**[Cite as *State v. Anderson*, 2009-Ohio-2521.]**

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

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| STATE OF OHIO, | : | |
| Plaintiff-Appellee, | : | CASE NO. CA2008-07-026 |
| | : | O P I N I O N |
| - vs - | | 6/1/2009 |
| | : | |
| KRISTEN ANDERSON, | : | |
| Defendant-Appellant. | : | |

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 07CRI00087

David B. Bender, Fayette County Prosecuting Attorney, Kristina M. Rooker, 110 East Court Street, Washington C.H., OH 43160, for plaintiff-appellee

Jeffrey A. McCormick, 1225 State Route 22 SW, Washington C.H., OH 43160, for defendant-appellant

**POWELL, J.**

**{¶1}** Defendant-appellant, Kristen Anderson, appeals her conviction from the Fayette County Court of Common Pleas for drug trafficking and possession of cocaine.

**{¶2}** Appellant was charged with the two offenses after her vehicle was stopped and police discovered crack cocaine and powder cocaine. Appellant's case was tried to a jury, which returned a guilty finding on both counts. The trial court found appellant to

be a major drug offender based on the specification to the trafficking count and the amount of crack cocaine established by the jury. Appellant received a consecutive prison term and a mandatory $10,000 fine.

**{¶3}** Appellant now appeals her conviction, presenting five assignments of error for our review. Appellant's first three assignments of error challenge the sufficiency of the evidence for the trafficking and possession offenses and the major drug offender finding. The fourth assignment of error contests the manifest weight of the evidence for her conviction. We will combine the first four assignments of error and address them together.

**{¶4}** Assignment of Error No. 1:

**{¶5}** "THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN APPELLANT'S CONVICTION FOR TRAFFICKING IN CRACK COCAINE."

**{¶6}** Assignment of Error No. 2:

**{¶7}** "THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN THE COURT'S FINDING THAT APPELLANT IS A MAJOR DRUG OFFENDER."

**{¶8}** Assignment of Error No. 3:

**{¶9}** "THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN APPELLANT'S CONVICTION FOR POSSESSION OF COCAINE."

**{¶10}** Assignment of Error No. 4:

**{¶11}** THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN CONVICTING HER OF TRAFFICKING IN CRACK COCAINE, FINDING HER TO BE A MAJOR DRUG OFFENDER, AND CONVICTING HER OF POSSESSION OF

COCAINE."

**{¶12}** The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. In reviewing a record for sufficiency, 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. Id. In determining whether a conviction is against the manifest weight of the evidence, the court weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶39; *State v. Wilson,* Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶34.

**{¶13}** Given that a sufficiency finding is required to take a case to the jury, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency, and therefore, a determination that a conviction is supported by the weight of the evidence will also be dispositive as to a claim of insufficiency. *State v. Wilkins*, Clinton App. No. CA2007-03-007, 2008-Ohio-2739, ¶22; *State v. Harry*, Butler App. No. CA2008-01-0013, 2008-Ohio-6380, ¶46; *State v. Roberts* (Sept. 17, 1997), Lorain App. No. 96CA006462; *State v. Bergsmark*, Lucas App. No. L-03-1137, 2004-Ohio-5753, ¶8.

**{¶14}** Appellant argues that the prosecution failed to prove that she knowingly engaged in trafficking in crack cocaine for that offense and for the major drug offender

finding. Appellant also argues that the state did not prove that she possessed the full amount of the crack cocaine in excess of 100 grams and the approximately 10 grams of powder cocaine.

**{¶15}** Evidence was presented that on May 10, 2007, a deputy from the Fayette County Sheriff's Office stopped appellant's vehicle on a Fayette County road at approximately 1:30 a.m. because one headlight was not illuminated. The deputy testified that appellant was driving the vehicle, with one man in the front passenger seat and another man sitting behind the passenger in the rear passenger area. The deputy observed the rear passenger lean over in the back seat area when the deputy pulled over the vehicle. The deputy requested assistance when he became aware that a felony warrant existed for the front passenger.

**{¶16}** The deputy's backup assistance was the shift supervisor and canine handler. The supervisor's canine, trained to detect narcotics, walked around appellant's vehicle and alerted to the rear passenger door. Appellant permitted a deputy to search her vehicle. Plastic baggies with crack cocaine and powder cocaine were found in a carry-out cup among refuse in the rear passenger area of the vehicle. Deputies testified that they located a $100 bill in the rear passenger area and $50 on appellant.

**{¶17}** The officer who transported appellant to the sheriff's department found crack cocaine under and on the rear seat of his police vehicle. Appellant acknowledged leaving the drugs. She provided a written statement in which she stated that the rear passenger handed her the crack cocaine after her vehicle was stopped and before the deputy approached the vehicle. She told police she stuffed the drugs into her underwear and subsequently dropped the drugs in the back seat of the police vehicle.

Appellant later indicated that it was the front-seat passenger and not the rear passenger who handed her the drugs and told her to conceal them.

**{¶18}** Appellant told the officers that while she currently lived in Gallipolis, Ohio, she had also spent some time in Dayton, Ohio, where she met the front passenger a few years ago. Appellant said she was asked by a third party to drive from her home in Gallia County to Dayton to pick up the front-seat passenger there. Her gas money would be paid. The third party told appellant that the passenger would call her on a cell phone provided to appellant to give her instructions on where to find him. Appellant indicated that once she arrived at an unidentified house, the rear passenger, with whom she was unfamiliar, entered her vehicle with the front passenger.

**{¶19}** The deputies testified that appellant told them, based on a conversation between the two passengers in her vehicle, she suspected drugs or specifically cocaine was in her vehicle that evening. Appellant told authorities that on two previous occasions within the last six-month period she had driven the front passenger from Dayton to Gallia County, knowing he was selling drugs "at that point."

**{¶20}** Appellant testified at trial that she did not tell police she previously transported the front passenger to Gallia County to sell drugs, that she did not hear any conversation from the passengers about drugs or selling drugs, and she did not know drugs were in her car until police stopped her vehicle. She testified that when police stopped her vehicle, the front passenger made a call on his cell phone, yelling that he was not "going back to jail," and threw her his drugs and ordered her to conceal them. She testified that she was fearful and did as the passenger said. Appellant said she thought she was hiding all of the drugs and did not know about the drugs in the rear

passenger area.

**{¶21}** The front passenger testified that his prior felony record included "multiple drug cases." He said he promised to give appellant $50 to pick him up in Dayton and take him to Gallipolis, that he told appellant he was going to "turn himself in" on the outstanding warrant, that he panicked when the car was stopped, and he threw the drugs at appellant and told her to "stash" them.

**{¶22}** Testimony was presented that the drugs were analyzed and determined to be crack cocaine and cocaine. The substance dropped by appellant in the police vehicle contained crack cocaine and weighed 68 grams. The substances found in the cup in the rear of appellant's vehicle were another 66 grams of crack cocaine and 10.3 grams of powder cocaine. The jury made the finding that the amount of crack cocaine involved was equal to or greater than 100 grams.

**{¶23}** Appellant's trafficking count was based on the portion of the applicable statute that deals with the accused knowingly preparing for shipment, shipping, transporting, delivering, preparing for distribution, or distributing the crack cocaine in an amount greater than 100 grams knowing or having reasonable cause to believe the controlled substance was intended for sale or resale. The possession count involved the allegation that appellant knowingly obtained, possessed, or used the powder cocaine in an amount more than five grams but less than 25 grams. See R.C. 2925.03(A)(2) and (C)(4)(g); R.C. 2925.11(A) and (C)(4)(b).[1]

**{¶24}** The jury at appellant's trial was instructed that it could find appellant guilty as a principal or as an accomplice. To support a conviction for aiding and abetting, the

1. We note that the indictment in this case contains the applicable language of the statutory sections of R.C. 2925.03(A)(2) and R.C. 2925.11(A), even though only the statutory designations of R.C.

evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstance surrounding the crime. *State v. McGowan*, Jefferson App. No. 04 JE 6, 2005-Ohio-1335, ¶17.

**{¶25}** A person's mere association with a principal offender is not enough to sustain a conviction based on aiding and abetting; there must be some level of active participation by way of providing assistance or encouragement. *State v. Mootispaw* (1996), 110 Ohio App.3d 566, 570. Criminal intent, however, can be inferred from the presence, companionship and conduct of a criminal defendant both before and after the offense is committed and may be proven by either direct or circumstantial evidence. Id.; *State v. McKnight,* Vinton App. No. 01CA556, 2002-Ohio-1971, ¶23.

**{¶26}** "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. 2925.01(K). Possession of drugs can be either actual or constructive. See *State v. Weckner,* Brown App. No. CA2001-06-009, 2002-Ohio-1012.

**{¶27}** A person has "constructive possession" if she is able to exercise domination and control over an item, even if the individual does not have immediate physical possession of it. *State v. Hankerson* (1982), 70 Ohio St.2d 87, 90-91. For constructive possession, it must be shown that the person was conscious of the presence of the object. Id. Evidence that a person was located in close proximity to

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2925.03(C)(4)(g) and R.C. 2925.11(C)(4)(b) are listed in the caption of the indictment.

readily usable drugs may be used to show that the person was in constructive possession. *Weckner*; *State v. Brown*, Butler App. No. 2006-10-247, 2007-Ohio-7070, ¶44. Two or more persons may have joint constructive possession of a particular item; constructive possession of contraband may be proven by circumstantial evidence. *State v. Cooper*, Marion App. No. 9-06-49, 2007-Ohio-4937, ¶25.

**{¶28}** A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist. R.C. 2901.22(B). Knowledge can be ascertained from the surrounding facts and circumstances in the case. *State v. Lott* (1990), 51 Ohio St.3d 160, 168.

**{¶29}** Reviewing the evidence under the applicable law, we find that appellant's conviction for trafficking and possession, as well as the major drug offender finding, was not contrary to the manifest weight of the evidence.

**{¶30}** The jury did not lose its way and did not create a manifest miscarriage of justice when it determined from the evidence that appellant, who on two previous occasions drove the front passenger from Dayton to Gallia County so he could sell drugs, again knowingly participated in an arrangement to pick up the front passenger in Dayton and transport him to Gallia County. There was evidence that appellant knew about the presence of drugs in the vehicle and concealed and eventually tried to discard some of the drugs after her vehicle was stopped. See *State v. Peart* (Oct. 4, 1995), Lorain App. No. 94CA005994 (found defendant aided and abetted passenger by driving automobile in which cocaine located; drugs not well secured and assessable to defendant; large quantity of cocaine involved was circumstantial evidence of defendant's

knowledge); cf. *McGowan*, 2005-Ohio-1335 at ¶17-18 (defendant did not have mere presence in case as appellant was not a passive passenger, but the driver); see *State v. Howland*, Fayette App. No. 2006-08-035, 2008-Ohio-521; see *State v. Molina*, Cuyahoga App. No. 83731, 2004-Ohio-4347; see *State v. Craft*, Butler App. No. CA2008-01-023, 2009-Ohio-675, ¶44 (more than recreational amount of drugs found in plastic baggies); R.C. 2925.03(A)(2) (trafficking) and (C)(4)(g) (amount equal to or exceeding 100 grams of crack cocaine); R.C. 2925.11(A) (possession) and (C)(4)(b) (equals or exceeds five grams but less than 25 grams of cocaine); R.C. 2941.1410 (specification concerning major drug offender).

**{¶31}** The jury in this case was in a better position to view the witnesses, observe their demeanor, and assess their credibility, and was free to believe or disbelieve all, part, or none of the testimony of the witnesses at trial. *Howland* at ¶43. The jury chose not to believe the testimony from appellant or the front passenger regarding appellant's knowledge or level of participation.

**{¶32}** Based upon our determination on the manifest weight of the evidence in appellant's fourth assignment of error, we find sufficient evidence existed on all the essential elements to sustain the conviction for trafficking, possession, and the major drug offender finding under appellant's first, second, and third assignments of error. All four assignments of error are overruled.

**{¶33}** Assignment of Error No. 5:

**{¶34}** "THE DEFENDANT-APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH

AMENDMENTS OF THE UNITED STATES CONSTITUTION."[2]

**{¶35}** Appellant argues that her trial counsel was ineffective because he failed to file an affidavit of indigency on her behalf before sentencing, and therefore, she was not eligible to avoid the imposition of the mandatory $10,000 fine.

**{¶36}** We overrule appellant's fifth assignment of error for the reason that appellant failed to show a reasonable probability that the trial court would have found her indigent and unable to pay the fine had the affidavit been filed. *State v. Botos*, Butler App. No. CA2004-06-145, 2005-Ohio-3504, ¶28-30; *State v. Burnett*, Franklin App. No. 08AP-304, 2008-Ohio-5224, ¶8-9 (defendant filing affidavit is not automatically entitled to a waiver of fine); *State v. Banks*, Lucas App. Nos. WD-06-094, WD-06-095, 2007-Ohio-5311, ¶16-18 (no evidence in record that defendant had condition that would prevent her from working in the future, in addition, record reflects that defendant had the ability to retain private legal counsel); see R.C. 2929.18(B); *Strickland v. Washington* (1984), 466 U.S. 668, 687-88, 104 S.Ct. 2052.

**{¶37}** Judgment affirmed.

BRESSLER, P.J., and YOUNG, J., concur.

2. The fifth assignment of error was taken from the body of the brief.