ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
JOSEPHINE LINKER HART, JUDGE

DIVISION I

CACR07-770

February 27, 2008

PHILLIP B. JONES

APPELLANT

APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT
[NO. CR 06-540]

V.

HONORABLE CHRISTOPHER CHARLES PIAZZA, CIRCUIT JUDGE

STATE OF ARKANSAS

APPELLEE

REVERSED AND DISMISSED

The circuit court convicted appellant, Phillip B. Jones, of the crimes of possession of cocaine with the intent to deliver, possession of marijuana, possession of a firearm by a felon, and simultaneous possession of drugs and firearms.[1] He contends that the court erred in convicting him of these crimes because the State failed to prove that he possessed any of the items. We reverse and dismiss.

At trial, Randy Rhodes testified that on December 20, 2005, in his capacity as a patrol officer with the North Little Rock Police Department, he assisted in the execution of a search

[1]While appellant also urges that the evidence was insufficient to support a conviction for possession of drug paraphernalia, the State correctly observes that the judgment and commitment order does not show that he was convicted of that offense.

warrant at a residence in North Little Rock. Four persons were found in the residence: Angel Elmore, Phyllis Beard, LaTanya Jones, and appellant. Elmore was found in the kitchen doorway, Beard in the northwest bedroom, and appellant and Jones in the northeast bedroom. Rhodes searched the northeast bedroom and found a glass smoking device with burnt ends in an ashtray, two small bags of crack cocaine in an entertainment center, a bag of marijuana in a nightstand drawer, two glass smoking devices with burnt ends also in the nightstand, and a loaded .38 caliber Rossi revolver under a mattress. Rhodes also testified that one bag of cocaine was not in plain view because it was "behind some tapes." The other, he testified, was "in the entertainment center."

Investigator John Nannen of the North Little Rock Police Department testified that he served the search warrant at the residence. He testified that the glass smoking devices were typically used to inhale crack cocaine and that the burn marks indicated that they had been used for that purpose. He also testified that two bags contained .7314 grams and .5644 grams of cocaine base, respectively, and the third bag contained 15.7 grams of marijuana. Nannen also noted that he found mail in the northwest bedroom of residence addressed to Beard and to another person and that the utilities were in Beard's name.

Further, Nannen testified that when they searched the residence, they secured the residence and all of the persons. When appellant was outside, he appeared to faint. Appellant indicated he was a diabetic and having problems. Nannen contacted the fire department and an ambulance service to assist. Appellant was placed in an ambulance for transport to a local hospital, and while he was in the ambulance, Nannen attempted to obtain appellant's name

and personal information. Appellant identified himself as "Andre Freeman." Through subsequent investigation, however, Nannen determined that appellant was not Andre Freeman and instead was Phillip Jones.

Appellant argued at trial and now argues on appeal that the State failed to prove that he possessed the cocaine, the marijuana, and the firearm. He asserts that because the bedroom was jointly occupied and because there were no other facts and circumstances from which his possession could be inferred, the State failed to prove that he possessed the contraband.

The State need not prove that the accused physically possessed the contraband in order to sustain a conviction for possession if the location of the contraband was such that it could be said to be under the dominion and control of the accused, that is, constructively possessed. *Walley v. State*, 353 Ark. 586, 112 S.W.3d 349 (2003). But while constructive possession can be implied when the contraband is in the joint control of the accused and another, joint occupancy is not sufficient in itself to establish possession or joint possession. *Id.* Rather, there must be some additional factor linking the accused to the contraband, and the State must show additional facts and circumstances indicating the accused's knowledge and control of the contraband. *Id.* But when the State's case is made entirely of circumstantial evidence and leaves the factfinder to speculation and conjecture, then the evidence is insufficient as a matter of law. *King v. State*, ___ Ark. App. __, ___ S.W.3d ___ (Oct. 31, 2007).

For reversal, appellant relies in part on *Mayo v. State*, 70 Ark. App. 453, 20 S.W.3d 419 (2000), and we agree that this case controls. There, the trial court found the defendant guilty of possession of marijuana. We noted that when the police arrived, the defendant was seated

on a couch near a coffee table where marijuana was in plain view. While the defendant admitted that he was aware of the presence of contraband, he had no connection with the residence, and another person was in the room. We concluded that the evidence presented the trial court with a choice so evenly balanced that the finding of guilt necessarily rested on conjecture, and accordingly, we reversed the conviction.

Here, not only was the residence jointly occupied by three other persons, the bedroom was jointly occupied by appellant and Jones. The firearm under the mattress and the controlled substances were not in plain view, and there was no evidence indicating that appellant resided at or owned the residence. Given that the evidence in *Mayo* was insufficient to establish possession when the contraband was in plain view, we must conclude that the evidence was insufficient when the contraband was hidden, the room jointly occupied, and there was no evidence that appellant resided there.

We are mindful that there are two additional facts and circumstances that arguably indicate appellant's knowledge and control of the contraband. First, we note that a glass smoking device was in an ashtray. It is equally plausible, however, that the other occupant of the room possessed the pipe. Second, appellant also gave a false name to police, and the State asserts that the giving of a false name is evidence of consciousness of guilt. The question before us then is whether the giving of a false name linked appellant to the contraband. We conclude that it does not.

We rely in part on *Wortham v. State*, 5 Ark. App. 161, 634 S.W.2d 141 (1982). There, the defendant had been convicted of burglary, which required proof that the defendant

entered the residence with the purpose of committing an offense punishable by imprisonment. We noted that the defendant fled from the residence when a young girl in the residence screamed and that flight from a crime scene "has long been regarded as a circumstance *corroborative of 'other proof' of guilt*." 5 Ark. App. at 165, 634 S.W.2d at 143 (citing *Cassell v. State*, 273 Ark. 59, 616 S.W.2d 485 (1981)). This court concluded, however, that the "'other proof'" was "dismally missing and can only be supplied by pure guesswork." *Id*. We held in that case that the evidence was insufficient to support the burglary conviction.

Similarly, in *Avett v. State*, 325 Ark. 320, 928 S.W.2d 326 (1996), the defendant was convicted of two counts of theft by receiving where he was a passenger in a stolen van that contained stolen toys and clothing. The police stopped the van, and the defendant became violent and belligerent when the police confronted him. The Arkansas Supreme Court concluded that the defendant's brief presence as a passenger in a van that was in poor condition along with his violent outburst upon being taken into custody did not establish that he committed the crime of theft by receiving.

Thus, in both *Wortham* and *Avett*, the additional circumstance was not conclusive without other proof of guilt. And as we noted above, joint occupancy is not sufficient in itself to establish possession—there must be some additional factor linking the accused to the contraband. Here, and similarly to *Wortham* and *Avett*, while the giving of a false name would be corroborative of other proof of guilt, there simply was no other proof of possession, as the contraband was not in plain view, there was no proof that appellant was connected with the residence, and the room was jointly occupied.

Furthermore, appellant gave a false name only after he had been secured by the police and placed in an ambulance. Given that he had been secured by the police, his reasons for giving a false name may not have been for the purpose of evading the police, as there was nothing to indicate that evading the police was even possible at the time he gave a false name. Thus, we must conclude that there was insufficient evidence that appellant possessed the contraband, as only speculation and conjecture could support the missing proof. We reverse and dismiss.

Reversed and dismissed.

BIRD and MARSHALL, JJ., agree.