



Indiana Public Defender Council

GUIDE TO CONSTRUCTIVE POSSESSION IN INDIANA

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Guide to Constructive Possession In Indiana

I. GENERALLY – ACTUAL, CONSTRUCTIVE, & JOINT POSSESSION

A conviction for possession of contraband may rest upon either actual or constructive possession. Henderson v. State, 715 N.E.2d 833, 835 (Ind. 1999). A person actually possesses contraband when she has direct physical control over it. Id. However, a conviction for a possessory offense does not depend on catching a defendant red-handed. Gray v. State, 957 N.E.2d 171 (Ind. 2011). Therefore, when the State cannot show actual possession, a conviction for possessing contraband may rest instead upon proof on constructive possession. Goodner v. State, 685 N.E.2d 1058 (Ind. 1997).

Possession does not need to be exclusive; so long as the evidence shows an actual or constructive possession, it is immaterial that the defendant may have possessed the contraband jointly with another person. Martin v. State, 372 N.E.2d 1194, 1198 (Ind. Ct. App. 1978). Thus, one party may jointly possess contraband, assuming they constructively possess it jointly with another, lending the idea that joint possession and constructive possession are deeply intertwined. See Calvert v. State, 930 N.E.2d 633 (Ind. Ct. App. 2015) (there is no authority that suggests that a firearm cannot be jointly possessed by two or more people).

II. CONSTRUCTIVE POSSESSION

In order to prove that a defendant constructively possessed the relevant contraband, the State must show that the defendant: (1) has the **capability** to maintain dominion and control over the item; and (2) the **intent** to maintain dominion and control over it. Wilkerson v. State, 918 N.E.2d 458, 462 (Ind. Ct. App. 2009) (quoting Gee v. State, 810 N.E.2d 338, 340 (Ind. 2004)).

“Control” in this sense concerns the defendant’s relation to the place where the contraband is found: i.e., whether the defendant has the power, by way of legal authority or in a practical sense, to control the place where, or the item in which, the substance is found. Allen v. State, 798 N.E.2d 490, 501 (Ind. Ct. App. 2003).

A. Capability

The capability prong may be met simply by proving a possessory interest in the premises in which the contraband is found. Monroe v. State, 899 N.E.2d 688, 692 (Ind. Ct. App. 2009) (citing Gee v. State, 810 N.E.2d 338, 340 (Ind. 2004)). See also Goliday v. State, 708 N.E.2d 4, 6 (Ind. 1999). This inference is permitted regardless of whether the possession of the premises is exclusive. Id. Proof that the defendant had the contraband on his person is not required. Evidence only needs to establish the defendant’s ability to control or reduce the contraband to his personal possession nor to otherwise direct its disposition or use. Martin v. State, 372 N.E.2d 1194, 1197 (Ind. Ct. App. 1978).

Moore v. State, 613 N.E.2d 849 (Ind. Ct. App. 1993) (state failed to make any connection between defendant and the premises where the contraband was seized, other than defendant’s mere presence in the apartment at the time of the raid and that the defendant had knowledge of the contraband, thus the state failed to prove that defendant had the capability to maintain control over the contraband since he did not have any possessory interest in the premises where the contraband was found).

A possessory interest in the premises or area is generally held sufficient to show the ability to exercise control and dominion over contraband found therein. Corrao v. State, 290 N.E.2d 484 (Ind. Ct. App. 1972). See also Allen v. State, 798 N.E.2d 490 (Ind. Ct. App. 2003). A defendant’s possessory interest in the premises does not require actual ownership. Allen v. State, 798 N.E.2d 490, 501 (Ind. Ct. App. 2003).

For example, a house or apartment used as a residence is controlled by the person who lives in it, and that person may be found in control of any contraband discovered therein, whether or not the person is the owner, tenant, or merely an invitee. Allen v. State, 798 N.E.2d 490, 501 (Ind. Ct. App. 2003). See also Ludlow v. State, 302 N.E.2d 838 (Ind. Ct. App. 1973).

The practical ability to control the area where the contraband is found may be sufficient. Corrao v. State, 290 N.E.2d 484 (Ind. Ct. App. 1972) (driver/owner of car was found in control of marijuana located in the trunk on the theory that he had possession of the car keys and thus the ability to enter the trunk). See also Moore v. State, 637 N.E.2d 816 (Ind. Ct. App. 1994).

Goliday v. State, 708 N.E.2d 4 (Ind. 1999) (although defendant was borrowing car, he was the only person in the vehicle when police stopped him and thus was in exclusive possession of the vehicle).

B. Intent

As with the capability prong, the intent prong may likewise be met by proof of a possessory interest in the premises in which the contraband is found, even where possession of the premises is not exclusive. Gee v. State, 810 N.E.2d 338 (Ind. 2004) (citing Davenport v. State, 464 N.E.2d 1302, 1307 (Ind. 1984)). Thus, to prove the intent element, the State must demonstrate the defendant's knowledge of the presence of the contraband. Goliday v. State, 708 N.E.2d 4, 6 (Ind. 1999). This knowledge may be inferred from either the exclusive dominion and control over the premises containing the contraband or, if the control is non-exclusive, evidence of additional circumstances pointing to the defendant's knowledge of the presence of the contraband. Id.

1. Exclusive Control

In cases where the defendant has exclusive possession of the premises on which the contraband is found, an inference is permitted that he or she knew of the presence of contraband and was capable of controlling it. Person v. State, 661 N.E.2d 587, 590 (Ind. Ct. App. 1996). See also State v. Emry, 753 N.E.2d 19 (Ind. Ct. App. 2001) and Goliday v. State, 708 N.E.2d 4 (Ind. 1999).

In cases, however, where contraband is found hidden in a secret compartment or the like, exclusive control does not always provide sufficient evidence of intent. Whitney v. State, 726 N.E.2d 823 (Ind. Ct. App. 2000). Thus, additional evidence may be needed to support a conviction, although a defendant may be found in exclusive control. Id.

2. Non-Exclusive Control

Mere presence in the vicinity or association with one having possession of the contraband is not sufficient to sustain a conviction. Martin v. State, 372 N.E.2d 1194, 1197 (Ind. Ct. App. 1978). See also Ledcke v. State, 296 N.E.2d 412, 416 (Ind. 1973); Moore v. State, 613 N.E.2d 849 (Ind. Ct. App. 1993); Smith v. State, 787 N.E.2d 458 (Ind. Ct. App. 2003); and Cannon v. State, 335 N.E.2d 229, 231-32 (Ind. Ct. App. 1975).

Where the defendant's possession of the premises upon which contraband is found is not exclusive, the inference must be supported by additional circumstances point to the defendant's knowledge of the nature of the contraband and its presence. Monroe v. State, 899 N.E.2d 688, 692 (Ind. Ct. App. 2009) (citing Gee v. State, 810 N.E.2d 338, 341 (Ind. 2004)). The additional circumstances include: (1) incriminating statements made by the defendant; (2) attempted flight or furtive gestures; (3) location of substances like drugs in settings that suggest manufacturing; (4) proximity of the contraband to the defendant; (5) location of the contraband within the defendant's plain view; (6) mingling of the contraband with other items owned by the defendant; and (7) nature of the place in which the contraband is found. Johnson v. State, 59 N.E.3d 1071 (Ind. Ct. App. 2016). These

circumstances, however, are non-exhaustive. The ultimate question is whether the evidence shows that the defendant knew of the nature and presence of the contraband. Gray v. State, 957 N.E.2d 171, 174-75 (Ind. 2011). See also Carnes v. State, 480 N.E.2d 581, 586-87 (Ind. Ct. App. 1985). Finally, the presence of the defendant at the time of the discovery of the contraband can be a relevant factor. Pier v. State, 400 N.E.2d 209 (Ind. Ct. App. 1980).

a. Incriminating Statements Made by Defendant

Floyd v. State, 791 N.E.2d 206 (Ind. Ct. App. 2003) (Defendant made statement that another person was not involved and that the “stuff” did not belong to the other person).

b. Attempted Flight or Furtive Gestures

Hiding, resisting, or attempting to flee from the police supports an inference that the defendant was aware of the nature and presence of illegal contraband.

Floyd v. State, 791 N.E.2d 206 (Ind. Ct. App. 2003) (fact that defendant was hiding under bed when police were executing a search warrant supports the inference that he was aware of the illegal items contained in the mobile home, in addition to the illegal nature of those items).

Crabtree v. State, 479 N.E.2d 70, 75 (Ind. Ct. App. 1985) (where defendant tried to prevent the police officers from entering the bedroom by holding a sliding door shut and tried to escape through a window, defendant had engaged both in furtive conduct and attempted flight).

However, flight or furtive gestures that are beyond the defendant’s control cannot be used to infer a defendant’s knowledge of the presence and character of contraband.

Brent v. State, 957 N.E.2d 648 (Ind. Ct. App. 2011) (although driver attempted to flee and stopped his vehicle in a suspicious location, the defendant was a passenger in the vehicle and had no control over the driver’s actions).

c. Location of Substances in Manufacturing Settings

Evidence of a drug manufacturing setting, such as a meth lab, leads to the inference that the defendant was aware of the nature and presence of illegal contraband.

Floyd v. State, 791 N.E.2d 206 (Ind. Ct. App. 2003) (where multiple witnesses testified that the mobile home was being used as a methamphetamine lab, police found meth recipe in defendant’s wallet, and during search found many items commonly used in manufacturing meth scattered around the kitchen and living room in plain view, including starter fluid, pitcher of ether, pseudoephedrine, coffee filters, and a coffee grinder containing white residue).

Jones v. State, 807 N.E.2d 58 (Ind. Ct. App. 2004) (police searched residence and found digital scales, plastic baggies, ties, and over 43 grams of crack cocaine).

d. Proximity of Contraband to the Defendant

When contraband is in close proximity to the defendant, but with no additional factors pointing to the defendant's knowledge of the presence and nature of the contraband, the defendant may not have constructively possessed it. Grimm v. State, 797 N.E.2d 825 (Ind. Ct. App. 2003) (where defendant was found in close proximity to case containing methamphetamine and box containing precursors, such evidence alone does not prove that the defendant knew of the presence of methamphetamine, and thus, he could not have been in constructive possession of it).

Note, however, that the defendant's close proximity to contraband in plain view may support the inference that he constructively possessed the contraband. Matthews v. State, 792 N.E.2d 934 (Ind. Ct. App. 2003). However, the contraband must be actually found near the defendant, and constructive possession cannot be imputed to a defendant on a "now you see it, now you don't" theory. K.F. v. State, 961 N.E.2d 501 (Ind. Ct. App. 2012) (although there was evidence sufficient to support a burglary and theft of property, there was no evidence that defendant had possession of guns that were taken from the home).

Furthermore, while sitting on contraband may not be sufficient for actual possession, it is a factor favoring a conclusion of constructive possession. Deshazier v. State, 877 N.E.2d 200 (Ind. Ct. App. 2007). See also Collins v. State, 82 N.E.2d 214 (Ind. Ct. App. 2005).

Fact Comparison: Contraband in Vehicles with Multiple Passengers

Houston

Houston was driving a car when cocaine was found in the crevice between the passenger seat and the center console.

Houston denied any knowledge of the presence of cocaine and none of the other occupants were even questioned about the cocaine.

No additional circumstances pointed to Houston's knowledge of the presence & nature of items.

Conviction reversed on appeal.

Houston v. State, 997 N.E.2d 407 (Ind. Ct. App. 2013).

Johnson

Johnson was driving a car when he was stopped and officers observed Johnson stick his hand between the driver door and the seat.

Heroin was found directly below the driver's position.

Only other passenger was in the front passenger seat and could not access the heroin.

Conviction affirmed on appeal.

Johnson v. State, 59 N.E.3d 1071 (Ind. Ct. App. 2016).

e. Location of Contraband within Defendant's Plain View

In addition to being in plain view, the contraband's incriminating character must be immediately apparent. Lampkins v. State, 682 N.E.2d 1268 (Ind. 1997) (it does not take much to recognize the incriminating character of marijuana). Indiana relies on the plain view doctrine contained in Minnesota v. Dickerson, 508 U.S. 366 (1993). Lampkins v. State, 685 N.E.2d 698 (Ind. 1997) (closed Tylenol bottle was not in plain view because the incriminating nature of the contraband was not immediately apparent, although the Tylenol bottle contained cocaine).

Holmes v. State, 785 N.E.2d 658 (Ind. Ct. App. 2003) (although court found other factors supporting a finding of constructive possession, the court held that the defendant's close proximity to a vinyl bag containing marijuana, standing alone, did not support a finding of constructive possession). See also Godar v. State, 643 N.E.2d 12 (Ind. Ct. App. 1994).

Crabtree v. State, 479 N.E.2d 70 (Ind. Ct. App. 1985) (where defendant was in small room, lying on the bed preparing to inject drugs into herself, and police found a lighter, cooker, and hypodermic syringe all in plain view when they entered, this was sufficient to find that the defendant intended to exercise dominion and control over the contraband).

Griffin v. State, 945 N.E.2d 781 (Ind. Ct. App. 2011) (evidence sufficient where burnt marijuana blunt was found on center console, in plain view, between defendant passenger and the driver, and the odor of the marijuana was so strong that the defendant could not have been unaware of its presence). See also Adams v. State, 946 N.E.2d 630 (Ind. Ct. App. 2011).

Halsema v. State, 783 N.E.2d 1199 (Ind. Ct. App. 2003) (Court affirmed finding that defendant passenger constructively possessed marijuana and paraphernalia found on passenger floor and between driver's and passenger's seat, on passenger's side).

Finding contraband hidden from plain view on premises in which a defendant has a nonexclusive possessory interest when the defendant was not even present will not, without more, support a conviction on the theory of constructive possession. Gee v. State, 810 N.E.2d 338, 343 (Ind. 2004). See also Lee v. State, 956 N.E.2d 758 (Ind. Ct. App. 2011) (conviction reversed where drugs were found in common area (kitchen), hidden in drawers, inside opaque bags; although officers found Lee's identification in the same room, it was in a separate upper cabinet; Court found no additional factors to support an inference that Lee knew of the presence and nature of the drugs).

Whitney v. State, 726 N.E.2d 823 (Ind. Ct. App. 2000) (additional evidence of guilty knowledge established where narcotics were found in hidden compartment, but officer first noticed marijuana cigarette on floor of driver's compartment and smelled odor of marijuana, in combination with exclusive possession of vehicle). See also Austin v. State, 980 N.E.2d 429 (Ind. Ct. App. 2012).

Fact Comparison: Hidden Contraband

Gee

Gee and cousin leased a residence, but Gee used only rarely.

Drugs and paraphernalia found largely hidden from view in closed containers and bags in a basement laundry room.

No additional circumstances pointed to Gee's knowledge of the presence and nature of the items.

Conviction reversed on appeal.

Gee v. State, 810 N.E.2d 338 (Ind. 2004).

Gray

Gray had a possessory interest in her apartment.

Small, clear baggie with a gray, leafy substance inside was found under a coffee table in the living room while Gray was at home.

Court found that Gray would have immediately realized that the substance was marijuana upon seeing it.

Conviction affirmed on appeal.

Gray v. State, 957 N.E.2d 171 (Ind. 2011).

f. Mingling of Contraband with other Items Owned by Defendant

The location of defendant's personal items in close proximity to the contraband is highly relevant in determining whether the defendant knew of its presence and nature.

Jones v. State, 807 N.E.2d 58 (Ind. Ct. App. 2004) (officers found crack cocaine in a grocery bag in defendant's bedroom, along with bills addressed to the defendant and a receipt made out to defendant; thus, items were in close proximity to contraband).

g. Nature of the Place in which Contraband is Found

The nature of the place where contraband is found may be such that it would defy logic and human experience, and force upon the courts an unwarranted naiveté, to believe that adults with a possessory interest in the premises were unaware of the presence of the contraband. Carnes v. State, 480 N.E.2d 581 (Ind. Ct. App. 1985). Contraband that is found within the residence without any indicia of exclusivity as between joint occupants, fits within this rationale. Id (contraband was found in a place where the it was not held by one of the occupants to the exclusion of the other).

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Thurman v. State, 319 N.E.2d 151 (Ind. Ct. App. 1974) (court found it difficult to accept defendant's contention that he was unaware of the presence of 85 packets of drugs located beneath a pillow underneath defendant's head).

Wilkerson v. State, 918 N.E.2d 458 (Ind. Ct. App. 2009) (court affirmed finding that defendant constructively possessed cocaine found in shoe box in bedroom closet of house where he lived).

Carnes v. State, 480 N.E.2d 581 (Ind. Ct. App. 1985) (court noted that it found it factually unlikely that contraband found inside a kitchen refrigerator would go unnoticed). See also Monroe v. State, 899 N.E.2d 688 (Ind. Ct. App. 2009) (gun found in refrigerator). But see Gee v. State, 810 N.E.2d 338 (Ind. 2004) (unlike a refrigerator, nothing in human experience tells us that anyone in particular, as a matter of course, is in and out of laundry room cabinets).

Fact Analysis

Watt

Court affirmed conviction where a man and a woman, who shared a bedroom, were convicted of possession of drugs found in the partially open drawer of a dresser containing men's clothing and in a box atop that dresser in the bedroom.

Watt v. State, 412 N.E.2d 90 (Ind. Ct. App. 1980).

Mason

Court affirmed conviction of possession of heroin and marijuana where the drugs were the sole items found in a purse on the floor in the open doorway of a bedroom closet shared by both male and female occupants of the bedroom.

Mason v. State, 392 N.E.2d 806 (Ind. 1979).

Carnes

Court affirmed convictions for possession of marijuana found in a package under a tray which rested on a small bench or table in the bedroom shared by both Michael and Leah Carnes.

Carnes v. State, 480 N.E.2d 581 (Ind. Ct. App. 1985).

h. Presence of the Defendant

Where a defendant is absent from the location where the contraband is found for a period of time prior to the discovery of the contraband, the defendant may not be found to constructively possess the contraband, absent other circumstances. Pier v. State, 400 N.E.2d 209 (Ind. Ct. App. 1980) (court reversed conviction where defendant was absent for 48 hours prior to discovery of contraband and others were present both when the contraband was discovered and during the time defendant was absent). Thus, the accused's presence at the scene tends to establish that they had the capability of maintaining control and dominion over the contraband; conversely, the accused's absence from the scene combined with evidence that others had access to the scene

during the accused's absence tends to be insufficient to prove dominion and control over the contraband. Id.

Harper v. State, 968 N.E.2d 843 (Ind. Ct. App. 2012) (court affirmed conviction where contraband was discovered relatively soon after defendant had checked into his hotel room and not long after he left and came back with a friend, and defendant also attempted to flee and resist police during his initial arrest).

i. Other Circumstances

These circumstances, however, are non-exhaustive; ultimate question is whether the evidence shows that the defendant knew of the nature and presence of the contraband. Gray v. State, 957 N.E.2d 171, 174-75 (Ind. 2011). See also Carnes v. State, 480 N.E.2d 581, 586-87 (Ind. Ct. App. 1985).

Carrying a gun on one's person is not suspicious behavior related to drugs. Martin v. State, 372 N.E.2d 1194, 1199 (Ind. Ct. App. 1978). See also United States v. Bethea, 442 F.2d 790 (D.C. Cir. 1971) (presence of three guns in car in which defendant was passenger did not indicate joint venture to commit drug-related crime).

Evidence showing that a person has a prohibited drug in their system is considered circumstantial evidence tending to show he was in possession of drug prior to taking it. State v. Vorm, 570 N.E.2d 109 (Ind. Ct. App. 1991) (however, the mere presence of drugs in someone's body is not sufficient, standing alone, to find them guilty of constructive possession).

Possession of contraband found in a car cannot be imputed to the driver without some additional evidence that the driver knew of the presence and nature of the contraband. Godar v. State, 643 N.E.2d 12 (Ind. Ct. App. 1994).

Moore v. State, 637 N.E.2d 816 (Ind. Ct. App. 1994) (constructive possession may be imputed to an owner/passenger of a vehicle if additional circumstances support the inference).

Johnson v. State, 59 N.E.3d 1071 (Ind. Ct. App. 2016) (defendant driver of friend's mother's vehicle was convicted of constructive possession of heroin found in vehicle due to additional circumstances that defendant made furtive gestures, his close proximity to the heroin, and other contraband found on defendant's person).

III. CONSTRUCTIVE POSSESSION OF FIREARMS

The doctrine of constructive possession applies to handgun cases and may serve as a basis for a finding that defendant was carrying a handgun. Grim v. State, 797 N.E.2d 825 (Ind. Ct. App. 2003). See also Henderson v. State, 715 N.E.2d 833 (Ind. 1999); Hoffman v. State, 520 N.E.2d 436 (Ind. 1988); Woods v. State, 471 N.E.2d 691 (Ind. 1984); Taylor v. State, 482 N.E.2d 259 (Ind. 1985); and State v. Hill, 688 N.E.2d 1280 (Ind. Ct. App. 1987).

Thus, to convict a defendant of carrying a handgun in a vehicle, the State must present evidence that a handgun was found in a vehicle and that the defendant had control of either the weapon or of the vehicle with knowledge of the weapon's presence. Grim v. State, 797 N.E.2d 825 (Ind. Ct. App. 2003).

There is no requirement of an intent to convey or transport the firearm from one place to another. McAnalley v. State, 514 N.E.2d 831 (Ind. 1987).

A. Control and Knowledge

Mere presence in a vehicle with multiple riders and multiple weapons is not sufficient to find the driver and/or a passenger guilty of constructive possession. Henderson v. State, 715 N.E.2d 833 (Ind. 1999). However, a driver who has a gun at his feet in plain view may be convicted of carrying the gun. Klopfenstein v. State, 439 N.E.2d 1181 (Ind. Ct. App. 1982). Similarly, a driver who had access to and control of the car for several days may be deemed to carry the weapons in the car, even though the car had earlier been used by a friend. Woods v. State, 471 N.E.2d 691 (Ind. 1984).

Generally speaking, Indiana courts are more likely to find sufficient evidence where evidence suggests that a vehicle's passenger could see the handgun, was in the best position to access the gun, and no evidence clearly indicates the gun belonged to or was under the control of another occupant of the vehicle. Deshazier v. State, 877 N.E.2d 200 (Ind. Ct. App. 2007).

When a car has multiple passengers, each with a gun at their feet, and no one person has a license for any of them, a jury could find them all guilty of carrying. Hoffman v. State, 520 N.E.2d 436 (Ind. 1988). When a car has multiple passengers, a gun near a passenger, and no one person has a license for the firearm, the jury can infer possession by that passenger, especially in combination with other factors. Person v. State, 661 N.E.2d 587 (Ind. Ct. App. 1996).

A passenger in the front seat, without more, is not deemed to possess a gun located on the floor behind the driver or in the trunk. See Cole v. State, 588 N.E.2d 1316 (Ind. Ct. App. 1992) and Walker v. State, 631 N.E.2d 1 (Ind. Ct. App. 1994). Even if the gun is located under the passenger's seat, without more, is not sufficient to sustain a constructive possession conviction. D.C.C. v. State, 695 N.E.2d 1015 (Ind. Ct. App. 1998). Essentially, the close proximity of the defendant passenger to the firearm, without more, is not generally sufficient to impute constructive possession. E.D. v. State, 905 N.E.2d 505 (Ind. Ct. App. 2009).

Where the driver of a vehicle has a permit and legally owns firearms contained within the vehicle, the mere presence of a passenger, without a permit, sitting in close proximity of the

firearms in plain view is not enough, standing alone, to permit an inference that the passenger constructively possessed the firearm. Henderson v. State, 715 N.E.2d 833 (Ind. 1999).

B. Exclusive Possession

Even in a situation in which a defendant has exclusive possession of another person's vehicle, if that exclusive possession is not of a sufficient time for a defendant to be aware of a firearm contained in a vehicle, without other factors, the defendant cannot be convicted of constructive possession of the firearm. Jones v. State, 881 N.E.2d 1095 (Ind. Ct. App. 2008). See also Jones v. State, 924 N.E.2d 672 (Ind. Ct. App. 2010) (insufficient evidence of constructive possession of handgun found under the front portion of the driver's seat; defendant was mechanic test driving car and because defendant did not have exclusive possession of the customer's car for a long enough time, it was inappropriate to impute intent to possess gun based only on defendant's exclusive possession of the car).

IV. CONSTRUCTIVE POSSESSION IN VEHICLES

Possession of contraband found in a car cannot be imputed to the driver without some additional evidence that the driver knew of the presence and nature of the contraband. Godar v. State, 643 N.E.2d 12 (Ind. Ct. App. 1994).

Moore v. State, 637 N.E.2d 816 (Ind. Ct. App. 1994) (constructive possession may be imputed to an owner/passenger of a vehicle if additional circumstances support the inference).

Johnson v. State, 59 N.E.3d 1071 (Ind. Ct. App. 2016) (driver of friend's mother's vehicle constructively possessed heroin found in vehicle due to additional circumstances that driver made furtive gestures, his close proximity to the heroin, and other contraband found on his person).

Thus, to convict a defendant of constructive possession of contraband in a vehicle, the State must present evidence that contraband was found in a vehicle and that the defendant had control of either the contraband or of the vehicle with knowledge of the contraband's presence. Grim v. State, 797 N.E.2d 825 (Ind. Ct. App. 2003).

A. Capability

The practical ability to control the area where the contraband is found may be sufficient. Corrao v. State, 290 N.E.2d 484 (Ind. Ct. App. 1972) (driver/owner of car was found in control of marijuana located in the trunk on the theory that he had possession of the car keys and thus the ability to enter the trunk). See also Moore v. State, 637 N.E.2d 816 (Ind. Ct. App. 1994).

Goliday v. State, 708 N.E.2d 4 (Ind. 1999) (although defendant was borrowing car, he was the only person in the vehicle when police stopped him and thus was in exclusive possession of the vehicle).

B. Intent

1. Exclusive Control

In cases where contraband is found hidden in a secret compartment or the like, exclusive control does not always provide sufficient evidence of intent. Whitney v. State, 726 N.E.2d 823 (Ind. Ct. App. 2000). Thus, additional evidence may be needed to support a conviction, although a defendant may be found in exclusive control. Id.

Even in situations where a defendant has exclusive possession of another person's vehicle, if that exclusive possession is not of a sufficient time for a defendant to be aware of contraband contained in a vehicle, without other factors, the defendant cannot be convicted of constructive possession of the contraband. Jones v. State, 881 N.E.2d 1095 (Ind. Ct. App. 2008).

Jones v. State, 924 N.E.2d 672 (Ind. Ct. App. 2010) (insufficient evidence of constructive possession of handgun found under the front portion of the driver's seat; defendant was mechanic test driving car and because defendant did not have exclusive possession of

the customer's car for a long enough time, it was inappropriate to impute intent to possess gun based only on defendant's exclusive possession of the car).

2. Non-Exclusive Control

Mere presence in a vehicle with multiple riders and illegal contraband is not sufficient to find the driver and/or a passenger guilty of constructive possession. Henderson v. State, 715 N.E.2d 833 (Ind. 1999). However, a driver who has contraband at his feet in plain view may be convicted of possessing the contraband. Klopfenstein v. State, 439 N.E.2d 1181 (Ind. Ct. App. 1982). Similarly, a driver who had access to and control of the car for several days may be deemed to carry the contraband in the car, even though the car had earlier been used by a friend. Woods v. State, 471 N.E.2d 691 (Ind. 1984).

Where the driver of a vehicle has a permit and legally owns firearms contained within the vehicle, the mere presence of a passenger, without a permit, sitting in close proximity of the firearms in plain view is not enough, standing alone, to permit an inference that the passenger constructively possessed the firearm. Henderson v. State, 715 N.E.2d 833 (Ind. 1999).

Multiple Passengers in Automobile -- General Guidelines

When a car has multiple passengers, each with contraband at their feet, and no one person has a license for any of the firearms, if applicable, a jury could find them all guilty of constructive possession. Hoffman v. State, 520 N.E.2d 436 (Ind. 1988).

When a car has multiple passengers, contraband near a passenger, and no one person has a license for the firearm, if applicable, the jury can infer possession by that passenger, especially in combination with other factors. Person v. State, 661 N.E.2d 587 (Ind. Ct. App. 1996).

A passenger in the front seat, without more, is not deemed to possess contraband located on the floor behind the driver or in the trunk. See Cole v. State, 588 N.E.2d 1316 (Ind. Ct. App. 1992) and Walker v. State, 631 N.E.2d 1 (Ind. Ct. App. 1994).

Even if the contraband is located under the passenger's seat, without more, is not sufficient to sustain a constructive possession conviction. D.C.C. v. State, 695 N.E.2d 1015 (Ind. Ct. App. 1998).

Essentially, the close proximity of the defendant passenger to the firearm, without more, is not generally sufficient to impute constructive possession. E.D. v. State, 905 N.E.2d 505 (Ind. Ct. App. 2009).

Generally speaking, Indiana courts are more likely to find sufficient evidence where evidence suggests that a vehicle's passenger could see the contraband, was in the best position to access the contraband, and no evidence clearly indicates the contraband belonged to or was under the control of another occupant of the vehicle. Deshazier v. State, 877 N.E.2d 200 (Ind. Ct. App. 2007).

a. Flight or Furtive Gestures

Flight or furtive gestures that are beyond the defendant's control cannot be used to infer a defendant's knowledge of the presence and character of contraband. Brent v. State, 957 N.E.2d 648 (Ind. Ct. App. 2011) (although driver attempted to flee and stopped his vehicle in a suspicious location, the defendant was a passenger in the vehicle and had no control over the driver's actions).

b. Plain View

In addition to being in plain view, the contraband's incriminating character must be immediately apparent. Lampkins v. State, 682 N.E.2d 1268 (Ind. 1997) (it does not take much to recognize the incriminating character of marijuana). Indiana relies on the plain view doctrine contained in Minnesota v. Dickerson, 508 U.S. 366 (1993). Lampkins v. State, 685 N.E.2d 698 (Ind. 1997) (closed Tylenol bottle was not in plain view because the incriminating nature of the contraband was not immediately apparent, although the Tylenol bottle contained cocaine).

Griffin v. State, 945 N.E.2d 781 (Ind. Ct. App. 2011) (evidence sufficient where burnt marijuana blunt was found on center console, in plain view, between defendant passenger and the driver, and the odor of the marijuana was so strong that the defendant could not have been unaware of its presence). See also Adams v. State, 946 N.E.2d 630 (Ind. Ct. App. 2011).

Halsema v. State, 783 N.E.2d 1199 (Ind. Ct. App. 2003) (Court affirmed finding that defendant passenger constructively possessed marijuana and paraphernalia found on passenger floor and between driver's and passenger's seat, on passenger's side).

Whitney v. State, 726 N.E.2d 823 (Ind. Ct. App. 2000) (additional evidence of guilty knowledge established where narcotics were found in hidden compartment, but officer first noticed marijuana cigarette on floor of driver's compartment and smelled odor of marijuana, in combination with exclusive possession of vehicle). See also Austin v. State, 980 N.E.2d 429 (Ind. Ct. App. 2012).

c. Other Circumstances

Be aware, the smell of marijuana is an additional circumstance in constructive possession issues involving non-exclusive possession. Godar v. State, 643 N.E.2d 12 (Ind. Ct. App. 1994).

V. TEMPORARY POSSESSION

Pursuant to Ind. Code § 35-41-2-1(a), a person commits an offense only if he voluntarily engages in conduct in violation of the statute defining the offense. If possession of property constitutes any part of the prohibited conduct, it is a defense that the person who possessed the property was not aware of his possession for a time sufficient for him to have terminated possession. Ind. Code § 35-41-2-1(a).

The term “possession” requires knowing control or custody. Doss v. State, 470 N.E.2d 732 (Ind. Ct. App. 1984). Thus, a defendant who is in possession of contraband for a time insufficient for the defendant to terminate possession or become sufficiently aware of the contraband cannot be convicted of constructive possession. Loudermilk v. State, 523 N.E.2d 769 (Ind. Ct. App. 1988) (State proved that defendant held plastic bag containing marijuana for a period of seven seconds before passing it to another individual; something more is necessary to support a conviction for constructive possession).

It is no defense that a courier or dealer are delivering or selling contraband that really belongs to someone else. McClendon v. State, 671 N.E.2d 486 (Ind. Ct. App. 1996) (Ind. Code § 35-41-2-1(b) does not provide a defense for those who knowingly possess illicit drugs in order to aid someone else’s illegal drug sales or use). Ind. Code § 35-41-2-1 provides a defense for those unwittingly duped into possession of illegal contraband because such contraband has been planted on their person or hidden on their property without their knowledge. Id.

VI. SUGGESTED JURY INSTRUCTIONS

A. Constructive Possession – In a Vehicle

Constructive possession of an item is the intent and capability to maintain dominion and control over the item. Proof of a possessory interest in the vehicle where the item is found might be adequate to show the capability to maintain control over the item. However, when possession of the vehicle is not exclusive, the inference of intent must be supported by additional circumstances that point to the Accused's knowledge of the nature of the item and its presence. Mere presence where an item is located or association with person who possess the item is not alone sufficient to support a finding of constructive possession.

Authority: Bergfeld v. State, 531 N.E.2d 486 (Ind. 1988); Macklin v. State, 701 N.E.2d 1247 (Ind. Ct. App. 1998); and Godar v. State, 643 N.E.2d 12 (Ind. Ct. App. 1994).

B. Constructive Possession – In a Home

Possession of something may take two forms. One can possess an item directly, meaning that he or she has actual physical control over the item. Or, one can possession something constructively, meaning that he or she has the capability and intent to possess the item, even though actual physical control is absent. Evidence has been presented that other individuals may have visited at, or resided in, [name of person's home]'s home. As such, possession of those premises was not exclusive to him/her. When possession of the premises on which drugs or their precursors is not exclusive, the inference of intent to maintain dominion and control over the items must be supported by additional circumstances pointing to the accused's knowledge of the nature of the drugs and/or precursors and their presence in her home. These additional circumstances can include incriminating statements the accused made, attempted flight or furtive gestures, proximity of the substances to the accused, location of the substances within the accused's plain view, and the combining of the substances with other items that the accused owned.

Authority: Britt v. State, 810 N.E.2d 1077 (Ind. Ct. App. 2004) and Gee v. State, 810 N.E.2d 338 (Ind. 2004).

Related Instructions:

Possession of a controlled substance may be either actual or constructive. Constructive possession consists of knowledge of the presence of the contraband plus the intent and capability to assert dominion and/or control over it. Capability to maintain control is the ability to reduce the item to personal possession or to direct its disposition or use.

Proof of a possessor interest in the premises in which the controlled substance is found may be adequate to infer knowledge and the capability to maintain dominion and control over the controlled substance. However, where the possession of said premises is not exclusive, the inference of intent must be supported by additional circumstances which point to the accused's knowledge of the nature of the controlled substance and its presence and the accused's ability to assert control over it.

C. Constructive Possession – Alternative 3

Constructive possession is shown when there is an intent and a capability to maintain dominion and control over the item. The intent to possess is proved by evidence of the accused's knowledge of the nature of the item and its presence. The intent may be inferred from the exclusive possession of the vehicle within which the item is found, or in the absence of exclusive possession, from the presence of additional circumstances, including:

1. incriminating statements by the accused;
2. attempted flight or furtive gestures;
3. proximity of the item to the accused;
4. location of the item within the accused's plain view;
5. mingling of the item with the other items owned by the accused.

Mere presence where an item is located or association with a person who possesses the item is not alone sufficient to support a finding of constructive possession.

Authority: Henderson v. State, 715 N.E.2d 833 (Ind. 1999) and Winters v. State, 719 N.E.2d 1279 (Ind. Ct. App. 1999)