

IN THE SUPREME COURT OF THE STATE OF DELAWARE

SPENCER BIRCKHEAD,	§
	§ No. 749, 2010
Defendant Below,	§
Appellant,	§ Court Below – Superior Court
	§ of the State of Delaware,
v.	§ in and for New Castle County
	§ Cr. I.D. No. 0904002701
STATE OF DELAWARE,	§
	§
Plaintiff Below,	§
Appellee.	§

Submitted: June 22, 2011

Decided: July 12, 2011

Before **STEELE**, Chief Justice, **HOLLAND** and **BERGER**, Justices.

ORDER

This 12th day of June 2011, upon consideration of the parties' briefs and the record below, it appears to the Court that:

(1) The defendant-appellant, Spencer Birckhead ("Birckhead"), filed this direct appeal from the final judgments of conviction in the Superior Court. We find no merit in his arguments on appeal. Accordingly, we affirm the judgments of the Superior Court.

(2) Birckhead was indicted on charges of: Possession of a Firearm During the Commission of a Felony ("PFDCF"), Possession of a Firearm by a Person Prohibited ("PFPP"), Possession of Ammunition by a Person Prohibited ("PAPP"), Receiving a Stolen Firearm, Possession with Intent to

Deliver (“PWID”) marijuana, PWID cocaine, Maintaining a Dwelling, and Conspiracy Second Degree. Prior to trial, the charges of PAPP and Receiving a Stolen Firearm were dismissed. The charge of PFPP was severed and the parties stipulated that a verdict as to that charge would be made by the trial judge without a jury.

(3) The jury returned guilty verdicts on the following counts: PWID marijuana, Maintaining a Dwelling, and Conspiracy Second Degree. The jury was unable to reach a verdict on the charges of PFDCF and PWID cocaine and a mistrial was declared as to those charges. The State entered a *nollo prosequi* on the mistried counts. Birckhead was convicted by the trial judge on the severed charge of PFPP.

(4) Birckhead was sentenced on November 15, 2010 as follows: PWID marijuana – five years at level V suspended for eighteen months at level III; Maintaining a Dwelling – two years at level V suspended for one year at level III; Conspiracy in the Second Degree – one year at level V suspended for one year at level III; and PFPP – mandatory three years at level V.

(5) In this direct appeal, Birckhead challenges the sufficiency of the State’s evidence on the charges of which he was convicted. This Court reviews *de novo* the Superior Court’s denial of a motion for judgment of

acquittal “to determine whether any rational trier of fact, after considering the evidence in the light most favorable to the prosecution, could have found the essential elements of the crime beyond a reasonable doubt.”¹

(6) The record reflects that on April 2, 2009, Wilmington Police applied for and obtained a search warrant for a house on Vandever Avenue in Wilmington, Delaware after conducting an investigation into drug sales at the residence. Birckhead was a target of that investigation. On April 3, 2009, Wilmington Police executed the search warrant and upon entering the premises on Vandever Avenue, encountered Gary Parks (“Parks”), Kristen Brown (“Brown”), and the owner of the home, Alvinette Lake (“Alvinette”). Birckhead was not present in the home when the search warrant was executed.

(7) Once inside, officers observed drugs in plain view in the living room. Specifically, officers observed twenty small Ziploc bags of crack cocaine and a small container of marijuana. A search of the living room revealed marijuana in the pocket of a jacket, which belonged to Parks and a backpack which contained a grinder, digital scale with white residue, and numerous Ziploc plastic bags.

¹ See *Morgan v. State*, 922 A.2d 395, 400 (Del. 2007).

(8) Alvinette was interviewed by officers shortly after they entered her home. She stated that she lived in the rear bedroom, that Parks resided in the middle bedroom, and that her daughter, Ikea Lake (“Ikea”), and Birckhead, Ikea’s boyfriend, lived in the front bedroom. Alvinette also told officers she had two weapons in her house, a Taurus .25 caliber handgun located in her bedroom and a Cobra .38 caliber handgun located in the kitchen. The officers located the Taurus handgun in Alvinette’s rear bedroom, but only found an empty gun case belonging to the Cobra handgun in the kitchen. When asked why the Cobra was missing, Alvinette stated that she believed Birckhead had taken it and placed it in his bedroom.

(9) Officers proceeded to search the front bedroom of the residence, which belonged to Ikea and Birckhead. There, officers found a large black jacket with 15 bags of marijuana in one pocket and Birckhead’s wallet, driver’s license, social security card, and paperwork in the other. Officers also found the Cobra handgun in a chest of drawers and a box of ammunition matching the .38 caliber handgun underneath the bedside table.

(10) Officers then searched Parks’ middle bedroom and discovered numerous small Ziploc bags inside a men’s sneaker along with Parks’ identification card. Parks was arrested and transported to Wilmington Police Station where he was questioned by officers. During that` interview, Parks

stated that Birckhead sold drugs from the residence on Vandever Avenue and that he, Parks, acted as a lookout for Birckhead in exchange for his being allowed to stay at the home.

(11) Following the search, an arrest warrant was issued for Birckhead. After learning he was wanted, Birckhead turned himself into the police.

(12) At trial, Parks testified that in April 2009 he resided at the house on Vandever Avenue and that he was staying in the middle bedroom when the police executed the search warrant. He denied knowledge of crack cocaine in the home, but admitted to possessing marijuana. Parks went on to testify that he knew Birckhead and that at times Birckhead would be at the Vandever Avenue residence. He stated that he had no knowledge of Birckhead selling cocaine, but admitted smoking marijuana with Birckhead.

(13) Parks stated that he had voluntarily spoken with Detective Leary on the night the search warrant was executed, and that to his knowledge, at the time, the statement he made was true. Because Parks' trial testimony was inconsistent with the prior statement he made to police, Detective Leary was called to testify about Parks' prior statement. Detective Leary stated that after Parks was arrested, he told police that Birckhead had been selling drugs out of the home and that Parks had acted as lookout for

Birckhead. Detective Leary's testimony about Parks' prior statement was admitted pursuant to title 11, section 3507 of the Delaware Code.² Parks was then recalled and explained that he had pled guilty to a single charge of Possession of marijuana and agreed to testify truthfully at Birckhead's trial. His sentence was deferred and he realized that his testimony would influence his sentence. Parks again stated that Birckhead did not sell drugs and had not been at the Vandever Avenue residence for at least two days prior to the search.

(14) Alvinette testified that in April 2009 she resided at the Vandever Avenue residence. She identified Birckhead as a person who had stayed at her home, but stated that he had not lived there since the middle of March 2009. She testified that Parks resided in the middle bedroom and Ikea resided in the front bedroom. Birckhead was Ikea's boyfriend and he would stay in the front bedroom with her. Alvinette testified that she had no knowledge of any drugs being in her house and admitted that she owned two guns. The Cobra handgun she kept in the kitchen, she stated, was taken by her daughter Ikea and placed in Ikea's bedroom. Because Alvinette's trial testimony was inconsistent with the statement she provided police during the search, Detective Pierson testified that Alvinette told police that she believed

² Del. Code Ann. tit. 11, §3507.

Birckhead took the handgun from the kitchen and placed it in his room. Alvinette's prior statement to police was admitted pursuant to title 11, section 3507 of the Delaware Code.³ Alvinette was recalled as a witness and denied telling Detective Pierson that she believed Birckhead removed the gun, and reiterated her prior testimony that Birckhead was not living in the house on April 3, 2009, and had not been there for a few weeks.

(15) Sheila Johnson ("Johnson"), Birckhead's mother, testified that she was with Birckhead on April 3, 2009, at a benefit for her grandson. She said that on April 3, 2009, Birckhead was living with the mother of his child in New Castle, Delaware and that he had moved there around Saint Patrick's Day in 2009.

(16) At trial, Ikea testified that she told Birckhead to leave the Vandever Avenue residence because of his infidelity to her. She said Birckhead had been gone several weeks prior to the search. Ikea further testified that the Cobra handgun found in her bedroom was placed there by her. She also identified the black jeans in the drawer as her jeans and stated that the jacket found hanging on the door was hers and she had placed Birckhead's belongings in there intending to give them back to him.

³ Del. Code Ann. tit. 11, §3507.

(17) Birckhead filed a motion for judgment of acquittal, arguing that the State: first, never placed him at the Vandever Avenue residence at the time of the search of while the property was under surveillance; second, offered no evidence to rebut the testimony that Birckhead had not been at the home for some time; and third, produced no evidence as to the origin of the drugs or how long they had been in the home. The Superior Court denied the motion, finding that the State had presented sufficient evidence upon which a jury could find Birckhead guilty, beyond a reasonable doubt, of all charges. The Superior Court also found Birckhead guilty of the severed charge of PFPP.

(18) Birckhead first argues that the State did not present sufficient evidence for a jury to find him guilty of PWID marijuana. To sustain a conviction for PWID marijuana, the State must prove that Birckhead knowingly possessed marijuana with the intent to deliver or transfer to substance to another.⁴ It is sufficient to show that Birckhead was in constructive possession of the drugs, which includes proving that the defendant: knew the location of the drugs; had the ability to exercise

⁴ Del. Code Ann. tit. 16, § 4752.

dominion and control over the drugs; and intended to guide the destiny of the drugs.⁵

(19) At trial, Alvinette testified that Birckhead and Ikea lived in the front bedroom of 917 Vandever Avenue. When officers searched that bedroom, they discovered fifteen small Ziploc bags of marijuana in the left pocket of a men's black jacket. In the right pocket of that same jacket, officer's found Birckhead's wallet, his driver's license, his social security card, and paperwork bearing his name. In light of this evidence, the Superior Court properly found that a rational juror could find, beyond a reasonable doubt, the Birckhead possessed the marijuana in the jacket with the intent to deliver.

(20) Birckhead next argues that there was insufficient evidence to support his conviction for Maintaining a Dwelling. To sustain a conviction for Maintaining a Dwelling, the State must show that Birckhead knowingly kept or maintained a dwelling which is resorted to by persons using controlled substances or which is used for keeping or delivering controlled substances.⁶ There must be "evidence of some affirmative activity by

⁵ *White v. State*, 906 A.2d 82, 86 (Del. 2006).

⁶ Del. Code Ann. tit. 16, § 4755(a)(5).

[Birckhead] to utilize the [dwelling] to facilitate the possession, delivery, or use of controlled substances.”⁷

(21) The State presented evidence to establish that Birckhead resided in the front bedroom of the Vandever Avenue house during the relevant time period. Ikea and Alvinette both testified that Birckhead lived at the residence. In the front bedroom of the home, officers found Birckhead’s jacket, his wallet, his driver’s license, his social security card, paperwork bearing his name, and clothing believed to be his. This evidence, coupled with the fifteen bags of marijuana found in Birckhead’s jacket, sufficiently established more than a single incident of Birckhead using the home to facilitate the possession, delivery, or use of drugs. Therefore, there was sufficient evidence to support his conviction for Maintaining a Dwelling.

(22) Birckhead next contends that the State did not present sufficient evidence to sustain his conviction for Conspiracy to PWID marijuana. In order to convict Birckhead of Conspiracy, the State must establish: his intent to promote or facilitate the possession of cocaine or marijuana with intent to deliver, his agreement with others to engage in conduct constituting

⁷ *White v. State*, 2007 WL 2320068, at *2 (Del. Aug. 15, 2007) (citing *Priest v. State*, 879 A.2d 576, 580 (Del. 2005)).

these felonies, and the commission of an overt act.⁸ The existence of a conspiracy may be inferred from the facts and circumstances.⁹

(23) In Parks' prior statement to police, he stated that Birckhead sold drugs from the Vandever Avenue residence and admitted that he acted as a lookout for Birckhead, and in exchange, was allowed to live at the home. This testimony, if believed, was sufficient evidence from which a rational juror could conclude that a conspiracy existed between Birckhead and Parks to possess drugs with the intent to deliver. Therefore, the evidence was sufficient to sustain Birckhead's conspiracy conviction.

(24) Finally, Birckhead challenges the sufficiency of the evidence supporting his conviction for PFPP. In order to convict Birckhead of PFPP, the State must prove that Birckhead was in possession of a firearm and at the time was a "person prohibited" under title 11, section 1448 of the Delaware Code. The record reflects that Birckhead was previously convicted of Reckless Endangering First Degree, a felony, on or about December 6, 2001. Being a prior convicted felon, Birckhead is a "person prohibited" from possessing a firearm within the meaning of section 1448.¹⁰

⁸ Del. Code Ann. tit. 11, § 512.

⁹ See *Stroud v. State*, 1990 WL 43315, at *3 (Del. Apr. 2, 1990).

¹⁰ See Del. Code Ann. tit. 11, § 1448.

(25) The officers testified that when they searched 917 Vandever Avenue they were unable to immediately locate the Cobra handgun. When questioned about its location, Alvinette stated that she believed Birckhead had taken the handgun from the kitchen and placed it in the front bedroom. She further stated that she did not believe that anyone else would have taken the handgun. When officers searched the front bedroom, they discovered the Cobra handgun lying on top of a pair of men's black jeans believed to be Birckhead's. In that same bedroom and in close proximity to the handgun, officers found Birckhead's jacket with marijuana in the pocket and ammunition that matched the caliber of the handgun. In light of this evidence, the Superior Court properly found that a rational trier of fact could find, beyond a reasonable doubt that Birckhead, a "person prohibited" possessed the firearm in violation of the Delaware statute.

NOW, THEREFORE, IT IS ORDERED that the judgments of the Superior Court are AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice