

No. 1-15-0911

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).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 14 CR 15952
)	
EARL LITZSEY,)	Honorable
)	Charles P. Burns,
Defendant-Appellant.)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Connors and Justice Harris concurred in the judgment.

ORDER

¶ 1 *Held:* Where the evidence at trial was sufficient to prove beyond a reasonable doubt that defendant constructively possessed a controlled substance, his conviction is affirmed.

¶ 2 Following a bench trial, defendant Earl Litzsey was convicted of possession of a controlled substance and sentenced to three years in prison. On appeal, Mr. Litzsey contends that his conviction must be reversed because the evidence was insufficient to prove he constructively possessed the controlled substance at issue. For the reasons that follow, we affirm.

¶ 3

BACKGROUND

¶ 4 Based on events that occurred on August 6, 2014, Mr. Litzsey was arrested and charged with one count of possession of a controlled substance, specifically, less than 50 grams of N-Benzylpiperazine (BZP), commonly known as Ecstasy, with intent to deliver.

¶ 5 At trial, Chicago police officer Joseph Siska testified that, at about 10:45 a.m. on August 6, 2014, while he was conducting narcotics surveillance, he observed Mr. Litzsey from a distance of about 90 feet. Mr. Litzsey was sitting with another person on the front porch of a two-flat residence at 1815 West 59th Street. As Officer Siska watched, a man approached the front of the residence. Mr. Litzsey walked down the porch stairs and climbed over a railing into the enclosed front yard, which was only accessible by climbing the railing. Mr. Litzsey then walked to a fence post in the front yard, bent down, picked up an item, climbed back over the railing by the porch stairs, and handed the man in front of the residence an unknown item in exchange for U.S. currency. Officer Siska testified that after this transaction, Mr. Litzsey “engaged in these same actions” three more times—once with another pedestrian, once with a person in white car, and once with a person in a red car. Each time, Mr. Litzsey would climb over the railing, walk over to the same fence post, climb back over the railing, and then hand the waiting person an item in exchange for money. Mr. Litzsey stayed on the porch between transactions.

¶ 6 Officer Siska testified that after making these observations, he called for enforcement officers to detain Mr. Litzsey. Once Mr. Litzsey was detained, Officer Siska approached and positively identified him. Officer Siska then went to the area from where he “saw [Mr. Litzsey] removing items” and found a plastic bag containing 38 tablets of suspect BZP. He inventoried the items and eventually sent them to the crime lab for testing. Officer Siska testified that he never lost sight of the area from where Mr. Litzsey had been retrieving items and did not see

anyone else go to that area. When Mr. Litzsey was arrested, “some money” and a phone were recovered from his person. Officer Siska acknowledged that none of the buyers he had observed were detained.

¶ 7 The parties stipulated that, if called, a forensic chemist would have testified that the recovered items tested positive for 6.6 grams of BZP.

¶ 8 Following closing arguments, the trial court found Mr. Litzsey not guilty of possession of a controlled substance with intent to deliver, but guilty of the lesser-included offense of possession of a controlled substance. The court reasoned that while there was strong circumstantial evidence that the items Mr. Litzsey tendered to the suspected buyers were narcotics, because the buyers were not stopped, it could not find that intent to deliver was proven beyond a reasonable doubt. Nevertheless, the trial court found the evidence sufficient to establish constructive possession and thus support a conviction. Specifically, the court found as follows:

“However it does appear that [Mr. Litzsey] knows exactly where to go. He goes to a specific[] location four separate times and retrieves an item from that location.

While [Mr. Litzsey] when he was arrested is not found with the drugs on his person, I do believe that he’s got constructive possession of those items in that he has knowledge of the items and intent to exercise dominion or control over those items.

Again it is secreted. He knows exactly where it is. He goes back to it four separate time[s].”

¶ 9 The trial court subsequently sentenced Mr. Litzsey to a term of three years in prison.

¶ 10 JURISDICTION

¶ 11 Mr. Litzsey was sentenced on March 10, 2015, and timely filed his notice of appeal on the same day. Accordingly, this court has jurisdiction pursuant to article VI, section 6, of the

Illinois Constitution (Ill. Const. 1970, art. VI, § 6), and Illinois Supreme Court Rules 603 and 606, governing appeals from a final judgment of conviction in a criminal case (Ill. S. Ct. Rs. 603, 606 (eff. Feb. 6, 2013)).

¶ 12

ANALYSIS

¶ 13 On appeal, Mr. Litzsey contends that his conviction must be reversed because the State failed to prove beyond a reasonable doubt that he constructively possessed the BZP at issue. He asserts that the evidence only established that he went to the same general area where the BZP was subsequently discovered, and that there was no evidence that he handled any objects matching the description of the BZP, either through Officer Siska's testimony or via fingerprint evidence. He argues that he did not have exclusive control over the area where the BZP was found, as it was easily accessible to the public and he was not the only person in the area at the time. Finally, noting the trial court's finding that the evidence was insufficient to support a finding of intent to deliver, Mr. Litzsey argues that there is no reason to presume he had knowledge of or control over the bag later found to contain the BZP.

¶ 14 When reviewing the sufficiency of the evidence, the relevant inquiry is 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, 318-19 (1979). The credibility of the witnesses, the weight to be given their testimony, and the resolution of any conflicts in the evidence are within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *People v. Brooks*, 187 Ill. 2d 91, 131 (1999). Reversal is justified where the evidence is "so unsatisfactory, improbable or implausible" that it raises a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 15 Section 402 of the Illinois Controlled Substances Act provides, in relevant part, that “it is unlawful for any person knowingly to possess a controlled or counterfeit substance or controlled substance analog.” 720 ILCS 570/402 (West 2014). Possession may be actual or constructive and is often proved with circumstantial evidence. *People v. Love*, 404 Ill. App. 3d 784, 788 (2010). Where a case is based on circumstantial evidence, it is not necessary for each link in the chain of circumstances to be proved beyond a reasonable doubt; it is sufficient if all the evidence, considered collectively, satisfies the trier of fact beyond a reasonable doubt that the defendant is guilty. *People v. Hall*, 194 Ill. 2d 305, 330 (2000).

¶ 16 Constructive possession—the type of possession at issue in the instant case—exists where a defendant has the intent and capability to maintain control and dominion over the contraband, and may be proved with evidence that the defendant had knowledge of the presence of the contraband and had immediate and exclusive control over the area where the contraband was found. *Love*, 404 Ill. App. 3d at 788. Knowledge may be inferred from surrounding circumstances which indicate that the defendant knew the contraband existed in the place where it was found (*People v. Smith*, 288 Ill. App. 3d 820, 824 (1997)), such as actions, declarations, or other conduct of the defendant (*People v. McLaurin*, 331 Ill. App. 3d 498, 502 (2002)). Hiding drugs indicates intent to exercise control over them. *McLaurin*, 331 Ill. App. 3d at 503.

¶ 17 In the instant case, the State introduced ample circumstantial evidence of Mr. Litzsey’s constructive possession of the BZP. On four successive occasions during Officer Siska’s surveillance, Mr. Litzsey went to the fence post from where the BZP was later recovered, bent down, retrieved something, and then handed an individual an item in exchange for money. This repeated conduct indicates that Mr. Litzsey knew the BZP existed by the foot of the fence post, and that he was not, as he argues in his brief, merely present in the vicinity of recovered

narcotics. Moreover, the fence post was located inside an enclosed yard that could be reached only by climbing over a railing. Officer Siska, who never lost sight of this area during his surveillance, did not see anyone other than Mr. Litzsey accessing this spot. Given the physical effort needed to get to the fence post, we disagree with Mr. Litzsey's assertion that the area was "easily accessible" to the public. Rather, the inconvenient location of the fence post supports a finding that Mr. Litzsey had exclusive control over the BZP located at its base.

¶ 18 We reject Mr. Litzsey's contention that his conviction is inconsistent with the trial court's acquittal on the charge against him of possession of a controlled substance with intent to deliver. Contrary to Mr. Litzsey's argument, the trial court did not find that he and the unknown individuals engaged in "innocent transactions." Rather, the trial court found that while there was "some strong circumstantial evidence" that Mr. Litzsey sold narcotics to these unknown buyers, he could not conclude "beyond a reasonable doubt" that the items that Mr. Litzsey was observed handing these people were narcotics. In contrast, however, it was proven beyond a reasonable doubt that the area near the fence post had a plastic bag containing 38 tablets that were confirmed to be BZP. There was also evidence from which the trial court could conclude beyond a reasonable doubt that Mr. Litzsey had control and dominion over this bag. As such, there was no inconsistency in these verdicts.

¶ 19 Viewing the evidence in the light most favorable to the prosecution, we find that a rational trier of fact could conclude that Mr. Litzsey constructively possessed the BZP recovered by Officer Siska. Accordingly, the evidence was sufficient to support Mr. Litzsey's conviction.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, we affirm the judgment of the trial court.

¶ 22 Affirmed.