

[Cite as *State v. Davis*, 2010-Ohio-5123.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93844

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

KEVIN DAVIS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-524901

BEFORE: Cooney, J., Gallagher, A.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: October 21, 2010

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Kevin Davis (“Davis”), appeals his convictions and sentences for three counts of drug trafficking, three counts of drug possession, and one count of possession of criminal tools. We find some merit to the appeal and affirm in part, reverse in part.

{¶ 2} In June 2009, Davis was charged with three counts of drug trafficking in violation of R.C. 2925.03(A)(2), three counts of drug possession in violation of R.C. 2925.11(A) and 4729.51(C)(2), and one count of possessing criminal tools in

violation of R.C. 2923.24(A). The indictment alleged that Davis possessed and prepared for sale, marijuana in an amount less than 200 grams, cocaine in an amount less than 5 grams, and morphine in an amount less than bulk. All counts included one-year firearm specifications and various forfeiture specifications. The trafficking counts and one of the drug possession counts also included juvenile and schoolyard specifications.

{¶ 3} Prior to trial, the parties stipulated that the firearm was operable and that Caledonia Elementary School is a school within the definition of the Ohio Revised Code. The parties also stipulated to the accuracy of a map created by the Cuyahoga County Engineer's Office that depicts the location of Davis's home in relation to Caledonia Elementary School, which was admitted into evidence at trial as State's Exhibit 1. The following evidence was presented at trial:

{¶ 4} Cleveland Heights Police Sergeant Christopher Skok ("Skok") testified that in February 2009, he was assigned to investigate complaints of drug activity at a home located at 960 Nelaview in Cleveland Heights. On February 23, 2009, while conducting surveillance on the house, Skok observed what appeared to be a drug transaction with known drug dealer Sean Chester ("Chester"). Skok and other Cleveland Heights police officers continued surveillance on the house for several days and witnessed numerous short-term visits to the house. They also saw another known drug dealer visiting the house.

{¶ 5} On February 27, 2009, Skok searched the garbage at the house and discovered a large quantity of tear-off baggies used for packaging drugs, some of which field-tested positive for cocaine. Based on these observations and discoveries, Skok obtained a search warrant for the home located at 960 Nelaview.

{¶ 6} When they executed the search warrant, Davis allowed the police into the house where they found a young child, approximately three to five years old, a 13-year-old girl, and an elderly woman. Skok testified that Davis admitted he lived in the basement where police found a variety of drugs, a firearm, and Davis's personal effects, including mail addressed to Davis at the 960 Nelaview address. Skok also found a large garbage bag full of tear-offs next to the washing machine. A suit jacket was hanging on a rack next to the washing machine. Police found a digital scale and a sandwich baggie containing 27 individually wrapped bags of marijuana in the jacket. In another suit coat, they discovered a gray pouch containing numerous individually wrapped pills. In one of the suit pockets, police found a photo of Davis, a heavy-set figure, wearing the suit coat that contained the digital scale and 27 bags of marijuana. Finally, police found a loaded revolver on a shelf in a closet nearby.

{¶ 7} Skok identified both 960 Nelaview and Caledonia Elementary School on the map created by the Engineer's Office. The parties had previously stipulated to the accuracy of the map and its being drawn to scale. Skok further

testified that it accurately depicted the positioning of the buildings and the street location. However, he was never asked the distance between the home and the school.

{¶ 8} Davis's mother, Elenora Davis ("Elenora"), and 13-year-old niece, Whynter Jordan ("Jordan"), testified for the defense. Jordan testified that although she did not live at 960 Nelaview, she frequently came to visit and Sean Chester was often present at the home. Jordan also testified that Davis lived with his girlfriend and that Sean Chester lived in the basement of the house. However, Elenora testified that although Davis spends much of the time at his girlfriend's house, he lives half of the time in the basement of 960 Nelaview.

{¶ 9} At the conclusion of the trial, the jury found Davis guilty on all counts, all the forfeiture specifications, and all schoolyard and juvenile specifications, thus enhancing each charge by one degree of felony. However, the jury found that the State proved the firearm specification only as it relates to the count of possession of criminal tools.

{¶ 10} The court sentenced Davis to one year in prison on Count 3, drug trafficking, and six months in prison on all other charges, to run concurrently. The court also sentenced him to one year for the firearm specification, to run consecutive to the one year for the other convictions, for a two-year aggregate sentence. Davis now appeals, raising four assignments of error.

Schoolyard Specification

{¶ 11} In the first assignment of error, Davis argues the jury's findings that Davis committed the offenses within 1,000 feet of a school were not supported by sufficient evidence. Davis claims that because no one testified as to the distance between the house located at 960 Nelaview and the school, the jury had no basis upon which to accurately determine whether the crimes were committed within 1,000 feet of the school. We agree.

{¶ 12} A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the State has met its burden of production at trial. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 678 N.E.2d 541. On review for sufficiency, courts are to assess not whether the State's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id.* The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 13} The trial transcript reveals that the parties stipulated to the accuracy of a map that Sergeant Skok used to explain where Caledonia Elementary School is located in relation to 960 Nelaview.¹ However, there is no testimony as to the

¹The prosecutor conceded at trial that the stipulation involved only that the school met the statutory definition of a school, not that it was within 1,000 feet of the house. (Tr. 401.)

distance between the house and the school other than Skok's testimony that Caledonia Elementary School "is two streets to the north of 960 Nelaview." Without specific testimony as to the distance between the house and the school, there is no way to accurately determine whether the crimes were committed within 1,000 feet of the school. Therefore, even viewing the evidence in a light most favorable to the State, the jury did not have sufficient evidence to find that Davis committed the offenses within 1,000 feet of the school.

{¶ 14} Accordingly, the first assignment of error is sustained.

Firearm Specification

{¶ 15} In the second assignment of error, Davis contends there was insufficient evidence to support the jury's finding that he had control of the firearm while possessing criminal tools. Davis argues that the jury's finding that he had control of the gun was erroneous because the gun was found in a common area of the house jointly occupied by several people.

{¶ 16} "[P]ossession' means having control over a thing or substance, but [it] may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." R.C. 2925.01(K). Possession may be actual or constructive. *State v. Haynes* (1971), 25 Ohio St.2d 264, 269-270, 267 N.E.2d 787. Constructive possession exists when an individual knowingly exercises dominion and control over an object, even though that object may not be within the individual's

immediate physical possession. *State v. Hankerson* (1982), 70 Ohio St.2d 87, 434 N.E.2d 1362, syllabus.

{¶ 17} In support of his argument, Davis relies on *Haynes*, a case involving the police finding drugs in a residence leased by the defendant but also occupied by other people. The Ohio Supreme Court found insufficient evidence to demonstrate that the defendant possessed the drugs because they were found in an area regularly occupied by co-tenants and accessible to all tenants. *Id.* The court explained that the mere fact that one is the owner or lessee of the premises is not, without further evidence, enough to establish possession in the owner or lessee. *Id.* at 270.

{¶ 18} However, *Haynes* is distinguishable from the instant case. In *Haynes*, the only evidence connecting the defendant to the drugs was the fact that he was the lessee of the premises. Further, he was not present at the time of the search and had not occupied the premises for a week prior to the search of the house. In this case, Davis was present at the house at the time of the search and admitted he lived in the basement where the drugs and the gun were found. The police found the gun in a locked closet next to Davis's bedroom, and the gun was located on a shelf next to his cologne and a few feet away from where the drugs, digital scale, and tear-off baggies were found.

{¶ 19} Although Davis's mother and niece testified that Sean Chester lived in the basement, Davis was present at the home when police executed the

search warrant, admitted he lived in the basement, and confessed to the crime when he admitted his willingness to cooperate with police in locating his drug supplier. There was also evidence that the other occupants of the house never went into the basement. Therefore, viewing the evidence in a light most favorable to the State, we find the jury's conclusion that Davis had control of the gun was supported by sufficient evidence.

{¶ 20} Accordingly, the second assignment of error is overruled.

Allied Offenses of Similar Import

{¶ 21} In the third assignment of error, Davis argues that Count 1, which alleged trafficking in cocaine, and Count 5, which alleged possession of cocaine, should have merged into a single count of conviction because they are allied offenses. In the fourth assignment of error, Davis argues that Count 3, which alleged trafficking in morphine, and Count 4, which alleged possession of morphine, should have merged into a single count of conviction because they are allied offenses. The State concedes that these offenses are allied offenses of similar import that should be merged under R.C. 2941.25.

{¶ 22} Therefore, the third and fourth assignments of error are sustained.

{¶ 23} Judgment affirmed in part and reversed in part. Case remanded for merger of allied offenses, vacating the convictions on the schoolyard specification, and resentencing.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

COLLEEN CONWAY COONEY, JUDGE

FRANK D. CELEBREZZE, JR., J., CONCURS;
SEAN C. GALLAGHER, A.J., CONCURS (WITH SEPARATE
CONCURRING OPINION ATTACHED)

SEAN C. GALLAGHER, A.J., CONCURRING:

{¶ 24} I concur with the majority holding in the first assigned error, but write separately to more closely address the question of when is a stipulation an actual stipulation. This case points out the need for prosecutors to be clear on what a stipulation involves, and if it is anything less than a complete agreement on an element of an offense charged or it is unclear what the stipulation addresses, supplemental evidence must be offered.

{¶ 25} The critical aspect of a schoolyard specification has always been the distance between the purported crime and the school. A stipulation that does not establish that fact does not appear to be a stipulation to anything.

{¶ 26} At trial, the following exchanges took place:

“THE COURT: What do you want to put on the stipulation in State v. Davis[?]”

MR. MARTIN: Your honor, I believe there will be stipulations to [the effect that] there is a map for the purposes of proving the schoolyard specification. This map was created by the Cuyahoga County Engineer’s Office, and it’s my understanding that the defendant will stipulate that the map is accurate.

THE COURT: What else?

MR. MARTIN: And drawn to scale.

*** ***

THE COURT: Okay. Is that all correct?

MR. GIBEL: Yes, your honor.”

{¶ 27} After the evidence was in, and during the reading of the charge to the jury, it appears this stipulation changed, or the understanding of the stipulation changed.

{¶ 28} The prosecutor revealed the following:

“THE COURT: In this case we had a stipulation with the firearm operable. What else?”

MR. MARTIN: The school.

THE COURT: School was in a thousand feet, and what else?

MR. MARTIN: Your honor, not that the school is within a thousand feet, but the school met the statutory definition of a school.

THE COURT: So it’s in dispute on the distance, okay. Good.”

{¶ 29} The exhibit in question was not part of the record sent to this court. Upon requesting the exhibit from the court reporter, the court was advised that it “had everything.” At the hearing, the prosecutor made an argument that the exhibit was essentially “self-authenticating” on the issue of distance because it had a “drawn to scale” representation on the exhibit. I cannot even consider this argument as I have not seen the exhibit and am unaware of where it is located.

{¶ 30} Even if the exhibit is located and offered, the stipulation, in its final form, does not appear to cover the distance. While the police officer was not asked about the distance at trial, this omission in my view is not significant. This testimony would only be relevant if the officer could actually testify with knowledge of the distance involved.

{¶ 31} For these reasons, I agree with the majority analysis and resolution of this issue.