



## **Case Summary**

Donald R. Tweedy (“Tweedy”) appeals from his convictions for Maintaining a Common Nuisance, as a Class D felony,<sup>1</sup> and Driving While Suspended, as a Class A misdemeanor.<sup>2</sup> He raises one issue for our review, whether there is sufficient evidence to sustain his conviction for Maintaining a Common Nuisance.

We affirm.

## **Facts and Procedural History**

On the evening of May 2, 2008, Tweedy and two co-workers were travelling on State Road 67 in Mooresville in Tweedy’s car, with Tweedy driving. All three had smoked marijuana earlier that day. Officer Daniel Whitley (“Officer Whitley”) noticed that one of Tweedy’s taillights was burned out, and initiated a traffic stop.

Unable to roll down a window, Tweedy opened the car door slightly to speak with and provide his driver’s license to Officer Whitley. Officer Whitley noted a strong smell of newly sprayed cologne from the car. He then returned to his police car to check Tweedy’s identification; upon learning that Tweedy’s license had been suspended indefinitely, Officer Whitley arrested Tweedy.

While taking Tweedy into custody, Officer Whitley noted that Tweedy smelled strongly of marijuana. He radioed for assistance from Officer Eric Pugh (“Officer Pugh”), who was the shift’s designated canine officer.

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<sup>1</sup> Ind. Code § 35-48-4-13.

<sup>2</sup> I.C. § 9-24-19-1. Tweedy does not challenge this conviction.

When Officer Pugh arrived, Officer Whitley requested that the service dog perform an external sniff of Tweedy's vehicle for drugs. Officer Pugh and his service dog conducted the sniff, and the service dog alerted Officer Pugh to the scent of drugs at the vehicle's passenger door. Officer Pugh then searched the vehicle and recovered from the vehicle's ashtray a "dugout" pipe (a combination of single-dose storage box and pipe for smoking marijuana) and a pillbox, each with a green leafy substance later determined to be a total of 0.4 grams of marijuana. (Tr. 85, 105.) Officer Pugh also recovered a bottle of cologne, some cigarette rolling papers, and three small straws with a powdery white substance on them; all of these were located next to or underneath the driver's seat where Tweedy had been sitting when Officer Whitley stopped the vehicle.<sup>3</sup>

On May 5, 2008, Tweedy was charged with Possession of Marijuana, as a Class A misdemeanor,<sup>4</sup> Possession of Paraphernalia, as a Class A misdemeanor,<sup>5</sup> and Driving While Suspended. On March 20, 2009, the State amended the charging information to include the charge for Maintaining a Common Nuisance. A jury trial was held on June 8, 2010, at the end of which the jury found Tweedy guilty of Maintaining a Common Nuisance and Driving while Suspended.<sup>6</sup> After the jury returned its verdict, the trial court entered judgment against Tweedy and sentenced him to three years imprisonment with two years suspended to probation.

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<sup>3</sup> The white powder was not tested or identified.

<sup>4</sup> I.C. § 35-48-4-11.

<sup>5</sup> I.C. § 35-48-4-8.3.

<sup>6</sup> Tweedy was found not guilty of Possession of Marijuana and Possession of Paraphernalia.

This appeal followed.

### **Discussion and Decision**

Tweedy argues that there was insufficient evidence to convict him of Maintaining a Common Nuisance. Specifically, Tweedy points to this court's decision in Lovitt v. State, 915 N.E.2d 1040 (Ind. Ct. App. 2009), for the proposition that the small quantity of marijuana and the purpose for its presence there does not fall within the intent of our Legislature when it enacted Indiana Code section 35-48-4-13.

When reviewing the sufficiency of the evidence, we consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). We do not assess the credibility of witnesses or reweigh evidence. Id. We will affirm the conviction unless “no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt.” Id. (quoting Jenkins v. State, 726 N.E.2d 268, 270 (Ind. 2000)). “The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.” Id. (quoting Pickens v. State, 751 N.E.2d 331, 334 (Ind. Ct. App. 2001)).

To convict Tweedy of Maintaining a Common Nuisance as charged, the State was required to prove that on May 2, 2008, Tweedy knowingly maintained a vehicle that was used one or more times by a person for unlawfully keeping marijuana. Ind. Code § 35-48-4-13(b); App. 56. Tweedy's sole contention is that the small amount of marijuana found in his car does not fall within the Legislature's intended scope of the statutory offense.

Tweedy's argument relies on a decision by another panel of this court in Lovitt.

Lovitt was stopped after driving erratically and was subjected to a field sobriety test. Before administering the test, the arresting officer performed a pat-down. Lovitt admitted that he had marijuana on his person, and the officer discovered a marijuana pipe during the pat-down. Lovitt, 915 N.E.2d at 1042. Lovitt was subsequently convicted of maintaining a common nuisance as a Class D felony in addition to two Class A misdemeanors for possession of marijuana and possession of paraphernalia. Id. at 1041. Lovitt challenged his conviction for maintaining a common nuisance, and the State opposed this, contending that whether Lovitt had the marijuana on his person or otherwise stored in the car was “inconsequential,” since Lovitt was transporting the marijuana in his vehicle by virtue of his driving the vehicle, and therefore was “keeping” it in conformance with the plain language of the statute. Id. at 1045 (quoting from the State’s brief).

The Lovitt court disagreed with the State and reversed Lovitt’s conviction, stating that “keeping” in the statute “implies that the controlled substance must be contained within the vehicle itself or that the vehicle is used to store the controlled substance for further manufacturing, sale, delivery or financing the delivery of that or another controlled substance.” Id. In Lovitt’s case, “[t]he marijuana was located inside the vehicle only by virtue of the fact that Lovitt was driving the vehicle.” Id. The court went on to observe:

We believe that the statute is intended to apply to an offender who uses his or her vehicle to facilitate manufacture, sale, delivery or to finance the delivery of a controlled substance, not to an offender who has personal use quantities of controlled substance(s) on his or her person or even loose in the vehicle. To hold otherwise would make every drug arrest after a traffic stop subject to an additional charge of maintaining a common nuisance.

Id. (emphasis added).

We recognize the rationale of the Lovitt panel, but disagree with Tweedy's argument that the decision in the Lovitt case is dispositive. We are bound by the language of the statute as enacted by the Legislature, which criminalizes knowingly maintaining a vehicle used one or more times for unlawfully keeping controlled substances or drug paraphernalia. I.C. § 35-48-4-13(b). The Legislature could have written the statute to limit its scope to particular quantities of drugs or paraphernalia or particular purposes for the presence of such items in a vehicle, but chose not to do so. Cf. I.C. § 35-48-4-11 (elevating from a Class A misdemeanor to a Class D felony possession of marijuana, hash oil, or hashish where certain quantities of each are found in an individual's possession). Thus, while we recognize the double-charging concerns of the Lovitt court and agree with the outcome of that case, we cannot agree that the statute can be applied only to the facilitation of drug manufacture, sale, delivery, or financing, since the plain language of the statute does not so limit its scope.<sup>7</sup>

Tweedy was found not guilty of possession of marijuana or drug paraphernalia, though both were found in his car, and thus was not subject to the additional charge that was of concern to the Lovitt court. Cf. Lovitt, 915 N.E.2d at 1045. The jury nevertheless found him guilty of maintaining a common nuisance. Tweedy smelled strongly of marijuana, and admitted he had used marijuana that day along with his two passengers. Officers Whitley

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<sup>7</sup> We note in passing that neither Tweedy nor the State produced evidence regarding whether the quantity of marijuana (0.4 grams) found in Tweedy's car was suitable only for personal use, but that this amount falls well below the threshold for elevation of an offense for Possession of Marijuana to a Class D felony (30 grams). I.C. § 35-48-4-11; Tr. 105; State's Ex. 8.

and Pugh testified that the straws found in Tweedy's car were found underneath or immediately next to Tweedy's seat in his car. Testimony from a third officer, Detective Brent Worth, indicated that two of the straws could have been used for snorting some form of drug, and that the copper straw could be used either for smoking marijuana or, with a brillo pad attached to the end of the straw, crack cocaine. Though Tweedy indicated to Officer Whitley that he did not know the marijuana or dugout pipe were in the car, the jury could infer that Tweedy had knowingly kept marijuana in the car at some point on May 2, 2008, from Tweedy's admission of his marijuana use that day, the presence of paraphernalia under or immediately next to Tweedy's seat, and the presence of marijuana and the dugout pipe in the car. Thus, there was sufficient evidence to support the conviction.

Affirmed.

NAJAM, J., and DARDEN, J., concur.