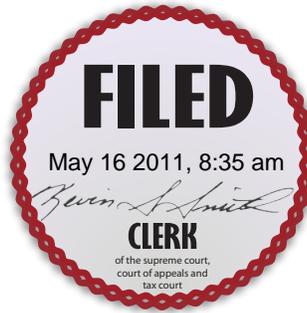


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

CINDY LEE BELL,)
)
Appellant-Defendant,)
)
vs.) No. 71A05-1010-CR-692
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH SUPERIOR COURT
The Honorable John M. Marnocha, Judge
Cause No. 71D02-1005-FD-423

May 16, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Cindy Lee Bell appeals her conviction for possession of cocaine, as a Class D felony, following a jury trial.¹ Bell presents the following issues for review:

1. Whether the trial court abused its discretion when it refused to give the jury Bell's tendered instruction on constructive possession.
2. Whether the evidence is sufficient to support Bell's conviction for possession of cocaine.

We affirm.

FACTS AND PROCEDURAL HISTORY

On May 16, 2010, Oscar Carapia was driving his 1999 Geo Storm in South Bend when a woman waved him down to ask for a ride. Carapia pulled over and agreed to take her to "Martin's and Portage." Transcript at 115. After Bell entered the front passenger seat of the car, Carapia continued driving.

Corporal Erik Schlegelmilch and probationary Officer Joseph Mitchell of the South Bend Police Department ("SBPD") were on patrol that afternoon. When Carapia's vehicle passed by the patrol car, Corporal Schlegelmilch observed that only one headlight was illuminated and that the vehicle had a loud and improper exhaust. As a result, the officers initiated a traffic stop.

After Carapia pulled over, Corporal Schlegelmilch approached the driver's side of the vehicle, and Officer Mitchell approached the passenger side. Carapia was in the driver's seat and Bell was in the front passenger seat. The officers asked Carapia for a driver's license and Bell for identification. Carapia replied that he did not have a driver's

¹ At trial, the jury also found Bell guilty of possession of paraphernalia, as a Class A misdemeanor. Bell does not appeal that conviction.

license. Both officers shined their flashlights into the passenger side glove box as Carapia reached into the box and retrieved the vehicle's registration. Bell produced a student identification card.

The officers returned to the patrol car and "ran the I.D.s." Transcript at 125. When they returned to Carapia's car, Corporal Schlegelmilch asked Carapia to exit the vehicle and for permission to search the car. Carapia exited the vehicle and consented "[w]ith no hesitation at all" to the search. Id. at 148. Officer Mitchell then asked Bell to exit the vehicle.

SBPD Officer Michael Stuk arrived at the scene to assist after Carapia and Bell had exited the car. Officer Stuk spoke with Bell at the rear of the vehicle while Officer Mitchell conducted the search. After searching, Officer Mitchell said he had found something and walked by Bell toward Corporal Schlegelmilch. Bell then said to Officer Stuk that Officer Mitchell must have found an item in the glove box. In fact, in the passenger side glove box Officer Mitchell had found a white rock-like substance, which appeared to be crack cocaine. In a field test conducted by Corporal Schlegelmilch, the substance tested positive for cocaine. The officers arrested Carapia and Bell. Carapia denied having any knowledge of the crack cocaine found in his car's glove box.

Officer Mitchell transported Bell to the jail. Before placing Bell in the back seat of the patrol car, Officer Mitchell lifted up the back seat of the patrol car and used his flashlight to search the area. He showed the area under the back seat to Bell, who said she did not see anything. Officer Mitchell then placed Bell in the back seat. He observed her "move around a lot" in transit. Id. at 130. When they arrived at the jail, Officer

Mitchell removed Bell from the patrol car and again checked under the back seat. He discovered a “metal cylinder pipe” and two plastic straws. Id. at 131. Based on his training, Officer Mitchell believed the pipe and straws to be used for smoking drugs.²

The State charged Bell with possession of paraphernalia, as a Class A misdemeanor, and possession of cocaine, as a Class D felony. Carapia was ticketed but was not charged with possession of cocaine. A jury trial commenced on August 26, 2010, and concluded the following day. At trial, Carapia testified that he did not know that the cocaine was in the glove box and that he had not seen Bell put anything in the glove box. After the close of evidence and deliberations, the jury found Bell guilty as charged. The court entered judgment accordingly and sentenced her to one year for possession of paraphernalia and three years for possession of cocaine, to be served concurrently. Bell now appeals.

DISCUSSION AND DECISION

Issue One: Jury Instructions

Bell contends that the trial court abused its discretion when it instructed the jury.

The standard of reviewing jury instructions is well-settled:

“The purpose of a jury instruction ‘is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and arrive at a just, fair, and correct verdict.’ ” Dill v. State, 741 N.E.2d 1230, 1232 (Ind. 2001) (quoting Chandler v. State, 581 N.E.2d 1233, 1236 (Ind. 1991)). Instruction of the jury is left to the sound judgment of the trial court and will not be disturbed absent an abuse of discretion. Schmidt v. State, 816 N.E.2d 925, 930 (Ind. Ct. App. 2004), trans. denied. Jury instructions are not to be considered in isolation, but as a whole and in reference to each other. Id. The instructions must be a complete, accurate statement of the law which will not confuse or mislead

² Officer Mitchell testified that someone who uses a pipe to ingest cocaine sometimes put a straw on the pipe so that she does not burn her lips.

the jury. Id. at 930-31. Still, errors in the giving or refusing of instructions are harmless where a conviction is clearly sustained by the evidence and the jury could not properly have found otherwise. Id. at 933 (citing Dill, 741 N.E.2d at 1233).

Williams v. State, 891 N.E.2d 621, 630 (Ind. Ct. App. 2008). Further:

When a party has challenged a trial court’s refusal of a tendered jury instruction, the court on appeal performs a three-part evaluation. First, we ask whether the tendered instruction is a correct statement of the law. Second, we examine the record to determine whether there was evidence present to support the tendered instruction. . . . Third, we determine whether the substance of the tendered instruction was covered by another instruction or instructions. This evaluation is performed in the context of determining whether the trial court abused its discretion when it rejected the instruction.

Walden v. State, 895 N.E.2d 1183, 1186 (Ind. 2008) (citations omitted).

Again, the State charged Bell with possession of cocaine, as a Class D felony.

Bell tendered the following jury instruction on constructive possession:

Constructive possession of an item is the intent and capability to maintain dominion and control over the item. Proof of a possessory interest in the vehicle where the item is found might be adequate to show the capability to maintain control over the item. However, when possession of the vehicle is not exclusive, the inference of intent must be supported by additional circumstances that point to the Accused’s knowledge of the nature of the item and its presence. Mere presence where an item is located or association with person [sic] who possess [sic] the item is not alone sufficient to support a finding of constructive possession.

Appellant’s App. at A-46. The trial court rejected Bell’s instruction and the constructive possession instruction tendered by the State, instead instructing the jury in relevant part as follows:

Possession defined.

The word “possess” means to own or to exert control over. The word “possession” can take on several different, but related meanings.

There are two kinds of “possession”—actual possession and constructive possession. A person who knowingly has direct physical control of a thing at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and intention at a given time to exercise control over a thing, either directly or through another person or person, is then in constructive possession of it.

Possession may be sole or joint. If one person alone has actual or constructive possession of a thing, then possession is sole. If two or more persons share actual or constructive possession of a thing, then possession is joint.

Possession may be actual or constructive, and either alone or jointly with others.

Appellant’s App. at A-21. The court also gave the following instruction:

I.C. 35-41-2-2. Culpability.

- (a) A person engages in conduct intentionally if, when she engages in the conduct, it is her conscious objective to do so.
- (b) A person engages in conduct “knowingly” if, when she engages in the conduct, she is aware of a high probability that she is doing so.

Id. at A-22.

Bell contends that the trial court abused its discretion when it refused to give the jury the instruction she had tendered on constructive possession. Specifically, she argues that the jury should have been instructed that “mere presence where an item is located or association with the person who possesses the item is not alone sufficient to support a finding of constructive possession.” Appellant’s Brief at 11-12. The State does not dispute that such is a correct statement of the law,³ nor is there any dispute that the evidence supports instructing the jury on constructive possession. Bell argues only that

³ We discuss the proof required to establish constructive possession in more detail in Issue Two.

the “mere presence” element of her tendered instruction was not covered by the trial court’s final instructions. Thus, our analysis is limited to the third prong of the test.

The trial court instructed the jury that a “person who knowingly has both power and intention at a given time to exercise control over a thing, either directly or through another person or persons, is then in constructive possession of it.” Appellant’s App. at A-21 (emphasis added). We must read the instruction on constructive possession together with the instruction defining a knowing level of culpability. See Williams, 891 N.E.2d at 630. In doing so, it is clear that the court instructed the jurors that they could find Bell guilty only after determining that she knew, or was aware of a high probability, that she had the power and intention to exercise control over the cocaine in the glove box. Because the jury had to find that Bell had such knowledge in order to return a guilty verdict, the jury could not have convicted her for “mere possession.” Thus, Bell’s argument on this point is without merit.

Bell also argues that jury was not instructed that “the inference of intent must be supported by additional circumstances that point to [Bell’s] knowledge of the nature of the item and its presence.” Appellant’s Brief at 12 (emphasis in original). Bell argues that the omission “is critical in this case in that there were no additional circumstances that pointed to Bell’s knowledge of the cocaine in the glove box.” Id. at 13. Again, our review is limited to whether the tendered instruction is covered by other instructions given by the trial court.

Here, again, the trial court instructed the jurors that a person who knowingly has both the power and intention at a given time to exercise control over a thing is in

constructive possession of it. Clearly that instruction allowed the jurors to consider any and all circumstances presented by the evidence. And, contrary to Bell's assertion, the evidence included "additional circumstances" for the jurors to consider in determining whether she knowingly had constructive possession of the cocaine in the glove box. Specifically, the evidence shows that Bell had been sitting in the front seat of the Carapia's car when Corporal Schlegelmilch pulled it over and that she had told Officer Stuk that Officer Mitchell must have found an item in the glove box. The jurors also could have considered that the patrol car's back seat had been searched and found to be empty before transporting Bell to jail but, upon arrival at the jail, was found to contain paraphernalia used for ingesting cocaine.

These additional circumstances support the jury's determination that Bell knew of the presence of the cocaine in the glove box and had the power and intention to exercise control over it. Bell's tendered jury instruction was covered by other instructions that the trial court gave to the jurors. As such, the trial court did not abuse its discretion when it refused to give the jury Bell's tendered instruction on constructive possession.

Issue Two: Sufficiency of Evidence

Bell also contends that the evidence is insufficient to support her conviction for possession of cocaine. When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Rhoton v. State, 938 N.E.2d 1240, 1246 (Ind. Ct. App. 2010), trans. denied. We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a

reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

To prove possession of cocaine, the State was required to show beyond a reasonable doubt that Bell “knowingly possessed cocaine (pure or adulterated) weighing less than three (3) grams.” Appellant’s App. at A-87. See also Ind. Code § 35-48-4-6(a). The element of possession may be proved by actual or constructive possession. We have described the proof necessary to show constructive possession as follows:

Constructive possession occurs when someone has the intent and capability to maintain dominion and control over the item. In cases where the accused has exclusive possession of the premises on which the contraband is found, an inference is permitted that he or she knew of the presence of the contraband and was capable of controlling it. When possession of the premises is non-exclusive, the inference is not permitted absent some additional circumstances indicating knowledge of the presence of the contraband and the ability to control it. Among the circumstances which will support such an inference are: (1) incriminating statements by the defendant; (2) attempted flight or furtive gestures; (3) a drug manufacturing setting; (4) proximity of the defendant to the contraband; (5) contraband in plain view; and (6) location of the contraband in close proximity to items owned by the defendant.

Atwood v. State, 905 N.E.2d 479, 484-85 (Ind. Ct. App. 2009) (citations omitted), trans. denied.

Here, Bell contends that the evidence does not support her conviction for possession of cocaine. In support, she points out that she did not own the car where the cocaine was found, that Carapia had been in the glove box shortly before officers found the cocaine, and that Carapia had not testified that he saw Bell put the cocaine in the glove box. Bell’s argument focuses on the lack of certain evidence and ignores the evidence in support of the verdict.

The evidence shows that Bell flagged down Carapia, asking for a ride. The two were not previously acquainted. When Corporal Schlegelmilch initiated a traffic stop, Carapia pulled over. Carapia retrieved the vehicle's registration from the passenger side glove box while Corporal Schlegelmilch and Officer Mitchell illuminated the glove box with their flashlights. Neither officer noticed Carapia put anything in the glove box at that time. The officers then went back to the patrol car for a short time before returning to Carapia's car. They asked Carapia and Bell to exit the car, and without hesitation Carapia gave permission to search the car. After Officer Mitchell had searched the car, he passed by Bell and Officer Stuk, and Bell said that he must have found an item in the glove box. Carapia denied knowing that any cocaine had been in the glove box. Further, while being transported to jail, Bell attempted to hide in the back of the patrol car paraphernalia used to ingest cocaine.

The evidence is sufficient to support Bell's conviction for possession of cocaine under a theory of constructive possession. Bell's arguments amount to a request that we reweigh the evidence, which we cannot do. Rhoton, 938 N.E.2d at 1246. Thus, we affirm Bell's conviction for possession of cocaine, as a Class D felony.

Affirmed.

ROBB, C.J., and CRONE, J., concur.