ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JUDGE DAVID M. GLOVER

DIVISION II

CACR08-759

February 11, 2009

APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT
[CR-2007-2133-1]

DWAYNE CLARENCE DURELL
APPELLANT

V.

HONORABLE WILLIAM A. STOREY, JUDGE

STATE OF ARKANSAS
APPELLEE

AFFIRMED

In this drug-lab case, appellant, Dwayne Durell, was convicted by a Washington County Circuit Court jury of possession of drug paraphernalia with intent to manufacture methamphetamine. He was sentenced to eleven years in the Arkansas Department of Correction and fined $4,000. On appeal, he argues that the trial court erred in denying his motion for directed verdict because the State failed to prove that he was in constructive possession of the methamphetamine laboratory. We affirm.

Our analysis requires detailing the investigating officers' testimony as well as the testimony of appellant's sister on his behalf. On August 17, 2007, the Washington County Sheriff's Office received an anonymous call regarding a methamphetamine lab in the

Canning Factory Road area. Deputies went to several incorrect addresses in the area before they encountered appellant at a shop/barn on his father's property after the deputies saw flashlights and saw some people talking. As the deputies approached the appellant, two people got into a car and left. Appellant began talking to the deputies, who informed him that they were looking for anything illegal, including drugs. Appellant told them that there was nothing illegal there, and he gave consent to search the property. The officers found the house on the property to be in an unliveable condition and then proceeded to the shop/barn.

Corporal Joseph Smith testified that appellant led the officers into the shop/barn and that appellant continued to state that there was nothing in there. However, Smith said that as soon as he walked into the shop, he saw appellant's I.D. lying on a table next to a box of Sudafed, and that appellant began to move stuff around to the back of the shop. Smith testified that Sergeant Lawson saw appellant try to hide a pill-soak solution that was located in a clear plastic jug, and that there was a strong chemical odor that became apparent at the back of the shop, where a door was located. When Smith asked appellant if he could let the officers in the door, appellant told him that he did not have the key, that his father had the key, and that he could call him to let them in if they wanted. Smith told appellant not to worry about it and asked if there was another entrance into the back of the shop; appellant told the officers yes; when the door was opened the meth lab was found.

On cross-examination, Smith stated that the shop was definitely occupied and contained a lot of things. Smith stated that it did not look like the shop was used just for storage, that it appeared that someone was in and out of the front of the shop quite frequently. Smith said that when they went around to the back of the shop, the door was chained and it was appellant who gained entrance to the back room of the shop by putting a pipe in the chain and pulling the door open. Smith also stated that appellant was extremely cooperative with the officers.

Corporal Ira Coker testified that as they entered the shop, he noted that it was "really cluttered" and that appellant began moving things around, but stopped when asked to do so by the officers. Coker said that he saw several syringes and cans of paint thinner thrown around the shop. Coker also testified that Sergeant Lawson told him that he saw appellant hiding something in the shop by placing a clock over some clear jugs; when Coker confronted appellant, appellant said that he did not know anything about it, and he also denied that the syringes on the ground belonged to him. Coker testified that the door at the back of the shop had a lock on it; when questioned, appellant said that he did not know what was behind the door, that it was not his. Coker asked if appellant had a key to the door; appellant told him no, but that he could get one. When asked about an alternative entry, appellant told the officers that there was a door on the back of the shop. They walked behind the building and found that the door had a locked chain through it; appellant told the officers that they could go in; the officers said that it was locked; appellant then took a bar and knocked the lock off and again told the officers that they

could go in; Coker told him to go first, and when he walked in, appellant stated that there was a meth lab in there. Coker testified that a chemical smell was apparent while they were in the front of the shop, and that it could also be smelled all the way around the barn; when the door was opened, he described it as a "grey fog." Coker said that when he looked in the room, he saw an ice chest, tubing coming out of a gas can, several paint-thinner cans, some de-icer, some blister packs from Sudafed packages, gas masks, rubber gloves, and glassware, and that it was recognizable to him as a meth lab. When Coker asked appellant about the lab, appellant said that he did not know anything about it.

On cross-examination, Coker agreed that appellant was very cooperative and made no attempt to flee; however, based on his experience, he said that it was not unusual for someone with a meth lab to be cooperative and grant consent for officers to perform a search. Coker said that after searching the house and shop building, he went to the back property line, which was bordered by a creek. Coker testified that when asked about entry to the locked area of the shop, appellant did not say he could get the key from his father, that he just said he could get the key. Coker said that they did not discuss whether appellant could get the key from the premises or from somewhere else, that appellant just said that he could get one. Coker said that appellant told him that the property belonged to his father, but that he had maintained it since his father had become ill; however, Coker stated that the property was not very well maintained, describing it as a "junk heap." Coker described the back door of the shop where they gained entrance as a hole cut in the back of an oak barn, and that it was rotten wood that anyone could have popped open.

Coker also said that appellant did not actually say that there was a meth lab in there when he opened the door, but that he just said that there was a lab in there. Coker said that he would characterize the property as unoccupied, but that he would not call it abandoned because there was some valuable stuff in the shop. Coker admitted that the property was not secured by anything other than the lock on the door, and that there were no fences or other restrictions to keep someone from accessing the property.

Drug Task Force Officer Josh McConnell testified that he was called to clean up the meth lab. He identified many items as trash from cooking methamphetamine, as well as many components used to manufacture methamphetamine, leading him to believe that this was an ongoing process and not just a one-time cook. In the front of the shop, McConnell identified coffee filters, aluminum foil, pill grinders, vial solutions, and bottles containing anhydrous-ammonia sludge; this was throughout the whole shop, not just the back room where the meth was being cooked. McConnell said that he took samples of sixteen items, and that several of the items tested positive for methamphetamine. McConnell also testified about other items found in the front of the shop that were regularly used in the manufacture of meth, including a Sudafed pack on which was written a note that you could only buy two at a time; he also found appellant's driver's license on a table in the main part of the shop, as well as a Pyrex dish with the name "Dwayne" written on the top. McConnell testified that a lab of that size would put off noticeable odors, and that while he knew it was a meth lab, someone who did not know might just smell regular household chemicals.

After McConnell's testimony, the State rested. Appellant moved for a directed verdict, arguing that the State failed to prove that he constructively possessed the contraband. Specifically, he argued that the State failed to prove that the contraband was immediately and exclusively accessible to him because he was not in the shop when the officers made contact with him and also because the shop doors were locked, he did not have a key, and he had to gain entrance by knocking the chain off the door, which anyone could have done. The trial court denied appellant's motion.

Sharon Disney, appellant's sister, testified that both her father and appellant had lived with her in Elkins for about two years. She said that although her father owned the property where the lab was found, he did not live there due to health reasons. Disney said that her father wanted to move back to the property, but that it would take a lot of work on the house for her father to be able to live there. She said that appellant had been trying to repair the property for about a year and that he had put a new roof on part of the house. She said that on the day he was arrested, appellant was at the house to meet a roofer to look at the roof; however, she admitted that the roof was not yet completed. Disney said that Highway 16 ran in front of the property and the White River ran along the back of the property; that there were canoes and four-wheelers on and along the river; that the property had been unoccupied for about two years; that her father was occasionally at the property but that it was unoccupied ninety-five percent of the time; that there was no security or fencing on the property; and that there was nothing to keep people from entering the property at night. On cross-examination, Disney admitted that

she was not at the property on August 17 and did not have first-hand knowledge of what occurred there, and she admitted that the roof was still in disrepair.

Appellant rested after his sister's testimony and renewed his motion for directed verdict, making the same arguments he made after the State's case-in-chief.[1] The trial court again denied appellant's motion. The jury found appellant guilty, and he now brings this appeal.

In *Fitting v. State*, 94 Ark. App. 283, 291, 229 S.W.3d 568, 573-74 (2006) (citations omitted), this court set forth the standard of review for the denial of directed-verdict motions:

> It is well settled that we treat a motion for a directed verdict as a challenge to the sufficiency of the evidence. The test for determining the sufficiency of the evidence is whether the verdict is supported by substantial evidence, direct or circumstantial. Evidence is substantial if it is of sufficient force and character to compel reasonable minds to reach a conclusion and pass beyond suspicion and conjecture. On appeal, we view the evidence in the light most favorable to the State, considering only that evidence that supports the verdict.

At the outset, this court must determine whether to analyze this case as one of sole possession or one requiring a joint-possession analysis. While appellant's father was the owner of the property, no one lived on the property at the time of the discovery of the meth lab; appellant stated that he was the caretaker of the property; and there was testimony that appellant's father occasionally visited the property and wanted to return

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[1] At trial, appellant also argued that drug paraphernalia does not include ingredients or laboratory equipment after the State was allowed to amend the information from manufacturing to possession of drug paraphernalia with intent to manufacture; however, he has abandoned this argument on appeal.

there to live. Furthermore, appellant's sister also asserted that because the property was not fenced or otherwise secured, there was nothing to keep people from coming onto the property from the highway or the river during the night. Although appellant was the sole occupant of the property at the time of the discovery of the meth lab, given the additional factors listed above, we believe it is more prudent to analyze these facts under the theory of joint possession.

> To convict one of possessing contraband, the State must show that the defendant exercised control or dominion over it. However, neither exclusive nor actual possession is necessary to sustain a charge of possessing contraband; rather, constructive possession is sufficient. Constructive possession may be implied when the contraband is in the joint control of the accused and another; however, joint occupancy alone is insufficient to establish possession or joint possession. The State must establish: (1) that the accused exercised care, control, and management over the contraband; and (2) that the accused knew the matter possessed was contraband. Control and knowledge may be inferred from the circumstances where there are additional factors linking the accused to the contraband. This control and knowledge can be inferred from the circumstances, such as proximity of the contraband to the accused; the fact that it is in plain view; and the ownership of the property where the contraband is found.

Dodson v. State, 88 Ark. App. 380, 385, 199 S.W.3d 115, 118 (2004) (citations omitted).

Immediately Accessible

Appellant first argues that there was no evidence that the lab was immediately accessible to him because he was in the front yard at the time of the officers' initial contact, and the meth lab was in the back of the shop. Appellant argues that the only time he entered the shop was when he assisted the deputies with their search. Furthermore, appellant argues that he did not have a key to the locked back room of the shop, and it was only after deputies inquired about another entrance that appellant took them to the

back of the building, where he used a metal bar to break into the back room. In support of this contention, appellant seems to argue that "immediately accessible" requires that the contraband be found in the same room as the defendant, as he cites *Sinks v. State*, 44 Ark. App. 1, 864 S.W.2d 879 (1993), where the accused was found within an arm's reach of cocaine, and *Nichols v. State*, 306 Ark. 417, 815 S.W.2d 382 (1991), where the accused was found at the kitchen table with contraband in plain view in front of him.

Appellant also cites *Darrough v. State*, 322 Ark. 251, 908 S.W.2d 325 (1995), in which the supreme court upheld, among other convictions, two convictions for possession of cocaine with intent to deliver. Appellant cites this case in support of his argument because for one of the counts, appellant was found with another person in a bedroom in his residence with a substantial amount of illegal drug and a large amount of cash in plain view, including a marked twenty dollar bill that had been used by an informant to purchase drugs at the house on the same day.

However, with regard to the second possession count, police executed another search warrant at a vacant house and adjacent salvage yard, finding cocaine residue in several places in the vacant house, bottles containing cocaine residue in the wheel well of a truck located on the east side of the fenced salvage-yard shop, and a container of crack-cocaine rocks in plain view on the ground west of the shop. The supreme court upheld the conviction for possession of cocaine in this instance, thus demonstrating that "immediately accessible" does not require that the contraband be within arm's reach or in the same room as appellant. *Darrough, supra*.

Here, the contraband was found on appellant's father's property; while no one lived on the property, appellant told officers that he was the caretaker of the property, a fact bolstered by appellant's sister's testimony that appellant had been attempting to make repairs to the property for about a year. Appellant had access to the front of the shop, and there were a lot of valuable items located in the front part of the shop. While appellant claimed he did not have a key to the locked portion of the shop, he told officers that he could get one; however, he ended up obtaining access to the back room by pulling the chain off a rotted back door, revealing the meth lab. Furthermore, a chemical smell permeated not only the front of the shop, but around the building as well.

Appellant argues that the Arkansas case most analogous to his case is *Sanchez v. State*, 288 Ark. 513, 707 S.W.3d 310 (1986). Specifically, he argues that his case is like one of the defendants in that case, Gary Piercefield. When police broke into an apartment, they found Santiago Sanchez and Bernie Netz in a bedroom containing illegal drugs and drug paraphernalia; however, they found appellant Piercefield hiding in the closet of another bedroom with the person who lived in the apartment, and there were no drugs or paraphernalia in that room. Piercefield was convicted of possession of a controlled substance with intent to sell; in reversing the conviction, the supreme court held that the apartment did not belong to Piercefield, that there was no evidence he had any connection to the apartment, and that while Piercefield was found on the premises, he was not where the drugs and paraphernalia were located.

This case is distinguishable from *Sanchez*. Although the property is not owned by appellant (it is owned by his father), appellant was the caretaker of the vacant property; therefore, appellant had a connection to the property. Furthermore, in *Sanchez*, there were other people present at the time the drugs were found; in this case, although appellant was not initially found in the same room as the meth lab, there was absolutely no one else found on the property except him when the lab was found. This will be discussed further in appellant's next point that he did not have exclusive control of the property.

Exclusive Control

Appellant's second point is that he did not have exclusive control of the property since anyone could have come onto the property at any time because it was not fenced or secured in any other way. In support of this argument, appellant cites *Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003), and *Knight v. State*, 51 Ark. App. 60, 908 S.W.2d 664 (1995). Both of these cases are distinguishable. In *Garner*, the supreme court reversed the convictions for possession of a controlled substance with intent to deliver and possession of drug paraphernalia, holding that there was insufficient evidence to support the convictions. In that case, the drugs and drug paraphernalia were found in a binoculars case on the side of the road where appellant had been seen looking, and the case also contained a letter from one of appellant's brother's to another of appellant's brothers. In reversing, the supreme court, citing *Hodge v. State*, 303 Ark. 375, 797 S.W.2d 432 (1990), held that when "narcotics are found in an area entirely outside the control of the defendant and

exposed to the public at large, the State must prove more definitive factors linking the defendant to the contraband." 355 Ark. at 89-90, 131 S.W.3d at 738-39. This court likewise reversed a conviction of being a minor in possession of a handgun on school property in *Knight*, *supra*, on the basis that appellant did not have exclusive possession of a book bag containing the gun that was found on a table in the study hall.

Here, appellant makes the argument that he did not have exclusive control of the meth lab because the property was not secured and therefore other people had access to the property. The meth lab found on the property in question was not in an area entirely outside the control of the defendant and exposed to the public at large, as in *Garner* and *Knight*. Rather, it was his father's property, and appellant controlled the property as caretaker. Furthermore, except for appellant's bare assertion, there is no evidence that the area was exposed to the public at large, which is what appellant attempts to persuade.

In *Osborne v. State*, 278 Ark. 45, 643 S.W.2d 251 (1982), police executed a search warrant on appellant's residence while appellant was not present; by the time appellant arrived, police had confiscated pills from a dresser in one of the bedrooms and from a suitcase in the hall, and marijuana was found in the living room, where appellant's wife and others were located. In reversing appellant's two convictions for possession of a controlled substance with intent to deliver, our supreme court held that the only evidence presented by the State was the stipulation that the home was appellant's residence; there was no indication of exclusive control of the premises or to indicate the right to control the content therein by the defendant.

Appellant argues that because the property was bordered on one side by the White River and because there was no fence keeping anyone from entering, that he did not have exclusive control of the property. Analyzing the case using joint-possession factors, there must be more than the fact that appellant was simply on the property — there must be more connecting appellant to the meth lab. Appellant was the admitted caretaker of the property. His driver's license was inside the shop next to a pack of Sudafed that had a note written on it that you could buy two packs at a time. Quite a bit of drug paraphernalia used to manufacture methamphetamine was found in plain view in the front of the shop, including a Pyrex dish that smelled like camp fuel that had appellant's first name on the cover. Although we are analyzing this case using the theory of joint possession, there were no people other than appellant on the property at the time the meth lab was found, and there was no evidence that appellant did not have access to the back room; in fact, appellant said that he could get the key. When the door to the back room was opened, appellant stated that there was a lab in there, a fact that, according to Josh McConnell, was not common knowledge to the average person. Additionally, there was testimony that on the night appellant was arrested, he was on the property to meet a roofer about completing the roof; however, it was dark and flashlights were in use, and there was testimony that the roof still had not been repaired one year later. This is an improbable explanation as to why appellant was on the property. Issues of credibility are within the jury's province; the jury may believe all or part of any witness's testimony and

must resolve questions of conflicting testimony and inconsistent evidence. *Phillips v. State*, 344 Ark. 453, 40 S.W.3d 778 (2001).

Viewing the evidence in the light most favorable to the State, as we are required to do, we hold that the State presented sufficient evidence to support appellant's conviction.

Affirmed.

KINARD and MARSHALL, JJ., agree.