

STATE OF MICHIGAN
COURT OF APPEALS

In re ADAM CLARK HARTSOE

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

ADAM CLARK HARTSOE,

Respondent-Appellant.

UNPUBLISHED
October 19, 2006

No. 262830
Oakland Circuit Court
Juvenile Division
LC No. 04-701341-DL

Before: Murray, P.J., and O’Connell and Fort Hood, JJ.

PER CURIAM.

Respondent, a juvenile, appeals as of right from a circuit court order, which adopted the recommendation of a juvenile division referee. The referee found respondent guilty of possession of marijuana, MCL 333.7403(2)(d). We affirm.

Respondent first argues that he did not validly consent to a search of his vehicle and that the items recovered from the vehicle, including the plastic bag of marijuana, should have been suppressed. We disagree. To preserve a suppression issue, a party must ordinarily file a pretrial motion to suppress the challenged evidence. *People v Gentner, Inc*, 262 Mich App 363, 368; 686 NW2d 752 (2004). Here, respondent never moved to suppress the items before or during the bench trial. Therefore, we review the record to determine if plain error occurred that affected respondent’s substantial rights. MRE 103(d); *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999). “The consent exception to the warrant requirement allows a search and seizure when consent is unequivocal, specific, and freely and intelligently given.” *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001). “A trial court is to review the ‘totality of circumstances’ to determine the validity of consent to a search.” *People v Goforth*, 222 Mich App 306, 309; 564 NW2d 526 (1997).

The record reveals that Deputy Scott Eriksen approached respondent’s vehicle from the passenger side following a traffic stop and began questioning both respondent and his passenger. After initially asking them their plans as curfew approached, Eriksen asked if there was “anything in the vehicle we should know about.” The passenger responded in the negative. Eriksen then stated, “Well, you don’t mind if I search the vehicle.” The passenger then questioned why Eriksen wanted to search the vehicle. Eriksen responded that it was “not [the passenger’s] vehicle” and that only respondent could consent to the search because “[the

passenger] was not the driver.” Respondent responded, “I guess so.” Respondent’s testimony also directly confirmed that he “gave permission to search” the vehicle and that he had “no problem” with Eriksen’s search of the car. Under the circumstances, respondent has not established that Eriksen, or any other officer, coerced him to consent to the search or that respondent was under any extraordinary duress. Viewing the totality of the circumstances, respondent’s consent was “unequivocal, specific, and freely and intelligently given.” *Frohriep, supra*.

Respondent argues that he merely acquiesced to Eriksen’s request and that, because of his youth and the “intensity” of the traffic stop, he did not know he had a right to refuse the search. However, the mere presence of police officers does not necessarily indicate coercion, see *People v Reed*, 393 Mich 342, 366; 224 NW2d 867 (1975), and knowledge of the right to refuse consent is not the only factor in determining the consent’s validity. *Schneckloth v Bustamonte*, 412 US 218, 227; 93 S Ct 2041; 36 L Ed 2d 854 (1973). Moreover, the record reflects that Eriksen had just told respondent’s passenger that respondent was the only person who could consent to the search, so respondent adequately understood this right.

Respondent next argues that the circuit court judge erred in affirming the referee’s recommendation because the bench trial transcript was not yet available. We disagree. “Before signing an order based on a referee’s recommended findings and conclusions, a judge of the court shall review the recommendations if requested by a party” MCR 3.991(A)(1). “The judge may adopt, modify, or deny the recommendation of the referee, in whole or in part, on the basis of the record and the memorandum prepared, or may conduct a hearing, whichever the court in its discretion finds appropriate for the case.” MCR 3.991(F). The circuit court judge must adopt the recommendation unless the judge would have decided the case differently or the referee committed clear and prejudicial error. MCR 3.991(E).

Respondent argues that the circuit court was required to examine the transcript of the proceedings before it reviewed the referee’s recommendation. However, respondent provided five specific arguments against the recommendation, and all of them were refuted by the existing record. For example, his chain of custody argument was minimized by a police report demonstrating that the substance had also tested positive in a field test before it was taken to the lab. Respondent did not challenge the field test. Two other objections related to tenuous arguments regarding evidentiary issues. Respondent first argued that the referee improperly sustained an objection preventing him from introducing his own signed statement as either a public document or as an “admission against interest” because it “included” adverse information. This argument lacked any indication of prejudice and was legally flawed on its face. MRE 801(d)(2); MRE 803(8); MRE 804(b)(3). Second, respondent argued that the prosecutor failed to specifically designate one of the witnesses as an “expert.” However, the alleged prejudice was belied by the witness list in the file, which clearly indicated the prosecutor’s intent to call a laboratory technician.

Likewise, respondent’s arguments regarding respondent’s plea and corresponding statements were settled by a referee’s memorandum placed in respondent’s court file. The memorandum demonstrated that the referee did not need to introduce respondent’s statements from the attempted plea because she conducted it herself. Respondent’s argument that his retained counsel lacked notice and did not attend the plea’s hearing was explained by the record’s documents demonstrating that, at the time of the plea, his attorney had not yet filed an

appearance and that counsel was appointed on his behalf. The other challenge presented by respondent was a discovery objection accompanied by a denied adjournment. Respondent did not challenge the tardy document, but only the procedural problems it created. Under the circumstances, the circuit court had sufficient information in the record to determine that respondent's objections did not amount to clear error and would not alter its determination of guilt. MCR 3.991(E). Therefore, the circuit court properly reviewed the recommendations and found respondent's objections lacking. MCR 3.991(A)(1).

Respondent next argues that petitioner failed to prove the elements of possession of marijuana beyond a reasonable doubt. We disagree. "[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). To sustain a conviction for possession of marijuana, petitioner was required to show that (1) respondent possessed a controlled substance, (2) the substance possessed was marijuana, and (3) respondent knew he was possessing marijuana. See *id.* at 516-517; MCL 333.7403(2)(d). To establish possession, there must be proof that respondent exercised physical control over the substance (actual possession) or that he had the right to exercise control over it (constructive possession). See *Wolfe, supra* at 520. "[C]onstructive possession exists when the totality of the circumstances indicates a sufficient nexus between the defendant and the contraband." *Id.* at 521.

Here, respondent was driving a Ford Mustang that he called "my car," even though his mother officially had title. The car contained a plastic baggie hidden under the ashtray. The baggie contained a substance which field and lab tests proved was marijuana. Even taking respondent's original version of events, he watched as his passenger stuffed a baggy of marijuana into the ashtray compartment. Although respondent argues on appeal that the passenger possessed the marijuana because it was initially on his person, constructive possession may be found even if the respondent is not the owner of the controlled substance. *Wolfe, supra* at 520. Viewing the evidence in the light most favorable to petitioner, a rational trier of fact could conclude that respondent was in constructive possession of the marijuana because he had the right to exercise control over it.

Respondent next argues that the referee erred in admitting into evidence the plastic baggie of marijuana and a photograph showing the items recovered from his car. Respondent contends that petitioner failed to lay a proper foundation. We disagree. Deputy Eriksen testified that the photograph showed the items recovered from respondent's vehicle on the evening of October 30, 2004, including the plastic bag of marijuana, a silver "weigh scale," and marijuana seeds and stems. Further, Eriksen testified that the photograph accurately represented the items as he saw them following the traffic stop and search. Deputy Jeffrey Cardinal testified that he removed the plastic bag of marijuana from the ashtray compartment of respondent's vehicle. Further, Cardinal testified that he turned the plastic bag over to the officer in charge, Deputy Sarah Myers. Myers testified that the bag of marijuana introduced at trial was the same as the one Cardinal gave her at the scene. The record also indicates that the police incident number was transcribed on the bag on the same night it was recovered. The admissibility of photographs and other particularized evidence requires minimal substantiation, which occurred here, and even fungible real evidence like the marijuana does not require a perfect chain of custody. *People v*

White, 208 Mich App 126, 130, 132-133; 527 NW2d 34 (1994). The minor anomalies in the authentication of this evidence went to its weight, not its admissibility. *Id.* Accordingly, the prosecutor presented sufficient testimony “to support a finding that the matter in question is what its proponent claims.” MRE 901(a). Respondent’s unpreserved argument that the photograph violated MRE 403 is an extension of his authenticity argument. Because this was a bench trial, “it is unlikely that the trier of fact considered the evidence for anything other than the purpose for which it was offered.” *People v Bailey*, 175 Mich App 743, 746; 438 NW2d 344 (1989).

Finally, respondent argues that the referee improperly questioned him regarding his former testimony at the failed plea hearing. We disagree. The record indicates that respondent initially indicated that he would plead guilty to possession of marijuana, but then denied any knowledge of the marijuana, claiming that he was not in the car when the passenger hid the baggie under the ashtray. The referee entered a not guilty plea on his behalf and adjourned the matter. After respondent’s testimony that he saw the passenger hide something in or under the ashtray, but denied knowing what was hidden, the referee asked respondent about the discrepancy. Pursuant to MCR 3.923(A)(1), “if at any time the court believes that the evidence has not been fully developed, it may examine a witness.” See also MRE 614(b). Although the rules prohibit the introduction of the previous plea statements or any plea proceedings into evidence, MRE 410, the referee did not introduce any statements into evidence because she did not need to; she was there. Given that this was a bench trial, there was no conceivable undue prejudice that was added by the referee’s questioning. The referee was fully aware of respondent’s earlier inconsistent statements, and the further questioning merely provided respondent an opportunity to explain the discrepancy, which he did. Without some indication of prejudice from the additional questioning, we will not reverse on this ground. MRE 103(a).

Affirmed.

/s/ Christopher M. Murray
/s/ Peter D. O’Connell
/s/ Karen M. Fort Hood