

REL: September 11, 2020

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2019-2020

CR-18-1171

Darius Brooks

v.

State of Alabama

Appeal from Baldwin Circuit Court
(CC-18-2058)

McCOOL, Judge.

Darius Brooks appeals his conviction for the unlawful possession of a controlled substance, a violation of § 13A-12-212, Ala. Code 1975, and his resulting sentence of 60 months' imprisonment; that sentence was suspended, and Brooks was

CR-18-1171

ordered to serve 2 years on probation. He was also ordered to pay a \$100 fine, a \$105 bail-bond fee, an Alabama Crime Victims Compensation Assessment of \$200, attorney fees, and court costs. Additionally, he was ordered to pay a Drug Demand Reduction Assessment of \$1,000. This appeal follows.

The following evidence was presented at trial. Officer Brandon Booker with the Elberta Police Department testified that on July 11, 2017, he was on patrol duty with another officer when he observed a silver Toyota Camry automobile traveling 52 miles per hour in a 35-mile-an-hour zone. Officer Booker activated the emergency lights on his patrol vehicle and initiated a traffic stop. As Officer Booker approached the vehicle, he looked in the backseat of the vehicle "for officer safety" and saw Brooks sitting in the backseat of the vehicle behind the front passenger seat. Officer Booker also saw an open "[K]ool cigarette pack ... within inches of [Brooks's] leg." (R. 57.) Officer Booker stated that he then approached the driver of the vehicle to talk to her about why he made the traffic stop and that he noticed the smell of "burnt marijuana," with which he was familiar based on his past law-enforcement experience and training, coming from inside the

CR-18-1171

vehicle. (R. 57.) Officer Booker conducted a vehicle search and found the cigarette pack containing "a white powdery substance that based off [his] past law enforcement experience and training appeared to be cocaine." (R. 58.) Officer Booker stated that the only item in the backseat of the vehicle with Brooks was the cigarette pack. The vehicle was determined to be a rental car and was not rented in Brooks's name. According to Officer Booker, none of the three individuals in the vehicle claimed the cigarette pack with the suspected cocaine as theirs, so Officer Booker arrested all three individuals.

An employee with the Alabama Department of Forensic Sciences ("DFS") testified that the substance found in the cigarette pack was tested and was revealed to be cocaine hydrochloride, which she stated is a controlled substance.

The State rested its case. Defense counsel moved for a judgment of acquittal, claiming that the State "failed to prove beyond a reasonable doubt that the defendant possessed the controlled substance" and "failed to prove the essential element that [he] had knowledge of the drugs present in the cigarette pack in the vehicle" or that the illegal substance even existed. (R. 87.) The defense rested without presenting

CR-18-1171

evidence, and the jury ultimately rendered a guilty verdict finding Brooks guilty of the unlawful possession of a controlled substance.

On appeal, Brooks's sole contention is that the circuit court abused its discretion by denying his motion for a judgment of acquittal because, he says, the State failed to provide sufficient evidence that he had knowledge of the presence of the controlled substance.

Regarding the sufficiency of the evidence, this Court has held:

"In deciding whether there is sufficient evidence to support the verdict of the jury and the judgment of the trial court, the evidence must be reviewed in the light most favorable to the prosecution. Cumbo v. State, 368 So. 2d 871 (Ala. Crim. App. 1978), cert. denied, 368 So. 2d 877 (Ala. 1979). Conflicting evidence presents a jury question not subject to review on appeal, provided the state's evidence establishes a prima facie case. Gunn v. State, 387 So. 2d 280 (Ala. Crim. App.), cert. denied, 387 So. 2d 283 (Ala. 1980). The trial court's denial of a motion for a judgment of acquittal must be reviewed by determining whether there existed legal evidence before the jury, at the time the motion was made, from which the jury by fair inference could have found the appellant guilty. Thomas v. State, 363 So. 2d 1020 (Ala. Crim. App. 1978). In applying this standard, the appellate court will determine only if legal evidence was presented from which the jury could have found the defendant guilty beyond a reasonable doubt. Willis v. State, 447 So. 2d 199 (Ala. Cr.

App. 1983); Thomas v. State. When the evidence raises questions of fact for the jury and such evidence, if believed, is sufficient to sustain a conviction, the denial of a motion for a judgment of acquittal by the trial court does not constitute error. Young v. State, 283 Ala. 676, 220 So. 2d 843 (1969); Willis v. State[, supra]."

Breckenridge v. State, 628 So. 2d 1012, 1018 (Ala. Crim. App. 1993).

Section 13A-12-212(a)(1), Ala. Code 1975, provides that "[a] person commits the crime of unlawful possession of controlled substance if ... he or she possesses a controlled substance enumerated in Schedules I through V." "Possession of a controlled substance may be actual, i.e., on the person, or constructive, i.e., not 'on the person.'" Moody v. State, 615 So. 2d 126, 127 (Ala. Crim. App. 1992). In this case, Brooks was not in actual possession of the controlled substance when was apprehended; thus, the State relied on a theory of constructive possession.

This Court has stated:

"[C]oncerning constructive possession, the Alabama Supreme Court stated:

"In order to establish constructive possession, the State must prove '(1) [a]ctual or potential physical control, (2) intention to exercise dominion

and (3) external manifestations of intent and control.'" "

"Ex parte Fitkin, 781 So. 2d 182, 183 (Ala. 2000) (quoting Bright v. State, 673 So. 2d 851, 852 (Ala. Crim. App. 1995)).... "'When constructive possession is relied on, the prosecution must also prove beyond a reasonable doubt that the accused had knowledge of the presence of the controlled substances.'" Ex parte Tiller, 796 So. 2d at 312 (quoting Posey v. State, 736 So. 2d 656, 658 (Ala. Crim. App. 1997)).

"'"While non-exclusive possession may raise a suspicion that all the occupants had knowledge of the contraband found, a mere suspicion is not enough. Some evidence that connects a defendant with the contraband is required. Generally, the circumstances that provide that connection include:

"'"(1) evidence that excludes all other possible possessors; (2) evidence of actual possession; (3) evidence that the defendant had substantial control over the particular place where the contraband was found; (4) admissions of the defendant that provide the necessary connection, which includes both verbal admissions and conduct that evidences a consciousness of guilt when the defendant is confronted with the possibility that illicit drugs will be found; (5) evidence that debris of the contraband was found on defendant's person or with his personal effects; (6) evidence

which shows that the defendant, at the time of the arrest, had either used the contraband very shortly before, or was under its influence.'" "

"'Grubbs v. State, 462 So.2d 995, 997-98 (Ala. Crim. App. 1984) (quoting Temple v. State, 366 So.2d 740, 743 (Ala. Crim. App. 1978)).'

"882 So.2d at 277-78.

"This Court has held:

"'"Constructive possession of contraband may be shown by proof of dominion and control over a vehicle containing contraband. United States v. Brunty, 701 F.2d 1375, 1382 (11th Cir.), cert. denied, 464 U.S. 848, 104 S.Ct. 155, 78 L.Ed.2d 143 (1983); United States v. Vera, 701 F.2d 1349, 1357 (11th Cir. 1983)." United States v. Clark, 732 F.2d 1536, 1540 (11th Cir. 1984). A controlled substance may be jointly possessed, and possession may be established by circumstantial as well as direct evidence. Knight v. State, 622 So. 2d 426, 430 (Ala. Crim. App. 1992). "Proximity to illegal drugs, presence on the property where they are located, or mere association with persons who do control the drugs may be sufficient to support a finding of possession when accompanied with testimony connecting the accused with the incriminating surrounding circumstances." German v. State, 429 So. 2d 1138, 1142 (Ala. Crim. App. 1982).'

"Laakkonen v. State, 21 So. 3d 1261, 1266 (Ala. Crim. App. 2008).

"[W]hile establishing the close proximity of a defendant to an illegal substance is relevant to show his knowledge of its presence, this alone is insufficient to prove the required knowledge necessary to support a finding of constructive possession. Smith v. State, 457 So. 2d 997 (Ala. Crim. App. 1984). Furthermore, a defendant's mere presence in an automobile in which an illegal substance is found will not support his conviction for possession of that substance unless the state introduces other evidence in support of the defendant's possession. Story v. State, 435 So. 2d 1360 (Ala. Crim. App. 1982), rev'd on other ground, 435 So. 2d 1365 (Ala. 1983). The kinds of other evidence or circumstances that could provide the additional support necessary to show possession are unlimited and will vary with each case. Temple v. State, 366 So. 2d 740 (Ala. Crim. App. 1978).'

"Perry v. State, 534 So. 2d 1126, 1128 (Ala. Crim. App. 1988) (emphasis in original)."

Black v. State, 74 So. 3d 1054, 1059-60 (Ala. Crim. App. 2011).

In Perry v. State, 534 So. 2d 1126 (Ala. Crim. App. 1988), this Court was presented with a similar issue. In Perry, the following factual circumstances existed:

"Officers of the Gadsden Police Department, with the assistance of an informant, set up a 'controlled buy' of two sets of Talwin, known as 'T's and Blues.' The informant called Glenda Beasley, a suspected drug dealer, and made plans to purchase the illegal substances at Benny's Motel. The

officers positioned themselves at various points in the vicinity of the motel and waited for Glenda Beasley to arrive. A car, which the officers recognized as Glenda Beasley's, pulled into the parking lot of the motel. The officers converged around the car and instructed the occupants to step outside and to the rear of the car. Glenda Beasley was not in the car; rather, her daughter Kim and appellant were in it. Kim was the driver of the car, and appellant was seated on the passenger side. The officers looked inside the car and found several pills, some of which were later determined to be Talwin. The officers testified that the pills were in a tissue on the console, but were not hidden and could be seen from the door of the car. The officers seized the pills and placed both Kim and appellant under arrest."

534 So. 2d at 1127. While considering the above-mentioned legal principles, this Court in Perry also noted other similar cases:

"In Cason v. State, 435 So. 2d 200 (Ala. Crim. App.1983), the defendant's close proximity to the contraband, coupled with his recent offer to sell marijuana, was held sufficient to warrant a finding of possession. In Shaneyfelt v. State, 494 So. 2d 804 (Ala. Crim. App. 1986), the state was held to have presented sufficient evidence to establish the accused's constructive possession of the illegal substance, where his close proximity with the substance was shown in conjunction with statements he made which indicated he knew of the presence of the substance."

Id., at 1128. However, the Court in Perry ultimately determined that there was insufficient evidence to connect the appellant with the pills in the vehicle other than his

presence in the automobile because "the only evidence before the court was that which established appellant's presence in the car and the visibility of pills," and "[n]othing had been presented by the state establishing any statements or conduct by [the] appellant or any other evidence indicating that appellant knew of the narcotic nature of the pills," nor was there any evidence that would provide "some basis" from which to infer the appellant's knowledge. Id.

The holding in Perry is dispositive of the instant case. As was the case in Perry, no evidence was presented establishing that Brooks had knowledge of the contraband contained within the cigarette pack, other than his close proximity to the cigarette pack. The only evidence linking him in any way to the drugs was that the cigarette pack was within "inches" of his leg when Officer Booker looked in the backseat of the vehicle. Although the fact of his close proximity to the illegal substance is certainly relevant to the determination of whether Brooks had knowledge of its presence, Perry establishes that this evidence alone is insufficient to prove the knowledge necessary to support a finding of constructive possession. See Black, 74 So. 3d at

CR-18-1171

1059-60. No other evidence was adduced at trial to establish his knowledge of the illegal drugs that were hidden from sight within the cigarette pack. Neither Officer Booker nor any other witness gave any testimony as to Brooks's demeanor at the time of the traffic stop. No evidence was presented regarding any activity on Brooks's part that Officer Booker observed that might have tended to show Brooks's knowledge of the illegal contraband in the cigarette pack. Officer Booker himself stated that he did not initiate the traffic stop based on any suspicion of illegal drug activity on the part of any of the occupants of the vehicle, but rather simply stopped the vehicle for speeding. The vehicle itself was determined to be a rental car that had been rented in the name of someone other than Brooks. Finally, none of the occupants of the vehicle (including Brooks) provided any statements or information connecting anyone to the cigarette pack.

After considering all the evidence presented by the State in the light most favorable to the State, we cannot conclude that the State established a prima facie case against Brooks. There was no other evidence to connect Brooks to the illegal substance other than his presence in the vehicle and his close

CR-18-1171

proximity to the cigarette pack. Therefore, we conclude that the circuit court erred in denying Brooks's motion for a judgment of acquittal.

The judgment of the circuit court is hereby reversed and a judgment is rendered for the defendant.

REVERSED AND JUDGMENT RENDERED.

Windom, P.J., and Kellum, Cole, and Minor, JJ., concur.