

NOT DESIGNATED FOR PUBLICATION

No. 100,316

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

DEBORAH M. DOUGLAS-KEOUGH,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Reno District Court; RICHARD J. ROME, judge. Opinion filed June 19, 2009. Reversed and remanded with directions.

*Meryl Carver-Allmond*, of Kansas Appellate Defender Office, for appellant.

*Benjamin J. Fisher*, senior assistant district attorney, *Keith E. Schroeder*, district attorney, and *Steve Six*, attorney general, for appellee.

Before MALONE, P.J., LEBEN and STANDRIDGE, JJ.

*Per Curiam:* Deborah M. Douglas-Keough appeals her convictions and sentences for possession of methamphetamine and possession of marijuana following a jury trial. Douglas-Keough claims: (1) the district court erred by admitting evidence of her participation in an outpatient drug treatment program; (2) the district court erred in instructing the jury on possession of a controlled substance; and (3) the district court violated her constitutional rights when it used her criminal history to increase her sentence without proving it to a jury beyond a reasonable doubt.

On May 5, 2007, Reno County Sheriff's Deputy Shawn McClay spotted Douglas-Keough driving her vehicle. He recognized her and began to follow her vehicle while he contacted dispatch to determine if she had any outstanding warrants and a valid driver's license. While McClay was following Douglas-Keough, she made six or seven turns in a short time. McClay believed she was trying to lose him. Shortly thereafter, McClay stopped Douglas-Keough's vehicle for failing to stop at a stop sign.

Meanwhile, dispatch had responded that Douglas-Keough had a revoked driver's license and expired registration. McClay asked Douglas-Keough to step out of the vehicle, and he placed her under arrest for driving while suspended, no insurance, and expired registration. McClay searched Douglas-Keough's vehicle incident to her arrest. While performing the search, McClay observed several empty packs of Camel cigarettes strewn about the vehicle. One of the packs was shoved deep between the driver's seat and the center console, but McClay could still see it. McClay opened the pack and inside was

a ziplock baggy of a green leafy substance McClay identified as marijuana and another baggy containing a white powdery substance later identified as methamphetamine.

On May 8, 2007, the State charged Douglas-Keough with one count of possession of methamphetamine, one count of possession of marijuana, one count of driving while suspended, and one count of driving without insurance. The no insurance violation was dismissed before trial. The district court commenced a jury trial on November 27, 2007. At the conclusion of the State's evidence, the district court dismissed the driving while suspended charge because Douglas-Keough's driving record was not presented as evidence at trial.

Douglas-Keough did not testify at trial. However, her defense was that the drugs belonged to her husband and she did not know the drugs were hidden inside the car. Ryan Douglas, Douglas-Keough's husband, testified for the defense. Douglas had been incarcerated since January or February 2007 for manufacturing methamphetamine. He testified that prior to his incarceration, he and Douglas-Keough shared a vehicle and he often hid illegal drugs inside empty packs of cigarettes scattered about the vehicle. Douglas testified that he smoked Camel cigarettes for almost 15 years and his wife smoked Marlboro red. Douglas testified that the interior of the vehicle was so "messy" and covered with trash that he had lost things in the vehicle several times in the past. Douglas-Keough introduced photographs of the vehicle, which depicted a debris-covered interior.

Douglas also testified that his wife did not know he had drugs in the vehicle and that she was "totally against my drug use." Douglas testified his wife would take away his drugs, throw them away, and flush them down the toilet whenever she did find them. This was the reason that he would hide the drugs from her inside their car. On cross-examination, the State asked Douglas if his wife had ever undergone drug treatment. He replied that she had not. Douglas-Keough objected based on K.S.A. 60-455. However, the State responded that Douglas-Keough had opened the door and the evidence was relevant to rebut Douglas' testimony that his wife was opposed to drug use. The district court overruled the objection.

The State then requested the district court to take judicial notice of a motion filed by Douglas-Keough in a child in need of care (CINC) case concerning her three children. In the motion, Douglas-Keough stated she was complying with the court's request to attend outpatient drug treatment. The defense objected to the request for judicial notice, but the district court overruled the objection and admitted the document. On redirect examination, Douglas testified that his wife was attending the drug treatment program only because it was court-ordered and it was necessary for her to receive custody of their children in the CINC case.

At the conclusion of the evidence, the district court instructed the jury on nonexclusive possession of a controlled substance pursuant to PIK Crim. 3d 67.13-D. Douglas-Keough objected to the jury instruction because it included factors for the jury to

consider that were not supported by the evidence. The jury found Douglas-Keough guilty of possession of methamphetamine and possession of marijuana. The district court imposed a presumptive sentence based on Douglas-Keough's criminal history. She timely appeals.

On appeal, Douglas-Keough claims the district court erred by admitting evidence of her participation in an outpatient drug treatment program because her prior bad act of using drugs was not relevant to prove that she possessed drugs in this case. Douglas-Keough also challenges Instruction No. 9, which instructed the jury on the definition of possession of a controlled substance and the factors that the jury may consider in a nonexclusive possession case. We will first consider the claimed error in instructing the jury.

Instruction No. 9, which was based on PIK Crim. 3d 67.13-D, provided:

"Possession of a controlled substance requires that Deborah Douglas have control over the substance with knowledge of and the intent to have such control. To possess a controlled substance, Deborah Douglas must have knowledge of the presence of the controlled substance with intent to exercise control over it. Control means to exercise a restraining or direct influence over the controlled substance.

"Possession may be immediate and exclusive, jointly held with another, or constructive. Joint possession occurs when two or more

persons, who have the power or control and intent to manage property, exercise the same jointly. Constructive possession is knowingly keeping a controlled substance in a place to which Deborah Douglas has some measure of access and right of control.

"When a defendant is in nonexclusive possession of the premises upon which a controlled substance is found, it cannot be inferred that Deborah Douglas knowingly possessed the controlled substance unless there are other circumstances linking Deborah Douglas to the controlled substance. Factors you may consider in determining whether Deborah Douglas knowingly possessed the controlled substance include:

"1. *Deborah Douglas' previous participation in the sale of a controlled substance;*

"2. *Deborah Douglas' use of controlled substances;*

"3. Deborah Douglas' proximity to the area where the controlled substance was found;

"4. *The fact the controlled substance was found in plain view;*

"5. Incriminating statements of Deborah Douglas;

"6. Suspicious behavior of Deborah Douglas; and

"7. Proximity of Deborah Douglas' possession to the controlled substance." (Emphasis added.)

Douglas-Keough maintains that the district court erred by including factors 1, 2, and 4 because there was no evidence presented at trial to support these factors. Douglas-Keough objected to the instruction in district court. When a defendant objects to instructions, an appellate court is required to consider the instructions as a whole and not isolate any one instruction. Even if erroneous in some way, instructions are not reversible error if they properly and fairly state the law as applied to the facts of the case and could not have reasonably misled the jury. *State v. McKissack*, 283 Kan. 721, 732, 156 P.3d 1249 (2007).

Douglas-Keough is correct that there was no direct evidence at trial supporting factors 1, 2, and 4 of the third paragraph of the instruction. There was no evidence that Douglas-Keough participated in the sale of a controlled substance. There was also no direct evidence that she used a controlled substance, except this fact could be inferred from the evidence of her outpatient drug treatment. Finally, there was no evidence that the drugs were found in plain view in the vehicle, but instead the evidence showed that the drugs were found in an empty pack of cigarettes shoved down between the driver's seat and the center console. Thus, the district court erred by including these factors which were not supported by the evidence in the jury instruction.

The State argues that the instructions as a whole could not have reasonably misled the jury. We disagree. The district court instructed the jury that it may consider seven factors in determining whether Douglas-Keough knowingly possessed the drugs found in

her vehicle. The seven factors were then set forth as if they were facts supported by the evidence at trial. For instance, the jury was instructed that it may consider Douglas-Keough's "previous participation in the sale of a controlled substance." However, there was absolutely no evidence that Douglas-Keough ever sold drugs, and any inference that she may have done so was highly prejudicial. The jury was also instructed that it may consider *the fact* the controlled substance was found in plain view. There was no evidence that the drugs were found in plain view in the vehicle, but instead the evidence showed that the drugs were found in an empty pack of cigarettes shoved down between the driver's seat and the center console. The contradiction between the language of the instruction and the evidence presented at trial could have easily misled the jury as it decided whether Douglas-Keough possessed the drugs in question.

According to the Notes on Use under PIK Crim. 3d 67.13-D, the district court should instruct the jury regarding only those factors in the third paragraph of the instruction which are supported by the evidence. This recommendation is important because the factors set forth in the third paragraph of the instruction are stated as if they are facts supported by the evidence at trial. The impact of the instruction may have been less damaging to Douglas-Keough if the jury had been told to consider only those factors that the jury found were supported by the evidence, but this was not the case. We conclude that Instruction No. 9 could have reasonably misled the jury under the facts and circumstances of this case, and the district court committed reversible error by giving the instruction over Douglas-Keough's objection.

Douglas-Keough also claims the district court erred by admitting evidence of her participation in an outpatient drug treatment program because her prior bad act of using drugs was not relevant to prove that she possessed drugs in this case. We will briefly address this issue because it may arise at Douglas-Keough's retrial.

The State introduced evidence that Douglas-Keough had participated in an outpatient drug treatment program. Participation in a drug treatment program is not a crime or civil wrong. *State v. Ralph*, 217 Kan. 457, 459, 537 P.2d 200 (1975) However, the evidence that Douglas-Keough participated in a drug treatment program inferred that she previously used drugs which is a crime. Generally, evidence of prior drug use can only be admitted to prove subsequent drug possession following proper analysis under K.S.A. 60-455.

When a defendant denies possessing illegal drugs, as opposed to asserting some innocent reason for possessing the drugs, evidence of the defendant's prior drug use is inadmissible to prove intent under K.S.A. 60-455. See *State v. Boggs*, 287 Kan. 298, 315-17, 197 P.3d 441 (2008). Here, Douglas-Keough did not assert an innocent reason for possessing the drugs in her vehicle; she completely denied possessing the drugs *at all*. Under these facts, the evidence of her prior drug treatment generally would have been inadmissible to prove that she intended to possess the drugs in this case.

The State argues that the evidence of Douglas-Keough's drug treatment was admissible under K.S.A. 60-447 to rebut Douglas' characterization of his wife as being opposed to drug use. The district court admitted the evidence for this reason. K.S.A. 60-447 allows evidence to be introduced of the accused's character as tending to prove guilt of the offense charged after the accused has introduced evidence of his or her good character. Here, Douglas-Keough introduced evidence of her staunch disapproval of drug use through Douglas' testimony. Under these circumstances, the evidence of Douglas-Keough's participation in an outpatient drug treatment program may have been admissible as proper rebuttal evidence under K.S.A. 60-447.

We do not know what evidence will be presented at Douglas-Keough's retrial. However, even if Douglas testifies in the same manner that he testified in the first trial, the district court should be aware that evidence of Douglas-Keough's prior drug treatment implicates K.S.A. 60-455. Before such evidence is admitted, the district court should balance its probative value against its potential for undue prejudice. The district court should also consider a limiting instruction informing the jury of the specific purpose for admission of the evidence.

Finally, because we are granting Douglas-Keough a new trial, we need not address her claimed sentencing error. Douglas-Keough's convictions of possession of methamphetamine and possession of marijuana are reversed and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded with directions.