Filed 5/15/18 In re William M. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re WILLIAM M., a Person Coming Under the Juvenile Court Law.	B281552 (Los Angeles County Super. Ct. No. NJ28654)
THE PEOPLE, Plaintiff and Respondent, v. WILLIAM M., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Irma J. Brown, Judge. Reversed.

Laini Millar Melnick, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant

Attorney General, Chung L. Mar and Ryan M. Smith, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

The juvenile court sustained a Welfare and Institutions Code section 602 petition that alleged minor William M. (minor) possessed for sale a controlled substance in violation of Health and Safety Code section 11375, subdivision (b)(1).[1] The court declared minor a ward of the court, ordered him placed in the camp community placement program for seven to nine months, and set the maximum period of confinement at four years and two months.[2] Minor appeals, contending there was insufficient evidence to sustain the petition. Minor also contends the trial court erred in admitting case-specific hearsay with respect to the forensic analyst's identification of the controlled substance. Finally, minor requests that we independently review the sealed transcript of the in camera hearing on his *Pitchess*[3] motion to ensure that all discoverable materials were produced.

Because insufficient evidence supports the petition, we reverse.

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1 Another minor, Paul M., also was a subject of the adjudication hearing. Paul M. is not a party to this appeal.

2 In addition to the petition at issue in this appeal, minor's placement and confinement concerned three additional sustained petitions. Minor received three years for his possession for sale of a controlled substance adjudication.

3 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

BACKGROUND

About 2:26 a.m. on July 7, 2016, Los Angeles County Sheriff's Department Deputy Mario Gomez and his partner, Deputy Horton, conducted a traffic stop for a Vehicle Code violation.

There were four people in the vehicle—Emilio Delgado was in the driver's seat, Gabriella Martinez was in the front passenger seat, and minor and Paul M. were in the backseat. When the deputies contacted the vehicle's occupants, Deputy Gomez smelled the odor of marijuana emitting from the vehicle. The occupants were detained, pending a marijuana investigation, and placed in the back of the deputies' patrol car.

Deputy Gomez searched the vehicle and recovered a backpack from the center of the backseat. The deputy did not know whose backpack it was. He opened the backpack and found an orange pill bottle of the type commonly used by pharmacies for prescription medications. Deputy Gomez opened the pill bottle and found 36 white pills with "Xanax" etched on them. The name on the pill bottle had been scratched off or altered in some way. Deputy Gomez believed an individual in minor's circumstances possessed such pills for sale because the amount was "larger than what's commonly possessed for personal use," the individual did not display symptoms of being under the influence of Xanax, and there was no prescription for the Xanax.

Deputy Horton searched Paul M. and removed a dark colored vial and a silver card holder from his pocket. The vial contained 44 loose pills and five pills in a plastic bag. The pills were marked "Xanax." The way the pills were kept in the vial was one of the ways Xanax pills are kept for sale on the street. The number of pills was more than would commonly be possessed

for personal use. Inside the card holder were several baggies that contained an off-white powdery substance that resembled cocaine.

Deputy Horton placed minor and Paul M. under arrest. Delgado and Martinez were released.

Los Angeles County Sheriff's Department forensic analyst Mary Keens tested one of the 49 pills recovered from Paul M. and determined it was Xanax. Keens did not test the 36 pills recovered from minor, explaining that they appeared to be the same as the 49 pills recovered from Paul M., that they were with the 49 pills as part of the same case, and that she had already tested the 49 pills. Instead, she accessed Drug.com and identified the 36 pills as Xanax by their markings—the number "2" on one side and "Xanax" on the other. The white powder from the silver card case tested positive for cocaine.

In adjudicating the charge, the juvenile court said, "[T]he only question is whether or not possession of that backpack can be attributed to minor . . . ." The court noted, "We don't have any testimony that there was any identifying material recovered from within the backpack, simply where it was located within the vehicle and the People's argument that constructive possession in addition to the other factors, one, that there was no evidence of a prescription taken into evidence. . . . [¶] So we have two separate containers of Xanax packaged in other than their original containers which would typically be prescribed by a physician and filled by a pharmacy. We have other indicia of possession for sale and I think that they can be and have been charged by the People to be in possession of both [Paul M.] and [minor], and therefor [*sic*] I find that there's no—there's insufficient evidence or no evidence to controvert that and that

both were in possession of the contents of the backpack and the Xanax that was found therein with the five packages in a baggie and the other loose pills." The court then sustained the petition.

DISCUSSION

Minor argues we must reverse the juvenile court's order sustaining the petition that alleged he possessed for sale a controlled substance because there was insufficient evidence that he possessed the backpack in which the Xanax was found. We agree.

I. Standard of Review

We review challenges to the sufficiency of the evidence in juvenile proceedings with the same standard used for criminal convictions. (*In re Sylvester C.* (2006) 137 Cal.App.4th 601, 605.) That is, "'we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [61 L. Ed. 2d 560, 99 S. Ct. 2781].) In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' (*People v. Kraft* (2000) 23 Cal.4th 978, 1053 [99 Cal. Rptr. 2d 1, 5 P.3d 68].)" (*People v. Edwards* (2013) 57 Cal.4th 658, 715.)

"Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom." (*People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1064.) "We 'must accept logical inferences that the [trier of fact] might have drawn from the circumstantial evidence. [Citation.]' [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) "'A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence."'" (*People v. Cluff* (2001) 87 Cal.App.4th 991, 1002.)

II. Analysis

To prove a violation of Health and Safety Code section 11375, subdivision (b)(1), "'the prosecution must prove beyond a reasonable doubt that (1) the defendant exercised dominion and control over the controlled substance, (2) the defendant was aware that he or she was in possession of a controlled substance, (3) the defendant was aware of the nature of a controlled substance, (4) the controlled substance was in an amount sufficient to be used for sale or consumption as a controlled substance, and (5) the defendant possessed a controlled substance with the specific intent to sell it.' [Citations.]" (*People v. Mooring* (2017) 15 Cal.App.5th 928, 943.) "Possession may be actual or constructive. Actual possession means the [contraband] is in the defendant's immediate possession or control. A defendant has actual possession when he himself has the [contraband]. Constructive possession means the [contraband] is not in the defendant's physical possession, but the defendant knowingly

exercises control or the right to control the object." (*In re Daniel G.* (2004) 120 Cal.App.4th 824, 831.) Mere proximity to a prohibited item is not, standing alone, sufficient evidence of possession. (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1417 (*Sifuentes*).)

The only evidence tying minor to the backpack and the Xanax pills inside was that the backpack rested on the seat between him and Paul M. No evidence was adduced that identified the backpack's owner or otherwise suggested minor exercised any dominion or control over the backpack. Minor's proximity to the backpack alone is not sufficient evidence of his possession of it. (*Sifuentes, supra,* 195 Cal.App.4th at p. 1417 [no possession of gun found under mattress in motel room in which defendant arrested].) Because there was no evidence that minor possessed the backpack, there was insufficient evidence to sustain the petition. (*People v. Martin* (1973) 9 Cal.3d 687, 696 (*Martin*) ["mere access or proximity" to stolen goods found in co-defendant's car insufficient to show possession of such goods]; *People v. Myles* (1975) 50 Cal.App.3d 423, 429 [evidence insufficient to establish possession of stolen television sets found in trunk of car in which defendant was a passenger]; *People v. Zyduck* (1969) 270 Cal.App.2d 334, 335-336 [rejecting argument "that defendant's mere presence in a car owned and driven by another, in which the stolen property is ready visible, is enough to show possession"].)

The Attorney General argues there was sufficient circumstantial evidence minor constructively possessed the Xanax pills in the backpack "[b]ecause the backpack was in a location in which [minor] had dominion and control over it, and the fact that he was a minor, out at 2:26 a.m., in an area of

known narcotics activity, and was pulled over in a vehicle that smelled of marijuana, it was reasonable for the court to find he constructively possessed the Xanax pills in the backpack." Apart from the location of the backpack, the evidence cited by the Attorney General may show *why* the Xanax in the backpack was possessed (i.e., for sale), but it says nothing about *who* possessed the backpack and Xanax inside.[4] (*Cf. Martin*, *supra*, 9 Cal.3d at p. 696 ["[A]lthough [defendant]'s knowledge that the machines in the rear of [co-defendant]'s car were stolen might be inferred, there is a total lack of proof as to the essential element of possession of those machines"].) As for the backpack's location, as discussed above, proximity alone is insufficient evidence of possession. (*Sifuentes, supra,* 195 Cal.App.4th at p. 1417.)

Accordingly, we reverse the order sustaining the Welfare and Institutions Code section 602 petition and declaring minor a ward of the court. Because we reverse that order, we need not reach minor's remaining issues.

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[4] There was no evidence adduced that the area where the vehicle was pulled over was "an area of known narcotics activity."

DISPOSITION

The order is reversed.

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KIN, J.*

We concur:

BAKER, Acting P. J.

MOOR, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.