FILED
JUN 29 1993
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 3-112 / 92-264

000381

STATE OF IOWA,

Appellee,

vs.

DAVID LESTER HILL,

Appellant.

Appeal from the Iowa District Court for Poweshiek County, James L. Beeghly, Judge.

Defendant appeals his conviction, following a jury trial, for being a felon in possession of a firearm. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Amy M. Anderson, Assistant Attorney General; Michael Mahaffey, County Attorney, and Ron Kelly, Assistant County Attorney, for appellee.

Considered by Schlegel, P.J., and Hayden and Habhab, JJ.

HABHAB, J. 000382

This is an appeal by the defendant, David Lester Hill, from a conviction of a felon in possession of a firearm, in violation of Iowa Code section 724.26 (1991). Hill claims there was not substantial evidence to prove he had dominion or control of the firearms. He also claims the trial court erred in not finding good cause for the late filing of his motion to suppress and that his defense counsel was ineffective for not timely filing the motion to suppress.

On March 26, 1991, police officers executed a search warrant for the Hill residence. Hill's wife, Mary, and their children were at home. In one of the upstairs bedrooms the police found a lock box containing two pistols on top of the dresser and a .22 caliber rifle in the closet. The State filed an information charging Hill with being a felon in possession of a firearm, in violation of Iowa Code section 724.26 (1991), and he was arraigned April 1, 1991. On January 2, 1992, Hill moved to suppress evidence seized as a result of the search warrant, alleging a lack of probable cause. The district court denied the motion as untimely and, after hearing oral argument from defense counsel, did not find good cause. Hill had alleged that the delay in filing the motion was due to the need to complete discovery and that the State had acquiesced in the delay.

At trial, Hill argued that he did not have control over the firearm. The jury convicted Hill and he was sentenced to up to five years in prison. Hill appeals.

I. Substantial Evidence.

Hill first contends there is not substantial evidence that he knowingly had dominion or control of a firearm.

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

Iowa Code section 724.26 (1991) states:

> A person who is convicted of a felony in a state or federal court and who knowingly has under the person's dominion and control, . . . a firearm or offensive weapon is guilty of a class "D" felony.

Id.

Hill admits he is a person convicted of a felony. He disputes that he had dominion and control of the firearms

found in his wife's home. We find there is substantial evidence of Hill's dominion and control of the firearms to support the jury's verdict.

Defendant admitted that one of the pistols in the lock box was his and that he stored his brother's rifle in the bedroom closet.

Mary Hill, the defendant's wife, testified that the defendant had moved out of the home where the guns were found and that she was in control of the guns, not defendant. However, Mary admitted the defendant still came to the house often. Mary continued to do his laundry for him, he kept his diabetes medication there, and he received mail at the house. Mary also testified defendant had access to the house when she was not at home. At the auto body shop where the defendant claimed to have moved, the police saw no evidence of residence.

Mary testified defendant did not know where the lock box was because she hid it. Police officers testified that the lock box was found on top of a dresser in plain view. Men's clothing was found in the bedroom where the lock box was discovered.

Mary also testified that one of the guns in the lock box was hers. She admitted, however, that she had never fired a gun, she had never opened the lock box, and she did not know where the key to it was. Mary also did not know there was a rifle in the bedroom closet.

Officer Clark testified that when they were executing the warrant, Mary told him the guns were the defendant's and that none of the guns were hers. He also said when he asked Mary about defendant's whereabouts she said she had not seen him since the day before. Mary did not tell any of the officers that defendant had moved out.

Wendy Covert, the defendant's sixteen-year-old daughter testified that she had seen the defendant open the lock box and take out the guns just a few weeks before the warrant was executed. Wendy stated that a key to the lock box was hanging on the rack in the living room.

Given the evidence submitted, the jury could have reasonably concluded that the defendant knowingly or intentionally possessed the pistols or the rifle. See State v. Hall, 301 N.W.2d 729, 731 (Iowa 1981) (defendant found in possession of guns even though defendant's mother testified she had exclusive control of guns). Where the evidence is in conflict, the jury is empowered to resolve those conflicts in accordance with its own views as to the credibility of the witnesses. State v. Miles, 490 N.W.2d 798, 799 (Iowa 1992). We therefore affirm on this issue.

II. Timeliness of Motion to Suppress.

Defendant next contends the trial court abused its discretion in refusing to find defendant had good cause for filing his suppression motion late.

According to Iowa Rules of Criminal Procedure 10(3), 10(4), and 11, a motion to suppress is to be filed no later than forty days after arraignment. Id. If the motion is late it is deemed waived. Iowa R. Crim. P. 10(3). However, a trial court may grant relief from that waiver if good cause is shown. Id. Prejudice to the State is not a factor in rule 10(4). State v. Froning, 328 N.W.2d 333, 335 (Iowa 1982).

In oral argument on the good cause issue, defense counsel stated that he did not file his motion to suppress earlier because he had not completed discovery including the depositions of certain police officers. He stated there was an understanding between the county attorney's office and defense counsel that he would depose the officers prior to filing a motion to suppress. Defense counsel further stated the court had been made aware of his intention to file a Motion to Suppress, as indicated by Judge Morrison's December 18, 1991 order. The last set of depositions were conducted December 26, 1991. The motion to suppress was filed January 2, 1991, five days before trial.

The trial court stated the following:

> THE COURT: Well counsel, you were aware of the search warrant proceedings quite some time ago, I assume.
> MR. CAMPBELL: That's correct, your Honor. We initially started taking depositions in the summer, I believe, and took some of the officers that were involved in the search warrant proceedings at that time.
> THE COURT: The arraignment took place April 1, 1991. For the record the Motion to

Suppress was not filed until January 2, 1992. Again the motion to suppress is not timely.

We find the trial court did not abuse its discretion in finding the defense counsel did not have good cause to file his suppression motion over seven months late.

III. Ineffective Assistance of Counsel.

Defendant's final claim is that his trial counsel was *ineffective in not* filing a timely motion to suppress. Defendant seeks to have this issue preserved for postconviction relief because neither the warrant applications nor certain depositions were introduced into evidence.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate defendant's claim. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

AFFIRMED.