IN THE COURT OF APPEALS OF IOWA

No. 6-452 / 95-1140

FILED
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CLERK SUPREME COURT

STATE OF IOWA,
Appellee,

vs.

KEVIN MONTGOMERY THOMAS,
Appellant.

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

Kevin Montgomery Thomas appeals the judgment and sentence entered upon his convictions of possession with intent to deliver (cocaine base) and failure to affix a drug tax stamp in violation of Iowa Code sections 124.401(1)(b)(3), 453B.1 and 453B.12 (1995). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas S. Mullin, County Attorney, and Clinton L. Spurrier, Assistant County Attorney, for appellee.

Considered by Habhab, P.J., and Cady and Vogel, JJ.

VOGEL, J.

On January 27, 1995, Sioux City police executed a search warrant for an apartment and vehicle located at 119 Center Street. The warrant was based on information received from a confidential informant that illegal drugs were present in the apartment and vehicle. The informant named four individuals who were present at the address, Duane Adams, Bessie Hayes, Keith Mayhan, and Dixie Murphy. The informant stated another individual, who had just come from California, was also present at the address. Inside the Center Street apartment police found the four named individuals and Keith Thomas.

When searching the northeast bedroom, police found a hand scale in a bag under the bed, an identification belonging to Dixie Murphy, and $2000 under each sole in a pair of tennis shoes. In the northwest bedroom, police found a rent receipt naming Bessie Hayes as the apartment's renter. On a chair in the living room police found a pot pipe. Police found two magnetic key holders containing cocaine outside the kitchen window.

In searching Keith Mayhan, police found a baggie containing a small amount of marijuana, cigarette papers, $223 in cash, and a Western Union transfer receipt for $1860 dated January 27, 1995, and naming Kevin Thomas as the sender. On Duane Adams's person, police found a California identification and $483 in cash.

Thomas was arrested and charged with, among other things, possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp. At

his bench trial Thomas objected to the admission of evidence of his prior conviction of possession of cocaine in California. The court took the objection under consideration.

The court found Thomas guilty of possession with intent to deliver and failure to affix a drug tax stamp. In its ruling the court indicated it considered the evidence of Thomas's prior possession conviction for the "limited purpose of how it relates to knowledge, intent, absence of mistake or accident, common scheme, ownership or plan." Thomas's motion for new trial was denied.

Thomas appeals.

I. ***Sufficiency of the Evidence.*** Thomas contends the district court erred in finding there was sufficient evidence to support a conviction. While there is some question as to whether Thomas properly preserved error on this issue, we choose to address the merits. The scope of review is for correction of errors at law. Iowa R. App. P. 4.

In criminal cases tried to the court, the district court's verdict is treated like a jury verdict. *State v. Price*, 365 N.W.2d 632, 633 (Iowa App. 1985). We examine the record to determine if substantial evidence, together with all reasonable inferences arising from the evidence, support the verdict. *State v. Terry*, 544 N.W.2d 449, 451 (Iowa 1996). The verdict binds this court if it is supported by substantial evidence. *Id.* 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. *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996).

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. Liggins*, 524 N.W.2d 181, 186 (Iowa 1994); *State v. Walker*, 538 N.W.2d 316, 319 (Iowa App. 1995). We consider all the evidence presented at trial, not just the evidence supporting the verdict. *State v. Constable*, 505 N.W.2d 473, 478 (Iowa 1993). Direct and circumstantial evidence are equally probative, as long as the evidence raises a fair inference of guilt and does more than create speculation or suspicion. *State v. Uthe*, 542 N.W.2d 810, 815 (Iowa 1996).

Thomas's convictions are based upon the cocaine found in the key holders attached to the kitchen window. We find the evidence this cocaine was readily accessible by Thomas in a common area, the evidence of the $1860 money transfer in Thomas's name, Thomas's apparent lack of a source of income, Thomas's presence in the residence when it was searched, his recent arrival from California, and his prior knowledge of rock cocaine is substantial evidence that (1) Thomas knew cocaine was in the key holders, (2) Thomas knew the cocaine in the key holders was in the form of rock cocaine, and (3) Thomas had constructive possession of the cocaine in the key holders pursuant to the definition of constructive possession in *State v. Simpson*, 528 N.W.2d 627, 631-32 (Iowa 1995). We also find the above-stated evidence in addition to the evidence that the amount of cocaine in the key holders exceeded any amount

which would be possessed for personal use and the evidence that the form of the cocaine demonstrates that it was prepared in a form to accommodate delivery is substantial evidence of the intent to deliver the cocaine in the key holders. We conclude there was substantial evidence to support Thomas's convictions.

II. ***Prior Bad Acts.*** Thomas contends the district court erred in considering evidence of his prior drug conviction for the purpose proof of knowledge, intent, absence of mistake or accident, common scheme, ownership or plan pursuant to Iowa Rule of Evidence 404(b). The district court's rulings on admissibility will not be disturbed on appeal unless an abuse of discretion is found. *State v. Spargo*, 364 N.W.2d 203, 209 (Iowa 1985). In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976) (quoting *Weeks v. Burnor*, 326 A.2d 138, 140 (Vt. 1974)).

The admission of prior bad acts evidence is permissible to show elements, such as intent or knowledge, in drug prosecutions. *State v. Wade*, 467 N.W.2d 283, 284 (Iowa 1991). The district court did exactly what is permissible under *Wade*. The district court made the following findings regarding the use of Thomas's prior drug conviction:

> The Court has not considered the defendant's prior conviction of possession of rock cocaine to show his character or that he acted in this case in conformity with his prior act of possession of cocaine. The Court has considered the prior conviction of possession of rock cocaine only for the limited purpose of how it relates to knowledge, intent,

> absence of mistake or accident, common scheme, ownership or plan in this case. The Court understands that the defendant is not being tried in this case for the prior offense that he was convicted of in California. Iowa Rule of Evidence 404(b). *State v. Wade*, 467 N.W.2d 283 (Iowa 1991).

We assume the district court followed it's own limiting order. *See Jasper v. State*, 477 N.W.2d 852, 857 (Iowa 1991); *State v. Knupp*, 310 N.W.2d 179, 184 (Iowa 1981). We find no abuse of discretion in the admission of the prior drug conviction.

AFFIRMED.