

[Cite as *State v. Atterbury*, 2009-Ohio-4370.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. **92031**

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LEON ATTERBURY

DEFENDANT-APPELLANT

AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-508836

BEFORE: Blackmon, J., McMonagle, P.J., and Stewart, J.

RELEASED: August 27, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Leon Atterbury appeals his conviction following a bench trial and assigns the following errors for our review:

“I. Appellant’s convictions were based upon insufficient evidence.”

“II. The convictions of appellant are against the manifest weight of the evidence.”

{¶ 2} Having reviewed the record and pertinent law, we affirm Atterbury’s convictions. The apposite facts follow.

{¶ 3} On April 2, 2008, the Cuyahoga County Grand Jury indicted Atterbury for drug possession, drug trafficking, possession of criminal tools, and receiving stolen property. Atterbury pleaded not guilty at his arraignment, subsequently executed a jury waiver, and on July 10, 2008, a bench trial commenced.

Bench Trial

{¶ 4} At trial, through the testimony of five State witnesses, the evidence established that based on complaints of drug activity in a Cuyahoga Metropolitan Housing Authority (“CMHA”) property, the CMHA’s police department began surveillance on Atterbury’s apartment. The CMHA police orchestrated controlled drug buys and subsequently obtained a search warrant for Atterbury’s apartment.

{¶ 5} On February 14, 2008, the CMHA police executed the search warrant during Atterbury's absence. The officers recovered \$390 from the pocket of a coat jacket located in a hallway closet. Discovered among the money recovered was the marked currency that was used to effect the controlled drug buys.

{¶ 6} In addition, the officers recovered a bag containing suspected crack cocaine, five small plastic bags containing suspected crack cocaine residue, a crack pipe, a box of gun shells, and a bottle containing Oxycodone pills. After scientific analysis, the suspected substance tested positive for cocaine with a total weight of 7.7 grams.

{¶ 7} Detective Clinton Ovalle, of the CMHA Police Department, testified that he participated in the surveillance of Atterbury's apartment, and arranged with an informant to execute a controlled drug buy from Atterbury's apartment. Detective Ovalle gave the informant the marked currency, watched as he knocked on the door to Atterbury's apartment, and was subsequently invited into the apartment. The informant exited Atterbury's apartment approximately three seconds later with the drugs.

{¶ 8} Subsequent to the controlled buy, Detective Ovalle cataloged and sealed the drugs, and conducted further surveillance on Atterbury's apartment.

Detective Ovalle testified that he later swore out an affidavit and secured the search warrant for Atterbury's apartment.

{¶ 9} Detective Ovalle participated in the execution of the search warrant. He discovered a bag containing suspected crack cocaine in the bedroom and a number of prescription bottles in the medicine cabinet, one of which contained Oxycodone and was prescribed to one Daniel Lyles. In addition, Detective Ovalle recovered razor blades with residue of suspected crack cocaine.

{¶ 10} After the search warrant was executed, Detective Ovalle spoke with Atterbury, who indicated that the crack cocaine recovered from his apartment belonged to him and that it was for his personal use. Atterbury also indicated that the pill bottle containing Oxycodone was given to him for safekeeping by Daniel Lyles, who was going out of town. Detective Ovalle subsequently interviewed Lyles, who indicated that the pills had been missing from his apartment.

{¶ 11} At trial, Lyles stated that he suffered from a heart condition and was taking several medications. Lyles denied that Atterbury had stolen his medication. Lyles stated that because people were constantly going into his apartment and stealing his medication, he asked Atterbury to keep some of his medication while he went out of town.

{¶ 12} Lyles further stated that at the time Detective Ovalle interviewed him about the pills recovered from Atterbury's apartment, he was confused and disoriented. Lyles stated that his confused state of mind resulted from him simultaneously drinking alcohol and taking his medication.

{¶ 13} The trial court acquitted Atterbury of receiving stolen property, but found him guilty of the remaining charges. On August 7, 2008, the trial court sentenced Atterbury to serve one year in prison.

Sufficiency

{¶ 14} In the first assigned error, Atterbury argues his convictions were based on insufficient evidence. We disagree.

{¶ 15} The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman*:¹

“Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.”²

¹(1978), 55 Ohio St.2d 261, syllabus.

²See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23; *State v. Davis* (1988), 49 Ohio App.3d 109, 113.

{¶ 16} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks*,³ in which the Ohio Supreme Court held:

“An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted at trial to determine whether such evidence, if believed, would convince the average mind of the 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. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)”

{¶ 17} After reviewing the evidence in a light most favorable to the State, we find that the evidence, if believed, could convince a rational trier of fact that the State had proven beyond a reasonable doubt each element of the charged drug possession, drug trafficking, and possession of criminal tools.

³(1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 18} In the instant case, Detective Ovalle stated that when he interviewed Atterbury subsequent to the execution of the search warrant, Atterbury indicated that the drugs recovered belonged to him and were for his personal use. Notwithstanding Detective Ovalle's testimony regarding Atterbury's admission, the evidence indicates that Atterbury possessed the crack cocaine found in his apartment.

{¶ 19} Possession is defined as having "control over a thing or substance," but it may not be inferred solely from "mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found."⁴ Possession can be actual or constructive.⁵ Constructive possession exists when an individual knowingly exercises dominion and control over an object, even though that object may not be within the individual's immediate physical possession.⁶

{¶ 20} We have previously stated that, "while proof of presence in the vicinity of the cocaine is not enough to prove possession, if the evidence presented at trial supports that the cocaine was in the appellant's constructive

⁴R.C. 2925.01(K).

⁵*State v. Whitted*, Cuyahoga App. No. 88979, 2007-Ohio-5069, citing *State v. Wolery* (1976), 46 Ohio St.2d 316, 329. See, also, *State v. Haynes* (1971), 25 Ohio St.2d 264, 267; *State v. Barr* (1993), 86 Ohio App.3d 227, 235.

⁶*Id.*, citing *State v. Hankerson* (1982), 70 Ohio St.2d 87.

possession, such as where the appellant was in close proximity to the drugs, a rational trier of fact can conclude that it was within the appellant's dominion or control.”⁷

{¶ 21} Applying the foregoing, we note that the State's evidence demonstrated that the officers discovered the crack cocaine in Atterbury's legal residence, which he leased from CMHA and where the evidence indicated he resided alone. Specifically, the officers discovered the drugs in Atterbury's bedroom.

{¶ 22} In addition to the crack cocaine found in Atterbury's bedroom, the officer discovered five little bags containing cocaine residue, a crack pipe, a box of gun shells, and \$390 in cash. Consequently, reviewing this evidence in a light most favorable to the prosecution, any rational trier of fact could have found that Atterbury constructively possessed crack cocaine.

{¶ 23} Relevant to the charge of drug trafficking, Detective Ovalle conducted surveillance on Atterbury's apartment after complaints of suspected drug activities. Detective Ovalle observed people entering Atterbury's apartment and staying for a mere two or three minutes. Thereafter, Detective

⁷*State v. Johnson*, Cuyahoga App. No. 82340, 2003-Ohio-6634, quoting *State v. Pruitt* (1984), 18 Ohio App.3d 50, 58.

Ovalle orchestrated a controlled drug buy through an informant, who entered Atterbury's apartment, executed the transaction, and returned with the drugs.

{¶ 24} Finally, Detective Ovalle stated that the marked currency used to effect the controlled drug buy was found interspersed in the \$390 recovered in Atterbury's apartment. Consequently, reviewing this evidence in a light most favorable to the prosecution, any rational trier of fact could have found that Atterbury was guilty of drug trafficking. Accordingly, we overrule the first assigned error.

Manifest Weight of Evidence

{¶ 25} In the second assigned error, Atterbury argues his convictions were against the manifest weight of the evidence. We disagree.

{¶ 26} In *State v. Wilson*,⁸ the Ohio Supreme Court recently addressed the standard of review for a criminal manifest weight challenge, as follows:

“The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively

⁸113 Ohio St.3d 382, 2007-Ohio-2202.

and quantitatively. *Id.* at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. *Id.* at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. *Id.* at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony.' *Id.* at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."

{¶ 27} As discussed in the first assigned error, the State presented sufficient evidence to establish that Atterbury constructively possessed the crack cocaine found in his apartment, even without considering testimony of his own

admission. The officers discovered the cocaine in an apartment Atterbury leased from CMHA and where he resided.

{¶ 28} Further, the officers orchestrated and executed a controlled drug buy, which took place in Atterbury's apartment and the marked currency used for the transaction was found in the apartment. Thus, we cannot say that the trial court clearly lost its way and created such a manifest miscarriage of justice that the conviction is against the manifest weight of the evidence. Accordingly, we overrule Atterbury's second assigned error.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

PATRICIA ANN BLACKMON, PRESIDING JUDGE

**CHRISTINE T. McMONAGLE, P.J., and
MELODY J. STEWART, J., CONCUR**