IN THE COURT OF APPEALS OF IOWA

No. 1-442 / 00-1196
Filed August 29, 2001

FILED
AUG 29 2001
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID EDWARD TORTICILL,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

David Torticill appeals from his convictions and sentences for manufacturing a controlled substance, failure to affix tax stamps, and keeping a dwelling for possession of a controlled substance in violation of Iowa Code sections 124.401(1)(d), 453B.1, 453B.12, 124.402(1)(e), and 124.402(2)(a) (1999). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Nan Jennisch, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas S. Mullin, County Attorney, and James Katcher, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Zimmer and Miller, JJ.

ZIMMER, J.

David Torticill challenges the sufficiency of the evidence supporting his convictions for manufacturing a controlled substance (marijuana), failure to possess a tax stamp, and keeping a dwelling for possession of a controlled substance in violation of Iowa Code sections 124.401(1)(d), 453B.1, 453B.12, 124.402(1)(e), and 124.402(2)(a) (1999). We affirm.

I. Background Facts and Proceedings.

On January 29, 2000, Honore Carlson discovered someone had burglarized her vehicle the previous night. She reported the burglary to the police who began an investigation. Deputy sheriff Frank Kofka discovered a trail of footprints in freshly fallen snow leading from the vehicle to a home at 812 Maple Street in Salix, Iowa. The home was owned by the defendant's mother, Rosalie Torticill. Deputy Kofka, a twenty-two year member of the sheriff's office, was aware the defendant resided at the house.

Officers executed a search warrant at 812 Maple Street on January 29, 2000. No one was present in the home when the warrant was executed. In a room in the basement, officers discovered twelve potted marijuana plants and evidence of a growing operation, including fans, fluorescent lights and fertilizer. The light fixtures were attached to timers. The pungent odor of marijuana could be smelled at the top of the stairwell leading to the basement. An issue of High Times, a magazine marketed to marijuana growers, was sitting on a table in the front room of the house. Several film canisters, one with a razor blade inside, were located on a coffee table. After further investigation, the State charged Torticill with a number of criminal offenses.

The defendant waived his right to a jury trial. Following a bench trial, the district court found Torticill guilty of the charges of manufacturing marijuana, drug tax stamp violations, and keeping a dwelling for possession of a controlled substance. The trial court also found the defendant was an habitual offender, since he stipulated he had previously been convicted of five felonies. The district court acquitted Torticill on charges of burglary and theft. The court sentenced the defendant to concurrent terms of incarceration of fifteen, fifteen and two years.

Torticill appeals. He contends that the State presented insufficient evidence regarding his knowledge and dominion and control of the marijuana or the growing process to support his convictions. In the event this issue was not adequately preserved, he contends his trial counsel was ineffective.

II. Standard of Review.

We review challenges to the sufficiency of the evidence for errors at law. *State v. Rohm,* 609 N.W.2d 504, 509 (Iowa 2000). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.* "Substantial evidence is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt." *Id.* We view the evidence in the light most favorable to the State, including all legitimate inferences and presumptions which may be fairly and reasonably deduced from the record. *State v. Simpson,* 528 N.W.2d 627, 632-33 (Iowa 1995). Circumstantial and direct evidence are equally probative. *State v. Boley,* 456 N.W.2d 674, 679 (Iowa 1990).

III. Analysis.

The defendant claims the State produced insufficient evidence to support convictions of manufacturing a controlled substance, failure to affix a drug tax stamp, and keeping a dwelling for possession of a controlled substance. The State agrees the issue was properly preserved. Each of the charged offenses involves either a possession or knowledge element.[1] The defendant asserts the trial court improperly inferred the essential knowledge and control elements. He contends the only evidence produced at trial suggested that he was, at most, in joint dominion and control of the residence where the marijuana production operation was found.

When a defendant is convicted of possessing a controlled substance not on his immediate person, the possession is said to be "constructive." *State v. Rudd,* 454 N.W.2d 570, 571 (Iowa 1990). Possession or control is constructive when the substance is found in a place over which the accused maintains dominion and control. *Id. See also State v. Reeves,* 209 N.W.2d 18, 21-22 (Iowa 1973); *State v. Spivie,* 581 N.W.2d 205, 208 (Iowa Ct. App. 1998)

The Iowa Supreme Court recently recognized *State v. Reeves,* 209 N.W.2d 18 (Iowa 1973), as continuing to provide guiding principles useful in the analysis of constructive possession issues. *State v. McDowell,* 622 N.W.2d 305, 308 (Iowa 2001). Quoting *Reeves*, the court reiterated:

---

[1] Iowa Code section 124.401 makes it unlawful for a person to *knowingly* manufacture a controlled substance.

Iowa Code section 425B.12 makes it unlawful to offer to sell, distribute, or *possess* a taxable substance without affixing a tax stamp.

Iowa Code section 124.402(1)(e) makes it unlawful to *knowingly* keep a home which is used for keeping, possessing, or selling a controlled substance.

> If the premises on which such substances are found are in the exclusive possession of the accused, knowledge of their presence on such premises coupled with his ability to maintain control over such substances may be inferred. Although no further proof of knowledge by the State is required in cases of exclusive possession by the accused the inference of knowledge is rebuttable and not conclusive. *But where the accused has not been in exclusive possession of the premises but only in joint possession, knowledge of the presence of the substance on the premises and the ability to maintain control over them by the accused will not be inferred but must be established by proof. Such proof may consist either of evidence establishing actual knowledge by the accused, or evidence of incriminating statements or circumstances from which a jury might lawfully infer knowledge by the accused of the presence of the substance on the premises.*

Id. at 308 (emphasis in original) (quoting *Reeves*, 209 N.W.2d at 23).

The trial court found there to be no doubt that the defendant lived at 812 Maple at the time of the search. However, the trial court also found some indication that other persons may have had access to the home. Therefore, as the defendant correctly points out, the State was not entitled to an inference of knowledge and control based on exclusive possession of the residence.

Absent exclusive control over the residence, additional proof is required to substantiate the inference that the defendant knew of and had control over the marijuana production operation. The additional proof necessary for a fact finder to infer the defendant's knowledge and control over the marijuana operation is established by the circumstances of the case. One recognized factor to be considered is the size of the manufacturing operation. *State v. Barber*, 635 S.W.2d 342, 344 (Mo. 1982). *See also State v. Eickelberg*, 574 N.W.2d 1, 5 (Iowa 1997). In the Torticill basement police discovered twelve potted marijuana plants, fans installed for optimal air circulation, and fluorescent light fixtures on timers to simulate natural growing conditions. As stated above, searching

officers also noted a pungent marijuana odor emanating from the basement, a High Times magazine, razor blades and film canisters on the coffee table. Based on this circumstantial evidence a fact finder could infer the defendant's knowledge of the presence of marijuana on the premises, and therefore his constructive possession of the contraband and control over the manufacturing operation.

We find sufficient evidence from which a fact finder could infer the defendant, the resident of a home in which a marijuana cultivation operation was discovered, knew of the existence of that operation and therefore constructively possessed the contraband and controlled the manufacturing process. Based on this inference, we find sufficient evidence by which a reasonable fact finder could find beyond a reasonable doubt that the defendant was guilty of manufacturing a controlled substance, failing to affix a drug tax stamp, and keeping a dwelling for possession of a controlled substance in violation of Iowa Code sections 124.401(1)(d), 453B.1, 453B.12, 124.402(1)(e), and 124.401(2)(a) (1999). We affirm the trial court's conviction.

AFFIRMED.