IN THE COURT OF APPEALS OF IOWA

No. 1-191 / 00-0949
Filed April 27, 2001

FILED
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CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

ORLANDO TYWAN HICKMAN,
Appellant.

Appeal from the Iowa District Court for Polk County, D. J. Stovall, Judge.

Orlando Hickman appeals his convictions and sentences for possession of a controlled substance with intent to deliver in violation of Iowa Code section 124.401(1)(b)(3) and failure to possess a drug tax stamp in violation of Iowa Code sections 453B.3 and 453B.12. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Cristen C. Odell, Assistant Attorney General, John P. Sarcone, County Attorney, and Robert DiBlasi, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Zimmer and Hecht, JJ.

VOGEL, P.J.

Orlando Hickman appeals the judgment and sentence entered upon convictions for possession of a controlled substance, crack cocaine, with intent to deliver, in violation of Iowa Code section 124.401(1)(b)(3) (1999)[1] and for failure to affix a drug tax stamp, in violation of Iowa Code sections 453B.3 and 453B.12 (1999). Hickman contends the district court erred in failing to grant his motion for judgment of acquittal. Because we find the record contained sufficient evidence to support the verdict of guilt, we affirm the district court's decision.

Background Facts. Hickman was sitting in the front passenger seat of a parked car when police approached and flashed the car with a spotlight. All of the vehicle's occupants exited immediately, with the exception of Hickman. Hickman instead reached behind his back, making up and down "digging" motions. The digging motions continued even after one of the police officers had drawn his weapon. It appeared to that officer Hickman was either stuffing something down into or preparing to pull something out of the area behind him. Hickman was not cooperative with the arresting officers, having to be told several times to place his hands on top of the vehicle, and lying about his identity.

When the vehicle was searched a large plastic bag was found wedged into the seat directly behind where Hickman had been sitting. It contained two smaller plastic bags, which held a "golf ball size" rock of crack cocaine, several smaller unwrapped rocks, and thirteen individually wrapped rocks. One of the

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[1] We note the district court's order for imposition of sentence lists possession of crack cocaine with intent to deliver as a violation of Iowa Code § 123.401(1)(b)(3).

officers testified the quantity and packaging of the drugs was consistent with drug dealing activity, and was in excess of an amount possessed for personal use.

Scope of Review. Denial of a motion for acquittal is reviewed for errors at law. Iowa R. App. P. 4. A guilty verdict will be binding on appeal so long as it is supported by substantial evidence. *State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998). Substantial evidence is found when, viewing all the evidence in the light most favorable to the State, a rational trier of fact could be convinced of the defendant's guilt beyond a reasonable doubt. *Id.*

Sufficiency of the Evidence. Hickman relies primarily on the case of *State v. Torres*, 506 N.W.2d 470 (Iowa Ct. App. 1993). In that case the evidence was insufficient to support the conviction of a vehicle passenger for possession with intent to deliver, where marijuana was found in the vehicle's trunk. Although there was no proof of actual, physical possession in *Torres*, *id.* at 472, actual possession is not necessary if a defendant is "in such close proximity to the substance as to be able to claim immediate dominion over it . . . ." *State v. Thomas*, 561 N.W.2d 37, 40 (Iowa 1997).

In *Torres*, the State attempted to prove constructive possession by showing the defendant was a passenger in the vehicle where the drugs were found, the passenger compartment contained a strong odor of marijuana, documents incriminating to the driver were found on the car console, and the defendant did not act surprised or shocked when informed drugs had been found. *Torres,* 506 N.W.2d at 472. While noting the record might support a conviction for simple possession, we found the defendant could not be convicted

of possession with intent to deliver where there was a complete lack of evidence he knew the drugs were in the trunk or had any authority or control over the drugs. *Id.*

Torres is distinguishable from the case at hand. Here, the drugs were found in the very place where Hickman had been "digging" with his hands just moments earlier. Both officers testified that no other vehicle occupant had been seen moving towards the area where the drugs were found, and the searching officer testified that given the intact condition of the rocks and the bags, the drugs could not have been concealed in the seat from another location. These facts are sufficient for a reasonable juror to find Hickman was in constructive possession of the crack cocaine. When combined with the testimony regarding the quantity and packaging of the drugs, the record contains substantial evidence in support of a conviction for possession with intent to deliver and, correspondingly, failure to possess a tax stamp.

AFFIRMED.