IN THE COURT OF APPEALS OF IOWA

No. 5-538 / 94-1432

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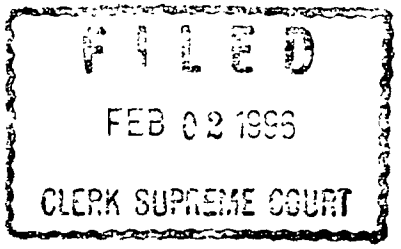
STATE OF IOWA,

Plaintiff-Appellee,

vs.

FRANCIS SINDELAR,

Defendant-Appellant.



Appeal from the Iowa District Court for Chickasaw County, John Bauercamper, Judge.

Defendant appeals from judgment and sentences, following jury trial, entered upon his convictions of possession of marijuana with intent to deliver and a drug tax stamp violation. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Annette L. Hitchcock, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, and Richard P. TeKippe, County Attorney, for appellee.

Considered by Hayden, P.J., and Sackett and Huitink, JJ.

SACKETT, J.

Defendant Francis Sindelar was convicted of the crimes of possession with intent to deliver a controlled substance (marijuana) in violation of Iowa Code section 124.401(1) (1993) and failure to affix a drug tax stamp in violation of section 453B.3. He appeals his convictions. We affirm.

In the spring of 1993, Jim Stevens gave defendant permission to plant a garden on a farm he owned in Chickasaw County. There was a shed on the site not regularly locked. Defendant stored his garden tools in the shed. In May 1993, Stevens went into the shed to repair a broken window and saw a cardboard box containing small plastic bags of a green leafy material and a metal canister.

Stevens took one of the plastic bags to the sheriff's office. A chief deputy noted the substance looked like marijuana and directed another deputy to go with Stevens to pick up the remainder of the green leafy material. There were seven plastic bags of marijuana in a coffee can inside the metal canister. Another seven bags of marijuana were found with a scale and a box of baggies. Additionally, inside a box were eight plastic bags of marijuana, plus four plastic bags which each held sixteen smaller plastic bags of marijuana. The marijuana recovered from the shed had a total weight of 3632.2 grams.

The material was taken to the Division of Criminal Investigation in Des Moines, where a criminalist determined the green leafy material was marijuana.

A forensic scientist with the Division of Criminal Investigation checked the plastic bags and other evidence for fingerprints. She found a fingerprint that matched defendant's on one of the plastic bags inside the metal canister and on seven other plastic bags.

The sheriff's department received the laboratory report. Defendant was arrested on July 23, 1993. In a search of his home on that date, officers found two books: Jim Richardson, *Sinsemilla - Marijuana Flowers* (1976), and Robert Connell Clark, *Marijuana Botany* (1981). These books were admitted into evidence at defendant's trial.

A jury found defendant guilty of the crimes of possession of a controlled substance (marijuana) with intent to deliver and failure to affix a drug tax stamp. Defendant was sentenced to a term of imprisonment not to exceed five years on each of these charges, to be served concurrently. He now appeals.

I. Defendant first claims his conviction and sentence for failure to affix a drug tax stamp violates the double jeopardy clause of the Fifth Amendment to the United States Constitution. He states he has already paid a revenue assessment and penalty under chapter 453B.

The supreme court in *State v. Lange*, 531 N.W.2d 108, 117 (Iowa 1995), concluded the Iowa drug stamp tax statute is not a criminal penalty and sentence on the drug stamp conviction is not a second punishment violative of a defendant's right against double jeopardy. We affirm on this issue.

II. Defendant contends he is entitled to a new trial because the district court failed to properly instruct the jury on the definition of "possession." The court submitted the following instruction on "possession" to the jury:

> 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.

Defendant objected to the third paragraph of this instruction, claiming it was not proper because the State was only required to show defendant had the power or intent to take control of the controlled substance. Defendant claims the recent case of *State v. Parrish*, 502 N.W.2d 1, 3 (Iowa 1993), added an additional element requiring the State to prove he maintained possession or control over the place where the marijuana was found. He states this distinction is important because he did not have control over the shed where the marijuana was found.

An instruction with an identical third paragraph was approved by the supreme court in *State v. Mehner*, 480 N.W.2d 872, 879 (Iowa 1992), a case which involved possession of a firearm.

The instruction given was similar to the uniform jury instruction on possession. The third paragraph of the uniform instruction provides:

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> A person who is not in actual possession, but who has knowledge of the presence of something and has the authority or right to maintain control of it either alone or together with someone else, is in constructive possession of it.

1 Iowa Criminal Jury Instruction 200.47 (1989). This instruction was recently cited with approval in *State v. Padavich*, 536 N.W.2d 743, 751 (Iowa 1995), and *State v. Simpson*, 528 N.W.2d 627, 631 (Iowa 1995).

In *Padavich*, the supreme court said *in addition* to the inference of constructive possession presented by uniform instruction 200.47, a fact finder may infer constructive possession when the thing is found in a place which is subject to the defendant's dominion and control, or to the joint dominion and control of the defendant and other persons. *Padavich*, 536 N.W.2d at 751 (emphasis added). Thus, an inference of constructive possession which arises when a defendant maintains sufficient dominion and control of the place where the substances are found is an additional or alternative method to show constructive possession to that which arises when a defendant maintains control or a right to control the illegal substance. *See State v. Reeves*, 209 N.W.2d 18, 22 (Iowa 1973).

The State did not need to show defendant occupied or controlled the premises where the substance was found if it showed defendant maintained control over the substance itself. We affirm on this issue.

III. Defendant next claims the district court abused its discretion in admitting into evidence the two books found at his house. He contends the discovery

of the books, in July 1993, was too remote in time from the date the marijuana was seized, in May 1993, for the books to be relevant. Defendant also contends the books were not relevant because they dealt with the manufacture of marijuana and not delivery of marijuana, the crime with which he was charged.

We review questions of admissibility of evidence for an abuse of district court discretion. *State v. Buller*, 517 N.W.2d 711, 712 (Iowa 1994). Under Iowa Rule of Evidence 402, evidence must be relevant in order to be admissible. Evidence is relevant under rule 401 when it has a tendency to make the existence of any fact which is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The three elements of possession are: (1) dominion and control over the substance; (2) knowledge of its presence; and (3) knowledge of its nature. *Parrish*, 502 N.W.2d at 3. The books are relevant because they contain photographs of marijuana plants, and are relevant to show defendant knew the green leafy material in the plastic bags was marijuana.

Generally, the remoteness of evidence affects its weight rather than its admissibility. *State v. Casady*, 491 N.W.2d 782, 785 (Iowa 1992). However, remoteness may render evidence irrelevant where the elapsed time is so great as to negate all rational or logical connection between the fact sought to be proved and the remote evidence offered to prove that fact. *Id.* Under these facts, the time period was not so great as to render the evidence inadmissible.

Defendant additionally claims the prejudicial value of the books outweighs their probative value. We have already found the books were relevant to show defendant knew the material in question was marijuana. The district court did not abuse its discretion in determining the probative value of the books outweighed their prejudice.

IV. Defendant contends he received ineffective assistance because his attorney failed to strike one of the jurors who was employed by the Northeast Iowa Council on Substance Abuse. We find no merit to this argument. *See State v. Neuendorf*, 509 N.W.2d 743, 748 (Iowa 1993).

V. Finally, defendant claims there was not sufficient evidence to support the jury's verdicts. He states there is insufficient evidence to show he had constructive possession of the marijuana found in the shed because other people had access to the shed.

When a criminal defendant challenges the sufficiency of evidence to support a conviction, we review all the evidence in the record in a light most favorable to the State. *State v. Garr*, 461 N.W.2d 171, 173 (Iowa 1990). We must uphold the conviction if there is substantial evidence in the record to support it. *State v. Frake*, 450 N.W.2d 817, 818 (Iowa 1990). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. *See State v. Robinson*, 288 N.W.2d 337, 339 (Iowa 1980).

We find there was substantial evidence in the record to support the jury's verdict. Defendant admits he had access to the shed and stored his garden tools there. Defendant's fingerprint was found on eight of the small plastic bags of marijuana. One of the plastic bags was in a coffee can inside a larger metal container. This evidence shows defendant intimately examined the marijuana and is sufficient to raise an inference of constructive possession.

After considering all claims raised in this appeal, we affirm defendant's convictions for possession of a controlled substance (marijuana) with intent to deliver and failure to affix a drug tax stamp. Costs of this appeal are assessed to defendant.

AFFIRMED.