

[Cite as *State v. Dorsey*, 2010-Ohio-6152.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93466

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CORY E. DORSEY

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-522017

BEFORE: McMonagle, P.J., Blackmon, J., and Jones, J.

RELEASED AND JOURNALIZED: December 16, 2010

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CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant, Cory E. Dorsey, appeals his convictions, rendered after a jury trial, for trafficking in drugs with specifications, possession of drugs with specifications, and possessing criminal tools with specifications. He also appeals his conviction, which was rendered by the court, for having weapons under disability.

{¶ 2} Dorsey was charged in March 2009 on the following counts: Count 1, drug trafficking; Count 2, drug possession; Count 3, having weapons under disability; and Count 4, possessing criminal tools.¹ Attendant to the charges were various forfeiture specifications for the following items: a cell phone, ammunition, a gun, a gun box, and U.S. currency. The drug trafficking and drug possession charges also had one-year firearm specifications. The indictment alleged that the offenses occurred “on or about February 26, 2009.”

{¶ 3} Dorsey waived his right to a jury trial on Count 3, having weapons under disability; the remaining counts were tried to a jury. Dorsey made a Crim.R. 29 motion at the close of the state’s case, but the motion was denied. Dorsey rested without presenting any witnesses and renewed his Crim.R. 29 motion. The motion was again denied.

{¶ 4} The jury found Dorsey guilty of the underlying charges, the firearm specifications, and the forfeiture specifications relating to the gun, ammunition, and gun box. The jury found him not guilty of the forfeiture specifications relating to the cell phone and U.S. currency. The court found Dorsey guilty of having weapons under disability and the specification regarding forfeiture of the gun, ammunition, and gun box. The trial court

¹The indictment alleged that the criminal tools were “firearms and/or money and/or ammunition and/or gun box and/or cell phone.”

sentenced him to two years in prison and ordered forfeiture of the relevant items.

{¶ 5} Dorsey challenges his convictions in three assignments of error, contending that the evidence was insufficient, the trial court improperly allowed opinion testimony, and the convictions were against the manifest weight of the evidence.

II

{¶ 6} The trial testimony established the following. Lisa Camacho had lived with Dorsey at a Sackett Avenue home “off and on for a couple of years.”

On February 25, 2009, she was involved in a domestic dispute with Dorsey and thereafter left the house. The following day, February 26, she obtained a police escort to return to the house to retrieve her personal belongings. Prior to entering the house, one of the officers asked Camacho, for officer safety, if there were any guns or dogs in the home. Camacho responded that there were guns in the house.

{¶ 7} After signing a consent to search form, Camacho led the police to a bedroom and told them that there was a gun in the ceiling tile. The police recovered an unloaded handgun, a gun case, and crack cocaine. Camacho also told the police that there was a gun in a vehicle parked outside. The police searched the vehicle and recovered a handgun. Camacho testified that

she had previously seen Dorsey put guns and drugs in the ceiling tile and that he told her that he had a gun in his car.

{¶ 8} After Dorsey was indicted, Camacho claimed responsibility for all of the contraband. She stated that she had a drug problem and that she had initially implicated Dorsey because she was mad at him about the domestic violence incident. Camacho maintained that the contraband was hers up until the day before trial, when she learned that she had contracted a venereal disease from Dorsey. Camacho admitted that she has prior felony convictions, two of which are for drug possession.

III

{¶ 9} For his first assigned error, Dorsey contends that the evidence was insufficient to sustain his convictions. We agree.

{¶ 10} 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*, 78 Ohio St.3d 380, 390, 1997-Ohio-52, 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.

A. Drug Trafficking

{¶ 11} R.C. 2925.03(A)(2), governing drug trafficking, provides that “[n]o person shall knowingly * * * [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person.”

B. Drug Possession

{¶ 12} R.C. 2925.11(A) prohibits drug possession: “No person shall knowingly obtain, possess, or use a controlled substance.”

C. Having Weapons Under Disability

{¶ 13} Having weapons under disability is governed by R.C. 2923.13(A)(2), which provides that “* * * no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if * * * [t]he person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence.”

D. Possessing Criminal Tools

{¶ 14} R.C. 2923.24(A) governs possessing criminal tools and provides that “[n]o person shall possess or have under the person’s control any substance, device, instrument, or article, with purpose to use it criminally.”

IV.

{¶ 15} The state presented some evidence that Dorsey at some unidentified time in the past “placed” the drugs and gun found in the ceiling, and some evidence that he knew there was a gun in his vehicle. There is no evidence whatsoever that he “possessed” any of these items “on or about February 26, 2009,” or any date even near that.² Accordingly, there is insufficient evidence to support convictions for drug possession or having a weapon under disability on or about February 26, 2009, as alleged in the indictment.³

{¶ 16} Additionally, there is absolutely no evidence whatsoever that Dorsey “prepared drugs for sale” or that the cell phone, money, ammunition,

²R.C. 2925.01, the definition section for drug offenses, states that “‘possess’ or ‘possession’ means having control over a thing or substance, but 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. 2929.01(K).

³We note reference to a stipulation concerning having a weapon under disability, but can locate no such stipulation in the record. The evidence envelope contains a certified copy of conviction for aggravated robbery for Cory Dorsey in 1990; however, the record is wholly silent as to whether the convicted Cory Dorsey is one-and-the-same as appellant herein. If indeed there was a stipulation as to this conviction belonging to appellant, it is absent from the record.

gun box, or guns found in the search were “possessed with purpose to use criminally in any felony,” alleged in the possession of criminal tools count.

{¶ 17} Finally, the possession of drugs and drug trafficking charges each had a one-year firearm specification attached. “On or about his person or under his control’ means that ‘the firearm was either carried on the defendant’s person or was so near the defendant’s person as to be conveniently accessible and within his immediate physical reach.” *State v. Smith*, Cuyahoga App. No. 93593, 2010-Ohio-4006, ¶11, quoting 2 Ohio Jury Instructions (2008) Section 4, at 127. The state presented no evidence whatsoever that Dorsey had the gun “on or about his person or under his control” while committing any of these alleged offenses.

{¶ 18} In light of the above, the first assignment of error is sustained. We reverse all of the convictions in this matter and remand the case to the trial court with orders to vacate. The remaining assignments of error are moot and we do not address them. See App.R. 12(A)(1)(c).

Reversed and remanded.

It is ordered that appellant recover from appellee his 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. Case remanded to the trial court for further proceedings consistent with this opinion.

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

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

LARRY A. JONES, J., CONCURS;

PATRICIA ANN BLACKMON, J., DISSENTS

PATRICIA ANN BLACKMON, J., DISSENTING:

{¶ 19} I respectfully dissent from the majority opinion. The Ohio Supreme Court in *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, has held that sufficiency of the evidence is a test of adequacy; accordingly, the question for review is whether the state's evidence supports a verdict as a matter of law. Consequently, the sufficiency issue is whether enough evidence exists to persuade a fact finder of defendant's guilt, not whether the state's evidence is of a certain quality.

{¶ 20} With regards to the weapons, Camacho testified a gun and drugs were in the house and a gun was in the car. She said Dorsey told her that the gun was in the car. She further testified that she and Dorsey lived in the house and the car was parked outside. To protect themselves, the officers asked her about the weapons while they escorted her in the house to obtain her belongings.

She asked for the help because of a domestic dispute. She testified that the

last time she saw him use a weapon was on New Year's Eve. She knew where the guns and drugs were and her testimony was adequate.

{¶ 21} On the issue of possession, the evidence is viewed in favor of the state. Also, there was sufficient evidence of constructive possession because he was in the house that Camacho testified belonged to both of them or at least they both occupied. Whether this evidence is quality or not is for the jury to decide and for us to evaluate only under manifest weight.

{¶ 22} The majority opinion argues that this is inferred evidence based on mere occupancy. I appreciate that argument; however, Camacho is the key witness. This was not merely the officers concluding that Dorsey possessed the weapons because of occupancy. The state's case rested on the shoulders of Camacho, who lived in the house with Dorsey, knew where the drugs and guns were, and ultimately led the officers to the guns and drugs. She tried to recant her story to take ownership of the guns and drugs out of fear of losing the house that they both occupied. This was her story that the judge was bound to accept as true and the jury could believe it or not.

{¶ 23} Finally, the possession for sale of the drugs was based solely on the opinion testimony of the officer. The officer testified as to the packaging and believed they were for sale. Viewed in the light most favorable to the state, the officer's testimony is enough, subject to disbelief by the jury. Consequently, I would have affirmed.