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IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ALLEN MICHAEL WILEY, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D18-878

Opinion filed June 3, 2020.

Appeal from the Circuit Court for Lee County; Bruce E. Kyle, Judge.

Howard L. Dimmig, II, Public Defender, and Richard J. Sanders, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Johnny T. Salgado, Assistant Attorney General, Tampa, for Appellee.

NORTHCUTT, Judge.

Allen Michael Wiley appeals six convictions for possessing a variety of illegal items that were found when police searched his home. We agree with his argument that the State failed to prove that he constructively possessed items police seized from a locked safe in a jointly occupied master bedroom. Accordingly, we reverse the convictions concerning the contents of the safe.

While executing a warrant to search the home that Wiley rented with his girlfriend, Tara Hewitt, police discovered several kinds of contraband. They spied a small bag containing methylenedioxymethamphetamine, commonly known as MDMA, in plain view on the kitchen counter. In the master bedroom they found a locked safe containing four mason jars that variously held heroin, marijuana, cocaine, small plastic bags, and cutting materials. Wiley's thumbprint was on the inside of the lid of the jar containing marijuana, but there were no other items inside the safe that might connect the contents to any particular person. Also in the master bedroom, law enforcement discovered Wiley's wallet and several prescription pill bottles bearing Hewitt's name. Based on the results of the search, the State charged Wiley with one count each of possession of heroin, possession of marijuana, possession of cocaine, possession of MDMA, possession of drug paraphernalia, and knowing possession of a premises used to sell a controlled substance.

Because Wiley was not found in actual possession of the drugs in the safe, the State was required to prove that he had constructive possession of them, meaning that Wiley (1) "had knowledge that the contraband was within his presence" and (2) "had the ability to exercise dominion and control over the contraband." Santiago v. State, 991 So. 2d 439, 441 (Fla. 2d DCA 2008). If "the premises where the officers found the contraband were in joint, rather than exclusive, possession, one cannot infer either the 'knowledge' or 'ability to maintain dominion and control' element from mere ownership of the residence or proximity to the contraband. The State must establish both elements by independent proof." Evans v. State, 32 So. 3d 188, 190 (Fla. 1st DCA 2010).

Here, Wiley and Hewitt were in joint possession of the home, including the bedroom where the safe was located. Both Wiley and Hewitt were listed on the lease as tenants, both were present at the time of the search, and both had property in that bedroom, i.e., Wiley's wallet and the prescription bottles bearing Hewitt's name. Those facts were sufficient to demonstrate joint possession. See Mitchell v. State, 958 So. 2d 496, 500 (Fla. 4th DCA 2007) (finding joint possession of a home when both the defendant and his girlfriend were present at the time of the search and the girlfriend was listed on the lease as the lessee, giving her the ability to enter the premises at will); see also Diaz v. State, 884 So. 2d 387, 389 (Fla. 2d DCA 2004) (finding joint possession of the premises when the location where the contraband was found was "accessible" to three different people); Edmond v. State, 963 So. 2d 344, 346 (Fla. 4th DCA 2007) (finding that the premises was jointly possessed when "a bill addressed to [the defendant] and identification belonging to [the defendant] were found in a bedroom, a juvenile female was found in [another] bedroom, and there was evidence that another man claimed the house was his).

Because the dwelling was jointly possessed, the State was required to demonstrate Wiley's constructive possession of the contents of the safe by independent proof. See Evans, 32 So. 3d at 190. "Generally, independent proof can be established by the admission into evidence of a pretrial statement made by an accused, by witness testimony, or by scientific evidence." Santiago, 991 So. 2d at 442. The State asserts that it submitted independent proof in the form of Wiley's fingerprint on the lid of one of the mason jars found in the safe, specifically the one containing the marijuana.

However, a fingerprint on an item containing contraband does not in itself prove the defendant's knowledge of the container's contents, because the fingerprint just as likely could have predated the introduction of the contraband into the container. See Chavez v. State, 702 So. 2d 1307, 1308 (Fla. 2d DCA 1997) (holding that defendant's fingerprints on foil that was wrapped around baggies containing methamphetamine were insufficient to prove defendant's knowledge of the methamphetamine's presence when there was no evidence that the fingerprints were placed on the foil after the drugs were present); Tanksley v. State, 332 So. 2d 76, 77 (Fla. 2d DCA 1976) (holding that defendant's fingerprint on a heroin-containing envelope that was on the ground about fifteen feet away from the defendant was insufficient to prove the defendant's knowledge of the heroin's presence); Doles v. State, 990 So. 2d 1213, 1214 (Fla. 1st DCA 2008) (holding that the evidence was insufficient to establish constructive possession when "[t]he only evidence directly connecting the appellant to the cocaine and marijuana, which were found in an open shoe box lying in the unenclosed yard of a residence, was his fingerprints on the outside of the box" and "[t]here was no evidence establishing when he was in contact with the box or otherwise indicating that he had knowledge of the presence of the drugs inside and the ability to exercise and maintain control over them"); Arant v. State, 256 So. 2d 515, 516–17 (Fla. 1st DCA 1972) ("The fingerprint proves quite conclusively that appellant touched the can [containing a marijuana plant]. It tells us nothing about when. It could have been before the plant was in the can or it could have been afterwards. Obviously the trier of fact thought it probable that the print was made after the plant's presence in the can was manifest. But guilt cannot rest on mere probabilities. It is no

less probable that the print was made before the plant was put in the can or perhaps while it contained a seed not yet visible. The State's hypothesis that the print proves possession, even if we held it consistent with guilt, is no less consistent with innocence.").

The State relies on two cases in support of its argument that the evidence was sufficient to establish Wiley's constructive possession of the items in the safe. First, in Knight v. State, 172 So. 3d 990, 993 (Fla. 1st DCA 2015), multiple types of narcotics and various items commonly used in drug distribution were found "in close proximity to, or in the same containers with, personal items of Appellant's," specifically:

> The shoe box, found in the closet of the bedroom Appellant frequently slept in, which contained the pills and baggies with cocaine and crack cocaine in them also contained ATM receipts from Appellant's bank account. In the same closet was the trash bag with heat-sealed plastic bags of the type used in drug sales which also contained Appellant's airplane boarding pass bearing dates that appeared to coincide with the date of a car rental agreement found in the entertainment center in the bedroom. And importantly, Appellant's fingerprint was found on one of the baggies containing cocaine that investigators found in the shoe box.

Id. However, Knight is distinguishable from the present case because there was no evidence linking anyone else to Knight's bedroom and his possessions were in close proximity to the contraband, and even in the same container. In Wiley's case, on the other hand, the State did not present any evidence linking Wiley to the safe other than his fingerprint on the mason jar, and Hewitt's prescription bottles placed her in the bedroom as well. Had the State shown that personal items belonging to Wiley were also in the safe, we might agree with its argument, but it did not present any such evidence.

The State's second case does not mandate an affirmance either. In State v. Holland, 975 So. 2d 595, 597 (Fla. 2d DCA 2008), law enforcement obtained a warrant to search Holland's home after Holland's daughter and son had engaged in two controlled drug sales in the home. The subsequent search revealed the following:

> The home consisted of three bedrooms: a master bedroom, a room with a crib, and a room with a bunk bed, all of which appeared occupied. During the search of the master bedroom belonging to Holland, officers found, in plain view, 3.3 grams of marijuana in a plastic bag located on Holland's bed, 41 Hydrocodone pills in a separate plastic bag, 3 Hydrocodone pills located in a plastic cup on Holland's headboard, and, in the same cup, a Cigna Health Insurance card bearing Holland's name. Also located in the bedroom was mail addressed to Holland. Present during the search were Holland's 22-year-old daughter, with her baby, both of whom resided with Holland. Holland's son occasionally resided with Holland but was not present during the search.

Id. Holland moved to dismiss the resulting information, arguing that the home was jointly occupied and that her constructive possession of the narcotics therefore could not be inferred. Id. The trial court granted the motion. Id.

On appeal we reversed, holding that there was a dispute over the material fact of whether Holland had exclusive possession of the master bedroom or whether Holland's daughter shared the room with her. Id. at 598. We also noted that at the motion-to-dismiss stage all inferences must be drawn in favor of the State, and it could be inferred that Holland, as the owner of the home, resided alone in the master bedroom. Id. On these bases alone, Holland is distinguishable from the present case.

However, the State points to additional comments that we made as dicta in which we opined that a jury could infer Holland's knowledge of the narcotics from the fact that they were in plain view and in close proximity to Holland's health insurance card. Id. But the fact that the drugs were in plain view is a crucial difference from

Wiley's case because a defendant's knowledge can be inferred when the items are in plain view, Sundin v. State, 27 So. 3d 675, 676-77 (Fla. 2d DCA 2009), and the same cannot be said when the items are hidden, Mitchell v. State, 958 So. 2d 496, 500 (Fla. 4th DCA 2007), as they were in the safe in Wiley's home. Additionally, as previously discussed, the State did not present any evidence that any of Wiley's possessions were in close proximity to the contraband, as the State did in Holland with Holland's insurance card. We therefore find Holland distinguishable.

In sum, we hold that the home and the master bedroom were jointly possessed and that the State did not present the necessary independent proof from which Wiley's knowledge and ability to control the items hidden in the safe could be inferred. We therefore reverse Wiley's convictions on count one (possession of heroin), count two (possession of marijuana), and count four (possession of cocaine).

Wiley also asks that we reverse his conviction on count five for possession of paraphernalia, presumably on the basis that the paraphernalia count was connected to the bags and cutting materials that were also found in the safe. While we would agree that the paraphernalia charge cannot depend on Wiley's possession of the items in the safe, the paraphernalia charge was separately supported by the fact that the MDMA found in plain view in the kitchen, possession of which Wiley does not contest, was contained in a plastic bag, which qualifies as paraphernalia. See § 893.145(9)–(10), Fla. Stat. (2016). Accordingly, we affirm that conviction, along with the unchallenged convictions on count three (possession of MDMA) and count six (knowing possession of a premises used to sell a controlled substance). We therefore reverse

Wiley's convictions and sentences on count one (possession of heroin), count two (possession of marijuana), and count four (possession of cocaine).

Affirmed in part, reversed in part, and remanded.

LaROSE and SALARIO, JJ., Concur.