

THIRD DIVISION  
September 27, 2017

No. 1-15-1815

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 11081-01
	)	
BYRON PORTIS,	)	Honorable
	)	Frank Zelezinski,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE HOWSE delivered the judgment of the court.  
Presiding Justice Cobbs and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The judgment of the circuit court of Cook County convicting defendant of possession of a controlled substance with intent to deliver is reversed; the evidence failed to prove defendant was in constructive possession of a controlled substance where the State failed to elicit circumstantial evidence of defendant’s ability and intent to exercise dominion and control over the substance.

¶ 2 Following a bench trial the circuit court of Cook County convicted defendant, Byron Portis, of possession of a controlled substance (cocaine) and possession with intent to deliver.

The State tried defendant with a codefendant, Jarrad Simms. The court found Simms not guilty. The conviction for possession merged into the conviction for possession with intent to deliver and the trial court sentenced defendant to eight years' imprisonment. Defendant appeals, arguing the evidence failed to prove he had actual or constructive possession of the cocaine or, if he did have possession, that he had intent to deliver the cocaine, and that he received ineffective assistance of counsel at trial. For the following reasons, we reverse defendant's conviction.

¶ 3

### BACKGROUND

¶ 4 Defendant's attorney informed the trial court during opening statements that: "This is a typical constructive possession case. There's no indication that [defendant] ever exercised indicia of control over this property." The State's first witness was Investigator Matthew Gena with the Cook County Sheriff's Police. Investigator Gena was working as a gang investigator on a task force in Harvey. Investigator Gena was with Officer Julian of the Chicago Heights Police Department when he saw Anthony Portis "standing on the sidewalk in a gangway." Gena approached Anthony with Officer Julian a little behind him. Anthony made eye contact with Investigator Gena and fled. Gena and Julian pursued Anthony to the rear door of a residence which Gena described as an apartment or condo. Anthony went inside the back door and Gena followed. Investigator Gena testified that when "you open that rear door, you have stairs go immediately up, and then you have, like, the living area and then the kitchen." Anthony went up the stairs and Gena went into the living room. Investigator Gena testified that when he entered the residence he did not follow Anthony upstairs because there were "multiple subjects \*\*\* inside the residence." Investigator Gena "observed [defendant] coming from the kitchen area into the living room." Defendant asked Gena what he was doing and Gena responded he was pursuing Anthony.

¶ 5 Gena went into the kitchen. Codefendant Jarrad Simms was in the kitchen. Gena described the kitchen as small, approximately 12 feet by 12 feet. On the south wall on the counter Investigator Gena observed “a large amount of crack cocaine along with packaging material.” The cocaine was in smaller plastic bags and the smaller bags were all contained in a larger plastic bag. Investigator Gena also saw “clear plastic ziplock bags commonly used to package narcotics” on the counter. The State asked Gena to “describe the size of the bags you observed.” Gena responded “It was a large amount of cocaine.” When asked to further describe it he said it “was like a ball” and indicated the size of a softball. Gena took defendant and codefendant Simms into custody after which he obtained written consent to search the premises from another individual. Gena testified that when he first ran into the building he thought it was abandoned because “the entire area around there is all abandoned.” Investigator Gena transported defendant to the police station where he inventoried defendant’s property. Gena testified he thought defendant had \$671 on his person. After refreshing his recollection with an inventory sheet Gena testified defendant had “thirty twenties; one fifty; six ones; and, I believe, one five.” On cross-examination Investigator Gena stated he never saw defendant in possession of the cocaine or packaging materials nor did he find them on his person. Gena later testified the only people in the kitchen were defendant and codefendant Simms.

¶ 6 Next, Officer David Julian of the Chicago Heights Police Department testified for the State. Officer Julian testified he was working on a task force with the Cook County Sherriff’s Police Department with Investigator Gena when they saw Anthony and he ran away from them. Officer Julian saw Investigator Gena follow Anthony into the rear door of a building and Julian went to the front door. Officer Julian testified that when he got to the front the door it was half open. He looked inside and “saw two subjects standing in the kitchen up against the counter.” Julian identified defendant and codefendant Simms as those two individuals. Officer Julian was

standing at the threshold of the kitchen approximately 10 to 15 feet away from defendant and Simms when he saw them. Julian testified he went into the kitchen and “observed a large chunk of crack cocaine on top of the counter; several baggies, a dozen baggies to bag crack cocaine up; and a cell phone.” The State asked Julian “where were the two defendants located in relationship to that crack cocaine?” Officer Julian responded, “The crack cocaine was in between both of them. They were standing on each side of it.” Officer Julian described “a plastic bag with several other plastic bags it looked like to me; and a large chunk, like, almost like maybe a half of a softball.” He also saw “several dozen clear ziplock bags used to package crack cocaine.” Julian then saw one of the defendants go and talk to Investigator Gena. A woman was in a bathroom off of the kitchen. When Officer Julian entered she was not in the kitchen and came out of the bathroom a few minutes after he arrived. On cross-examination, defendant’s attorney asked Officer Julian one question: if he ever saw defendant in possession of the items Officer Julian testified to, and Julian responded “No, sir.” Codefendant Simms’s attorney asked Officer Julian how much time elapsed from when Julian first saw Anthony and the time Simms was placed under arrest. Officer Julian responded it was minutes. Julian also testified on cross-examination that he never saw Simms in possession of any drugs or drug paraphernalia, “just standing next to it.” There was no evidence that defendant owned, rented, or resided at the premises.

¶ 7 The parties stipulated to the testimony of the State’s forensic expert that she tested items in six smaller bags and determined they contained 17.8 grams of cocaine and that she estimated the total weight from the ten smaller bags to be 29.6 grams.

¶ 8 The trial court found codefendant Simms not guilty because “[t]hough Mr. Simms was right next to the items as I indicated when the police officers came in, Ms. Nelson [(Simms’s girlfriend)] does create a reason for him to be there very temporarily, to change the diaper, and

the court does find it plausible.” Nelson testified she and Simms stopped at Simms’s sister’s home to change their baby’s diaper, Simms went downstairs to retrieve a fresh diaper, then “a couple minutes later” Nelson heard a commotion downstairs. Nelson also testified that when they arrived there were several adults and children in the residence. The court found that defendant “creates a different situation.” The court stated as follows:

“THE COURT: The question is, why is he there for that matter? Is he exercising appropriate possession over these items being knowledge and control? Yes, these items were also next to him, within his view, and for that matter packaged for distribution, and he was the only one there in addition to Mr. Simms.

The big difference between [defendant] and Mr. Simms comes through the fact [defendant] had a larger quantity of money on his person, \$600-some, but a lot of it was smaller bills as the evidence goes, quite a lot of twenties and smaller denominations, indicating to the court in light of the fact that you have smaller amounts, which could have been sold for \$10, \$20, et cetera. It creates a bigger question of what that money was doing on him and is evidence of drug dealing.

Based upon what I have, I have close proximity and knowledge and control of that and the fact he had this large amount of money, smaller bills for that matter here, I do believe that possession has been established for [defendant.]

And, therefore, there’s a finding of guilty on Counts 1 and 2, narcotics charges.”

¶ 9 This appeal followed.

¶ 10 ANALYSIS

¶ 11 Defendant raises four arguments on appeal: (1) the State failed to prove him guilty beyond a reasonable doubt because the State failed to establish defendant had constructive

possession of the narcotics where defendant was only seen standing next to them; (2) he was denied his right to effective assistance of counsel when his attorney failed to ask the State's witnesses how long they saw defendant standing next to the narcotics found; (3) the State failed to prove him guilty beyond a reasonable doubt because the currency found on defendant is not sufficient circumstantial evidence of intent to deliver; and (4) he was denied his right to effective assistance of counsel when his attorney failed to adduce evidence explaining defendant's possession of a large amount of currency in small denominations.

“A challenge to the sufficiency of the evidence requires us to 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 offense beyond a reasonable doubt. [Citations.] We will not substitute our judgment for that of the trier of fact, and we will not reverse a conviction unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt. [Citation.]” *People v. Terrell*, 2017 IL App (1st) 142726, ¶ 17.

“To support a conviction for possession of a controlled substance, the State must prove that the defendant had knowledge of the presence of the narcotics and that the narcotics were in the defendant's immediate and exclusive control. [Citations.]” *People v. Tate*, 2016 IL App (1st) 140619, ¶ 19. “Possession may be either actual or constructive. [Citation.]” *Terrell*, 2017 IL App (1st) 142726, ¶ 18. Defendant's conviction rests on finding he was in constructive possession of the cocaine. The State does not argue defendant had actual possession of the cocaine. “[E]vidence establishing constructive possession is often entirely circumstantial. [Citations.] A trier of fact is entitled to rely on an inference of knowledge and possession sufficient to sustain a conviction absent other factors that might create a reasonable doubt as to the defendant's guilt. [Citations.]” (Internal quotation marks omitted.) *Id.* “Constructive

possession exists where there is no personal dominion over the contraband, but the defendant has control over the area where the contraband was found. [Citation.]” *Id.* However, “[c]ontrol of the location where the contraband is found is not essential to support a conviction based on constructive possession.” *Tates*, 2016 IL App (1st) 140619, ¶ 20. “A defendant’s lack of control of the premises will not preclude a finding of guilt if the circumstantial evidence supports an inference that the defendant intended to control the contraband inside.” *Id.* Constructive possession can be inferred through an intent and capability to maintain control and dominion. *Id.* “[P]roof of mere presence, even combined with defendant’s knowledge of the presence of narcotics, will not support a finding of constructive possession unless there is other circumstantial evidence of defendant’s control over the contraband.” *Id.*

¶ 12 Defendant argues the State’s only evidence of his alleged constructive possession of the cocaine was his mere presence in proximity to the cocaine. Defendant claims the State provided no evidence of his control or intent to control the cocaine. The State argues it proved beyond a reasonable doubt that defendant had constructive possession of the cocaine because “[t]he open nature of the drugs and defendant’s proximity to the drugs along with the \$671 recovered from him provided sufficient evidence that defendant possessed the narcotics.” In other words, the State argues the large amount of currency in small denominations in defendant’s possession is “other circumstantial evidence of defendant’s control over the contraband.” *Id.* Defendant replied there is no authority for the proposition that a large amount of cash is indicative of constructive possession, and the decision in *Tates* indicates the opposite is true.

¶ 13 In *Tates*, the trial court found the defendant guilty of possession with intent to deliver heroin, cocaine, and cannabis, and simple possession of methamphetamines. *Tates*, 2016 IL App (1st) 140619, ¶ 1. The defendant argued the State failed to prove his possession of the narcotics beyond a reasonable doubt. *Id.* ¶ 2. Several officers executed a search warrant at a residence,

and one of the officers saw the defendant and a codefendant, Walter, near a dining room table that held clumps of suspect narcotics and packaging materials. *Id.* ¶ 5. The officer testified that the defendant, Walter, and a third individual, Green, were sitting at the table or “in the dining table area” but his arrest report did not state that the defendant was sitting at the table when he entered. The officer testified all three individuals fled the dining room. The court found the evidence of whether Green was present in the dining room when the officers entered the residence to be disputed. The officer “had difficulty recalling where Green was when police entered” and was unable to identify Green at trial. *Id.* ¶ 6. The court noted there was “no evidence that when police entered, [the defendant] was touching or otherwise handling any of the materials on or around the dining room table.” *Id.* ¶ 5. In addition to the openly visible clumps of suspect cannabis and packaging materials, the table held bagged suspect cannabis and paraphernalia for weighing and cutting narcotics. *Id.* ¶ 7. “Plastic bags containing larger ‘ounce bags’ of suspect cannabis were found inside various boxes, bags, and express mail containers on the floor of the dining room, along with packaging and mailing materials. A loaded Taurus .40 caliber handgun and a .9 millimeter magazine were found inside a closed credenza in the dining room.” *Id.* Police found no indicia of residency linking the defendant to the location. *Id.* ¶ 9. In statements to police Walter admitted ownership of all of the narcotics and related paraphernalia. *Id.* ¶ 10. Walter’s statements never referenced the defendant. *Id.* Green testified he and the defendant had just arrived and were going to eat some fast food they had purchased in the side yard of the residence when police arrived. *Id.* ¶ 12. No weapons, drugs, or money were found on the defendant’s person. *Id.* ¶ 13.

¶ 14 The *Tates* court began by noting that because of the lack of evidence linking the defendant to the residence the State was required to adduce circumstantial evidence of the defendant’s exercise of control over the contraband located there. *Id.* ¶ 24. The defendant



attempted to rely on Walter's admission to ownership of the narcotics and drug paraphernalia, but the court found that was insufficient because exclusive control can include joint possession, so it was possible for both the defendant and Walter to maintain possession of the narcotics even if Walter openly claimed ownership. *Id.* ¶ 25. Nonetheless, the court found that Walter's statement "does bear on the issue;" and the evidence warranted a finding the State failed to prove the defendant's constructive possession of the narcotics. *Id.* ¶ 26.

¶ 15 The *Tates* court found that "[w]hether [the defendant] was standing in the dining room or sitting at the dining room table when police executed the warrant, no evidence establishes that police observed him touching or otherwise handling the cannabis or other materials on and around the dining room table. [The officer] did not find any drugs or weapons on [the defendant's] person, and no forensic evidence, such as fingerprints, linked [the defendant] to the location or to the narcotics found there." *Id.* The court rejected the State's argument that the volume of cannabis and related packaging materials were circumstantial evidence of the defendant's involvement in a presumed distribution operation. *Id.* ¶ 27. The court found that

"no case has turned on the volume of drugs or drug paraphernalia present as indicative of a defendant's constructive possession where no other evidence connects the defendant to the contraband. Thus, while we could find, based on the quantity of cannabis and packaging materials present in the dining room, that [the defendant] must have been aware of Walter's drug operation, nothing else supports the inference that [the defendant] was constructively in possession of the drugs." *Id.* ¶ 27.

The State argued the defendant's attempt to flee when police entered the dining room was circumstantial evidence of the defendant's constructive possession. The court found this evidence "scant." *Id.* ¶ 29. It found "[t]he fact that [the defendant] attempted to flee when police

used a battering ram to break down the front door, while probative, cannot, standing alone, satisfy the State's burden to prove his constructive possession of the narcotics beyond a reasonable doubt. This is particularly true given the lack of any evidence connecting him to the narcotics other than his presence in the dining room." *Id.* ¶ 29. The court held that "at most, the State established [the defendant's] presence in the residence and his awareness of the presence of cannabis in the dining room. This is insufficient to prove his constructive possession of that contraband." *Id.* ¶ 28.

¶ 16 In this case, defendant argues the currency in his possession is similar to the volume of drugs and drug paraphernalia in *Tates* which the court found insufficient to establish constructive possession "where no other evidence connects the defendant to the contraband." *Id.* ¶ 27.

Defendant argues the currency may be "considered as a factor in determining 'intent to deliver' \*\*\* but there is simply no legal support for it to be used as an inference of constructive possession." We agree with defendant that the currency is circumstantial evidence of intent to deliver. *People v. Thomas*, 261 Ill. App. 3d 366, 369-71 (1994) (large amounts of cash coupled with other factors can lead to an inference of intent to deliver). As stated earlier, "constructive possession requires a showing that the defendant had both the intent and capability to maintain control over the substance." *People v. Brown*, 277 Ill. App. 3d 989, 997 (1996). Defendant had the capability to maintain control over the cocaine because he was standing right next to it. The question for this court is whether his possession of currency that could be circumstantial evidence of selling narcotics is circumstantial evidence of defendant's intent to maintain control over the cocaine in question. We hold it is not.

¶ 17 Circumstantial evidence of defendant's possible involvement in selling drugs fails to establish a relationship to the cocaine at issue here. See *Tates*, 2016 IL App (1st) 140619, ¶ 20 ("Where narcotics are found on premises that are *not* under the defendant's control, defendant's

control of the premises is not dispositive. Rather, it is [the] defendant's relationship *to the contraband* that must be examined." (Emphases in original.) (quoting *People v. Minniweather*, 301 Ill. App. 3d 574, 578 (1998))). A relationship between a defendant and narcotics giving rise to an inference the defendant intends to maintain control over the narcotics may be established where the defendant attempts to secrete the contraband (see *People v. Brown*, 277 Ill. App. 3d 989, 998 (1996)) or to dispose of it (see *People v. Rouser*, 199 Ill. App. 3d 1062, 1065 (1990)). However, such a relationship is not established where the defendant is merely in proximity to the narcotics but is "not engaged in any activity suggestive of control over the contraband." *People v. Strong*, 316 Ill. App. 3d 807, 812 (2000) In *Strong*, the court found that:

"The only evidence linking [the] defendant to the drugs (other than [the] defendant's confession) was his proximity to the container holding the drugs when the police arrived. This evidence was not sufficient to establish constructive possession where defendant was but one of four adult guests at the residence in which the contraband was found and he was not engaged in any activity suggestive of control over the contraband. See *People v. Heerwagen*, 30 Ill. App. 3d 144, 145 (1975) (constructive possession not proved where contraband was found on premises in plain view but there was no evidence that defendant owned, rented or resided at premises); cf. *People v. Rouser*, 199 Ill. App. 3d 1062, 1065 (1990) (constructive possession established where activities in locked bathroom were such that reasonable person could conclude defendants were disposing of illegal contraband)." *Strong*, 316 Ill. App. 3d at 812.

Similarly, in this case there was no evidence defendant engaged in any activity evincing intent to maintain control over the cocaine. Also, like *Strong*, the evidence in this case established that

defendant was one of many adults in the residence, even though he and codefendant Simms were the only people in the kitchen.

¶ 18 Moreover, the State failed to adduce evidence establishing defendant had control over the premises where the cocaine was seized, or any connection between defendant and the premises.

*People v. Curry*, 37 Ill. App. 3d 72, 73 (1976) (“Defendant claims that her physical proximity to the bag of contraband is not in itself sufficient to prove possession on her part. Defendant admits that the trial court could reasonably have inferred that defendant had knowledge of the presence of the marijuana in the car. We must agree that the facts will not allow the State to prove possession on a ‘constructive possession’ theory since defendant did not have control over the premises, the automobile.”); *cf. People v. Ciconte*, 102 Ill. App. 3d 1, 8-9 (1968) (“In the case before us the evidence is that the Federal agents found, besides the narcotics, various articles clearly belonging to the defendant, including a billfold with a driver’s license and personal identification cards in the name of the defendant.”); *People v. Spann*, 332 Ill. App. 3d 425, 445 (2002) (“The fact that defendant stayed in the apartment, paid rent there, and possessed a key to the apartment demonstrate that defendant had possession of the drugs found in the apartment. Based on the record, there was sufficient evidence to prove that defendant was in possession of the drugs found in the apartment.”). Further, defendant did not attempt to flee when Investigator Gena and Officer Julian entered. *Cf. Tate*s, 2016 IL App (1st) 140619, ¶ 29 (“the scant additional circumstantial evidence argued by the State does not change the result. The fact that Tate attempted to flee when police used a battering ram to break down the front door, while probative, cannot, standing alone, satisfy the State’s burden to prove his constructive possession of the narcotics beyond a reasonable doubt. This is particularly true given the lack of any evidence connecting him to the narcotics other than his presence in the dining room”). And, in this case, “no evidence establishes that police observed [defendant] touching or otherwise

handling the [narcotics] or other materials on and around the [kitchen counter.] [The officers] did not find any drugs or weapons on [the defendant's] person, and no forensic evidence, such as fingerprints, linked [defendant] to the location or to the narcotics found there.” *Id.*

¶ 19 “The mere presence in the vicinity of contraband cannot establish constructive possession.” *People v. Ray*, 232 Ill. App. 3d 459, 462 (1992). The State offered no circumstantial evidence of defendant’s intent or capability to maintain control and dominion over the contraband. *Tates*, 2016 IL App (1st) 140619, ¶ 20. There being no evidence on this element of the offense, we hold the evidence of defendant’s possession of the cocaine is so unsatisfactory as to create a reasonable doubt of defendant’s guilt. *Terrell*, 2017 IL App (1st) 142726, ¶ 17. Accordingly, defendant’s conviction for possession and possession with intent to deliver must be reversed. *Id.* ¶¶ 28, 31 (“at most, the State established [the defendant’s] presence in the residence and his awareness of the presence of [narcotics.] This is insufficient to prove his constructive possession of that contraband.”). In light of our holding, we have no need to address defendant’s arguments the State failed to prove intent to deliver or that he received ineffective assistance of counsel.

¶ 20 CONCLUSION

¶ 21 For the foregoing reasons, the circuit court of Cook County is reversed.

¶ 22 Reversed.