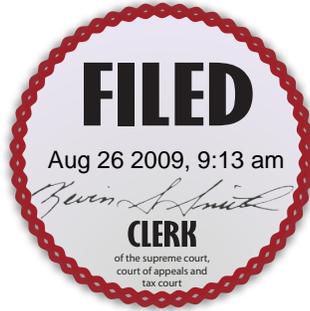


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

TYON L. EASLEY,)
)
Appellant-Defendant,)
)
vs.) No. 57A03-0902-CR-39
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE NOBLE SUPERIOR COURT
The Honorable Robert E. Kirsch, Judge
Cause No. 57D01-0712-FD-347

August 26, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Tyon L. Easley (“Easley”) appeals his conviction following a trial by jury for Class D felony Possession of Marijuana (Greater than 30 Grams)¹. Easley raises the following issue for our review: whether the State presented sufficient evidence of the constructive possession of marijuana to support his conviction.

We reverse.

FACTS AND PROCEDURAL HISTORY

The facts most favorable to the conviction indicate that on December 7, 2007, Easley was a passenger in the front seat of a car that was driven by and registered to James O.J. Gray (“Gray”). Ligonier City Police Officer Michael Alexander stopped the vehicle for traffic violations. When Officer Alexander questioned both men about their destination, they were nervous and gave conflicting answers.

Officer Alexander noticed a strong smell of marijuana coming from the vehicle. When Officer Alexander visually examined the vehicle, he observed several signs of what he believed was illegal drug activity. He saw several small particles of what appeared to marijuana leftover from packaging and handling in the interior of the vehicle. The trunk lock was punched out, which Officer Alexander testified was a common tactic among drug dealers to hinder a search of the vehicle. He found a Crown Royal bag in the passenger side door storage compartment, which the officer knew was commonly used among drug dealers to store their drugs.

Because of his observations, Officer Alexander called fellow Officers Brandon Stout and Josh Halsey to assist him at the scene. Officer Halsey, a K-9 handler, had his

¹ Ind. Code. § 35-48-4-11(1)

drug detection dog smell the exterior of the vehicle. The dog reacted to the passenger side door and the trunk.

The officers then conducted a search of the vehicle. In the trunk, they found a black Puma bag containing 216.5 grams of marijuana and digital scales covered with small particles of marijuana.

When questioned by Officer Halsey, Easley denied knowledge of the marijuana. Noticing a green leafy substance on Easley's shirt, Officer Halsey asked, "[W]ell, what is the evidence on your shirt?" *Tr.* at 153. Easley replied, "I know you didn't see that." *Tr.* at 153.

The State charged Easley with possession of marijuana in an amount greater than thirty grams, a Class D felony. The jury found him guilty, and the trial court sentenced him to two years imprisonment and fined him \$500. Easley now appeals.

DISCUSSION AND DECISION

Easley claims that there was insufficient evidence to sustain his conviction for possession of the marijuana because: (1) he was passenger with no possessory interest in the vehicle; and (2) there was no evidence that he had the intent or ability to maintain dominion or control over the marijuana in the trunk.

Our standard of review for claims of insufficient evidence is well-settled. When reviewing the sufficiency of the evidence, we will neither reweigh the evidence nor judge the credibility of witnesses. *Williams v. State*, 873 N.E.2d 144, 147 (Ind. Ct. App. 2007). We examine only the evidence most favorable to the judgment together with all reasonable inferences to be drawn therefrom. *Id.* We will affirm the conviction if there

is substantial evidence of probative value to support the conviction. *Id.*

In order to prove Easley committed Class D felony possession of marijuana, the State was required to show that Easley knowingly or intentionally possessed more than thirty grams of marijuana. Ind.Code § 35-48-4-11(1). However, possession may be either actual or constructive. *Goffinet v. State*, 775 N.E.2d 1227, 1230 (Ind. Ct. App. 2002), *trans. denied*. An individual has actual possession of an item when he or she has direct physical control over the item. *Id.* In the instant case, the marijuana was found in the trunk of the automobile. Because Easley could not have physical possession of the bag of marijuana when he was arrested, the State was required to establish that Easley constructively possessed the marijuana. The mere presence of a passenger in a car transporting contraband is insufficient to find the passenger guilty of possession. *See Grim v. State*, 797 N.E.2d 825, 830-34 (Ind. Ct. App. 2003).

To prove constructive possession, the State must show that Easley had (1) the intent and (2) the capability to maintain dominion and control over the marijuana.² *Ladd v. State*, 710 N.E.2d 188, 190 (Ind. Ct. App. 1999). As to the second element of constructive possession, “the evidence must demonstrate the capability to exercise control over the item, that is, the ability to reduce the item to his personal possession or to otherwise direct its disposition or use.” *Id.* In cases where the accused has exclusive control of the premises on which the contraband is found, an inference is permitted that he or she knew of the presence of contraband and was capable of controlling it. *Id.*

² Easley argues that the State did not present sufficient evidence to show he had knowledge of the marijuana to support the intent to maintain control and dominion. Because we rule in Easley’s favor based on the requirement that the State show the capability to maintain dominion and control, we need not decide whether the State presented sufficient evidence as to the first element.

However, 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. *Id.*

Proof of dominion and control over contraband may be found through a variety of means: (1) incriminating statements 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 contraband with other items owned by the defendant. *Henderson v. State*, 715 N.E.2d 833, 836 (Ind. 1999). Here, Easley made no incriminating statements, did not attempt to flee or make any furtive gesture, and was not in a manufacturing setting. The marijuana was not in Easley's plain view or even in the passenger compartment of the car. Finally, there was no showing that the marijuana was mingled with items owned by Easley.

To establish that the defendant had the capability to maintain dominion and control over the contraband, the State must demonstrate that the defendant was able to reduce the contraband to his personal possession. *Goliday v. State*, 708 N.E.2d 4, 6 (Ind.1999); *Armour v. State*, 762 N.E.2d 208, 216 (Ind.Ct.App.2002), *trans. denied*. Furthermore, proof of a possessory interest in the premises in which the illegal drugs are found is adequate to show the capability to maintain control and dominion over the items in question. *Goliday v. State*, 708 N.E.2d 4, 6 (Ind. 1999) (citing *Davenport v. State*, 464 N.E.2d 1302, 1307 (Ind. 1984), *cert. denied*, 469 U.S. 1043, 105 S. Ct. 529 (1984)).

In the instant case, there was no showing that Easley had an ownership interest in

the car or could exert control over the marijuana. None of the factors relied upon by the State gives rise to any inference that Easley had the ability to exert control over the marijuana in the trunk. While officers testified that Easley was nervous, nervousness when pulled over by a police officer does not support any inference that Easley had the ability to exert control over the drugs. While Easley had flakes of a substance on his shirt that police officers believed to be marijuana, such fact may support an inference that Easley has recently been in possession of marijuana and knew of the presence of the marijuana in the trunk. It does not, however, support an inference that Easley had the ability to exert control over the marijuana in the trunk of the car. We therefore conclude that insufficient evidence was presented to support Easley's conviction for possession of marijuana as a Class D felony.

Reversed.

NAJAM, J., and BARNES, J., concur.