STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0839

State of Minnesota,
Respondent,

vs.

Dustin Spencer Casey,
Appellant.

Filed June 19, 2017
Affirmed
Ross, Judge

Ramsey County District Court
File No. 62-CR-13-9492

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Ross, Judge; and Kalitowski, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

The state charged appellant Dustin Casey with a first-degree controlled substance crime after an officer discovered methamphetamine in his backpack. On appeal, Casey argues that the circumstantial evidence was insufficient to prove his guilt, and alternatively, that he should be resentenced under the amended provisions of the Minnesota Drug Sentencing Reform Act (DSRA). We affirm Casey's conviction because the circumstantial evidence precludes any reasonable hypothesis other than his guilt. And we affirm his sentence because the legislature indicated its clear intent that the DSRA would apply only to crimes committed on or after its enactment.

FACTS

A St. Paul police officer found methamphetamine in Dustin Casey's backpack after the officer stopped Casey and arrested him on an arrest warrant. The state charged Casey with a first-degree controlled substance crime, and at trial the jury considered evidence that we now summarize.

Officer Pheng Xiong began his late-night watch one evening in September 2013 having the names, addresses, photographs, and other details of several individuals who may be in his patrol area and who were the subjects of outstanding arrest warrants. One was Casey. Shortly before 3:00 a.m., Officer Xiong drove to a home that Casey was known to frequent, and he saw a man who turned out to be Casey and a woman, T.O., walking from the home.

Officer Xiong illuminated the pair with his squad car's spotlight. Casey was carrying a backpack, and T.O. a purse. Casey quickened his pace. Officer Xiong turned his squad car around, and Casey and T.O. walked toward a parked sport utility vehicle. The officer saw T.O. enter through the driver's door, and he watched as Casey approached the passenger's side, removed his backpack, and set it inside the vehicle. Officer Xiong got out of his squad car and walked to Casey, who had walked away from the sport utility vehicle.

Officer Xiong asked Casey to identify himself. Casey said he had no identification. The officer put Casey in his squad car and attempted to verify his identity while T.O. remained in her vehicle. Casey identified himself as "Donovan Patrick Casey" rather than Dustin Casey. But a tattoo on Casey's arm and photographs of Casey and his brother Donovan all confirmed the officer's understanding that he had in fact stopped Dustin Casey, not Donovan Casey. He placed Casey under arrest on the warrant.

Officer Xiong went to retrieve Casey's backpack. A video recording inside the squad car captured an officer, presumably Officer Xiong, saying, "I'm gonna grab his bag." (A transcript of the audio recording erroneously states that the officer says, "I'm gonna grab him back [inaudible][.]" In the video recording itself, however, which is also included in the record and which was played for the jury, the officer clearly says, "grab his bag."). The video recording next depicts Casey looking out the squad car window for nearly a minute, and then he says simply, "F-ck."

The officer found several things in Casey's backpack: clothes, tools, and a small "money bag." Inside the money bag the officer found an Altoids breath mints container, and inside that, he found small baggies containing a substance that the officer suspected

was methamphetamine. No DNA or fingerprint testing was performed on the backpack or its contents. Officer Xiong acknowledged that he did not know who had put the items inside Casey's backpack. T.O. was never searched.

Officer Joel Johnston testified that the substance field-tested positive for methamphetamine. Bureau of Criminal Apprehension analyst James Dahlke confirmed that the substance was methamphetamine, weighing 25.3 grams.

The jury found Casey guilty of drug possession, and the district court entered the conviction and sentenced him to 161 months in prison. Casey appeals.

D E C I S I O N

Casey asks us to reverse his conviction because the circumstantial evidence of his guilt was insufficient or, alternatively, to remand for resentencing under the modified provisions of the 2016 DSRA because his conviction is not yet final.

I

Casey argues that his conviction must be reversed because the circumstantial evidence was insufficient to prove that he possessed the methamphetamine. When we review a claim of insufficient evidence, we generally read the record to determine whether the evidence, considered in the light favorable to the conviction, supports the jury's finding of guilt beyond a reasonable doubt. *State v. Caine*, 746 N.W.2d 339, 356 (Minn. 2008). We assume that the fact-finder disbelieved any evidence that conflicted with the verdict. *State v. Fox*, 868 N.W.2d 206, 223 (Minn. 2015). But we scrutinize more strictly a conviction based on circumstantial evidence. *State v. Al-Naseer*, 788 N.W.2d 469, 473 (Minn. 2010). We ask whether the proved circumstances and reasonable inferences drawn

from those circumstances are consistent with guilt and inconsistent with any rational, non-guilty hypothesis.[1] *Id.*

A. Circumstances Proved

We first identify the circumstances proved at trial. *Id.* We defer to the jury's acceptance of the proof of those circumstances and its rejection of evidence conflicting with the state's proved circumstances. *Id.*; *see also State v. Hawes*, 801 N.W.2d 659, 668–69 (Minn. 2011) ("Under this standard, we disregard testimony that is inconsistent with the verdict."). Put another way, "we consider only those circumstances that are consistent with the verdict." *State v. Silvernail*, 831 N.W.2d 594, 599 (Minn. 2013).

The following circumstances were proved at trial, consistent with the guilty verdict: Officer Xiong saw Casey and T.O. walking together toward the sport utility vehicle; Casey was carrying a backpack; Casey quickened his pace once Officer Xiong spotlighted him; Casey put his backpack in the passenger seat of the vehicle and began walking *away* from it; T.O. sat in the driver's seat while officers briefly investigated Casey's identity; Casey lied about his identity; as Officer Xiong collected Casey's bag, Casey uttered a frank, disappointed expletive; and Officer Xiong found methamphetamine in the backpack.

[1] The state questions the wisdom of continuing to apply a heightened-scrutiny standard of review for circumstantial-evidence appeals. After the state submitted its brief, the Minnesota Supreme Court declined to abandon the heightened-scrutiny standard. *See State v. Harris*, ___ N.W.2d ___, ___, 2017 WL 2265434, at *5 (Minn. May 24, 2017).

The state adds that Casey also "pretended not to know his female companion." This is not so; Casey identified T.O. by her first name and claimed only to be unable to pronounce her last name.

B. Reasonable Inferences

Having determined the circumstances proved, we next consider whether those circumstances are consistent with Casey's guilt and inconsistent with any rational hypothesis except his guilt. *See Silvernail*, 831 N.W.2d at 599. We give no deference to the jury's choice between competing reasonable inferences. *Al-Naseer*, 788 N.W.2d at 474. "Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *State v. Taylor*, 650 N.W.2d 190, 206 (Minn. 2002). We consider circumstantial evidence as a whole, not as isolated facts. *Silvernail*, 831 N.W.2d at 599.

We measure the circumstances proved against the elements of Casey's crime of conviction:

> A person is guilty of a controlled substance crime in the first degree if . . . the person unlawfully possesses one or more mixtures of a total weight of 25 grams or more containing cocaine, heroin, or methamphetamine[.]

Minn. Stat. § 152.021, subd. 2(a)(1) (2012). The trial transcript reveals that the prosecutor presented Casey's possession to the jury as a question of *constructive* possession, not *actual* possession. The parties therefore frame the issue likewise on appeal—as a case of constructive possession. This may have been an unnecessarily attenuated approach. The

defendant's possession of the drugs *at the time of his apprehension* is not necessary to prove actual possession. *State v. Barker*, 888 N.W.2d 348, 354 (Minn. App. 2016). And we again question the approach of proving *constructive* possession when there is evidence (including circumstantial evidence) of *actual* possession. *See State v. Arnold*, 794 N.W.2d 397, 400–401 (Minn. App. 2011) (because the defendant's handling of drugs evidenced her actual possession, we noted our "awkward position of determining whether proof of physical possession [was] sufficient to prove constructive possession"). But because the jury was instructed only on constructive possession and both parties frame the question similarly on appeal, we review the circumstantial evidence in the context of constructive possession.

To show constructive possession, the state must establish either one of two elements:

> (a) that the police found the substance in a place under defendant's exclusive control to which other people did not normally have access, or (b) that, if police found it in a place to which others had access, there is a strong probability (inferable from other evidence) that defendant was at the time consciously exercising dominion and control over it.

State v. Florine, 303 Minn. 103, 105, 226 N.W.2d 609, 611 (1975); *see also Barker*, 888 N.W.2d at 353 ("*Actual* possession, also referred to as physical possession, involves direct physical control." (quotation omitted) (emphasis added)).

Casey emphasizes that the state had to prove he was "consciously exercising dominion and control of the methamphetamine at the time of his arrest." Casey cites *State v. Sam*, 859 N.W.2d 825, 836 (Minn. App. 2015), where we reversed Sam's conviction for

possessing methamphetamine with a firearm enhancement after we deemed the circumstantial evidence insufficient to support his conviction. We required that "the state must prove that a defendant exercised dominion and control over the *contraband*, not merely the place where the contraband is located." *Id.* at 834 (emphasis in original).

Casey's alternative hypothesis, which he claims the evidence does not preclude, is that "[T.O.] placed the methamphetamine inside the backpack during the 15-minute period of time that the bag was in her exclusive possession immediately before it was searched." Casey proposes that the methamphetamine could have been in T.O.'s purse, or already in her vehicle, and that T.O. slipped it into his backpack. On that factual hypothesis, he also theorizes her motive, saying that T.O. "could not be sure that [the] police investigation would not lead to a search of her, her purse, and her [vehicle]."

Casey is not really offering a reasonable alternative hypothesis based on the circumstances proved; he is instead suggesting that we speculate about a new circumstance that was never proved or even implied by the evidence actually presented to the jury. We will not overturn a conviction based on circumstantial evidence relying on conjecture. *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). Casey's arguments rely only on conjecture. No evidence offered by any party would lead a reasonable juror to believe that T.O. possessed the methamphetamine in her purse or car and then transferred it to the backpack without the police noticing her transfer. Although Officer Xiong did not observe T.O. the entire time she remained inside her vehicle sitting beside the backpack that Casey had put there, he did testify that he never saw her do anything suspicious while he was watching her. The evidence includes no detail from which a reasonable juror would infer that T.O.

moved drugs into the backpack, or even that she used or possessed drugs, or that she feared that Casey's detention on the warrant might lead police to search her purse or her car. And even if some evidence of these things had existed, we think it is implausible rather than reasonable to surmise that T.O., who was never told she was being detained and had no reason to believe she would be detained on Casey's warrant, would risk detection and prosecution by handling and transferring drugs while she sat in her vehicle, possibly in view of the nearby police.

The circumstances actually proved, viewed as a whole, preclude any rational hypothesis other than Casey's guilt. Certain parts of Casey's conduct—specifically his giving false information—might be explained by his attempting to avoid arrest on the warrant. But the evidence must be viewed in its entirety. *See Al-Naseer*, 788 N.W.2d at 473. Most compelling is Casey's clear attempt to separate himself from his backpack. His colorful, single-word exclamatory statement, which he made apparently in response to the officer's retrieval of his backpack, also tends to establish that he knew police would find drugs inside the backpack. Casey's alternative theory does not explain these circumstances. The circumstantial evidence leads directly and exclusively to Casey's guilt.

II

Casey seeks to avail himself of a change in the law to reduce his sentence. He argues that, because his conviction is not final, we should instruct the district court to resentence him under the 2016 Drug Sentencing Reform Act. *See* 2016 Minn. Laws ch. 160, §§ 1–22, at 576–92. The effort fails.

Casey was convicted under Minnesota Statutes section 152.021, subdivision 2(a)(1) (2012), which at the time of Casey's conviction, criminalized as a first-degree offense the possession of more than 25 grams of a controlled substance. By Casey's violating that statute, his criminal history and offense severity resulted in a presumptive prison sentence of 161 months. *See* Minn. Sent. Guidelines 2.B.2.c.(1), 4.A (2013). But under the DSRA and Minnesota Statutes section 152.021, subdivision 2(a)(1) (2016), a first-degree controlled substance conviction now requires proof that the defendant possessed drugs weighing *50* grams or more. Possessing "25 grams or more . . . methamphetamine" is now a lesser, *second*-degree controlled substance crime. Minn. Stat. § 152.022, subd. 2(a)(1) (2016). And under the 2016 guidelines, Casey's first-degree controlled substance crime would carry a presumptive sentence of only 107 to 150 months' imprisonment, while a second-degree conviction would carry a presumptive sentence of only 92 to 129 months. Minn. Sent. Guidelines 4.C (2016).

Casey asks us to remand so the district court can grant him the lower sentence under the DSRA. The problem is that the legislature provided that the relevant portions of the DSRA were "effective August 1, 2016, and appl[y] to crimes *committed on or after that date*." 2016 Minn. Laws ch. 160, §§ 3, at 579; 4, at 581 (emphasis added). The legislature has established the presumption against the retroactivity of its enactments: "No law shall be construed to be retroactive unless clearly and manifestly so intended by the legislature." Minn. Stat. § 645.21 (2016). And this includes amendments, because "[w]hen a section or part of a law is amended . . . the new provisions shall be construed as effective only from the date when the amendment became effective." Minn. Stat. § 645.31, subd. 1 (2016).

Casey committed his crime nearly three years before the DSRA's effective date. We must decide whether the change in the law applies retroactively, a task we undertake de novo. *State v. Basal*, 763 N.W.2d 328, 335 (Minn. App. 2009).

Casey relies on the amelioration doctrine developed in *State v. Coolidge*, 282 N.W.2d 511 (Minn. 1979), and he urges that "Minnesota follows the common-law rule that the legislature nonetheless intends for newly-enacted laws reducing the punishment for a criminal offense to apply to all cases that are not final when the law takes effect[.]" We think Casey reads *Coolidge* too expansively. In *Coolidge*, the supreme court addressed legislative amendments that reduced the punishment for Coolidge's crime before his conviction became final. *Id.* at 514. The supreme court observed,

> It is also true that a statute mitigating punishment is applied to acts committed before its effective date, as long as no final judgment has been reached. The rationale for such a rule is that the legislature has manifested its belief that the prior punishment is too severe and a lighter sentence is sufficient. Nothing would be accomplished by imposing a harsher punishment, in light of the legislative pronouncement, other than vengeance.

Id. at 514–15. The supreme court restricted *Coolidge*'s holding in *Edstrom v. State*, which held that the analysis in *Coolidge* applies "absent a contrary statement of intent by the legislature." 326 N.W.2d 10, 10 (Minn. 1982). We have continued to rely on *Edstrom*'s limitation. *See, e.g.*, *Basal*, 763 N.W.2d at 336 ("Because the legislature provided for a specific effective date for the 2007 amendment, the legislature did not intend for the amendment to apply to conduct occurring before the effective date."); *State v. McDonnell*, 686 N.W.2d 841, 846 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004) ("[T]he

effective-date provision of the [amendment] explicitly states that the amendment applies to violations that occur on or after August 1, 2003. Therefore . . . the principle stated in *Coolidge* does not apply to appellants even though their convictions were not final on the effective date of the amendment.").

Edstrom teaches that the DSRA does not apply retroactively to Casey's offense. Casey attempts to distinguish *Edstrom*, arguing that *Edstrom* requires something "like a specific provision stating that the new law does not apply to 'past and present' prosecutions for crimes committed before the changes took effect." Casey's reading of *Edstrom* is too restrictive; it would require the legislature to preclude the ameliorative doctrine *only* by excluding crimes committed before the effective date. We specifically rejected this formulation in *McDonnell*, which extended *Edstrom* to an amendment applying to violations occurring on or after the effective date. 686 N.W.2d at 846. The DSRA's operative language is substantially similar. The *inclusive* language applying to crimes committed "on or after" an effective date is equivalent to *exclusive* language applying to crimes committed before an effective date.

Casey argues that even if the limiting language "overcome[s] the presumption that [the amendments apply] to non-final cases, this language is not present in Section 18(b)(4), the provision reducing the grid sentences for first-degree offenses." That section provides, "The Sentencing Guidelines Commission shall . . . re-rank first-degree possession of a controlled substance under Minnesota Statutes, section 152.021, subdivision 2, paragraph (a), at the renumbered severity level D8 . . . ." 2016 Minn. Laws ch. 160, § 18(b)(4), at 591. Casey emphasizes that neither section 4 of the DSRA, *id.* at § 4, at 579–81, nor Minnesota

Statutes section 244.09, subdivision 11 (2016), limits changes to the guidelines grid to crimes committed on or after their effective date.

Casey's argument faces three obstacles. First, section 18(b) begins by directing the guidelines commission to make certain changes to the "new drug offender grid" and "criminal history grids." 2016 Minn. Laws. ch. 160, § 18(b)(1), (2), at 591. The section clearly references the commission's "January 15, 2016" report. *Id.*, § 18(a), at 590. Section 18(b) makes similar reference to the same "report." *Id.*, § 18(b)(1)–(3), at 591. Section 18's effective date of "the day following final enactment" appears to be a directive authorizing the commission to modify certain provisions of its reported recommendations before the remainder of the act became effective on August 1. Second, the argument is inconsistent with the effective dates for the amendments to sections 152.021 and 152.022. *Id.*, §§ 3, at 579; 4, at 581. If the legislature intended *effective* changes to the grid before August 1, 2016, those sentencing modifications would predate the amendments to the corresponding substantive statutes. This would be silly. Third (and most important), the sentencing guidelines unmistakably provide that sentences and effective dates are determined in relation to offense dates. *See* Minn. Sent. Guidelines (2016) (providing on cover page that guidelines "are effective August 1, 2016, and determine the presumptive sentence for felony offenses committed on or after the effective date"); Minn. Sent. Guidelines 2 (2016) ("The presumptive sentence for any offender convicted of a felony committed on or after May 1, 1980, is determined by the Sentencing Guidelines in effect on the date of the conviction offense . . . ."); Minn. Sent. Guidelines 3.G.1 (2016) ("Modifications to the

Minnesota Sentencing Guidelines and associated commentary apply to offenders whose date of offense is on or after the specified modification effective date.").

The legislature's language and the caselaw compel us to hold that the DSRA's sentencing provisions do not apply to Casey's non-final conviction. We observe that the issue is presently pending before the Minnesota Supreme Court after briefing and oral argument. *See State v. Otto*, A15-1454, (Minn. App. July 18, 2016), *review granted* (Minn. Sept. 28, 2016); *State v. Kirby*, No. A15-0117, (Minn. App. July 18, 2016), *review granted* (Minn. Sept. 28, 2016). Until the supreme court decides the issue, we will follow our precedent. *See State v. M.L.A.*, 785 N.W.2d 763, 767 (Minn. App. 2010), *review denied* (Minn. Sept. 21, 2010). We affirm Casey's sentence.

Affirmed.