuana as alleged, but he disputed the other allegations. He demanded a hearing.

¶5 Police Officer Jeffrey R. Timmerman testified at the administrative hearing. His testimony and accompanying police reports showed that he spoke to Williams on June 14, 2012, when police arrived in the area of 3286 N. 25th Street in response to her call. Williams told Timmerman that she lives next door to 3286 N. 25th Street and that four men associated with that residence had confronted her in her yard. She said that two of the men brandished rifles or shotguns, and two of the men had handguns, one of which was silver. Williams also told Timmerman that the people who had carried the "long guns" went inside the residence after the confrontation and then ran out while the police were arriving.

¶6 The Division also presented a police report prepared by Officer Angela Gonzalez. This report showed that while Gonzalez was at the scene of the disturbance, Williams pointed to a passing car and said: "that's him right there, they [sic] he goes right there in the green car." Gonzalez stopped the car, which contained Smith and a woman, both unarmed. Williams identified Smith as the person she saw with a silver handgun.

¶7 Neither Williams nor Gonzalez testified at the hearing. The administrative law judge found that Timmerman's testimony and the police reports were insufficient to support either the allegation that Smith was involved in disorderly conduct on June 14, 2012, or the allegation that he possessed a gun during Williams's dispute with her neighbors.

¶8 The administrative law judge, however, believed Timmerman's testimony that Timmerman conducted a protective sweep of 3286 N. 25th Street because "others involved in this argument, Mr. Smith's relatives, were alleged to

have carried the long guns back through the residence." The judge also credited Timmerman's testimony that, during the protective sweep, Timmerman found "in a [sic] plain view on a built-in hutch a black semi-automatic handgun in a common area." The judge further received Smith's statement to his probation agent and found that Smith "shared [the residence] with his family." The judge concluded that Smith "constructively possessed the black handgun recovered in plain view inside his residence in an area over which he and his relatives exercised control." Based on the three probation violations deemed proven, the judge ordered Smith's probation revoked.

¶9 Smith appealed his probation revocation to the Administrator of the Division of Hearings and Appeals. The Administrator's short decision explained that "Smith stipulated ... that he ... us[ed] alcohol and marijuana. The record also established that police found a firearm in plain view in Smith's residence. This is sufficient to establish that Smith had constructive possession of the firearm in violation of his rules [of probation] and the law." The Administrator concluded that "Smith's status as a felon, coupled with evidence that a firearm was kept in plain view in his residence, constitutes a substantial threat to public safety, making continued probation supervision and any alternatives to revocation inappropriate."

¶10 Smith pursued review of the probation revocation order by petitioning the trial court for a writ of *certiorari*. The trial court upheld the order, and this appeal followed.

ANALYSIS

¶11 "[P]robation revocation is the product of an administrative, civil proceeding." ***State ex rel. Cramer v. Wisconsin Court of Appeals***, 2000 WI 86, ¶28, 236 Wis. 2d 473, 613 N.W.2d 591. An offender challenges the revocation

decision by writ of *certiorari* to the trial court. *See* ***id.*** In a further appeal to this court, we review the decision of the Division, not the decision of the trial court. *See* ***State ex rel. Warren v. Schwarz***, 211 Wis. 2d 710, 717, 566 N.W.2d 173 (Ct. App. 1997), *aff'd*, 219 Wis. 2d 615, 579 N.W.2d 698 (1998). Our scope of review is identical to that of the trial court. ***State ex rel. Staples v. DHSS***, 136 Wis. 2d 487, 493, 402 N.W.2d 369 (Ct. App. 1987). Review encompasses only four issues: "(1) whether the [Division] stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable and represented its will, not its judgment; and (4) whether the evidence was such that it might reasonably make the decision that it did." ***Warren***, 211 Wis. 2d at 717.

¶12 In this appeal, as in the trial court proceedings, Smith challenges the sufficiency of the evidence supporting the finding that he possessed a gun. "[A]t a revocation hearing, the [Division] has the burden to prove the allegation of the violation by a preponderance of the evidence. Our inquiry on review is limited to whether there is substantial evidence to support the [Division]'s decision." ***State ex rel. Thompson v. Riveland***, 109 Wis. 2d 580, 585-86, 326 N.W.2d 768 (1982) (citation and footnote omitted). "'Substantial evidence is evidence that is relevant, credible, probative, and of a quantum upon which a reasonable fact finder could base a conclusion.'" ***Von Arx v. Schwarz***, 185 Wis. 2d 645, 656, 517 N.W.2d 540 (Ct. App. 1994) (citation omitted). The burden on the Division is considered low. *See* ***State ex rel. Washington v. Schwarz***, 2000 WI App 235, ¶17, 239 Wis. 2d 443, 620 N.W.2d 414. We nonetheless conclude that the Division failed to meet its burden to prove the disputed allegation that Smith possessed a gun.

¶13 "[T]he Wisconsin criminal jury instructions provide a standard definition for the term 'possession.'" *See* ***State v. Peete***, 185 Wis. 2d 4, 16, 517

N.W.2d 149 (1994). One way for a person to possess contraband is to "knowingly ha[ve] actual physical control of" the contraband. *See* WIS JI—CRIMINAL 920. Physical possession, however, is not essential. *See* ***State v. Allbaugh***, 148 Wis. 2d 807, 813, 436 N.W.2d 898 (Ct. App. 1989). "'[I]t is enough if the defendant has constructive possession of the ... [contraband].'" ***Id.*** (citation omitted; ellipses in ***Allbaugh***). Thus, a person may possess contraband when it "'is found in a place immediately accessible to the accused and subject to his [or her] exclusive or joint dominion and control, provided that the accused has knowledge of the presence of the [contraband.]'" ***Id.*** at 814 (citation omitted, second set of brackets added).

¶14 In ***Allbaugh***, we applied the foregoing principles in the context of a prosecution for possession with intent to deliver marijuana. *See* ***id.*** at 808, 814-15. That case involved a police search of the home that the defendant shared with another adult and a child. ***Id.*** at 808, 811. During the search, police found marijuana covering the bed and floor of one bedroom, and nineteen pounds of marijuana hanging in an open closet. ***Id.*** at 814. Although the officers found no marijuana in the room identified as the defendant's, they found marijuana plants drying on the dining room table, bags of marijuana and marijuana seeds scattered around the living room, and, further, "[t]he entire house smelled of drying plants." ***Id.*** at 812, 815. We agreed with the defendant that these facts constituted largely circumstantial evidence against him, but we rejected the suggestion that the evidence was insufficient to prove that the defendant possessed the marijuana. *See* ***id.*** at 808, 810. We concluded that the evidence permitted the jury to infer the defendant's knowledge of the contraband because it "'was in plain view in common areas throughout the house.'" *See* ***id.*** (citation omitted). Further, the jury could infer the defendant's dominion and control over the contraband because the

defendant was a joint resident of the home and thus had "'control over the common areas.'" *See* ***id.*** (citation omitted).

¶15 In the instant case, the Division discusses four facts that it asserts show Smith's possession of the handgun found in 3286 N. 25th Street on June 14, 2012. First, the Division notes that Smith admitted living at that address and sleeping there that morning. Second, the Division asserts that "the gun was found in a common area of the home in plain view." Third, the Division points to Smith's admission that he watched Williams's altercation with his uncle outside the residence. Finally, the Division relies on a portion of Timmerman's police report reflecting that, after Williams called police to report a disturbance involving guns, she saw Smith "walk[] back to 3286 N. 25th Street." These facts, however, do not constitute substantial evidence that Smith possessed the handgun.

¶16 The evidence shows that Smith lived at 3286 N. 25th Street and that he slept there on the morning of June 14, 2012, but these facts must be paired with some additional fact or set of facts permitting an inference that he had knowledge of and control over the gun found in the residence later that afternoon. *See* ***id.*** at 813. Long-settled Wisconsin law teaches that residency alone does not establish the resident's possession of contraband inside the premises.

> It is quite absurd to say that [contraband] found in a man's place of business or on his premises conclusively establishes guilt of unlawful possession. If so, any one might find himself in the position of a criminal because a stranger had left in his office or place of business, temporarily or otherwise, with or without evil design, a satchel or other container having [contraband] in it, without the knowledge or consent of the owner of the place.

Schwartz v. State, 192 Wis. 414, 418, 212 N.W. 664 (1927).

¶17 In ***Schwartz***, a prohibition-era case, the State charged the defendant with possessing alcohol in his soft-drink shop. *See* ***id.*** at 415. The evidence presented at trial revealed that police entered the shop and found a single bottle of alcohol. *See* ***id.*** at 416. An employee was on the premises, but the defendant was not. *See* ***id.*** at 415-16. The employee testified that he carried the alcohol into the shop while the defendant was away and without the defendant's knowledge. *See* ***id.*** at 416. The supreme court deemed the evidence "clearly insufficient" to support a guilty verdict, explaining that unlawful possession requires evidence of "some claim of right, control, or dominion with knowledge of the facts." *See* ***id.*** at 418.

¶18 Here, the Division emphasizes that Smith acknowledged watching the dispute between Williams and his uncle outside of 3286 N. 25th Street on June 14, 2012, and the statement in the police report that Williams saw Smith "walk[] back to 3286 N. 25th Street" after she called the police. The Division suggests that these facts show access to the residence shortly before the police found the gun and thus "'buttress' the inference of knowing possession from joint occupancy of premises in which [contraband is] found.'" *See* ***Allbaugh***, 148 Wis. 2d at 813 (citation omitted). We cannot agree. The Division does not explain why Smith's observation of events outside his home constitutes evidence that he knowingly possessed contraband later found inside. As to the statement in the police report that Williams saw Smith walk back to the residence, Smith accurately points out that the same police report describes Williams's statement that, after her neighbors confronted her with guns, only two of those neighbors—identified as Jermaine L. Moore and Garland T. Peterson—"walked into 32[86]

N. 25th Street."[1] Further, Williams said that when the police squad car arrived, only Moore and Peterson "were exiting the house," but "Smith and the other subject who were outside ran through the gang way eastbound." The police report describing Williams's statements does not permit an inference that Smith knew about and controlled a gun inside 3286 N. 25th Street. Rather, the materials show that Smith was outside of 3286 N. 25th Street when Williams saw other men with guns go inside.

¶19 In sum, the record shows that the administrative law judge did not believe that Smith participated in the armed confrontation with Williams, and the judge did not believe that Smith possessed a gun during that incident. The record further shows that, on June 14, 2012, Smith left the residence at 3286 N. 25th Street during the day, and he was not in that residence when Williams saw other people who had guns go inside. The record also shows that Smith was not in the residence during the protective sweep that uncovered a gun and that he was not inside the residence just before that sweep. Further, unlike the circumstances described in ***Allbaugh***, the residence was not so packed with contraband when officers arrived as to permit a reasonable inference that the contraband was necessarily present earlier in the day. Based on this record, the conclusions that Smith knew the home contained a gun and that he exercised control over that gun rest entirely on speculation. Speculation, however, fails to satisfy even the low burden required to prove that Smith violated his rules of probation. Absent some

[1] Some portions of the police reports describe the subject residence as 3268 N. 25th Street while other portions describe the residence as 3286 N. 25th Street. The parties do not suggest that references to 3268 N. 25th Street are anything other than clerical errors, and we treat all references to both 3286 N. 25th Street and to 3268 N. 25th Street as describing the same residence at 3286 N. 25th Street.

facts to show that Smith knew about the gun and had some "right, control, or dominion" over the gun, the evidence is not sufficient to prove he possessed the gun. *See* ***Schwartz***, 192 Wis. at 418.

¶20 The Division revoked Smith's probation based on three probation violations, including the allegation that Smith possessed a gun. We conclude, however, that the Division did not prove that he possessed a gun. The Division asserts that, in the event we reach such a conclusion, Smith's remedy is a remand to the Division to determine whether revocation of his probation is appropriate in light of the two probation violations that he admitted. Smith concurs, and we agree as well. *See* ***Snajder v. State***, 74 Wis. 2d 303, 312, 246 N.W.2d 665 (1976). Accordingly, we reverse and remand to the Division for further proceedings consistent with this opinion.

By the Court.—Order reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.