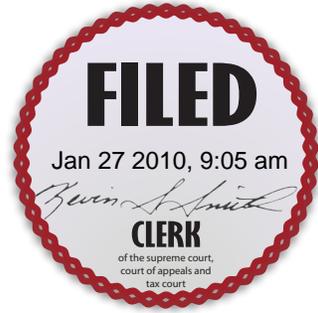


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

D.W.,)
)
Appellant/Respondent,)
)
vs.) No. 49A02-0908-JV-737
)
STATE OF INDIANA,)
)
Appellee/Petitioner.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gary Chavers, Judge Pro Tempore
The Honorable Geoffrey A. Gaither, Magistrate
Cause No. 49D09-0905-JD-1289

January 27, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

BRADFORD, Judge

Appellant/Petitioner D.W., a juvenile, appeals from the juvenile court's finding that he committed what would be Class A misdemeanor Carrying a Handgun Without a License¹ if committed by an adult. D.W. contends that the State produced insufficient evidence to establish that he constructively possessed a firearm, that the trial court abused its discretion in admitting a handgun into evidence, and that an allegedly defective probable cause affidavit requires reversal. We affirm.

FACTS AND PROCEDURAL HISTORY

At 3:28 a.m. on May 3, 2009, Indianapolis Metropolitan Police Officer Jamal Abdullah observed an automobile drive through a red light at 38th Street and Forest Manor. Four persons were in the automobile altogether, with sixteen-year-old D.W. sitting in the front passenger seat. Neither the driver nor any of the other occupants possessed a valid driver's license. After the owner of the vehicle was contacted and arrived to retrieve it, Officer Abdullah shone a flashlight inside and noticed the handle of a .38 caliber revolver protruding from under the front passenger seat onto the rear passenger-side floorboard. Officer Abdullah recovered a total of two handguns from under the front passenger seat, the .38 caliber revolver and a .32 caliber revolver. Police recovered four spent .32 caliber casings from D.W.'s waistband.

On May 4, 2009, the State alleged that D.W. committed what would be Class A misdemeanor carrying a handgun without a license and Class A misdemeanor dangerous possession of a firearm if committed by an adult. After a hearing on June 25, 2009, the juvenile court found that D.W. had committed carrying a handgun without a license,

¹ Ind. Code § 35-47-2-1 (2008).

adjudicated him a delinquent, and ordered a suspended commitment to the Department of Correction.

DISCUSSION AND DECISION

Out the outset, we note that we have not received an Appellee's Brief from the State in this case. Where the appellee fails to file a brief on appeal, it is within our discretion to reverse the trial court if the appellant makes a *prima facie* showing of reversible error. *Phegley v. Phegley*, 629 N.E.2d 280, 282 (Ind. Ct. App. 1994), *trans. denied*. "Prima facie error is error at first sight, at first appearance, or on the face of it." *Valley Federal Sav. Bank v. Anderson*, 612 N.E.2d 1099, 1101 (Ind. Ct. App. 1993). "This rule is not for the benefit of the appellant." *Phegley*, 629 N.E.2d at 282. "It was established for the protection of the court so that the court might be relieved of the burden of controverting the arguments advanced for a reversal where such a burden rests with the appellee." *Id.*

I. Sufficiency of the Evidence

"When the State seeks to have a juvenile adjudicated to be a delinquent for committing an act which would be a crime if committed by an adult, the State must prove every element of the crime beyond a reasonable doubt." *J.R.T. v. State*, 783 N.E.2d 300, 302 (Ind. Ct. App. 2003) (citations omitted). "Upon review of a juvenile adjudication, this court will consider only the evidence and reasonable inferences supporting the judgment." *Id.* (citing *Moran v. State*, 622 N.E.2d 157, 158 (Ind. 1993)). "We will neither reweigh the evidence nor judge witness credibility." *Id.* (citing *Moran*, 622 N.E.2d at 158). "If there is substantial evidence of probative value from which a

reasonable trier of fact could conclude that the defendant was guilty beyond a reasonable doubt, we will affirm the adjudication.” *Id.* (citing *Moran*, 622 N.E.2d at 158).

D.W. contends that the State produced insufficient evidence to establish that he constructively possessed either of the handguns found in the vehicle in which he was a passenger. “[C]onviction for possessory offenses does not depend on the accused being ‘caught red-handed’ in the act by the police.” *See Wilburn v. State*, 442 N.E.2d 1098, 1101 (Ind. 1982).

A defendant is in the constructive possession of [contraband] when the State shows that the defendant has both (i) the intent to maintain dominion and control over the [contraband] and (ii) the capability to maintain dominion and control over the [contraband]. *Lampkins v. State*, 682 N.E.2d 1268, 1275 (Ind. 1997), *on reh’g*, 685 N.E.2d 698 (Ind. 1997).

....
When a defendant’s possession of the premises on which [contraband is] found is not exclusive, then the inference of intent to maintain dominion and control over the [contraband] “must be supported by additional circumstances pointing to the defendant’s knowledge of the nature of the [contraband and its] presence.” *Lampkins*, 682 N.E.2d at 1275. The “additional circumstances” have been shown by various means: (1) incriminating statements made by the defendant, (2) attempted flight or furtive gestures, (3) location of substances like drugs in settings that suggest manufacturing, (4) proximity of the contraband to the defendant, (5) location of the contraband within the defendant’s plain view, and (6) the mingling of the contraband with other items owned by the defendant. *Henderson v. State*, 715 N.E.2d 833, 836 (Ind. 1999).

Gee v. State, 810 N.E.2d 338, 340-41 (Ind. 2004).

D.W. does not dispute that he had the capability to maintain control and dominion over the revolvers, which were both found under the seat in which he was riding. As for D.W.’s intent to maintain control and dominion over the revolvers, we conclude that the State introduced sufficient evidence of additional circumstances to support a reasonable

inference that he knew of the nature and presence of, at least, the .32 caliber revolver. First, the .32 caliber revolver was found under the seat in which D.W. was sitting, much closer to him than to any other occupant and much more accessible by him than by any other occupant. Moreover, spent .32 caliber casings were found on D.W.'s person, raising the reasonable inference that he had recently actually possessed a weapon that used such ammunition.

D.W. argues that the spent casings found on his person are the only piece of physical evidence tying him to the .32 caliber revolver and distinguishing him from the other occupants. This contention fails to take into account that D.W. was also distinguished from the other occupants by his close proximity to the revolvers. In addition, we do not consider this evidence to be trivial, especially when there is no evidence beyond mere presence in the vehicle connecting any of the other occupants to either handgun. As we recently noted, we are “far more likely to find sufficient evidence where evidence suggests that a vehicle’s passenger could see the [contraband], was in the best position to access the [contraband], and no evidence clearly indicates the [contraband] belonged to or was under the control of another occupant of the vehicle.” *Deshazier v. State*, 877 N.E.2d 200, 208 (Ind. Ct. App. 2007), *trans. denied*. So, while there may be no direct evidence that D.W. was able to see the revolver from the front passenger seat, his close proximity to it and possession of .32 caliber spent casings nonetheless permit an inference that he knew of its nature and presence under the seat, likely because he had put it there at some point. The State produced sufficient evidence to establish that D.W. possessed the .32 caliber revolver.

II. Whether the Juvenile Court Abused its Discretion in Admitting the .32 Caliber Revolver

D.W. contends that the juvenile court abused its discretion in admitting the .32 caliber revolver on the ground that the State failed to establish a sufficient chain of custody or that the revolver admitted at the hearing was the same revolver recovered at the scene. The admissibility of evidence is within the sound discretion of the trial court. *Curley v. State*, 777 N.E.2d 58, 60 (Ind. Ct. App. 2002). We will only reverse a trial court's decision on the admissibility of evidence upon a showing of an abuse of that discretion. *Id.* An abuse of discretion may occur if the trial court's decision is clearly against the logic and effect of the facts and circumstances before the court, or if the court has misinterpreted the law. *Id.* The Court of Appeals may affirm the trial court's ruling if it is sustainable on any legal basis in the record, even though it was not the reason enunciated by the trial court. *Moore v. State*, 839 N.E.2d 178, 182 (Ind. Ct. App. 2005). We do not reweigh the evidence but consider the evidence most favorable to the trial court's ruling. *Hirsey v. State*, 852 N.E.2d 1008, 1012 (Ind. Ct. App. 2006).

Any error the juvenile court may have made in admitting the revolver could only be considered harmless. "The improper admission of evidence is harmless error if the conviction is supported by substantial independent evidence of guilt satisfying the reviewing court that there is no substantial likelihood the challenged evidence contributed to the conviction." *Beach v. State*, 816 N.E.2d 57, 59 (Ind. Ct. App. 2004) (citing *Pavey v. State*, 764 N.E.2d 692, 703 (Ind. Ct. App. 2002)). Quite simply, under the circumstances of this case, admission of the revolver as a physical exhibit at the hearing

was unnecessary, and the State's case would not have been hindered by its absence. The State's case against D.W. essentially consisted of Officer Abdullah's testimony (1) that he found a .32 caliber revolver under the front passenger seat where D.W. sat and (2) that spent .32 shell casings were found on his person, along with (3) photographic exhibits taken at the scene of both revolvers. In the absence of fingerprints or other forensic evidence tending to tie the revolver to D.W., its admission as a physical exhibit does nothing to bolster the State's case that he possessed it. As such, its admission, even if an abuse of discretion, could only be considered harmless.

III. Whether an Allegedly Defective Probable Cause Affidavit Entitles D.W. to Relief

In addition, D.W. contends that the .32 caliber revolver should not have been admitted at the hearing because the probable cause affidavit containing Officer Abdullah's averments was not signed by him and was therefore defective under Indiana Code section 35-34-1-2.4 (2008). D.W. argues that the allegedly defective probable cause affidavit was relied upon to identify the .32 caliber revolver when it was admitted into evidence, and the revolver should therefore have been excluded. First, we would note that Indiana Code section 35-34-1-2.4 does not contain an explicit requirement that a probable cause affidavit be signed by the affiant. In any event, we need not further reach the merits of D.W.'s argument, as we have already concluded that any error in the admission of the .32 caliber revolver could only be considered harmless.

The judgment of the juvenile court is affirmed.

NAJAM, J., and FRIEDLANDER, J., concur.