

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2013 IL App (3d) 110512-U

Order filed March 20, 2013

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	of the 12th Judicial Circuit,
Plaintiff-Appellee,)	Will County, Illinois,
)	
v.)	Appeal No. 3-11-0512
)	Circuit No. 10-CF-1333
)	
JEFFREY L. NUNNERY,)	Honorable
)	Amy Bertani-Tomczak,
Defendant-Appellant.)	Judge, Presiding.

JUSTICE CARTER delivered the judgment of the court.
Justices Lytton and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held:* Trial counsel was not ineffective for failing to move to suppress statements made after defendant arguably invoked his right to remain silent. Defendant's convictions were supported by sufficient additional evidence such that suppression would not have affected the outcome of the trial.

¶ 2 After a stipulated bench trial, defendant, Jeffrey L. Nunnery, was found guilty of unlawful possession of a controlled substance with intent to deliver, a Class X felony (720 ILCS 570/401(a)(2)(A) (West 2010)); unlawful possession of cannabis with intent to deliver (720 ILCS

550/5(d) (West 2010)); and aggravated driving while license suspended (625 ILCS 5/6-303(d-3) (West 2010)). Defendant appeals, claiming that his trial counsel was ineffective. Defendant argues that counsel should have moved to suppress statements made by defendant in response to police questioning after defendant invoked his right to remain silent. We affirm.

¶ 3

FACTS

¶ 4 Defendant was charged with unlawful possession of a controlled substance with intent to deliver, a Class X felony (720 ILCS 570/401(a)(2)(A) (West 2010)); unlawful possession of cannabis with intent to deliver (720 ILCS 550/5(d) (West 2010)); and aggravated driving while license suspended (625 ILCS 5/6-303(d-3) (West 2010)).

¶ 5 At a hearing on defendant's motion to suppress evidence, police officer Philip Miller testified about the events that led to defendant's arrest. On June 25, 2010, Miller was on duty, driving in an unmarked squad car. He observed a grey Mitsubishi automobile traveling at 25 miles per hour in a 45 miles per hour zone. The Mitsubishi crossed the yellow line, and its tire raised up onto the median for approximately one second. Miller followed the Mitsubishi as it turned into the parking lot of a closed business, parked, and turned off its lights. Defendant, the driver of the Mitsubishi, exited the vehicle and began walking away. The individual in the front passenger seat, Samantha McDonald, moved over into the driver's seat. Miller shone his squad car's spotlight on defendant, exited his vehicle, and told defendant to stay where he was.

¶ 6 Defendant informed Miller that he was carrying a switchblade knife. Miller conducted a pat-down search of defendant and found drug paraphernalia. Miller handcuffed defendant and placed him in the back of the squad car. McDonald and another passenger were detained while officers searched the Mitsubishi. Officers found the following items in the car: a plastic bag

containing cocaine in a compartment under the car's gear shifter; a ziplock bag containing cannabis in the car's trunk; amphetamine powder and a sedative pill in the center armrest compartment; a digital scale on the front passenger seat; cannabis, a cannabis pipe, cocaine, and a methamphetamine pill in McDonald's purse; and paperwork with defendant's name on it and a black grinder containing cocaine residue in a cloth bag in the car's trunk. The cocaine found under the gear shifter and the cannabis found in the trunk formed the basis of defendant's drug charges.

¶ 7 A video and audio recording from Miller's squad car was introduced at the hearing. On the recording, defendant was heard using his cellular telephone to talk to his mother while seated in Miller's car. Defendant stated that "Sam's" vehicle was being searched and that he did not know whether there were any drugs inside.

¶ 8 A conversation between defendant and an officer was also heard on the recording. The officer read defendant his *Miranda* rights, and then questioned him about whether the drugs found in the car belonged to defendant. The officer explained that he wanted defendant to tell him the truth about whether the drugs were his or whether they belonged to the passengers. The following exchange then occurred:

"DEFENDANT: Whatever they say, that's what they say. I don't have anything to say.

OFFICER: The powder isn't yours?

DEFENDANT: I didn't say that.

OFFICER: You didn't say that? Are the fingerprints going to be on the bag coming back to you?

DEFENDANT: That I do not know."

The officer then warned defendant not to lie, and defendant responded, "I have nothing else to say." The officer explained to defendant that if he did not tell the truth, the passengers in his vehicle would go to jail. Defendant stated, "I can tell you this, take your fingerprints but my girlfriend has nothing to do with anything." The court found that the seizure and search of defendant and the vehicle were valid and denied defendant's motion to suppress.

¶ 9 At a stipulated bench trial, the court found defendant guilty of all three charges. The parties stipulated to the following facts, among others: (1) that Sergeant Doug May would testify that he is an expert in the area of narcotics and that based on their weight and packaging, the cocaine and cannabis in this case were intended for distribution; (2) that People's Exhibit 3 was a plastic bag containing 19.1 grams of cocaine found in a compartment located under the Mitsubishi's gear shifter; (3) that People's Exhibit 4 was a manila envelope containing 54 grams of cannabis found in the Mitsubishi's trunk; and (4) that Miller's police report was a true and accurate memorialization of Miller's investigation.

¶ 10 Miller's report was introduced into evidence. Included in the report is Miller's summary of a second phone call made by defendant to his parents while he was seated in Miller's squad car. The report describes the defendant stating:

"I'm going to jail. I don't know if there's drugs in this car or not. I think maybe me and Sam are going to jail and maybe my friend. Since I was driving, if there's anything in there, I'm going to jail for it. If they find anything in this car then I am completely and utterly screwed ... The way they're sitting around, I'm thinking the drug dog is coming. If that is the case then that is bad, bad, bad ... I was getting ready to run, but there was

nowhere to run to ..."

A vehicle tow report was attached to the police report, establishing that McDonald was the owner of the Mitsubishi. The recording from Miller's squad car was also admitted into evidence.

¶ 11 Defendant was sentenced concurrently to 2 years' imprisonment for aggravated driving while license suspended, 3 years' imprisonment for unlawful possession of cannabis with intent to deliver, and 10 years' imprisonment for unlawful possession of a controlled substance (cocaine) with intent to deliver. Defendant filed a motion for a new trial, arguing that the court erred in denying his motion to suppress. That motion was denied. Defendant appeals.

¶ 12

ANALYSIS

¶ 13 Defendant argues that his convictions for unlawful possession of cannabis with intent to deliver and unlawful possession of a controlled substance with intent to deliver should be vacated and his case remanded for a new trial on those two charges. Defendant claims that his trial counsel provided ineffective assistance by failing to move to suppress, under *Michigan v. Mosley*, 423 U.S. 96 (1975), defendant's statements made in response to questioning after defendant had invoked his right to remain silent. Defendant argues that a motion to suppress those statements would have been successful, and without the statements, the State could not have established his possession of the cannabis and cocaine.

¶ 14 To succeed on a claim of ineffective assistance of counsel, defendant must show that: (1) counsel's performance was objectively unreasonable; and (2) counsel's unreasonable performance prejudiced defendant. *Strickland v. Washington*, 466 U.S. 668 (1984). In the context of a motion to suppress, defendant must show that the motion enjoyed a reasonable probability of success and that the outcome of the trial would have been different had the motion been granted. *People v.*

Little, 322 Ill. App. 3d 607 (2001).

¶ 15 In the present case, we reach only the question of whether the outcome of the trial would have been different had the hypothetical motion to suppress been granted. We will assume, *arguendo*, that defendant validly invoked his right to remain silent and that his later statements in response to officers' questioning would have been suppressed. The issue for us to decide then becomes whether there was sufficient other evidence to establish defendant's possession of the cocaine and cannabis. We proceed in this manner because a court should consider a constitutional question only where the case cannot be determined on other grounds. *People v. White*, 2011 IL 109689.

¶ 16 To sustain a charge of unlawful possession of a controlled substance, the State must prove that the defendant knew of the presence of the substance and that it was in his immediate and exclusive control. *People v. Blue*, 343 Ill. App. 3d 927 (2003). " 'Exclusive' control also encompasses control shared with another person." *People v. Brown*, 277 Ill. App. 3d 989, 997 (1996) (quoting *People v. Scott*, 152 Ill. App. 3d 868, 871 (1987)). Possession may be either actual or constructive.

¶ 17 Constructive possession exists without actual physical dominion over the narcotics but where there is an intent and a capacity to exercise control and dominion over them. *Blue*, 343 Ill. App. 3d 927. Constructive possession requires proof that the defendant had some control over the area where the drugs were found. *Brown*, 277 Ill. App. 3d 989. A defendant's *mere presence* in a car where contraband is found is not enough to establish the defendant's knowledge of the contraband (*People v. Love*, 404 Ill. App. 3d 784 (2010)), but a defendant's *control* over the premises where the narcotics were found creates an inference of knowledge and control that is

sufficient to support a conviction for unlawful possession. *Brown*, 277 Ill. App. 3d 989. And while mere proximity to narcotics is insufficient to prove possession, proof of proximity plus inferred knowledge of the presence of the narcotics will support a finding of possession. *Id.* Evidence establishing constructive possession is often wholly circumstantial. *People v. Scott*, 2012 IL App (4th) 100304.

¶ 18 In the present case, defendant was driving the vehicle in which the narcotics were located, and thus controlled the premises where the narcotics were found. This fact alone is enough to infer his knowledge and control of the narcotics. See *Brown*, 277 Ill. App. 3d 989. The cocaine was found in a void compartment located underneath the gear shifter. Because defendant was operating the gear shifter, this provides additional circumstantial evidence that defendant had the intent and capacity to exercise control over the cocaine. The marijuana was found in a clear ziplock bag in the vehicle's trunk. Also located in the trunk was a cloth bag containing documents with defendant's name on them. This evidence leads to an inference that defendant had placed the cloth bag in the trunk and would have seen the marijuana. Therefore, there is strong circumstantial evidence that defendant had knowledge and control over both the cocaine and the marijuana.

¶ 19 Defendant's voluntary statements made during a cellular telephone call in the back of Miller's squad car lend additional support to a finding of possession. These statements were not made in response to interrogation by an officer, and therefore would not have been subject to suppression. See *People v. Enoch*, 122 Ill. 2d 176 (1988). Although defendant begins the conversation by telling his parents, "I don't know if there's drugs in this car or not," he later makes statements that are more incriminating: "The way they're sitting around, I'm thinking the

drug dog is coming. If that is the case then that is bad, bad, bad ... I was getting ready to run, but there was nowhere to run to[.]" This statement leads to the inference that defendant knew about the narcotics in the vehicle and attempted to run to avoid criminal liability.

¶ 20 The circumstantial evidence in this case did more to establish defendant's possession than did his potentially suppressible statements. Defendant's statements to the officer were equivocal about whether the cocaine belonged to him, as defendant did not go so far as to make an outright admission to possessing the cocaine. The most incriminating statement that defendant made was, "I can tell you this, take your fingerprints but my girlfriend has nothing to do with anything." Had his statements been suppressed, there was otherwise sufficient circumstantial evidence to establish defendant's possession of the cocaine and cannabis. Therefore, had trial counsel filed a motion to suppress, the outcome of the trial would not have been different. Accordingly, trial counsel was not ineffective, and defendant's convictions are affirmed.

¶ 21

CONCLUSION

¶ 22 The judgment of the circuit court of Will County is affirmed.

¶ 23 Affirmed.