

2021 IL App (1st) 172412-U
No. 1-17-2412
February 22, 2021

FIRST DIVISION

NOTICE: This order was filed under Supreme Court Rule 23 and is not precedent except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the Circuit Court
)	Of Cook County.
Plaintiff-Appellee,)	
)	No. 17 CR 5697
v.)	
)	The Honorable
MICHAEL CARAWAY,)	Tommy Brewer,
)	Judge Presiding.
Defendant-Appellant.)	

PRESIDING JUSTICE WALKER delivered the judgment of the court.
Justices Pierce and Coghlan concurred in the judgment.

Order

Held: The evidence was insufficient to satisfy the State's burden of proof beyond a reasonable doubt.

¶ 1 Following a jury trial, defendant Michael Caraway was convicted of four counts of possession of a controlled substance (720 ILCS 570/402 (West 2016)), four counts of possession of a controlled substance with intent to deliver (720 ILCS 570/401 (West 2016)), one count of possession of cannabis (720 ILCS 550/4 (West 2016)), and one count of possession with intent to deliver cannabis (720 ILCS 550/5 (West 2016)). Defendant was

sentenced to 18 years' imprisonment. Defendant now appeals his convictions arguing that (1) he was prejudiced by the trial court's admission of the mail to prove his residency, (2) evidence was insufficient he had constructive possession of the contraband, (3) he was denied effective assistance of counsel, and (4) plain errors occurred during the jury instructions. For the following reasons, we reverse the circuit court.

¶ 2

I. BACKGROUND

¶ 3

Detective David DePaolo of the Lynwood Police Department testified that on February 20, 2017, at approximately 11:00 p.m., he was working as part of a team that included other law enforcement agencies, when he was assigned to conduct surveillance of a residence located at 2025 223rd Street, in Sauk Village, Illinois ("Residence"). DePaolo observed a black Chevy Tahoe ("Tahoe") parked in the driveway of the Residence. At approximately 12:25 a.m., DePaolo saw a black Pontiac ("Pontiac") pull into the driveway. A woman and a child got out of the car and went into the Residence. The woman then left the Residence and drove away in the Pontiac.

¶ 4

A short time later, DePaolo observed a Chevy Impala ("Impala") arrive at the Residence. A man exited the vehicle and went inside the Residence. Approximately 15 minutes later, the same man left the residence and got into the Tahoe. Defendant and the child also left the Residence and got into the Impala, and both vehicles drove away. DePaolo estimated that the time was approximately 12:45 a.m.

¶ 5

DePaolo continued his surveillance of the Residence until his shift ended at 7:00 a.m. on February 21, 2017. DePaolo testified that defendant was the last person to leave the Residence,

and that nobody entered the Residence during the remainder of his shift. DePaolo also testified that the door to the Residence was ajar after defendant left.

¶ 6 On cross-examination, DePaolo testified that he was not wearing a body camera during his surveillance of the residence. DePaolo explained that while the Lynwood Police Department had available body cameras, he could choose whether to wear one.

¶ 7 Detective Anthony Bruno of the Chicago Heights Police Department (“CHPD”) testified that he was working the morning of February 21, 2017, in full uniform and in a marked police vehicle, when he received a call to pull over the Impala. Bruno said that when the Impala pulled over, defendant exited from the passenger side. Detective Bruno ordered defendant to get on the ground. However, defendant ran, but was later apprehended and arrested.

¶ 8 On cross-examination, Bruno admitted he did not see defendant in possession of any drugs, and that neither drugs nor drug paraphernalia were found in the area where defendant was arrested. When asked if he was wearing a body camera, Bruno said that, although his department issued body cameras to its officers, he chooses not to wear body cameras because “[i]t’s policy.” Bruno explained that the officers could choose whether to wear a body camera and that he chose not to wear one that day pursuant to department policy. Defense counsel asked Bruno about his department’s policy on body cameras, and the State objected, asking for a sidebar.

¶ 9 Outside the presence of the jury, the State argued that defense counsel’s questions about body cameras was coming “dangerously close” to revealing information about a separate investigation during which officers may have been wearing body cameras. Defense counsel argued that the questioning was to show that the officers were selective with what they

recorded. The trial court warned defense counsel not to enter evidence from another case. Defense counsel agreed to move on.

¶ 10 CHPD Detective Alfredo Salinas testified that he began surveilling the Residence at 4:00 a.m. on February 21, 2017. Salinas testified that at about 11:00 a.m. that morning, other officers arrived with a warrant to search the Residence. Detective Salinas executed the search warrant with CHPD Detectives Leo Garza, Will Henderson, Stuart Murtaugh, and Steve Bakowski. Salinas testified he did not know if anybody was in the Residence before it was searched, and that it was his job to secure the Residence to ensure that no occupants were inside.

¶ 11 During cross-examination, Salinas testified that although he was wearing a body camera on February 21, he turned it off before searching the Residence. Detective Salinas testified that he chose to turn off the body camera pursuant to his department's policy. Salinas acknowledged that body cameras can provide the best documentary evidence of incidents. He clarified that nobody directed him to turn off his camera and that the policy does not require him to turn off his camera prior to entering the residence. Salinas agreed that the body camera, if turned on, would have shown the location of everything in the Residence as it existed when the police first entered.

¶ 12 Salinas also testified that while he was performing surveillance, two women approached the Residence. Salinas activated his body camera for the interaction with the two women but denied the women entry into the Residence. Salinas said he did not determine whether the woman resided at the Residence. Salinas also did not determine who owned or rented the Residence.

¶ 13 Detective Leo Garza testified that on February 21, 2017, he was assigned to photograph evidence recovered during the search of the Residence. Garza said the front door of the Residence was still ajar when officers entered, and that the Residence smelled like cannabis. Officers then conducted a systematic search of the residence. Garza identified several photographs he took while inside the Residence, including photographs of a family room, living room, kitchen, several bedrooms, and a bathroom.

¶ 14 Garza testified that he helped search the two bedrooms located on the front side of the Residence. Garza identified photographs of what he termed the second bedroom (“Second Bedroom”) and testified that the Second Bedroom had no furniture or contraband in it but had women’s clothes in the closet.

¶ 15 Garza then identified photographs of what he termed the first bedroom (“First Bedroom”). This bedroom contained a closet with male clothing, a safe on the floor inside the closet, vacuum sealers and bags in front of the safe, two leaf-like substances next to the safe, a black plate with a white, rock-like substance on a shelf in the closet, a cell phone, and other contraband. The top shelf area of the closet contained a black plate with a white rock-like substance on it, a small tissue, and a razor blade. The white rock-like substance tested positive for 4.7 grams of cocaine. There was a brown rock-like substance inside the tissue which was not tested. There was a hotplate and a respirator mask directly next to the closet. Outside the closet, there was a box that contained surgical masks, latex gloves, sandwich bags, and a powdered dietary supplement, super lactose.

¶ 16 On cross-examination, Garza admitted that some of the items depicted in the photographs had been moved from their original locations and placed in different locations for

photographing. When asked about body cameras, Garza said he did not use a body camera because, pursuant to department policy, detectives in a special assignment are not required to wear body cameras. He did not know the “specific language” of the policy, or whether the policy prohibited him from wearing a body camera during a special assignment. The trial court sustained the State’s objection when defense counsel asked Garza if he had asked anyone at the CHPD whether he could use a body camera in this case.

¶ 17 CHPD Detective Henderson testified that he was working the morning of February 21, 2017, when defendant was brought to the CHPD and searched. Henderson said \$5,047.26 in cash was recovered from defendant during the search. Henderson later went to the Residence to participate in the search. Henderson did not have his body camera on during the search, saying he chose not to wear it. Henderson explained that he could, but was not required, to use a body camera. The court sustained the State’s objection to whether a body camera would have been the best way to document exactly what transpired during the search.

¶ 18 Detective Stuart Murtagh testified that, on February 21, 2017, he was responsible for collecting evidence during the search of the Residence. Over defense counsel’s objections, Murtagh identified a piece of unopened mail from Comcast Xfinity that was recovered from the mailbox outside the Residence. Murtagh also testified that he recovered a field trip permission slip for Michael Caraway, Jr. that had defendant’s signature on it from the kitchen counter inside the Residence.

¶ 19 Murtagh testified about a third bedroom (“Third Bedroom”), and identified photographs taken of the Third Bedroom, including photographs of a bed and a closet. Murtagh recovered a scale, as well as a plate on the top shelf of the closet that had 27.6 grams of heroin on it.

Detective Murtagh also recovered two prescription medicine bottles that were both in the name of Michael Caraway. However, the address on the prescription bottles was 2900 South State Street, Chicago, IL, 60619.

¶ 20 Murtagh also testified about a fourth bedroom (“Fourth Bedroom”), located immediately next to the kitchen. Although Murtagh did not himself search the Fourth Bedroom, he inventoried items recovered from it. Those items included a blue folder containing birth certificates for defendant and a Michael Caraway, Jr., born December 19, 2001. The folder also contained a social security card for Michael Caraway, Jr.

¶ 21 Murtagh was also present at the CHPD when the safe, recovered from the First Bedroom, was searched. The safe had a combination key and combination lock and smelled of cannabis. Murtagh testified that the safe contained \$7,322 in cash, suspected heroin and cocaine, suspected cannabis in vacuum-sealed bags, a scale, and various plastic bags and gloves.

¶ 22 On cross-examination, Murtagh admitted that he had not checked any records to determine whether defendant resided at the Residence. Murtagh also found mail addressed to others, but he did not know whether he inventoried that mail.

¶ 23 CHPD Sergeant Steve Bakowski testified that he was also assigned to assist in searching the Residence. Bakowski searched the Fourth Bedroom of the Residence, and said that it contained a bed, a nightstand, dressers, a television, and a door to the outside that was secured with a two-by-four. Bakowski said he found the blue folder containing the birth certificates and Michael Caraway, Jr.’s social security card inside a drawer of the nightstand. He also found plastic bags in a dresser drawer, and a digital scale in another dresser drawer. Bakowski testified that the bags are commonly used for packaging narcotics and the digital scale is

commonly used for weighing narcotics. Also, in the Fourth Bedroom, Bakowski found a February 6, 2017 letter from ComEd that was addressed to defendant at the address being searched, a credit report prepared for defendant, a health insurance card bearing defendant's name, a book with the name Caraway on it, a certificate of title for a Tahoe bearing defendant's name, and a red folder with about 20 documents inside bearing defendant's name. No illegal drugs were found in the Fourth Bedroom.

¶ 24 Bakowski testified that he received special narcotics training and was certified as a narcotics investigator through the Drug Enforcement Administration. He testified how narcotics are manufactured and delivered in Cook County. Based on his training and experience, Bakowski believed the residence was used for the manufacture, packaging, and distribution of narcotics and cannabis.

¶ 25 On cross-examination, Bakowski testified that when looking for evidence to prove residency, he is trained to look for articles of clothing and toiletries. Bakowski said he looked for articles of defendant's clothing during his search of the Residence, but he did not submit any clothing into evidence. The only toiletry item Bakowski found inside the Residence was men's cologne in the Fourth Bedroom. Bakowski admitted that the Tahoe certificate of title had a mailing and residential address that was different from the Residence, and that he found mail addressed to someone other than defendant inside the Residence.

¶ 26 The State rested. The trial court denied defendant's motion for directed finding. Defendant did not present any evidence.

¶ 27 During his closing argument, defense counsel argued that the State failed to prove that defendant had constructive possession of the Residence or the contraband recovered from the

Residence. Defense counsel suggested that if defendant resided at the Residence, he would not have left it unlocked with the door ajar, especially if he knew he had money and drugs inside. Defense counsel also raised the officers' failure to use body cameras, saying:

“Look at each of these pictures [of injuries to defendant suffered during his arrest,] because they don't tell a story, they tell you the truth, and they tell you the truth in a documentary way. The same way that these officers had the ability to present the truth here in open court. How? By the body cams.

You know in this day and age we want and should demand total transparency, total transparency, the truth, the whole truth and nothing about [sic] the truth. It shouldn't have to take a lawyer to pull the truth out of officers.”

¶ 28 The State objected to this argument, and the court sustained the objection. The State was then allowed to argue in its closing that the officers' procedure was to turn their body cameras on only when they encountered civilians.

¶ 29 The jury found defendant guilty on all charges. Defendant filed a Motion for Judgment Notwithstanding the Verdict or in the Alternative for the Granting of a New Trial. Defendant's posttrial motion was denied. On August 21, 2017, after hearing arguments in aggravation and mitigation, the trial court sentenced defendant to 18 years in prison. Defense counsel filed a late notice of appeal on October 3, 2017.

¶ 30

II. ANALYSIS

¶ 31

On appeal, defendant argues that (1) he was prejudiced by the trial court's admission of the mail to prove his residency, (2) evidence was insufficient to prove beyond a reasonable doubt that he had constructive possession of the contraband he was charged with possessing, (3) he

was denied effective assistance of counsel by his trial counsel's failure to request that the jury be instructed pursuant to the Law Enforcement Officer-Worn Body Camera Act (Body Camera Act), and (4) plain errors occurred when the jury was not instructed pursuant to the Body Camera Act and allowed to infer that officers complied with body camera policy.

¶ 32 We address Defendant's argument that the evidence was insufficient to prove beyond a reasonable doubt that defendant had constructive possession of the contraband recovered from the Residence. Where a defendant challenges the sufficiency of the evidence to support his conviction, the reviewing court must view all the evidence at trial in the light most favorable to the prosecution, *People v. Young*, 128 Ill. 2d 1, 48 (1989). We will not substitute our judgment for that of the trier of fact and will not reverse a conviction unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of defendant's guilt. *People v. Beauchamp*, 241 Ill.2d 1, 8 (2011). Moreover, it is for the fact finder to determine the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence. *People v. Nitz*, 143 Ill. 2d 82, 95 (1991). Likewise, any resolution of conflicts or inconsistencies in testimony is wholly within the province of the trier of fact. *People v. Phillips*, 127 Ill. 2d 499, 514 (1989).

¶ 33 Defendant was convicted of possession of a controlled substance with intent to deliver and possession of cannabis with intent to deliver. These offenses require proof beyond a reasonable doubt of possession. See 720 ILCS 570/401, 402 (West 2016); 720 ILCS 550/4, 5 (West 2016); see also *People v. Maldonado*, 2015 IL App (1st) 131874, ¶ 23. Possession falls into two categories, actual and constructive. "Actual possession is proved by testimony which shows [that the] defendant exercised some form of dominion over the unlawful substance, such as

trying to conceal it or throwing it away.” *People v. Scott*, 152 Ill. App. 3d 868, 871 (1987). There was no evidence that defendant had actual possession of the contraband found inside the Residence. Therefore, the State had to prove that defendant had constructive possession.

¶ 34 Constructive possession exists when the defendant has the intent and capability to maintain control and dominion over the contraband. *People v. Eghan*, 344 Ill. App. 3d 301, 307 (2003). Constructive possession may be proved by showing that the defendant had knowledge of the presence of the contraband and had immediate and exclusive control over the area where the contraband was found. *People v. Ingram*, 389 Ill.App.3d 897, 899–900 (2009). Generally, habitation of the location where contraband is found is sufficient evidence of control constituting constructive possession. *Maldonado*, 2015 IL App (1st) 131874, ¶ 29. Evidence of residency or habitation can take the form of rent receipts, utility bills, or mail. See *People v. Lawton*, 253 Ill. App. 3d 144, 147 (1993).

¶ 35 Here, the primary evidence offered to prove defendant’s **constructive possession** was police observation of defendant leaving the Residence and the ComEd letter. While this evidence demonstrates the defendant had a circumstantial connection to the Residence, it is insufficient to prove **constructive possession** beyond a reasonable doubt.

¶ 36 We find *Maldonado* instructive. In *Maldonado*, the defendant was convicted of unlawful use or possession of ammunition by a felon and possession of heroin with intent to deliver after police executed a search warrant at his home and found several boxes of ammunition, a small amount of heroin hidden in a statue, a scale, and \$1,500 cash. Officers found the ammunition in the kitchen and in one of the bedrooms. *Id.* ¶ 4. The heroin, cash, and scale were found in a

second bedroom. *Id.* ¶ 6. The defendant argued that the State failed to prove that he had constructive possession of any of those items. *Id.* at ¶¶ 1-3, 17, 23.

¶ 37 At trial, the evidence revealed that the defendant was not present when the search warrant was executed; the defendant's wife testified that the contraband belonged to her; and the three pieces of "proof of residency" found inside the home consisted of: (1) a delivery receipt from a furniture store that showed the defendant's name as the purchaser, but signed as accepted by the defendant's wife; (2) unopened piece of junk mail addressed to the defendant; and (3) unopened piece of mail addressed to both the defendant and his wife. *Id.* at ¶ 28. The reviewing court noted that "a single piece of junk mail has little or no evidentiary value given the nature of mass mailing solicitations." *Id.* The court then held that, "[w]hile it is clear from existing case law that mail addressed to a defendant found where contraband is recovered may be sufficient to allow an inference of residency, and thereby control, we will not draw the same inference when a defendant is not present during the execution of a search warrant and other indicia of residency or an admission of residency is not shown." *Id.* at ¶ 29.

¶ 38 In this case, defendant was not present during the execution of the search warrant, never admitted residing there, the ComEd letter was not a bill, and the Comcast mail was unconvincing as unopened advertisement found in the mailbox. Further, there was no utility bill or rent statement found inside the Residence and no key found on defendant. The other documents offered to prove residency included defendant's birth certificate, HMO card, prescription bottle, and vehicle title. All these documents either had no address or had an address different than the Residence. Additionally, these items were found in a bedroom that

contained no contraband. Indeed, there was no purported proof of residency found in a room that contained contraband.

¶ 39 The number of personal documents is not necessarily dispositive on the issue of residency. *People v. Terrell*, 2017 IL App (1st) 142726. In *Terrell*, police found large men's clothes on top of a china cabinet in the dining room, two prescription bottles and an adult probation card bearing defendant's name next to the living room couch with his passport, and a framed photo depicting Terrell in the living room. *Id.* ¶ 19. Despite this evidence, the court held that evidence did not support a finding that defendant committed the essential elements of the crime beyond a reasonable doubt. *Id.* ¶ 31 The court found that even if the evidence showed that defendant had some connection with the residence "the fact that the contraband was concealed in a compartment in the hallway closet undercuts the inference that he had knowledge of its existence." *Id.* ¶ 30.

¶ 40 Here, like in *Terrell*, the recovered contraband was essentially hidden. The First Bedroom contained cash, contraband, a scale, and various plastic bags and gloves, but these items were all concealed in a safe on the floor inside a closet. The Third Bedroom contained a plate with 27.6 grams of heroin on it, but this plate was found on the top shelf of a closet. Officers also recovered two prescription medicine bottles in the name of Michael Caraway, but the address on the prescription bottles was 2900 South State Street, Chicago, IL, 60619.

¶ 41 Finally, the fact that defendant attempted to flee when police pulled over the car in which he was a passenger cannot satisfy the State's burden to prove his constructive possession of the narcotics found in the Residence beyond a reasonable doubt. See *People v. Tates*, 2016 IL App (1st) 140619, ¶ 29.

¶ 42 Even when viewed in the light most favorable to the prosecution, the State failed to prove a finding that defendant committed the essential elements of the crime beyond a reasonable doubt. Therefore, we reverse defendant's convictions. In light of our disposition, we need not address the remainder of defendant's arguments.

¶ 43 III. CONCLUSION

¶ 44 In this case, the record before us does not meet the State's burden to show defendant's immediate and exclusive control over the contraband. The evidence and reasonable inferences that can be drawn therefrom do not support the jury's verdict on the narcotics charges as there is no evidence that defendant was aware of the narcotics hidden in the closets and no evidence, other than (i) defendant leaving the Residence and (ii) mail to demonstrate his constructive possession of that contraband. Because the evidence is insufficient to satisfy the State's burden of proof beyond a reasonable doubt, we reverse the judgment of the circuit court.

¶ 45 Reversed.