

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 7th day of December, 2017.

Derrick Alexis Williams, Appellant,

against Record No. 170101
Court of Appeals No. 0080-16-2

Commonwealth of Virginia, Appellee.

Upon an appeal from a judgment rendered by the Court of Appeals of Virginia.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is reversible error in the judgment of the Court of Appeals.

I.

On September 16, 2014, a grand jury indicted Derrick Alexis Williams (“Williams”) for possessing with the intent to distribute cocaine in violation of Code § 18.2-248, and conspiracy to possess with the intent to distribute cocaine in violation of Code § 18.2-256, in connection with an incident that occurred on May 3, 2014 in Prince George County. On April 9, 2015, the Circuit Court of Prince George County conducted a bench trial on these charges, as well as related charges against two codefendants, Dejuan Roy (“Roy”) and Brando Clifton Carter (“Carter”).

At trial, Officer Richardson testified that, on May 3, 2014, at 1:20 a.m., he stopped a vehicle that was “weaving in and out of its lane.” Roy was driving, Carter was in the front passenger seat, and Williams was in the rear seat behind Carter. Roy, who was visibly intoxicated, told Officer Richardson that his girlfriend had leased the vehicle and that neither his name, nor that of Carter or Williams, was on the lease. Officer Richardson placed Roy under arrest for driving under the influence and, because the lessee of the vehicle was not present, asked Carter and Williams to step out of the vehicle so he could conduct an inventory search before having the vehicle towed.

After obtaining consent, Officer Richardson searched Carter's and Williams's persons. Upon searching Williams, he discovered "two large stacks of cash, U.S. currency, divided by denomination, in each of his left and right front pockets," totaling \$3,792. Officer Richardson asked Williams where he got the money, and Williams responded that he found it in the vehicle.

During the inventory search of the vehicle, Officer Richardson searched the glove compartment, which was a "standard glove compartment" with an opaque door that must be released in order to look inside. The glove compartment contained a semi-automatic handgun and a bag containing four individual smaller baggies, each of which contained cocaine.

Officer Richardson detained Carter and Williams, and after reading them their *Miranda* rights, asked them about the items he found in the glove compartment. Carter was arrested for possession of the firearm and the cocaine. No responses to Officer Richardson's questions or any other statements made by Carter were offered or admitted into evidence. Williams was not arrested, but after seizing the \$3,792, Officer Richardson "asked Williams about the money again." Williams asked Officer Richardson, "What if I told you it was mine?" Officer Richardson replied "he would have to show evidence of where he got the money." Officer Richardson then asked Williams if he had a job and Williams said no. On cross-examination, Officer Richardson testified that the second thing Williams said was that his girlfriend had given him the money.

At that point, Officer Richardson had not called for a tow but testified "I knew I would be [making that call], I just didn't know when." Ultimately, the vehicle was not towed because it was released to the lessee who had arrived on the scene. Officer Richardson said he allowed the lessee to drive the car away because "[i]n my eyes, they did nothing wrong."

Expert testimony from Special Agent Jeff Perry of the Virginia State Police established that the quantity and packaging of the cocaine was inconsistent with personal use. Special Agent Perry, however, opined that an individual in the vehicle holding a significant amount of money with the cocaine and the firearm in the glove compartment "would give rise to probable cause" but that he would have to investigate further.

The circuit court overruled Williams' motion to strike, stating that the totality of the circumstantial evidence "is sufficient for the Court to find that [each defendant] had dominion and control and knowledge of the drugs."

Neither Carter nor Roy put on evidence. Joslin Foster, Williams's girlfriend, testified that she had recently settled a personal injury claim and that she gave Williams \$4,000 in cash two days before the incident to take care of her children and make car payments on her behalf while she was out of town for several weeks. Williams renewed his motion to strike, which the circuit court denied.

The circuit court found all three men guilty of possession with intent to distribute cocaine and conspiracy to commit that same offense. In finding the men guilty, the circuit court explained,

When I look at the totality of it and the circumstances, I do find that they – that each of them knew the drugs were in the car. And the conspiracy in my mind, as I said, they're each playing an element. And one is the driver, one holding the cash, one in control of the drugs and the gun.

Williams appealed to the Court of Appeals and assigned error to the trial court's judgment finding him guilty of possession with the intent to distribute and conspiracy to commit possession with the intent to distribute. The Court of Appeals granted Williams' appeal.

Upon considering the conspiracy conviction on its merits, the Court of Appeals reversed Williams' conviction on that charge in an unpublished opinion. *Williams v. Commonwealth*, Record No. 0080-16-2, 2016 Va. App. LEXIS 349 (December 20, 2016). In reversing the conviction, the Court of Appeals held:

[T]here is no evidence of a conversation between appellant and the other occupants in the vehicle nor are there any statements made by any occupants from which to infer an agreement [T]he fact that two other men were in the car with appellant is insufficient to find beyond a reasonable doubt that any of the occupants of the vehicle were acting together to attain the ultimate goal of distributing the cocaine in the closed glove compartment. There was no scent, residue, or evidence of the cocaine on any of the occupants of the vehicle. There is no evidence of the order in which each person entered the vehicle or how long each was in the vehicle. Further, there were no furtive movements by the occupants or other overt actions that tended to prove they were working together to accomplish anything other than driving down the road at an early hour in the morning.

Id. at *13-14 (internal quotation and citation omitted). The Court of Appeals affirmed Williams' conviction for possession of cocaine with the intent to distribute, holding the evidence was

sufficient to allow the fact finder to conclude that Williams possessed the cocaine in the glove compartment. *Id.* at *10-11.

This Court granted Williams an appeal regarding whether the Court of Appeals erred in affirming Williams' conviction for possession of cocaine with the intent to distribute.

II.

Williams' remaining conviction rests on whether he constructively possessed the cocaine found in the glove compartment. *See* Code § 18.2-248. In finding Williams guilty, the circuit court found that each of the defendants knew about the drugs, and that, as occupants of the car, each of them played an "element": Roy was the driver, Williams held the money, and Carter controlled the cocaine and firearm. In so doing, the court found that only Carter exercised dominion and control over the cocaine and firearm. To find that Williams possessed the cocaine, the court relied on its finding that a conspiracy existed between Roy, Carter, and Williams and that they acted in concert to justify the inference that they each jointly possessed the drugs.

The Court of Appeals, however, held that the evidence was insufficient to establish conspiracy, stating that there was no evidence that "tended to prove they were working together to accomplish anything other than driving down the road at an early hour in the morning." Thus, absent the conspiracy, the circuit court's factual finding that only Carter exercised dominion and control over the cocaine foreclosed affirming the circuit court's holding that Williams possessed the cocaine with the intent to distribute. The circuit court's finding that Williams knew of the presence and character of the cocaine, without a finding that it was also subject to his dominion and control, is insufficient to support a conviction based upon constructive possession. *See, e.g., Eckhart v. Commonwealth*, 222 Va. 447, 450, 281 S.E.2d 853, 855 (1981) (explaining that "[c]onstructive possession [of a controlled substance] may be shown by establishing that the [substance in question] was known to and subject to the dominion and control of the accused," and that "[k]nowledge of the presence and character of the controlled substance may be shown by evidence of the acts, statements or conduct of the accused," but that "[m]ere proximity [of the accused] to the controlled substance, however, is insufficient to establish possession"); *Drew v. Commonwealth*, 230 Va. 471, 473, 338 S.E.2d 844, 845 (1986) (same). Accordingly, the Court of Appeals erred in affirming Williams' conviction.

III.

For the aforementioned reasons, we reverse the judgment of the Court of Appeals affirming Williams' conviction of possessing cocaine with the intent to distribute in violation of Code § 18.2-248, vacate Williams' conviction on that charge, and dismiss the indictment against him.

This order shall be certified to the Court of Appeals of Virginia and the Circuit Court of Prince George County.

A Copy,

Teste:

Debra L. Hamington

Clerk