[Cite as *State v. Darling*, 2009-Ohio-4198.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92120

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DAMON DARLING

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510932

BEFORE: Kilbane, J., Gallagher, P.J., and Blackmon, J.

RELEASED: August 20, 2009

JOURNALIZED:

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MARY EILEEN KILBANE, J.:

{¶ 1} Appellant, Damon Darling (Darling), appeals his convictions for drug possession and drug trafficking with a schoolyard specification. For the following reasons, we affirm in part, reverse in part, and remand this case to the trial court for further proceedings consistent with this opinion.

{¶ 2} On May 22, 2008, the Cuyahoga County Grand Jury returned a two-count indictment against Darling. Count 1 charged possession of drugs, in violation of R.C. 2925.11(A), a felony of the second degree. Count 2 charged drug trafficking, in violation of R.C. 2925.03(A)(2) (knowingly prepared for shipment, shipped, delivered, prepared for distribution, or distributed a controlled substance), a felony of the first degree. Count 2 contained within it a further specification that the offense was committed within 1000 feet of a school in violation of R.C. 2925.03(C)(2)(b).

{¶ 3} On July 28, 2008, the case proceeded to a jury trial.

{¶ 4} On July 29, 2008, a jury convicted Darling of the offenses as charged in the indictment.

{¶ 5} On August 28, 2008, the trial court sentenced Darling to a period of three years of incarceration on Count 1, three years of incarceration on Count 2, and three years of postrelease control. The terms of incarceration in counts 1 and 2 were to be served concurrently.

{¶ 6} This appeal followed.

{¶ 7} The following facts were developed in the record at trial.

{¶ 8} On May 2, 2008, Cleveland Police Officer Donald Horvat was on patrol in the vicinity of East 152nd Street, near Saranac Avenue, at approximately 9:30 p.m., when he observed Darling's vehicle run a red light as he traveled south on East 152nd Street at Saranac. Officer Horvat testified that he observed Darling proceed through the light and then turn onto Holmes Street, where he traveled approximately 60 to 70 feet before pulling over almost simultaneously with Officer Horvat's activation of his overhead lights. Officer Horvat testified that, as he activated his lights, he observed Darling in the driver's seat and another individual in the front passenger's seat moving around in the car, and then the passenger's door opened. Officer Horvat testified that he ordered the passenger back into the car, but the individual fled on foot. The officer never identified the passenger.

{¶ 9} When Officer Horvat approached Darling's vehicle, he observed Darling hunched over and moving around. Officer Horvat asked Darling for his driver's license and a copy of his insurance card. Darling said his insurance card was in his glovebox. Officer Horvat testified that he observed Darling looking for his insurance card, but eventually removed Darling from the vehicle after he became concerned for his own safety. He then placed Darling in the back of his police car.

{¶ 10} Upon removing Darling from his vehicle, Officer Horvat testified that he observed a small rock of suspected crack cocaine on the driver's seat. After securing Darling, Officer Horvat returned to the vehicle and, upon approaching it, he observed in plain view a plastic sandwich bag that was partially tucked into the passenger's seat. Within the bag were individually wrapped pieces of suspected crack cocaine. The contents of the bag were subsequently tested and determined to be rocks of crack cocaine in the amount of 14.99 grams.

{¶ 11} Officer Horvat testified that the stop occurred twelve houses away from St. Mary's church and school, and that each house's lot was no more than 40 feet wide. Based upon this deduction, Officer Horvat testified that the stop occurred approximately 480 feet from St. Mary's, because he visited the site after making the arrest and measured the width of each lot, and then "walked" the amount of lots between where the stop occurred and where the school was located.

Analysis

{¶ 12} For convenience, we address Darling's assignments of error out of order where appropriate.

{¶ 13} Darling's first assignment of error states:

> "Mr. Darling's convictions for drug possession and drug trafficking were allied offenses of similar import and the convictions must merge into a single conviction."

{¶ 14} With respect to Darling's first assignment of error, the State concedes that the convictions herein were allied offenses of similar import and that they merge for sentencing purposes into a single conviction. See *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625. In *Cabrales*, the Supreme Court held inter alia that drug trafficking, in violation of R.C. 2925.03(A)(2), and drug possession, in violation of R.C. 2925.11(A), are allied offenses of similar import. In so holding, the *Cabrales* court reasoned that:

> "[t]he test under R.C. 2941.25(A) for whether two offenses are allied offenses of similar import is that if the elements of the crimes correspond to such a degree that the commission of one crime will result in the commission of the other, the crimes are allied offenses of similar import. It is then required that the elements be compared in the abstract, i.e., without consideration of the evidence in a particular case. However, nowhere is it mandated that the elements of compared offenses must exactly align in order to be allied offenses of similar import under R.C. 2941.25(A)." Id. at 59.

{¶ 15} Recently, the Supreme Court reaffirmed the holding of *Cabrales* that offenses can be allied even if the elements of the offenses do not exactly align when compared under the two-step analysis required under R.C. 2941.25. See *State v. Harris*, Slip Opinion No. 2009-Ohio-3323. In a different opinion released the same day, the Supreme Court also noted the subtle yet distinct difference in the law between allied offenses of similar import and lesser included offenses. See *State v. Evans*, Slip Opinion No. 2009-Ohio-2974. The *Evans* court compared the allied offenses test of *Cabrales* with the "lesser included offense test" of *State v. Deem* (1988), 40 Ohio St.3d 205, 533 N.E.2d 294, noting:

> "This allied offenses test corresponds to step two of the *Deem* test which * * * states 'whether the greater offense as statutorily defined cannot be committed without the lesser offense also being committed.' Thus, application of the *Cabrales* test for allied offenses and the *Deem* test for lesser included offenses suggests that a lesser included offense will always be an allied offense, although an allied offense may not necessarily be a lesser included offense, because a lesser included offense must also satisfy the first and third steps of *Deem*.
>
> "* * *
>
> "These holdings are neither inconsistent nor mutually exclusive. Other courts have considered whether two offenses can be both allied offenses of similar import and lesser included offenses." Id.

{¶ 16} The *Harris* court, in applying *Cabrales* and its progeny, held that felonious assault as defined in R.C. 2903.11(A)(1) and felonious assault as defined in R.C. 2903.11(A)(2) are allied offenses of similar import, and one cannot be convicted of both offenses when both are committed with the same animus against the same victim. *Harris*, citing *Cabrales*, following *State v. Cotton*, 120 Ohio St.3d 321, 2008-Ohio-6249.

{¶ 17} The State's position on this issue is that in order to prepare it for shipment, one must have possession or control of the substance. One therefore cannot traffic in drugs without first possessing them. We agree. See, e.g., *State v. Quinones*, Cuyahoga App. No. 91632, 2009-Ohio-2718, at ¶43; *State v. Goss*, Cuyahoga App. No. 91160, 2009-Ohio-1074. Darling's first assignment of error is well-taken. He cannot be convicted of both offenses and we must therefore

remand this matter in order that the trial court may impose only one sentence for these offenses, which merge for sentencing purposes. See *Goss* at ¶12.

{¶ 18} Darling's second and third assignments of error state:

> "There was insufficient evidence to convict Mr. Darling of a schoolyard specification.
>
> "Mr. Darling's conviction on a schoolyard specification was against the manifest weight of the evidence."

{¶ 19} With respect to these assignments of error, the State concedes that there was no evidence that St. Mary's school was either open or operating as a school, and that it could easily have been abandoned or closed since no evidence was produced to show that it was operating as a school pursuant to the standards set by the State of Ohio School Board pursuant to R.C. 3301.07. We agree.

{¶ 20} "The introduction of evidence that a 'school' as defined by R.C. 2925.01 actually exists in proximity to the location is * * * not an unduly burdensome requirement. Laxness in proof that an illegal drug sale occurred in the vicinity of a school for minor children – as opposed to a vacant school building or a post-secondary welding school – results in defendants receiving enhanced penalties contrary to the purpose of the law." *State v. Boyd* (2008), Ottawa App. No. OT-06-034, 2008-Ohio-1229. "We cannot assume the existence of sufficient evidence to support an essential element of the state's case-in-chief." Id., citing *State v. Brown*, 85 Ohio App.3d 716, 621 N.E.2d 447, *State v. Olvera*

(Oct. 15, 1999), Williams App. Nos. WM-98-022 and WM-98-023. Darling's second and third assignments of error are well taken with respect to the schoolyard specification for Count 2. His conviction in relation to this specification is reversed.

{¶ 21} Accordingly, Darling's second and third assignments of error are sustained.

{¶ 22} Darlings fourth and sixth assignments of error state:

> "There was insufficient evidence to convict Mr. Darling of drug trafficking.
>
> "There was insufficient evidence to convict Mr. Darling of drug possession."

{¶ 23} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492.

{¶ 24} "Sufficiency is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law."

State v. Thompkins (1997), 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148.

{¶ 25} The elements of the offense of drug trafficking under R.C. 2925.03(A)(2) in this matter are to knowingly prepare for shipment, ship, deliver, prepare for distribution, or distribute crack cocaine in an amount equal to or exceeding 10 grams but less than 25 grams, knowing or having reasonable cause to believe such drug was intended for sale or resale by the offender or another.

{¶ 26} The elements of the offense of drug possession pursuant to R.C. 2925.11(A) in this matter are to knowingly obtain, possess, or use a controlled substance, to wit: crack cocaine, in an amount equal to or exceeding 10 grams but less than 25 grams.

{¶ 27} In this matter, though they merge for sentencing purposes, we find sufficient evidence to support both offenses. That is, the record demonstrates that Darling had control of the drugs, that those drugs were found in his car, and that they were packaged according to a size and weight that indicated his intention to distribute them, as opposed to consume them. In addition, no other devices, such as a crack pipe, were found in the car or on Darling's person. This, coupled with the size, quantity and packing of the drugs, further indicates Darling's intent to sell the drugs. The State met its evidentiary burden with

respect to the requisite statutory elements for each offense. The evidence in this matter was legally sufficient to support the jury's verdict. *Thompkins* at 386.

{¶ 28} Darling's fourth and sixth assignments of error are not well taken.

{¶ 29} Darlings fifth and seventh assignments of error state:

> "Mr. Darling's conviction for drug trafficking was against the manifest weight of the evidence.
>
> "Mr. Darling's conviction for drug possession was against the manifest weight of the evidence."

{¶ 30} In evaluating a challenge to the verdict based on manifest weight of the evidence, a court sits as the thirteenth juror and intrudes its judgment into proceedings that it finds to be fatally flawed through misrepresentation or misapplication of the evidence by a jury which has "lost its way." *Thompkins* at 387. As the Ohio Supreme Court explained:

> "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." Id.

{¶ 31} Darling argues that aside from the drugs, Officer Horvat did not find any additional indicators of drug trafficking, such as money, or a scale. Darling also argues that there was enough time for the passenger to tuck the drugs into the seat on the passenger's side, so that the drugs may not have been Darling's,

and that Darling's mere proximity to the drugs does not mean he possessed them. Darling argues that his case is analogous to *State v. Palmer* (Feb. 5, 1992), Cuyahoga App. No. 58828, or *State v. Mayer*, Cuyahoga App. No. 80168, 2003-Ohio-1, wherein this court found that a defendant's mere proximity to drugs was insufficient to convict him of drug possession.

{¶ 32} In *Palmer*, this court found that the defendant did not exercise any dominion or control over the car, since he was in the back seat and the drugs were found under the driver's seat. In so holding, this court noted that the drugs could have been possessed by either of the other two people in the car.

{¶ 33} In *Mayer*, the defendant did have control over his car, since he was the driver; however, this court found that the drugs could have been possessed by his passenger at the time. This case, however, is clearly distinguishable from *Palmer* and *Mayer*.

{¶ 34} Here, unlike *Palmer*, defendant did exercise dominion and control over the car. It was his car and he was driving it. Moreover, there was only one other person in the car with him at the time he was pulled over and, according to the record, that person fled when Officer Horvat pulled the car over. No further information was given with respect to the identity of that individual.

{¶ 35} Further, *Palmer* holds possession may be proven by evidence of actual physical possession or constructive possession, where the contraband is under the defendant's dominion or control. *Palmer* at 2. Constructive

possession may be proven by circumstantial evidence alone but "dominion and control" may not be inferred solely from mere access to the substance through ownership or occupation of the premises upon which the substance is found. *State v. Taylor*, 78 Ohio St.3d 15, 1997-Ohio-243, 676 N.E.2d 82.

{¶ 36} While it is true that the drugs could have been the unidentified passenger's and not Darling's, Officer Horvat's testimony regarding Darling's movements in the moments after the initial stop clearly inferred otherwise. Darling's arguments on this point, then, essentially call into question the credibility of that testimony.

{¶ 37} When assessing witness credibility "the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123, 489 N.E.2d 547. The fact-finder is free to believe all, part, or none of the testimony of each witness appearing before it. *Hill v. Briggs* (1996), 111 Ohio App.3d 405, 412, 676 N.E.2d 547. Indeed, the court below is in a much better position than an appellate court "to view the witnesses, to observe their demeanor, gestures and voice inflections, and to weight their credibility." *Briggs* at 412, citing *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273.

{¶ 38} Here, the jury, as the trier of fact, weighed the evidence, considered the facts and the credibility of the witnesses, and found Darling guilty.

{¶ 39} Applying the standard of review for sufficiency of the evidence as set forth above, we find, after viewing the evidence in a light most favorable to the State, that any rational trier of fact could have found the essential elements of the crime of possession of drugs and drug trafficking proved beyond a reasonable doubt. From all of the foregoing, we cannot say that the jury lost its way in convicting defendant of these offenses.

{¶ 40} Assignments of error five and seven lack merit and are overruled.

{¶ 41} Based upon the State's concessions, the schoolyard specification accompanying Darling's conviction for drug trafficking is reversed. This matter is remanded to the trial court to merge defendant's convictions for possession of drugs (Count 1) and drug trafficking (Count 2) and to impose a single conviction and sentence for those allied offenses. In all other respects, the matter is affirmed.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, JUDGE

SEAN C. GALLAGHER, P.J., and
PATRICIA A. BLACKMON, J., CONCUR