

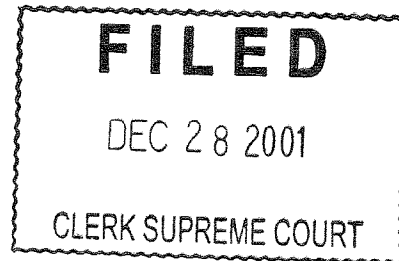
IN THE COURT OF APPEALS OF IOWA

No. 1-516 / 00-717
Filed December 28, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUDITH KAY JENS,
Defendant-Appellant.



Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden, Judge.

Defendant appeals from various drug offenses. **AFFIRMED IN PART, REVERSED AND REMANDED IN PART FOR RESENTENCING.**

Jeffrey M. Johnson, Muscatine, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Richard R. Phillips, County Attorney, and Alan R. Ostergren, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

VAITHESWARAN, J.

A jury convicted Judith Jens of four offenses arising from delivery of marijuana to a minor, one of which included a statutory enhancement based on immediate possession or control of a firearm. On appeal, Jens contends: (1) the district court did not properly instruct the jury on the firearm enhancement; (2) there was insufficient evidence to support the firearm enhancement; and (3) the district court abused its discretion in sentencing her to the maximum prison term on two of the four counts. We reverse and remand for resentencing on the charge containing the firearm enhancement.

I. Background Facts and Proceedings

The father of fifteen-year-old Jacob reported to police that his son purchased marijuana from Jens, at her home. Police sought and obtained a search warrant for Jens' home. Prior to executing the warrant, the officers spoke to Jens, who admitted selling marijuana to minors.

A search of Jens' bedroom revealed individually wrapped packets of marijuana, a scale, and several marijuana pipes. Officers also found a locked safe in the closet of her bedroom. They located a key and unlocked the safe. Inside was a .25 caliber semi-automatic pistol, ammunition, and paperwork pertaining to the gun.

The State charged Jens with three counts of delivery of a controlled substance to a minor, one count of delivery of a controlled substance or possession of a controlled substance with intent to deliver while in immediate possession or control of a firearm, and a fifth count of failure to affix a drug tax stamp. See Iowa Code §§ 124.406(1)(a); 124.401(1)(d); 124.401(1)(e);

124.401A; 453B.1, 453B.3, 453B.7, 453B.12. The first four counts also alleged that the illegal activities occurred within 1000 feet of a school. See Iowa Code §124.401A.

The jury found Jens guilty of all but the second delivery count. On the possession with intent to deliver charge, the jury expressly determined Jens had a firearm in her immediate possession at the time she participated in the crime.

The district court sentenced Jens to prison terms not exceeding twenty-five years on the two delivery counts and a term not exceeding five years on the tax stamp charge. On the charge of possession with intent to deliver, the court sentenced Jens to an indeterminate term of up to five years but enhanced the sentence to ten years based on Jens' possession of a firearm. The court ordered the sentences to be served concurrently. This appeal followed.

II. Jury Instruction on Possession

Jens takes issue with the court's jury instruction on possession as it applies to the firearm enhancement charge. See Iowa Code §124.401(1)(e).¹ We review this issue for prejudicial error. *Herbst v. State*, 616 N.W.2d 582, 585 (Iowa 2000).

Before we examine the instruction, we must summarize the procedural context in which Jens' challenge to the instruction arose, as this context controls our disposition. Following the close of the State's case, Jens moved for

¹ That provision states:

A person in the immediate possession or control of a firearm while participating in a violation of this subsection shall be sentenced to two times the term otherwise imposed by law, and no such judgment, sentence, or part thereof shall be deferred or suspended.

judgment of acquittal and moved to strike the firearm enhancement portion of the fourth charge based on insufficiency of the evidence. The district court concluded there was enough evidence to create a submissible issue on the question of Jens' possession of a firearm, but not on her control of a firearm.²

In accordance with this ruling, the court's statement of charges referred only to "immediate possession of a firearm" and not to "immediate possession or control of a firearm.", as set forth in the statute. See Iowa Code section 124.401(1)(e). The court did not separately instruct the jury on possession of a firearm³ but only gave the following general possession instruction:

The word "possession" includes actual as well as constructive possession, and also sole as well as joint possession.

A person who has direct physical control of something on or around his person is in actual possession of it.

A person who is not in actual possession, but who has both the power and the intention to later take control over something either alone or together with someone else, is in constructive possession of it.

If one person alone has possession of something, possession is sole. If two or more persons share possession, possession is joint.

² The court relied on *State v. Eikelberg*, 574 N.W.2d 1 (Iowa 1997) and *State v. Franklin*, 564 N.W.2d 440 (Iowa Ct. App. 1997), neither of which were overruled or called into question by our highest court's most recent opinion on the issue. See *State v. McDowell*, 622 N.W.2d 305 (Iowa 2001).

³ A recently adopted uniform jury instruction defines immediate possession or control of a firearm or offensive weapon as follows:

To have immediate possession of a [firearm][offensive weapon] means to have actual possession of the [firearm][offensive weapon] on or around one's person. To have immediate control of a [firearm][offensive weapon] means to have the [firearm][offensive weapon] in close proximity so that the person can reach for it or claim dominion or control over it. In order to prove that the defendant had immediate possession or control of a [firearm][offensive weapon], the State must prove that the defendant had knowledge of its [sic] existence and its general location.

See 1 Iowa Criminal Jury Instruction 200.48.

Following submission of the case to the jury, jurors asked the court for clarification on the meaning of "immediate possession", a term only used in the firearm enhancement statute. The court instructed the jury to consider the evidence and make deductions according to reason and common sense and to reread the general possession instruction set forth above. Defense counsel objected to the court's response and the general possession instruction on the ground that they allowed the jury to equate "possession" with "immediate possession", in contravention of Iowa law.

The jury returned a guilty verdict on the charge of delivery or possession of a controlled substance with intent to deliver while in immediate possession of a firearm. The verdict form contained the following question: "[d]o you find the State has proved the defendant had in her *immediate possession* a firearm at the time she participated in the crime of Possession of a Controlled Substance with Intent to Deliver?". (emphasis added). The jury answered yes to this question.

On appeal, Jens reiterates that the court's general possession instruction improperly allowed the jury to equate "possession" as it has been defined in drug possession cases with "immediate possession" of a firearm under Iowa Code section 124.401(1)(e). She notes that the jurors' question regarding the definition of "immediate possession" of a firearm highlights the inaccuracy of the possession instruction. We agree.

Our highest court recently revisited the issue of what constitutes immediate possession of a firearm under Iowa Code section 124.401(1)(e). See *State v. McDowell*, 622 N.W.2d 305 (Iowa 2001). The court stated that

"immediate possession of a firearm means actual possession on one's person." *Id.* at 307 (citing *State v. Eickelberg*, 574 N.W.2d 1, 5 (Iowa 1997)). The court noted that "immediate control", in contrast, only required a showing that the defendant was in such close proximity to the weapon as to claim immediate dominion over it." *Id.* The court also stated that both "immediate possession" and "immediate control" required a showing that the defendant had "knowledge of the firearm's existence and location." *Id.* at 308.⁴

After *McDowell*, there can be no question that "immediate possession" means actual possession on one's person. Accord *State v. Eickelberg*, 574 N.W.2d at 3. The court's possession instruction, however, allowed the jury to find "immediate possession" based on either actual or constructive possession. This was error. Additionally, the error was prejudicial, as there was no evidence that Jens had actual possession of the gun on her person at the time of the drug transactions.⁵ Therefore, we reverse and remand for resentencing on the State's charge that Jens delivered or possessed a controlled substance with intent to deliver while in the immediate possession or control of a firearm, without consideration of the firearm enhancement.

III. Remaining Issues

⁴ The Iowa Supreme Court admonished courts to include this knowledge requirement in any instruction on immediate possession or control of a firearm. See *McDowell*, 622 N.W.2d at 308. However, the absence of this requirement in the instruction is not an issue here.

⁵ There was evidence Jens had immediate control over the gun rather than immediate possession. See *State v. Reeves*, 209 N.W.2d 18, 23 (Iowa 1973) (knowledge and control could be inferred from evidence that "the premises on which such substances are found are in the exclusive possession of the accused."). However, the issue of immediate control was not submitted to the jury.

Our resolution of the jury instruction issue also disposes of Jens' claim that the evidence was insufficient to support the firearm enhancement portion of the State's charge.

Jens' final claim is that the district court failed to consider mitigating circumstances in sentencing her to maximum terms on the delivery counts. We reject this contention. The court specifically noted this was Jens' first offense, and the court further considered the fact she had cooperated with police. However, the court found these mitigating circumstances were overridden by the proximity of the crime to a school and by Jens' failure to show significant remorse. We believe the court's discussion of the sentencing factors was sufficient to meet the requirements of Iowa Rule of Criminal Procedure 22(3)(d). *See State v. Russian*, 441 N.W.2d 374, 374-75 (Iowa 1989).

IV. Disposition

We affirm the court's judgment and sentences on the delivery to a minor and tax stamp charges. We reverse and remand for resentencing on count IV, delivery or possession of a controlled substance with intent to deliver while in the immediate possession or control of a firearm, without consideration of the firearm enhancement.

AFFIRMED IN PART, REVERSED AND REMANDED IN PART FOR RESENTENCING.