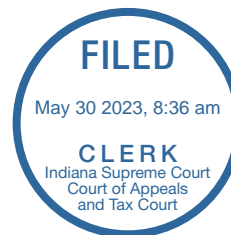


MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision is not binding precedent for any court and may be cited only for persuasive value or to establish res judicata, collateral estoppel, or law of the case.



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IN THE COURT OF APPEALS OF INDIANA

D.S.,

Appellant-Respondent,

v.

State of Indiana,

Appellee-Petitioner.

May 30, 2023

Court of Appeals Case No.
22A-JV-1708

Appeal from the Marion Superior
Court

The Honorable Ryan K. Gardner,
Judge

Trial Court Cause No.
49D10-2202-JD-844

Memorandum Decision by Judge Kenworthy
Judges Robb and Crone concur.

Kenworthy, Judge.

Case Summary

- [1] D.S. appeals the trial court's determination he is a juvenile delinquent for committing two acts, specifically Class A misdemeanor dangerous possession of a firearm by a child¹ and possession of marijuana, a Class B misdemeanor if committed by an adult.² D.S. argues the evidence cannot support the court's judgment. The State concedes there is insufficient evidence to sustain the marijuana adjudication, and we conclude there is insufficient evidence to prove D.S. possessed the firearm. Accordingly, we reverse.

Facts and Procedural History

- [2] In the early morning hours of December 19, 2021, Officer Tyler Dowdy and another officer stopped a vehicle for speeding. Officer Dowdy noted the vehicle's windows were down as he approached, and he smelled the odor of burnt marijuana emanating from inside. D.S. was in the driver's seat, and two passengers were present.
- [3] The officers ordered all three occupants out of the vehicle and handcuffed them. Next, Officer Dowdy informed them of their *Miranda* rights. The two officers then searched the vehicle. They found two pieces of what appeared to be raw marijuana in the passenger compartment of the vehicle. Next, an officer opened the trunk, and Officer Dowdy saw two handguns on top of clothing and

¹ Ind. Code 35-47-10-5(a) (2014).

² I.C. 35-48-4-11(a)(1) (2018).

other items. Officer Dowdy wrote D.S. a ticket for speeding and took him to the police station, where he released D.S. to the custody of one of his parents.

- [4] The State filed a petition alleging D.S. had committed the following delinquent acts: (1) Class A misdemeanor dangerous possession of a firearm by a child; (2) possession of marijuana, a Class B misdemeanor if committed by an adult; (3) carrying a handgun without a license, a Class A misdemeanor if committed by an adult; and (4) dealing in marijuana, a Class A misdemeanor if committed by an adult. After an evidentiary hearing, the trial court entered true findings against D.S. on the allegations of dangerous possession of a firearm by a child and possession of marijuana. The court placed D.S. on probation. D.S. now appeals, challenging the sufficiency of the evidence supporting the court's judgment.

Discussion and Decision

- [5] In juvenile delinquency proceedings, the State must prove every element of a delinquency allegation beyond a reasonable doubt. *A.B. v. State*, 885 N.E.2d 1223, 1226 (Ind. 2008). On appeal, we do not reweigh evidence or judge witness credibility. *Id.* We instead consider only the probative evidence and the reasonable inferences supporting the judgment. *Moran v. State*, 622 N.E.2d 157, 158 (Ind. 1993). We will not disturb the fact-finder's conclusion if the fact-finder could reasonably find beyond a reasonable doubt the juvenile committed the act at issue. *A.B.*, 885 N.E.2d at 1226.

1. Possession of Marijuana

[6] To obtain a true finding for an alleged delinquent act regarding the possession of marijuana, the State was required to prove beyond a reasonable doubt D.S. (1) knowingly or intentionally (2) possessed (3) marijuana. I.C. § 35-48-4-11. D.S. claims there is not enough evidence to support the true finding because the State failed to prove the percentage of THC concentration in the alleged marijuana. He argues evidence of the THC concentration is essential so the fact-finder could reasonably distinguish between marijuana, which is illegal to possess, and hemp, which is legal.

[7] The State concedes “this Court should reverse [D.S.’s] adjudication for possession of marijuana” because the State failed to present evidence at trial demonstrating the substance was marijuana rather than hemp. *Appellee’s Br.* at 10. Based on the State’s concession, we need not address the issue further. We reverse the juvenile court’s true finding for possession of marijuana. *See, e.g., Fedij v. State*, 186 N.E.3d 696, 709 (Ind. Ct. App. 2022) (reversing conviction for possession of marijuana; the State failed to present evidence establishing the alleged marijuana’s THC content).

2. Dangerous Possession of a Firearm by a Child

[8] To obtain a true finding on this allegation, the State had to prove beyond a reasonable doubt D.S., (1) a child, (2) knowingly, intentionally, or recklessly (3)

possessed a firearm (4) for any purpose other than those described in Indiana Code Section 35-47-10-1 (2014).³ I.C. § 35-47-10-5.

[9] D.S. argues there is insufficient evidence to prove he possessed the firearms the officers found in the vehicle's trunk. The Indiana Supreme Court characterizes "the possession of contraband as either actual or constructive." *Henderson v. State*, 715 N.E.2d 833, 835 (Ind. 1999). This case involves constructive possession. "Constructive possession will support a possession conviction if the [S]tate shows that the defendant had both the capability and the intent to maintain dominion and control over the contraband." *Mitchell v. State*, 745 N.E.2d 775, 789 (Ind. 2001). In this case, we focus on the question of intent because it is dispositive. When a person has non-exclusive control over the location where contraband is found, intent to maintain dominion and control may be inferred from additional circumstances that indicate the person knew of the presence of the contraband. *Id.*

[10] The Indiana Supreme Court has identified a non-exhaustive list of "additional circumstances" that bear on whether a defendant knew of the presence of contraband, for purposes of constructive possession:

- (1) a defendant's incriminating statements;
- (2) a defendant's attempting to leave or making furtive gestures;
- (3) the location of contraband like drugs in settings suggesting manufacturing;
- (4)

³ The exemptions set forth in Indiana Code section 35-47-10-1 include possessing a firearm at a firearms safety course or while hunting, or while traveling to or from such an activity. D.S. does not argue any of those exemptions apply to this case.

the item's proximity to the defendant; (5) the location of contraband within the defendant's plain view; and (6) the mingling of contraband with other items the defendant owns.

Gray v. State, 957 N.E.2d 171, 175 (Ind. 2011).

[11] In D.S.'s case, he was the driver of the vehicle, but he had non-exclusive control over the premises because two other people were with him. See *B.R. v. State*, 162 N.E.3d 1173, 1177 n.5 (Ind. Ct. App. 2021) (deeming driver of vehicle to have non-exclusive control over vehicle due to presence of passenger). As a result, we must consider any additional circumstances, such as those set forth in *Gray v. State*, 957 N.E.2d at 175, to determine whether D.S. knew the handguns were in the trunk. The State failed to present any evidence showing D.S. made incriminating statements or furtive gestures during the traffic stop. In addition, he did not try to flee. And the firearms were neither close to D.S. nor in his plain view. Also, the State presented no evidence to show D.S. owned the other items officers found in the trunk with the firearms. Finally, the State failed to show D.S. had access to the vehicle's trunk.

[12] The State cites *Goliday v. State*, 708 N.E.2d 4 (Ind. 1999), comparing the facts there to the facts in D.S.'s case to support its argument D.S. was aware of the firearms in the trunk. But the circumstances of *Goliday* are dissimilar from the circumstances of D.S.'s case. In *Goliday*, police officers stopped the defendant for a traffic infraction and discovered the defendant was the driver and sole occupant of the vehicle. The officers later found cocaine in the vehicle's trunk. The Indiana Supreme Court determined the defendant's intent to possess the

cocaine could be inferred from the defendant's "exclusive possession" of the vehicle at the time of the traffic stop. 708 N.E.2d at 6. By contrast, D.S. had two passengers.

[13] The State also discusses *Corrao v. State*, 290 N.E.2d 484 (Ind. Ct. App. 1972), but the circumstances in *Corrao* differ from D.S.'s case. In *Corrao*, the Court affirmed convictions for possession of marijuana as to the driver of the car and the owner of the car (who was a passenger), but not as to two other passengers, after police found marijuana in the car's trunk. The Court determined knowledge of the presence of the marijuana could be imputed to the driver and the owner-passenger because of the odor and their control of the vehicle. By contrast, in D.S.'s case, there is no comparable evidence to prove he was aware the firearms were in the vehicle's trunk.

[14] Finally, the State directs the Court to *Young v. State*, 564 N.E.2d 968 (Ind. Ct. App. 1991), *trans. denied*, in which the Court upheld the defendant's conviction of possession of cocaine after officers found cocaine in a container on the floor of a car, behind the front seats. The defendant was driving, and he had a passenger. The defendant argued the evidence failed to show he had constructively possessed cocaine. The *Young* Court, citing *Corrao*, stated, "Constructive possession of items found in an automobile may be imputed to the driver of the vehicle." 564 N.E.2d at 972.

[15] We disagree with the *Young* Court's broad reading of *Corrao* as to intent to maintain dominion and control over contraband. The *Corrao* Court explained:

“where a person is in possession, but not in exclusive possession of the premises, it may not be inferred that he knew of the presence of marijuana there and had control of it unless there are statements or other circumstances tending to buttress the inference.” 290 N.E.2d at 487–88 (quoting *Feltes v. People*, 498 P.2d 1128, 1131 (Colo. 1972)). The *Corrao* Court then considered whether evidence showed “each of the four defendants,” including the driver, was aware of the presence of contraband. *Id.* at 488.

[16] The two key circumstances in *Corrao* for purposes of imputing to the driver knowledge of the presence of the marijuana were the odor of marijuana and the driver’s control of the vehicle, but the *Young* court did not acknowledge the odor issue in its analysis. And in D.S.’s case, there is no evidence comparable to the odor of the marijuana in *Corrao* to show D.S. was aware of the firearms in the trunk. Furthermore, there is no evidence the vehicle belonged to D.S. or was regularly entrusted to him.

[17] In summary, there is insufficient evidence to show D.S. was aware of the firearms in the trunk, and thus insufficient evidence to show beyond a reasonable doubt he constructively possessed them. We must reverse the trial court’s true finding. *See B.R.*, 162 N.E.3d at 1178 (reversing true finding for possession of a firearm; there was insufficient evidence to prove the juvenile driver of a vehicle was aware of the presence of a handgun, which officers found in a hidden compartment).

Conclusion

[18] Because the State concedes there is insufficient evidence supporting the marijuana-related true finding, and because there is deficient evidence supporting the firearm-related true finding, we reverse the judgment adjudicating A.S. a delinquent child.

[19] Reversed.

Robb, J., and Crone, J., concur.