STATE OF CONNECTICUT *v.* ANDRE D. MARTIN
(AC 25823)

Schaller, DiPentima and Rogers, Js.

Argued March 24—officially released November 21, 2006

(Appeal from Superior Court, judicial district of Fairfield, Owens, J.)

Arthur L. Ledford, special public defender, for the appellant (defendant).

C. Robert Satti, Jr., senior assistant state's attorney, with whom, on the brief, was *Jonathan C. Benedict*, state's attorney, for the appellee (state).

Opinion

DiPENTIMA, J. The defendant, Andre D. Martin, appeals from the judgment of conviction, rendered after a jury trial, of attempt to possess one kilogram or more of marijuana with the intent to sell by a person who is not drug-dependent in violation of General Statutes §§ 21a-278 (b)[1] and 53a-49,[2] possession of four ounces or more of a cannabis-type substance in violation of General Statutes § 21a-279 (b),[3] and conspiracy to possess one kilogram or more of marijuana with the intent to sell in violation of General Statutes §§ 21a-277 (b), 21a-278 (b) and 53a-48.[4] On appeal, the defendant claims that the evidence was insufficient to convict him on these charges. We agree and therefore reverse the judgment of the trial court.[5]

On the basis of the evidence presented at trial, the jury reasonably could have found the following facts. At the end of May, 2003, Don Hibbert, a special agent assigned to the Bridgeport office of the federal Drug Enforcement Administration (DEA) was contacted by Thomas Barbee, an agent with the Tucson, Arizona, office of the DEA. Barbee contacted Hibbert regarding a suspicious package that had been left at the Yellow Freight Company (Yellow Freight) in Tucson to mail to an address in Bridgeport. Although the address to which the package was to be mailed existed, a background investigation revealed that the name to whom the package was addressed was fictitious. On either May 31 or June 1, 2003, the DEA agreed to allow the package to be routed to Connecticut, but with delivery at the Yellow Freight facility in Middletown. No surveillance was conducted on the package in route.

When the package arrived at the Middletown facility on June 9, 2003, Yellow Freight informed Hibbert, who had obtained a federal search warrant for the package prior to its arrival. Hibbert brought the package to the state police building located in Meriden, which is approximately five to ten miles from Yellow Freight. Together with state police, Hibbert opened the package, which was found to be a wooden crate. Inside were four white buckets that resembled five gallon paint buckets. Each bucket contained one or more large bundles heavily wrapped in plastic. Upon examining the material packed in the bundles, Hibbert believed the substance was marijuana on the basis of his extensive previous experience, but he did not perform a field test on the substance. Later laboratory tests confirmed that the substance in the package was marijuana, and the total weight of the material was approximately eighteen pounds.[6] The marijuana, at the point of entry into the country, would sell wholesale for $400 to $500 per pound and would sell retail for $1000 to $1200 per pound. In the Bridgeport area, the marijuana would have a markup of three to four times the original retail price per pound.

Because the total weight of marijuana did not meet the threshold for federal prosecution, it was decided that the high intensity drug trafficking area task force, comprised of federal, state and local officials, would seek state prosecution of any violation of the state drug dependency laws. The state's attorney's office decided that all but 4.4 ounces of the marijuana would be removed from the package. The package then was filled to approximate its original weight. Jeremy DiPietro, a detective with the Bridgeport police department, and a state trooper took over the investigation and, on the evening of June 9, 2003, the state trooper, working undercover, telephoned the person Yellow Freight was to contact to pick up the package. He told the person to pick up the package at approximately noon the following day. On June 10, 2003, the trooper and DiPietro transferred the package from the state police office back to Yellow Freight.

On June 10, 2003, police set up surveillance of Yellow Freight and the immediate surrounding area. Hibbert and DiPietro were at "point of contact" in the Yellow Freight parking lot, approximately 2000 feet from the loading dock. William Brooks, a detective with the Bridgeport police department, was located in the loading dock area conducting video surveillance. Edwin Kohl, a state detective assigned to the statewide cooperative crime control task force with the DEA in Bridgeport, conducted aerial surveillance from a DEA plane using binoculars and a camera. The surveillance operation of the Yellow Freight facility on June 10, 2003, revealed the following scenario.

At approximately 12:15 p.m., a tan Mitsubishi Gallant entered the lower parking lot of the Yellow freight complex with a man driving and a woman in the front passenger seat. The woman, later identified as Janine Crockett, got out of the car and spoke with a Yellow Freight representative. The man in the car appeared to be talking on a cellular telephone as Crockett reappeared, spoke to him and then got back into the car. The car left the lot and turned onto Country Club Road, where it rendezvoused with another vehicle, a maroon Chevrolet,[7] for approximately one to two minutes. The tan Mitsubishi then returned, and Crockett again got out of the vehicle, this time holding an unidentifiable object in her left hand. When she again returned to the vehicle, it backed up to the loading dock, and the man in the vehicle made a call on his telephone. A Yellow Freight employee brought the package to the individuals in the vehicle. The package at first was too large to maneuver into the vehicle, and Crockett had to move up her seat in order to fit the package in the backseat. The Yellow Freight employee handed the man a signature receipt, and he, in turn, gave it to Crockett. Crockett refused to sign the receipt and handed it back to the man, who signed it himself and returned it to the

employee.

Some time after the tan Mitsubishi completed its first trip into the Yellow Freight parking lot, but before its second trip, during which its occupants picked up the package, the maroon Chevrolet entered the lot and drove into the lower parking lot where Hibbert and DiPietro were located. The vehicle, which was occupied by two men, one of whom later was identified as the defendant, drove slowly around the lot. It then stopped, and the defendant, who was a passenger in the vehicle, got out of the car. The defendant was out of the vehicle for fewer than five minutes, during which time he walked around the lot, casually looking at the vehicles in the lot as he passed them. He then returned to the vehicle, and the Chevrolet left the lot. Shortly thereafter, the tan Mitsubishi returned, and the package was picked up.

When the tan Mitsubishi left the lot after the package was picked up, it was driven away from the entrance ramp to Interstate 91 and again rendezvoused with the maroon Chevrolet. Then both vehicles merged onto Interstate 91 southbound and together traveled to 98 Holly Street in Bridgeport.[8] As they traveled, the two vehicles maintained a consistent distance from each other, remained primarily in the right lane and traveled within the speed limit; the vehicles did not make any quick lane changes or do anything else to attract attention. The surveillance team maintained sight of the vehicles until they reached their destination.

After the vehicles reached the Holly Street residence, an individual, later identified as Keith Mangan, was seen bringing the package into the house. The defendant testified that he helped Mangan carry the crate up the stairs in front of the house. The maroon Chevrolet was not seen in front of the house again after the defendant left it and entered the house.

The surveillance team waited several minutes after seeing the package brought into the house before executing the search and seizure warrant. It was understood by the officers executing the warrant that all people involved were to be arrested. When Hibbert, who was the first officer at the front door of the house, approached, a woman identified as Diana York was on the porch. Hibbert identified himself, and York ran inside and slammed the front door shut. An officer behind Hibbert opened the door with a breach tool, and Hibbert entered the apartment. York was just inside the front door, and the defendant was approximately twelve feet from the door, in the living room. Mangan was in the bedroom, which was off to the left. Hibbert told everyone to get on the floor, and everyone, including the defendant, was compliant. Hibbert located the crate, still sealed, in the bathroom, inside a freestanding tub and concealed by a shower curtain. The defendant and Mangan were equidistant from the bathroom where

the package was discovered.

Hibbert conducted a patdown search of the defendant. The defendant was in possession of a wallet, a cellular telephone, an $800 check and $1291 in cash. The cash was comprised of a few fifty dollar bills, but mostly twenty, ten and five dollar bills. The defendant told Hibbert that the cash was for a car payment he had to make on his Mercedes Benz, which was being repaired that day. The defendant did not have any weapons, drugs, or drug paraphernalia on his person. After the defendant was arrested, Hibbert checked his name with the narcotic and dangerous drugs information systems, which revealed that the defendant had no past drug related offenses and was not the subject of a current drug related investigation.

Additionally, the following information was elicited from the defendant on cross-examination.[9] Although he had been living in Connecticut for at least four years prior to the trial, the defendant did not have a Connecticut driver's license. He initially had a New York driver's license and then obtained a Florida driver's license in March, 2003. The defendant never resided at the addresses listed on either of his driver's licenses, and his personal vehicle was registered to a post office box in New Rochelle, New York. The defendant used his false Florida address to rent the Chevrolet that was used on June 10, 2003. The defendant admitted that he never had paid taxes to either the state or federal government, although he indicated that he believed he paid taxes to the government when making car insurance payments. The defendant was unable to account for the origin of money he used to pay for rent, food for himself and his family, car payments and jewelry, especially during periods of time when he claimed not to have had a job and was receiving welfare payments from the state. The defendant could not indicate clearly the dates during which he was employed, and evidence was presented that he had lied to Hibbert about his job, stating that he was unemployed on June 10, 2003, but that his prior job was as a graphic designer when, in fact, he worked in a hair salon. The defendant also admitted to having pleaded guilty to assault and a weapons charge, which arose from a dispute he had had with his child's mother.

The defendant claims that the state presented insufficient evidence to prove beyond a reasonable doubt that he (1) had dominion and control over the marijuana and (2) had knowledge that marijuana was contained in the package. We agree with the defendant that the state presented insufficient evidence that he knew the contents of the package.[10]

When reviewing sufficiency of the evidence claims, we employ a two part test. "First, we construe the evidence in the light most favorable to sustaining the verdict. Second, we determine whether upon the facts

so construed and the inferences reasonably drawn therefrom the [jury] reasonably could have concluded that the cumulative force of the evidence established guilt beyond a reasonable doubt. . . . This court cannot substitute its own judgment for that of the jury if there is sufficient evidence to support the jury's verdict." (Internal quotation marks omitted.) *State* v. *Boscarino*, 86 Conn. App. 447, 454, 861 A.2d 579 (2004).

"While . . . every element [must be] proven beyond a reasonable doubt in order to find the defendant guilty of the charged offense[s], each of the basic and inferred facts underlying those conclusions need not be proved beyond a reasonable doubt. . . . [I]n determining whether the evidence supports a particular inference, we ask whether that inference is so unreasonable as to be unjustifiable. . . . [A]n inference need not be compelled by the evidence; rather, the evidence need only be reasonably susceptible of such an inference. . . . Moreover, [i]n evaluating evidence that could yield contrary inferences, the trier of fact is not required to accept as dispositive those inferences that are consistent with the defendant's innocence. . . . Finally, we must remember that it is the jurors who are the arbiters of fact. [W]e do not sit as the seventh juror when we review the sufficiency of the evidence . . . rather, we must determine, in the light most favorable to sustaining the verdict, whether the totality of the evidence, including reasonable inferences therefrom, supports the jury's verdict of guilt beyond a reasonable doubt." (Citations omitted; internal quotation marks omitted.) *State* v. *Glasper*, 81 Conn. App. 367, 371–72, 840 A.2d 48, cert. denied, 268 Conn. 913, 845 A.2d 415 (2004). Although we review the sufficiency of the evidence in the light most favorable to sustaining the verdict, those facts underlying the jury's conclusions must be based on reasonable inferences drawn, not mere speculation. See *State* v. *Goodrum*, 39 Conn. App. 526, 540, 665 A.2d 159, cert. denied, 235 Conn. 929, 667 A.2d 554 (1995).

I

An essential element of possession and possession with the intent to sell is that the offender have knowledge of the character of the illegal substance he possesses, in this instance, marijuana. See *State* v. *Gooden*, 89 Conn. App. 307, 319, 873 A.2d 243 ("similar to its lesser included offense of possession of [a cannabis-type substance], the crime of possession of a [cannabis-type] substance with the intent to sell . . . includes the element of knowledge" [internal quotation marks omitted]), cert. denied, 275 Conn. 918, 919, 883 A.2d 1249 (2005); see also *Illinois* v. *Andreas*, 463 U.S. 765, 769 n.3, 103 S. Ct. 3319, 77 L. Ed. 2d 1003 (1983) ("[M]ere fact that [an individual] takes possession of [a] container would not alone establish guilt of illegal possession or importation of contraband. The recipient of the package would be free to offer evidence that *the nature*

of the contents were unknown to him; the nature of the contents and the recipient's awareness of them would be issues for the factfinder." [Emphasis added.]); *State* v. *Parent*, 8 Conn. App. 469, 473, 513 A.2d 725 (1986) ("to establish illegal possession of narcotics the state must prove, not only that the defendant exercised dominion and control over the substance, [but that he] had knowledge of its presence, and *had knowledge of its narcotic character*" [emphasis added; internal quotation marks omitted]). Although a "trier of fact may infer that a defendant who is in fact in physical possession of a substance knows the character of the substance and knows of its presence"; (internal quotation marks omitted) *State* v. *Shipp*, 79 Conn. App. 427, 433, 830 A.2d 368, cert. denied, 267 Conn. 902, 838 A.2d 212 (2003); when, as here, the state proceeds under a theory of constructive possession,[11] "it may not be inferred that [the defendant] knew of the presence of the [substance] and had control of [it], unless there are other incriminating statements or circumstances tending to buttress such an inference." (Internal quotation marks omitted.) *State* v. *Gooden*, supra, 316.

The state argues that the defendant's role in picking up the package suffices as the incriminating circumstances tending to buttress an inference that the defendant knew the package contained marijuana. The state cites the actions engaged in by both vehicles when picking up the package at the Yellow Freight facility, specifically, the use of two vehicles, the fact that the vehicles did not enter the highway immediately after retrieving the package, the traveling of the two vehicles in tandem, the vehicle in which the defendant rode driving around the Yellow Freight parking lot and the defendant walking through that lot on foot while looking at the cars stationed there. The state cites the testimony of Hibbert and Kohl, who identified these actions as countersurveillance techniques. Yet, even if we were to allow for the jury's having made a reasonable inference that the defendant, in fact, was engaging in countersurveillance, his actions, although possibly incriminating of something, did not show that he knew the package contained marijuana. These same actions could lead the jury to speculate that the defendant knew the package contained stolen goods, weapons, falsified documents or any other product used for illicit purposes. To conclude that the defendant knew the package contained marijuana is neither more nor less speculation than to conclude that he knew the package contained any of these other products, which speculation, in and of itself, is insufficient to support his conviction.

The state also argues that the defendant's use of a rental car to pick up the package, the use of a Florida address to rent the vehicle, his unexplained access to cash and his inconsistent statements regarding his employment at the time of the offense buttress the

inference that the defendant knew the package contained marijuana. As with the state's argument regarding the countersurveillance techniques in which the defendant engaged, we find the argument unavailing. Although these factors may show that the defendant knew he was engaging in some type of illicit activity, they do not show that he knew the precise nature of the contents of the package.[12]

In this case, we are not presented with a factual scenario in which the defendant was found with drugs, drug paraphernalia or even a weapon on his person. See *State* v. *Clark*, 255 Conn. 268, 294, 764 A.2d 1251 (2001); *State* v. *Wright*, 47 Conn. App. 559, 565, 707 A.2d 295, cert. denied, 244 Conn. 917, 714 A.2d 8 (1998); *State* v. *Hilton*, 45 Conn. App. 207, 218–19, 694 A.2d 830, cert. denied, 243 Conn. 925, 701 A.2d 659 (1997), cert. denied, 522 U.S. 1134, 118 S. Ct. 1091, 140 L. Ed. 2d 147 (1998). Although the defendant was inside the house when the search team discovered the drugs, he was not found in a location where drugs were out in the open, nor was he exhibiting any signs of drug use himself. See *State* v. *Sanchez*, 75 Conn. App. 223, 241–42, 815 A.2d 242, cert. denied, 263 Conn. 914, 821 A.2d 769 (2003); *State* v. *Delarosa*, 16 Conn. App. 18, 34, 547 A.2d 47 (1988). There also was no evidence to suggest that the defendant regularly frequented the house and would have reason to know that drugs were present there.

As an essential element of the crimes, the defendant's knowledge of the marijuana contained in the package he helped transport had to be proven beyond a reasonable doubt. To meet this burden, it is insufficient for the state simply to demonstrate that the defendant was engaging in illicit or even illegal behavior. See generally *State* v. *Gooden*, supra, 89 Conn. App. 318–20. The state was required to prove some additional incriminating circumstance *related to illegal drugs*. No such evidence was produced in this case. Consequently, the state has failed to satisfy its burden, and the conviction cannot stand.

Finally, this court is wary of the repercussions that affirming the defendant's conviction would have on future cases. To hold that these facts are sufficient to satisfy the knowledge element in a possession of narcotics charge would expose to criminal culpability the innocent bystanders that this requirement was meant to protect. See *State* v. *Parent*, supra, 8 Conn. App. 473 (mere acceptance of package containing narcotics is insufficient basis for inference of knowledge of its contents; otherwise "recipient of the package would be liable to conviction, not because of the criminality of his own behavior but because of the wholly unilateral act of the sender" [internal quotation marks omitted]); see also *Illinois* v. *Andrea*, supra, 463 U.S. 769 n.3.

II

The state also argues that even if the evidence was insufficient to support the defendant's conviction of possession and possession with the intent to sell as a principal, the defendant also was convicted of conspiracy, and the jury could have found him guilty under the theories of accessory liability on which it was charged. The defendant claims that because the evidence was insufficient to prove he had knowledge of the contents of the package, the evidence also was insufficient to convict him of conspiracy because that crime also includes the element of knowledge.[13] We agree with the defendant.

"Conspiracy is a specific intent crime, with the intent divided into two elements: (a) the intent to agree or conspire and (b) the intent to commit the offense which is the object of the conspiracy. . . . To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree but also that they *intended to commit the elements of the offense*." (Emphasis in original; internal quotation marks omitted.) *State* v. *Sanchez*, supra, 75 Conn. App. 240. Therefore, it is not enough that the state may be able to show that the defendant had an agreement with Mangan to go to Yellow Freight and to pick up the package that awaited them there; the state also must show that the defendant, when picking up that package, knew that it contained marijuana. As with the knowledge elements for possession and possession with the intent to sell, the state did not present sufficient evidence of the defendant's knowledge to sustain its burden in proving a conspiracy.

The judgment is reversed and the case is remanded with direction to render judgment of not guilty.

In this opinion ROGERS, J., concurred.

[1] General Statutes § 21a-278 (b) provides in relevant part: "Any person who . . . possesses with the intent to sell . . . one kilogram or more of a cannabis-type substance . . . and who is not at the time of such action a drug-dependent person, for a first offense shall be imprisoned not less than five years nor more than twenty years . . . ."

[2] General Statutes § 53a-49 (a) provides: "A person is guilty of an attempt to commit a crime if, acting with the kind of mental state required for commission of the crime, he: (1) Intentionally engages in conduct which would constitute the crime if attendant circumstances were as he believes them to be; or (2) intentionally does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

[3] General Statutes § 21a-279 (b) provides in relevant part: "Any person who possesses or has under his control . . . four ounces or more of a cannabis-type substance . . . for a first offense, may be imprisoned not more than five years or be fined not more than two thousand dollars or be both fined and imprisoned . . . ."

[4] General Statutes § 53a-48 (a) provides: "A person is guilty of conspiracy when, with intent that conduct constituting a crime be performed, he agrees with one or more persons to engage in or cause the performance of such conduct, and any one of them commits an overt act in pursuance of such conspiracy."

[5] The defendant also claims (1) that his due process rights were violated,

specifically his right against double jeopardy, because of his conviction of both attempt to possess one kilogram or more of marijuana with the intent to sell and possession of more than four ounces of marijuana, and (2) that the court improperly excluded as hearsay statements by his alleged coconspirators that exculpated him. Because we agree with the defendant that the evidence was insufficient to sustain his conviction, we need not reach these claims.

[6] The package weighed approximately twenty-eight pounds, but analysis of the plant material in the package alone confirmed that there was slightly more than eighteen pounds of marijuana in the package.

[7] Investigation uncovered that the maroon Chevrolet was a rental car from an agency located in Bridgeport. The defendant had rented the car in his name with a Florida driver's license.

[8] The apartment located at 98 Holly Street belonged to Diana York, and Keith Mangan also resided there. Both individuals were suspected of being involved in transporting drugs.

[9] Although the defendant made a motion for a judgment of acquittal at the culmination of the state's case, that motion was denied, and the defendant then chose to take the witness stand. Our review of the sufficiency of the state's evidence against him, therefore, encompasses not only evidence adduced during the state's case-in-chief, but also all reasonable inferences the jury could have drawn from the defendant's testimony. See *State* v. *Perkins*, 271 Conn. 218, 220–22, 856 A.2d 917 (2004) (explaining and upholding constitutionality of "waiver rule").

[10] Because we conclude that the evidence was insufficient to prove the element of knowledge for all three charges, we need not decide whether the state presented evidence sufficient to prove that the defendant exercised dominion and control over the package. We do note, however, the weakness of the state's case in this regard, at least as to principal responsibility, as it relied on the defendant's presence in an apartment which he neither occupied nor visited regularly and his helping Mangan move the package into the apartment.

[11] Where . . . the [marijuana was] not found on the defendant's person, the state must proceed on the theory of constructive possession, that is, possession without direct physical contact. . . . One factor that may be considered in determining whether a defendant is in constructive possession of [marijuana] is whether he is in possession of the premises where the [marijuana is] found. . . . Where the defendant is not in exclusive possession of the premises where the [marijuana is] found, it may not be inferred that [the defendant] knew of the presence of the [marijuana] and had control of [it], unless there are other incriminating statements or circumstances tending to buttress such an inference. . . . To mitigate the possibility that innocent persons might be prosecuted for . . . possessory offenses . . . it is essential that the state's evidence include more than just a temporal and spatial nexus between the defendant and the contraband. . . . While mere presence is not enough to support an inference of dominion or control, where there are other pieces of evidence tying the defendant to dominion and control, the [finder of fact is] entitled to consider the fact of [the defendant's] presence and to draw inferences from that presence and the other circumstances linking [the defendant] to the crime." (Internal quotation marks omitted.) *State* v. *Smith*, 94 Conn. App. 188, 193–94, 891 A.2d 974, cert. denied, 278 Conn. 906, 897 A.2d 100 (2006).

[12] The state also argues that the fact that the defendant was found with $1291 in cash on his person can lead to an inference that he knew the contents of the package because one pound of marijuana would sell for approximately $1200. The package in this case was to contain eighteen pounds of marijuana, and only a handful of people were involved in this leg of the operation. To say that the defendant had enough money to buy one pound of marijuana and therefore knew the package contained marijuana is as incongruous as saying that the defendant had enough money to buy two guns, and the package contained thirty; therefore, he must have known that the package contained guns. This factor, even combined with all the other inferences that the state urged the jury to make, does not suffice to show knowledge.

[13] We note that the defendant does not make this argument in the most artful fashion, and the state has argued that the claim has not been raised properly for our review. The defendant has raised the claim, albeit briefly, and the argument for reversing his conviction on the conspiracy count essentially mirrors the argument he makes in depth for reversing the conviction of the substantive offenses. In this case, therefore, where the crimes of

which the defendant has been convicted are so intertwined that an injustice would result if we were not to review the defendant's claim, as this would permit his conviction of all three offenses to stand on the basis of accessory liability or liability pursuant to *Pinkerton* v. *United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946), we decline the state's invitation to dispose of the claim in such a cursory manner. We do caution all parties, however, that it is the policy of this court not to review claims that have been abandoned through inadequate briefing. See *State* v. *Bermudez*, 95 Conn. App. 577, 590 n.2, 897 A.2d 661 (2006).