[Cite as *State v. Edwards*, 2010-Ohio-1414.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 92472 and 92473

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ADRIAN EDWARDS

DEFENDANT-APPELLANT

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

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-492649 and CR-514353

BEFORE: Celebrezze, J., Rocco, P.J., and Kilbane, J.

RELEASED: April 1, 2010

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), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Adrian Edwards, appeals his convictions in common pleas case numbers CR-492649 and CR-514353. Based on our review of the record and pertinent case law, we affirm appellant's convictions, but in CR-492649, we reverse and remand.

{¶ 2} In CR-492649, appellant was indicted in a two-count indictment for drug trafficking in violation of R.C. 2925.03 and drug possession in violation of R.C. 2925.11. He applied for admission into the Early Intervention Program ("EIP").[1] In order to allow appellant's admission into the EIP, the state agreed to nolle the drug trafficking charge and, on October 3, 2007, appellant pled guilty to drug possession, a fourth degree felony. He was thereafter placed in the EIP for a period of one year and advised that violation of the terms of the EIP would result in a one-year prison term.

{¶ 3} On July 14, 2008, Cleveland police received a complaint that two SUVs, one black and one green, were drag racing down Gooding Avenue in Cleveland. The individual who placed the call also indicated that the two SUVs were engaged in selling drugs and that the green SUV had come to a stop at 10606 Gooding Avenue. Officer Kennedy Jones and his partner, Officer Jerry Tucker, with Cleveland Police Department responded to the

[1] The EIP is a program utilized in Cuyahoga County that offers treatment in lieu of conviction for first time offenders pursuant to R.C. 2951.041.

dispatch related to these events. The following testimony was elicited from Officer Jones.

{¶ 4} The officers heard the dispatch at 3:27 p.m., they advised that they would respond at 3:28 p.m., and the officers actually arrived on the scene at 3:29 p.m. Upon arriving at the scene, Officer Jones observed a green SUV [2] parked in the driveway at 10606 Gooding Avenue. Appellant was standing between the driver's side of the vehicle and the open driver's side vehicle door. As the officers approached, appellant stepped back, shut the vehicle's door, and proceeded to walk toward Gooding Avenue where the officers were located.

{¶ 5} Upon approaching appellant, Officer Jones asked him to turn down the vehicle's radio because it was playing loudly. Appellant opened the vehicle door and turned down the radio, but did not turn off the vehicle's engine. At some point throughout this event, another squad car arrived on the scene.

{¶ 6} A search of appellant's person revealed nothing. Officer Jones and another officer conducted a search of the green SUV. The officers found a small vial in the SUV's center console, which contained remnants of what was later determined to be cocaine. Appellant was placed under arrest. The

[2] It was undisputed at trial that this vehicle was registered to a Miss Banks, who was never identified.

vehicle, which was still running despite the fact that this event lasted approximately 30 to 40 minutes, was then towed.

{¶ 7} These events resulted in a one-count indictment for drug possession in CR-514353. Appellant waived his right to a trial by jury, and the matter proceeded to a bench trial on October 30, 2008. Appellant was found guilty of drug possession in violation of R.C. 2925.11(A), a felony of the fifth degree. As a result of this conviction, the trial judge found that appellant had violated the terms of the EIP in CR-492649 and found him guilty of drug trafficking, a fifth degree felony.[3] The trial court sentenced appellant to six months for CR-492649 and six months for CR-514353. These terms were to run concurrent to one another for an aggregate sentence of six months. This appeal followed.

{¶ 8} Appellant presents three assignments of error for our review. In his first assignment of error, he argues that the state failed to provide sufficient evidence that he constructively possessed the drugs in the vehicle. In his second assignment of error, appellant argues that the state presented insufficient evidence that he knowingly possessed a prohibited substance. In his third and final assignment of error, appellant argues that the trial court

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[3] We recognize that appellant actually pled guilty to drug possession in CR-492649, which was a fourth degree felony. This error will be addressed later in this opinion.

lacked subject-matter jurisdiction to sentence him in CR-492649 because he had successfully completed his one-year term in the EIP.

Law and Analysis

I. Sufficiency of the Evidence

{¶ 9} The Ohio Supreme Court has recognized that "[i]n determining whether the evidence is legally sufficient to support the jury verdict as a matter of law, '[t]he 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. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, 919 N.E.2d 190, ¶34, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 10} The Court, explaining further, stated: "In *Jenks*, we emphasized that '[w]here reasonable minds can reach different conclusions upon conflicting evidence, determination as to what occurred is a question for the trier of fact. It is not the function of an appellate court to substitute its judgment for that of the factfinder. Rather, upon appellate review, the evidence must be viewed in the light most favorable to the prosecution.'" Id., quoting *Jenks* at 279. Finally, we note that a judgment will not be reversed upon insufficient or conflicting evidence if it is supported by competent,

credible evidence that goes to all the essential elements of the case. *Cohen v. Lamko* (1984), 10 Ohio St.3d 167, 462 N.E.2d 407.

A. Constructive Possession

{¶ 11} In his first assignment of error, appellant claims the state presented insufficient evidence to prove that he constructively possessed the drugs that were found in the SUV. He specifically argues that because he was never seen inside the vehicle and the vehicle was registered to another individual, the state did not prove that appellant was a recent occupant of the vehicle, and thus no constructive possession was shown. In order to determine whether appellant was in constructive possession of the drugs, we must first determine whether he was a recent occupant of the SUV. If appellant was, in fact, an occupant of the vehicle, we must then determine whether he constructively possessed the drugs found in the SUV's center console.

{¶ 12} Ohio's drug possession statute provides that "[n]o person shall knowingly obtain, possess, or use a controlled substance." R.C. 2925.11(A). Drug possession may be shown by actual or constructive possession. *State v. Jackson*, Cuyahoga App. No. 92153, 2009-Ohio-5479, ¶20, citing *State v. Palmer* (Feb. 6, 1992), Cuyahoga App. No. 58828. An individual is in constructive possession when he is able to exercise dominion and control over an item even though it is not in his physical possession. *State v. Wolery*

(1976), 46 Ohio St.2d 316, 348 N.E.2d 351; *State v. Boyd* (1989), 63 Ohio App.3d 790, 580 N.E.2d 443. The state must also show that the individual was "conscious of the presence of the object." *State v. Hankerson* (1982), 70 Ohio St.2d 87, 434 N.E.2d 1362. Possession "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." R.C. 2925.01(K). Additionally, presence in the vicinity of drugs alone is insufficient to prove possession. *State v. Benson* (1992), Cuyahoga App. No. 61545, citing *Cincinnati v. McCartney* (1971), 30 Ohio App.2d 45, 47-48, 281 N.E.2d 855.

{¶ 13} Appellant relies on the fact that he was never seen occupying the vehicle and that the vehicle was registered to someone else to argue that there was insufficient evidence to find that he constructively possessed the vial found in the SUV's center console. We disagree. First, ownership of the vehicle is not a prerequisite to a conviction for drug possession. See *State v. Edwards*, Cuyahoga App. No. 91841, 2009-Ohio-4365, ¶16 (finding that an individual does not have to reside at a particular address in order to possess drugs found inside). Likewise, ample evidence was presented to establish that appellant was a recent occupant of the SUV. Officer Jones testified that two minutes passed between when the officers were told to respond to the Gooding Avenue address and when they arrived. Appellant was seen closing the SUV's driver's side door and was the only individual seen near the SUV

throughout the entire duration of events. After being asked to turn down the volume of the vehicle's radio, appellant opened the vehicle's door, immediately located the volume control, and turned down the volume with no difficulty. Officer Jones also testified that approximately 30 to 40 minutes passed while they were questioning and searching appellant and the vehicle. At no time did anyone come forward and indicate that the vehicle was theirs. This evidence, viewed in a light most favorable to the prosecution, was sufficient to establish that appellant was a recent occupant of the SUV.

{¶ 14} We also find that there was sufficient evidence to show that appellant constructively possessed the vial of cocaine. Officer Jones testified that when searching a vehicle, he always starts with the front passenger area of the vehicle because that is the most common area where contraband is located. While searching this area in the SUV, Officer Jones opened the center console and the vial of cocaine was lying on top. These facts, viewed in addition to the evidence presented showing appellant had been a recent occupant of the vehicle, and considered in a light most favorable to the prosecution, were sufficient to prove that appellant constructively possessed the vial of cocaine.

{¶ 15} Appellant argues that because the state presented only circumstantial evidence establishing that he was a recent occupant of the vehicle, the trial court impermissibly drew an inference based solely upon

another inference in finding that he constructively possessed the cocaine. We are not persuaded.

{¶ 16} "The rule against 'stacking' inferences, drawing an inference based solely upon another inference, although it is still recognized, has very limited application. It only prohibits drawing an inference based solely and entirely upon another inference, unsupported by any additional facts or inferences drawn from other facts. *State v. King* (May 17, 1995), Montgomery App. No. 14309, unreported. The rule does not prohibit the use of parallel inferences in combination with additional facts, or drawing multiple, separate inferences from the same set of facts. Id." *State v. Maddox* (June 29, 2001), Montgomery App. No. 18389, at 3.

{¶ 17} In this case, facts were presented to establish that appellant was seen shutting the driver's side door of the SUV, he willingly turned down the radio volume with no difficulty, he was the only individual seen near the vehicle throughout the duration of the event, and no one else came forward to claim the vehicle, even while it was being towed. These facts were sufficient to establish that appellant was a recent occupant of the vehicle. Based on these facts, the state presented sufficient evidence to prove that appellant was able to exercise dominion and control over the vial found in the SUV's center console. Based on our review of the evidence presented at trial, we cannot find that the state failed to prove that appellant constructively possessed the

drugs found in the vehicle's center console. Appellant's first assignment of error is overruled.

B. Knowledge

{¶ 18} In his second assignment of error, appellant argues that the state presented insufficient evidence to establish that he knowingly possessed drugs. "A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). "[W]hether a person charged with drug abuse in violation of R.C. 2925.11 knowingly possessed, obtained, or used a controlled substance is to be determined from all the attendant facts and circumstances available." *State v. Teamer*, 82 Ohio St.3d 490, 492, 1998-Ohio-193, 696 N.E.2d 1049.

{¶ 19} In this case, the facts and circumstances unequivocally established that appellant was seen standing between the vehicle and its open driver's side door. As Officer Jones approached, he observed appellant step away from the SUV and shut the driver's side door. When asked, appellant was able to turn down the vehicle's radio volume with no difficulty. Appellant was the only individual seen near the vehicle as officers approached, and no one else appeared to claim the vehicle, even as it was being towed. This evidence could easily lead to the conclusion that appellant was a recent occupant of the vehicle and constructively possessed the vial of cocaine. Based on this evidence, it is unlikely that reasonable minds could easily differ

on whether appellant knowingly possessed the cocaine, and thus his conviction cannot be reversed based on a sufficiency of the evidence argument. Id. ("If there is sufficient evidence such that a reasonable trier of fact could have found that the state had proven guilt beyond a reasonable doubt, a reviewing court may not reverse a conviction"). Appellant's second assignment of error is overruled.

II. Subject-Matter Jurisdiction

{¶ 20} In his third assignment of error, appellant argues that the trial court lacked subject-matter jurisdiction to find him guilty in CR-492649 based on his alleged violation of the EIP. In support, appellant argues that he was placed in the EIP on October 3, 2007 for a period of one year. His trial and sentencing in CR-514353 did not occur until October 30, 2008. Appellant relies on these dates to argue that he had successfully completed his one-year term in the EIP, and thus the trial court could not find him guilty in CR-492649.

{¶ 21} The state, however, points out that on September 26, 2008, appellant signed a waiver extending his period of supervision due to the pendency of his new case. Since appellant voluntarily extended his period of

supervision until April 3, 2009,[4] we cannot find that he successfully completed the EIP.

III. Plain Error

{¶ 22} Although appellant failed to raise this argument on appeal, the trial court committed error when finding him guilty of drug trafficking in CR-492649. As such, we must apply a plain error standard of review. To constitute plain error, the error must be obvious on the record, palpable, and fundamental, so that it should have been apparent to the trial court without objection. See *State v. Tichon* (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16. Moreover, plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions. *State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-100, 661 N.E.2d 1043. Notice of plain error is to be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Phillips*, 74 Ohio St.3d 72, 83, 1995-Ohio-171, 656 N.E.2d 643.

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[4] We note that the journal entry contains a typographical error and states that appellant agreed to extend his period of supervision until April 3, 2008. We find this error to be harmless. Appellant did not sign the waiver until September 26, 2008, well after April 2008 had already passed. In addition, the journal entry indicates that appellant agreed to extend his supervision because he had a new case pending with the court.

{¶ 23} The record shows that when being placed in the EIP, appellant pled guilty to drug possession and the charge of drug trafficking was nolled. When sentencing appellant, however, the trial court stated that appellant was guilty of drug trafficking and sentenced him accordingly. This is plain error. The trial court is therefore ordered to correct its sentencing entry.

Conclusion

{¶ 24} Viewing the evidence presented at trial in a light most favorable to the prosecution, we cannot find that appellant's conviction for drug possession in CR-514353 was based on insufficient evidence. A reasonable trier of fact could have found that appellant knowingly and constructively possessed the vial of cocaine found in the SUV's center console, and thus the trial judge did not lose his way in finding appellant guilty.

{¶ 25} In addition, the trial court did not lack jurisdiction to impose a conviction and sentence in CR-492649 since appellant voluntarily executed a waiver extending his period of supervision until April 3, 2009. The trial court did, however, commit plain error in stating that appellant was guilty of drug trafficking when appellant pled guilty to drug possession. The trial court is therefore ordered to correct this journal entry.

{¶ 26} This cause is affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

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 convictions 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.

FRANK D. CELEBREZZE, JR., JUDGE

KENNETH A. ROCCO, P.J., and
MARY EILEEN KILBANE, J., CONCUR