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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1845**

State of Minnesota,
Respondent,

vs.

James Paul Aery,
Appellant.

**Filed December 7, 2020
Reversed
Segal, Chief Judge**

Beltrami County District Court
File No. 04-CR-18-3347

Keith Ellison, Attorney General, St. Paul, Minnesota; and

David L. Hanson, Beltrami County Attorney, Hannah M. Hanlon, Assistant County Attorney, Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Ryan M. Schultz, Special Assistant Public Defender, Robins Kaplan LLP, Minneapolis, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Segal, Chief Judge;
and Connolly, Judge.

UNPUBLISHED OPINION

SEGAL, Chief Judge

Appellant challenges his conviction of drug possession in the fifth degree on the grounds that he was subject to an unlawful search and that the drug evidence found during the search should have been suppressed. Because the circumstances were not sufficient to give rise to an honest and strong suspicion that appellant had constructive possession of suspected drugs seen in a car, law enforcement lacked probable cause to arrest appellant on that basis and the subsequent search of appellant's person was unlawful. The drug evidence resulting from the search thus should have been suppressed. We reverse.

FACTS

After the district court denied the motion of appellant James Paul Aery to suppress evidence, this case was submitted to the district court for a bench trial pursuant to a stipulation to the prosecution's evidence under Minn. R. Crim. P. 26.01, subd. 4, to obtain appellate review of the suppression issue. The case arose out of a vehicle stop initiated by a Beltrami County sheriff's deputy in October 2018. The car stopped by the deputy had three occupants—the driver, a passenger in the front seat, and Aery, who was seated in the backseat directly behind the driver. The deputy approached the car and spoke to the driver through the driver's side window. While speaking to the driver, the deputy noticed a micro-baggie containing a white, crystal substance that had been placed in the alcove or pocket behind the interior handle of the driver's side front door of the car (the driver's door micro-

baggie). The deputy suspected that the driver's door micro-baggie contained methamphetamine.

The deputy directed the driver and the two passengers to exit the vehicle. After Aery exited the vehicle, the deputy said he was going to pat him down. Aery put his hand into his pocket and, when the deputy instructed him to remove his hand from his pocket, Aery did so but kept his hand clenched. Aery then dropped a micro-baggie (the dropped micro-baggie) on the ground; the deputy then put Aery into handcuffs and searched him. During the search, the deputy found a third micro-baggie containing a "weighable amount" of methamphetamine, as verified by later testing, in the pocket of Aery's pants and three glass smoking pipes in his waistband.

Aery filed a motion to suppress the evidence found on his person along with the dropped micro-baggie, claiming that the deputy violated his Fourth Amendment rights. The state did not challenge Aery's assertion that he was under arrest for Fourth Amendment purposes when he was searched and the third micro-baggie was found in his pocket.¹ The district court found that the search was a lawful "search incident to arrest" because Aery was in constructive possession of the driver's door micro-baggie and the deputy thereby had probable cause for the arrest. The court thus denied the motion. The court also held that the dropped micro-baggie was not subject to Fourth Amendment protection because it was voluntarily abandoned. Pursuant to the stipulated evidence, the district court issued

¹ We further note that the state never argued that the dropped micro-baggie created a lawful basis to conduct the search of his person.

its findings of fact, conclusions of law and a verdict of guilt, adjudging Aery guilty of a single count of drug possession in the fifth degree in violation of Minn. Stat. § 152.025, subd. 2(1) (2018). Aery now appeals.

D E C I S I O N

The sole issue in this appeal involves a review of the district court's denial of Aery's motion to suppress the drug evidence found during the search of his person. The state has limited its argument before this court to the grounds adopted by the district court as the basis for its denial of Aery's motion to suppress: that Aery was under arrest at the time of the challenged search and that there was probable cause for the arrest on the theory that Aery was in constructive possession of the driver's door micro-baggie. Consequently, we have not analyzed any alternative grounds upon which the search might have been justified and our opinion is based solely on the assumption that probable cause was, therefore, required to justify the search. Because this was a court trial pursuant to stipulated evidence, the only issue before us is a question of law that we review *de novo*. *State v. Williams*, 794 N.W.2d 867, 871 (Minn. 2011) (citing *State v. Flowers*, 734 N.W.2d 239, 247-48 (Minn. 2007)).

Aery argues that the search of his person was not a lawful search incident to arrest because the deputy lacked probable cause to arrest him and that the search thus violated his Fourth Amendment rights. The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Generally, a warrantless search is *per se* unreasonable unless a well-delineated exception

to the warrant requirement applies. *Flowers*, 734 N.W.2d at 248. One such exception to the warrant requirement is that, incident to a lawful arrest, a peace officer may search a person's body and the area within that person's immediate control. *State v. Ortega*, 770 N.W.2d 145, 149-50 (Minn. 2009) (citing *State v. Robb*, 605 N.W.2d 96, 100 (Minn. 2000)). The state bears the burden of establishing that an exception to the warrant requirement applies. *Flowers*, 734 N.W.2d at 248.

There is probable cause to arrest a person “without a warrant when a person of ordinary care and prudence, viewing the totality of circumstances objectively, would entertain an honest and strong suspicion that a specific individual has committed a crime.” *Ortega*, 770 N.W.2d at 150. “The crime for which probable cause exists must be one for which a custodial arrest is authorized.” *Id.* Methamphetamine possession is such a crime.²

In this case, the state argues and the district court found that the deputy had probable cause for the arrest because Aery had constructive possession of the suspected methamphetamine in the driver's door micro-baggie. If unlawful drugs are found in a place where more than one person has access, such as in this case, possession can be established under the constructive-possession doctrine. *State v. Florine*, 226 N.W.2d 609, 610-611 (Minn. 1975). A finding of constructive possession requires that there be “a strong probability, inferable from the evidence, that the defendant was, at the time, consciously exercising dominion and control over [the contraband].” *State v. Lee*, 683 N.W.2d 309,

² Possession of methamphetamine is a felony-level offense for which a custodial arrest is authorized. Minn. Stat. §§ 152.025, subd. 4(b), 629.34, subd. 1(c) (2018).

316-17 n.7 (Minn. 2004); see *Maryland v. Pringle*, 540 U.S. 366, 372, 124 S. Ct. 795, 800-01 (2003).

Here, the district court based its finding of constructive possession on the fact that the driver's door micro-baggie was in "plain view," at least from the deputy's vantage point, and was "within an arm's reach" of Aery who was seated in the back seat on the driver's side of the car. The court concluded that these facts were sufficient to demonstrate a conscious exercise of dominion and control by Aery of the driver's door micro-baggie to support probable cause for Aery's arrest and the subsequent search.

The district court cited *Ortega* in support of its conclusion. In *Ortega*, a case that also involved a vehicle stop, the officer smelled the odor of burnt marijuana in the car and observed a rolled-up dollar bill with what appeared to be cocaine powder in it. 770 N.W.2d at 148. The rolled-up dollar bill was located in the front-seat center console cup holder between the driver and Ortega, who was sitting in the front passenger seat. *Id.* The Minnesota Supreme Court held that

when combined with the odor of burnt marijuana, [the officer's] discovery of the cocaine-laced dollar bill in an unconcealed location that was accessible to both [the driver] and Ortega would cause a person of ordinary care and prudence to entertain an honest and strong suspicion that Ortega constructively possessed the cocaine jointly with [the driver].

Id. at 151.

Aery argues that the facts in this case are distinguishable from *Ortega* and we agree. In *Ortega*, the dollar bill with cocaine powder was located in plain view between Ortega and the driver. Here, the state acknowledges that there is no evidence that the driver's door

micro-baggie was visible to Aery from his position in the backseat. In addition, the evidence shows that Aery was three feet away from the driver's door handle pocket and no evidence was presented by the state concerning the accessibility of the door handle pocket to a backseat passenger. *See, e.g., State v. Reyes*, No. C0-02-1769, 2003 WL 21150520, at *1 (Minn. App. May 20, 2003)³ (backseat passenger was not in constructive possession of drugs located in the front seat even though the officer testified that it was a small car and the passenger "easily could have reached up [to the front]"). Finally, there was no evidence of contemporaneous drug use, such as the smell of burnt marijuana in the *Ortega* case, to suggest knowledge by Aery of the presence of drugs in the car.

We also note the lack of any evidence that Aery had an ownership interest in the car or had even been in the car before the date of this incident. This further erodes the state's argument that there was a "strong probability" that Aery exercised "dominion and control" over the driver's door micro-baggie. *See State v. Slifka*, 256 N.W.2d 90, 91 (Minn. 1977) ("The officers arguably had reasonable cause to believe that the driver constructively possessed the marijuana because the car was his and he was in control of the car[;]" the officers lacked such cause with respect to the defendant who was just a passenger).

For the above reasons, we determine that, under "the totality of the circumstances," the evidence is not sufficient to support an "honest and strong suspicion" that Aery had constructive possession of the driver's door micro-baggie. Since the sole basis put forward

³ As an unpublished opinion, *Reyes* is cited only as persuasive authority. Minn. Stat. § 480A.08, subd. 3(c) (2018).

by the state on this appeal to justify the search was that it was a search incident to arrest based on Aery's constructive possession of the driver's door micro-baggie, we conclude that the "arrest" was not supported by probable cause and the evidence found as a result of the search should have been suppressed. Without evidence that Aery possessed methamphetamine, the conviction must be reversed.⁴

Aery also argues that the district court erred in finding that he voluntarily abandoned the dropped micro-baggie. He argues that this evidence must also be suppressed as the "fruit of the poisonous tree." It does not appear from the district court's findings of fact, however, that the dropped micro-baggie served as a basis for Aery's conviction.⁵ We, thus, do not need to address this issue.

Reversed.

⁴ We note that Aery filed a pro se brief. The state argues that we should not consider the brief because it fails to cite any legal authority. The brief also raises no arguments that were not covered in the brief filed by Aery's counsel. For these reasons, we will not separately address the allegations in the pro se brief.

⁵ There is some confusion contained in the Stipulation to Prosecution's Case to Obtain Review of a Pretrial Ruling with regard to which micro-baggie (the dropped micro-baggie or the one found in Aery's pocket during the search) was tested by a laboratory and proven to contain methamphetamine. The district court's findings of fact, however, make clear that it was the micro-baggie found by the deputy in Aery's pocket after Aery was handcuffed. It appears that the dropped micro-baggie was never tested or otherwise proven to contain drugs.