

[Cite as *State v. English*, 2010-Ohio-1759.]

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NO. C-080872
	:	TRIAL NO. B-0209646
Plaintiff-Appellee,	:	
vs.	:	<i>DECISION.</i>
RECO ENGLISH,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: April 23, 2010

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Christine Y. Jones, for Defendant-Appellant.

Note: We have removed this case from the accelerated calendar.

Per Curiam.

{¶1} On November 1, 2002, Cincinnati police executing a search warrant issued for a residence located at 2159 Oesper Avenue found evidence of drug trafficking, including crack cocaine, noncrack cocaine, two loaded firearms, United States currency, scales, and baggies. The only occupants of the residence were the defendant-appellant, Reco English, and Brooke Goodwin. English did not own the residence or pay the utilities, and no contraband was found on English's person. But many of English's personal belongings were found in the living room and in a first-floor bedroom. His fingerprints were found on a shotgun found in the kitchen.

{¶2} English was arrested and later indicted on two counts of drug trafficking with a firearm specification, two counts of drug possession with a firearm specification, and two counts of having weapons under a disability.

{¶3} English fled while on bond. He was recaptured four and one-half years later after he had been stopped on an unrelated matter. During that stop, English gave the police a false name.

{¶4} Prior to trial, English moved unsuccessfully to suppress the evidence from the search and statements that he had made to the police. At trial, English testified that he was only visiting the residence and that the contraband recovered did not belong to him. English was acquitted on the drug-trafficking counts but found guilty of the other four counts and a firearm specification. For each count, the trial court sentenced English to a prison term and imposed a driver's license suspension. Raising six assignments of errors, English now seeks a reversal of his convictions and a reduction of his sentence.¹

Motion to Suppress

¹ English, pro se, has filed a supplemental brief raising additional issues. Because these issues have not been presented by his appointed counsel as assignments of error, they are not properly before this court, and we decline to address them.

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{¶5} The police located most of the evidence presented in this case after executing on a search warrant issued for 2159 Oesper Avenue. In his fifth assignment of error, which we address first, English argues that the affidavit supporting the search warrant was insufficient to establish probable cause and that the evidence found at the residence should have been suppressed as the result of an illegal search.

{¶6} The affidavit supporting the warrant, dated October 31, 2002, reads in relevant part as follows:

{¶7} “The affiant [Paul Fangman], a Cincinnati Police Officer with training and experience in drug investigations, is familiar with the methods utilized by narcotics traffickers to prepare, transport, ship, and distribute narcotics in the community. The affiant has spoken with a confidential and reliable informant who stated to the affiant that crack cocaine is being stored and sold from within the above listed residence [2159 Oesper Ave.] by Reco English, Ctl. # 1783067. This informant is able to identify crack cocaine due to past contacts with the drug as well as through association with users and dealers. Additionally, this informant has provided information to the affiant and other members of law enforcement on numerous occasions in the past, all of which have been proven to be true and correct through independent investigation. An RCIC computer check conducted by the affiant has revealed that Reco English has been convicted for felony drug violations in the past to include a conviction for Drug Abuse on February 13, 1995, case number B9403029, and Trafficking in Drugs on November 6, 1997, case number B-9502378. Within the past 72 hours the affiant and other members of law enforcement met with the informant for the purpose of making a controlled drug purchase from Reco English. The informant was then provided with government currency and was searched prior to responding to a pre-determined location agreed upon by both the informant and Reco English. While under constant monitoring by the affiant, the informant responded

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directly to the pre-determined location where the informant met with Reco English. Additional constant monitoring by the affiant and other members of law enforcement prior to the transaction revealed Reco English to leave the above listed residence and respond directly to the same pre-determined location, stopping at no other locations. While at that pre-determined location the informant purchased a quantity of crack cocaine from Reco English with the government currency. Upon completion of the purchase, and under continual monitoring by the affiant and other members of law enforcement, the informant responded directly to a separate pre-determined location where the informant delivered the quantity of crack cocaine to another member of law enforcement, which the affiant then field-tested for crack cocaine with positive results. Continued surveillance by law enforcement revealed Reco English to respond back into the above listed residence with the government currency. Based on the investigation conducted by the affiant and other members of law enforcement, the affiant believes that there are additional drugs, and proceeds made from the sales of drugs, being stored within the above listed residence.”

{¶8} When determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, an issuing magistrate must make “ ‘a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and the ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.’ ”² Reviewing courts must give great deference to the probable-cause determination, ensuring only “that the magistrate had a substantial basis for concluding that probable cause existed.”³

² *State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640, paragraph one of the syllabus, quoting *Illinois v. Gates* (1983), 462 U.S. 213, 238-239, 103 S.Ct. 2317.

³ *Id.* at paragraph two of the syllabus.

{¶9} In this case, the probable-cause inquiry focused on whether there was a “fair probability” that crack cocaine and other contraband would be found at 2159 Oesper Avenue. To support a finding of probable cause to search the residence, Fangman first provided some background information about his training and experience in drug investigation. Admittedly, this information was rather generic,⁴ but Fangman coupled it with detailed information from a confidential informant who had told Fangman that English was storing and selling crack cocaine at 2159 Oesper Avenue. Fangman added that the confidential informant had successfully purchased crack cocaine from English within the preceding 72 hours in a controlled drug purchase, and that a surveillance team including Fangman had observed English leaving and returning to 2159 Oesper Avenue to complete the sale to the confidential informant. Further, Fangman noted English’s previous drug-related convictions.

{¶10} Although the information Fangman attested to from the confidential informant was hearsay, Fangman set forth facts providing “a substantial basis for believing the source of the hearsay to be credible and for believing that there [wa]s a factual basis for the information furnished.”⁵ These facts included the confidential informant’s accuracy and reliability on “numerous” occasions in the past and Fangman’s corroboration of the confidential informant’s allegations in this case with the controlled purchase and with the facts surrounding that purchase.

{¶11} English argued to the trial court that Fangman’s affidavit was defective because Fangman did not allege that English “lived” in the house. The trial court disagreed with English, and we do too. Fangman’s affidavit created a sufficient nexus between the address and the drugs and other contraband that the police were seeking. Certainly English could have stored the drugs in the house without “living” there. Thus,

⁴ Compare *State v. Coleman*, 8th Dist. No. 91058, 2009-Ohio-1611.

⁵ Crim.R. 41(C).

we conclude that the magistrate had a substantial basis for concluding that probable cause existed, and we find no error in the trial court's order affirming that determination.

{¶12} Accordingly, we overrule the fifth assignment of error.

Sufficiency and Weight of the Evidence

{¶13} In his first three assignments of error, English contends that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence. He contends that state failed to connect him to the drugs and firearms found at the Oesper Avenue residence.

{¶14} In reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the record to determine whether the evidence, if believed, would support a conviction. "The relevant inquiry is whether, after viewing the evidence in the 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."⁶ When reviewing a manifest-weight-of-the-evidence claim, this court weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.⁷ The weight to be given the evidence and the credibility of witnesses are primarily for the trier of fact.⁸

Evidence at Trial

{¶15} At trial, the state chose not to present the facts of the controlled-drug purchase that supported the search warrant. But Officer Fangman presented limited testimony about his surveillance activity involving the Oesper Avenue residence in the

⁶ *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus; see, also, *State v. Carter*, 72 Ohio St.3d 545, 553-554, 1995-Ohio-104, 651 N.E.2d 965.

⁷ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

⁸ *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 221, paragraph one of the syllabus.

days before the issuance of the search warrant. Fangman testified that, during this time, he had seen English drive away from the residence and return to the residence in a vehicle registered to Brooke Goodwin. Fangman had not seen English leave the house again until after English's arrest. Fangman also testified that English's own vehicle, registered at his mother's address, had been parked outside the residence for the duration of the surveillance period.

{¶16} The state also presented testimony from Fangman and several other police officers who had entered the residence, which was occupied by only English and Goodwin. According to the police, they found English in a first-floor bedroom in his underwear, near a loaded revolver and ammunition. After the residence had been secured and English had been permitted to dress, English selected clothing from the same first-floor bedroom.

{¶17} Officers searching the residence found 5.92 grams of crack cocaine and 56.09 grams of noncrack cocaine stored in furniture in the bedroom. According to several officers, English had told them where to find some of the cocaine, and he had identified a brown substance they had recovered as old cocaine that had made him sick.

{¶18} In the bedroom and the living room, the police recovered ammunition and some of English's personal belongings, such as his cellular phone, his birth certificate, his high-school report card, and stacks of his mail. Most of this mail was addressed to English at his mother's house located nearby. But one piece of mail from Terrance Barrett, postmarked June 15, 2002, was addressed to English at "2159 O[e]sper Ave."

{¶19} In the kitchen of the residence, the police recovered more drugs, drug-trafficking materials, and a loaded shotgun. Two sets of English's fingerprints were lifted from the shotgun. Trace quantities of drugs and some trafficking materials were found in the basement of the residence on a stove. The shotgun and the revolver recovered were test-fired and determined to be fully operable.

{¶20} English, testifying in his defense, denied that the drugs, the other contraband, and the guns belonged to him. He claimed to live at his mother's house and contended that the only residents of 2159 Oesper Avenue were John Kenney, the owner of the house; Brooke Goodwin; and Terrence Barrett. According to English, he had gone to the Oesper Avenue residence at 2:00 a.m. on November 1 to play dominoes with Kevin Turner, who provided security for Goodwin, a stripper. Then, after Turner had left, he had sexual relations with Goodwin.

{¶21} Contrary to the testimony of the police, English testified that when the police had entered the house, he was in the bathroom, not in the bedroom, and he was fully dressed. English also denied making any admissions or statements to the police concerning the drugs in the house.

{¶22} English explained that his nephew had erroneously brought a large bag of his mail to the Oesper Avenue residence when he was visiting the residence a few weeks before the execution of the search warrant. English admitted to touching the shotgun "a long time ago" to remove it from the living-room couch so that he could sit there. He claimed that he had merely given the gun to Kenney, who had taken it to the "back room."

Drug-Possession Offenses

{¶23} R.C. 2925.11 prohibits knowingly possessing controlled substances, including crack cocaine and cocaine. English was convicted of possessing crack cocaine in an amount equal to or exceeding five grams but less than ten grams, although he had been indicted for possessing a larger quantity. He was also convicted, as charged, of possessing cocaine that was not crack in an amount equal to or exceeding 25 grams but less than 100 grams. "Possession" of drugs is statutorily 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.”⁹

{¶24} In this case, the state argued that English had constructively possessed the drugs. A party has constructive possession where, conscious of its presence, he exercises dominion and control over something even though it is not within his immediate physical possession.¹⁰

{¶25} English claims that the state proved only that he was an occupant of the premises where the drugs were found, because the police did not find any drugs on his person, he did not own the residence on Oesper Avenue, and none of the utilities for the residence were in his name.

{¶26} But English admitted to using some of the drugs, he told the police where drugs were located in the bedroom, he was found near the drugs, and the bedroom contained his personal belongings including his mail and photographs. Further, surveillance activity placed him in the residence with his vehicle parked outside in the days immediately before the execution of the warrant. Thus, the facts demonstrated more than English’s mere presence in the residence when the drugs were found.¹¹ After viewing the evidence at trial in the light most favorable to the state, as we are required to do, we easily conclude that a reasonable trier of fact could have found that English had constructively possessed the drugs located in the bedroom, including 5.92 grams of crack cocaine and over 56 grams of noncrack cocaine.

{¶27} And we are not persuaded that English’s convictions for drug possession were against the manifest weight of the evidence. Although English denied his guilt and presented evidence that other individuals were living in the house, we cannot say that the

⁹ R.C. 2925.01(K); see, also, *State v. Pumpelly* (1991), 77 Ohio App.3d 470, 477, 602 N.E.2d 714.

¹⁰ *State v. Hankerson* (1982), 70 Ohio St.2d 87, 91, 434 N.E.2d 1362; *State v. Harry*, 12th Dist. No. CA2008-01-013, 2008-Ohio-6380, ¶48.

¹¹ See *State v. Murrell*, 1st Dist. No. C-020333, 2003-Ohio-2068, at ¶19.

jury clearly lost its way in finding English guilty. The state impeached his credibility on several occasions, and the jury was in the best position to evaluate the credibility of the witnesses.

Firearm Specification

{¶28} English’s drug-possession convictions were accompanied by a firearm specification. R.C. 2941.141 provides that a one-year mandatory prison term shall be imposed if the “offender had a firearm on or about the offender’s person or under the offender’s control while committing the offense.” To meet its burden under R.C. 2941.141, the state does not need to demonstrate that the defendant used the firearm to commit a felony; all that is required is that the defendant have the firearm on or about his person or under his control “ ‘at some point’ ” during the commission of the crime.¹²

{¶29} In this case, the police recovered a firearm near English and his belongings including his drugs. The revolver was in plain view, and English had unfettered access to it. The police also recovered a firearm with English’s fingerprints on it in the kitchen of the residence. When this evidence is viewed in the light most favorable to the state, we hold that one could reasonably conclude beyond a reasonable doubt that English had about his person a firearm while he committed the drug-possession offenses. Further, after reviewing the evidence under a weight-of-the-evidence standard, we cannot say that the jury lost its way in finding English guilty of the firearm specification.

Having-Weapons-Under-a-Disability Offense

{¶30} English was convicted of two counts of having weapons under a disability in violation of R.C. 2923.13(A)(3). English’s 1997 conviction for trafficking in drugs, which

¹² *Harry*, 2008-Ohio-6380, at ¶53, citing *State v. Powell* (1991), 59 Ohio St.3d 62, 63, 571 N.E.2d 125 (interpreting similar language in former R.C. 2929.71[A][2]).

he stipulated to at trial, made it illegal for him to “knowingly acquire, have, carry, or use any firearm or dangerous ordnance.”¹³

{¶31} To “have” a firearm within the meaning of the weapons-under-a-disability statute, the offender must actually or constructively possess it.¹⁴ In this case, the state proceeded against English for constructively possessing the firearms in the Oesper Avenue residence when the police executed the search warrant on November 1, 2002.

{¶32} Constructive possession has been defined as “knowingly exercising dominion and control over an object, even though the object is not within the person’s immediate physical possession.”¹⁵ A defendant’s exercise of dominion and control over the area where a firearm is found supports an inference that the defendant has exercised dominion and control over the firearm.¹⁶ And the dominion and control necessary to establish constructive possession may be proved by circumstantial evidence.¹⁷ Moreover, we hold that, in the context of the disability statute, which broadly bars those with a disability from having access to firearms, constructive possession does not require proof of exclusive possession.

{¶33} In this case, the evidence supported a finding that English had constructively possessed both weapons, even though others may have lived in the residence. English was one of only two occupants found in the residence when the warrant was executed, and he had been in the residence for several days. He had handled the shotgun in the past, as demonstrated by the fingerprint evidence and his own admission. The revolver was located in a room containing English’s personal belongings,

¹³ R.C. 2923.13(A)(3).

¹⁴ *State v. Bailey*, 1st Dist. Nos. C-060089 and C-060091, 2007-Ohio-2014, at ¶36, citing *State v. Messer* (1995), 107 Ohio App.3d 51, 667 N.E.2d 1022; *State v. Duganitz* (1991), 76 Ohio App.3d 363, 601 N.E.2d 642; *State v. Hardy* (1978), 60 Ohio App.2d 325, 327, 397 N.E.2d 773.

¹⁵ *Hankerson*, 70 Ohio St.2d 87, syllabus; *Bailey*, supra, at ¶36.

¹⁶ *State v. Pitts*, 4th Dist. No. 99-CA-2675, 2000-Ohio-1986.

¹⁷ See *Jenks*, 61 Ohio St.3d 259, paragraph one of the syllabus; *State v. Hawthorne*, 8th Dist. No. 89345, 2008-Ohio-1815, ¶18.

including drugs that he had exercised control over, and the revolver's location was such that English had immediate access to it.

{¶34} We conclude that this evidence, if believed, supported a finding that English had constructively possessed both weapons. Thus, we hold that the evidence at trial was sufficient to support convictions on both counts of having weapons under a disability. And after our review of the record, we are not convinced that those convictions were against the manifest weight of the evidence.

{¶35} In summary, because we conclude that English's convictions were supported by sufficient evidence and were not against the manifest weight of the evidence, we overrule the first, second, and third assignments of error.

{¶36} In his sixth assignment of error, English contends that prosecutorial misconduct during closing argument prejudiced his right to a fair trial. English claims that the prosecutor twice expressed his personal opinion that English was a liar.

{¶37} The prosecutor may not give a personal opinion on the veracity of the witnesses.¹⁸ During the rebuttal portion of closing argument in this case, the prosecutor, responding to defense counsel's accusations that the state's witnesses had "lied," commented that "under oath, in this setting, [the defendant] looks you in the face and lies," and that "the only proven lies in this case have come in from one single solitary person [the defendant] with a huge motive." The prosecutor, however, tied the comments to English's testimony.

{¶38} English failed to object to the comments, waiving all but plain error.¹⁹ Prosecutorial misconduct gives rise to plain error only where it is clear that the defendant would not have been convicted in the absence of the improper comments.²⁰

¹⁸ *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 470 N.E.2d 883.

¹⁹ Crim.R. 52(B); *State v. LaMar*, 95 Ohio St.3d 181, 2002-Ohio-2128, 767 N.E.2d 166, ¶126.

²⁰ *State v. Kelly*, 1st Dist. No. C-010639, 2002-Ohio-6246, ¶22, citing *State v. Slagle* (1992), 65 Ohio St.3d 597, 604-605, 605 N.E.2d 916.

{¶39} Assuming that the prosecutor’s comments were improper, we do not consider them, standing alone, to have risen to the level of plain error requiring a reversal, in light of the evidence properly admitted at trial. The fifth assignment of error is overruled.

{¶40} In his fourth assignment of error, English challenges his sentences. The trial court imposed two concurrent five-year terms for the drug-possession offenses, which were to be served after the mandatory one-year term for the firearm specification, and two 12-month consecutive terms for the weapons offenses, which were also made consecutive to the terms imposed for the drug offenses. The court also imposed a one-year driver’s license suspension as part of the sentence on each of the four counts.

{¶41} English contends that these sentences are excessive. And, in a supplemental brief ordered by this court, English argues that the two counts of having weapons under a disability involved allied offenses of similar import that should have been merged into a single conviction.

{¶42} We find no error concerning the duration of the sentences, which were within the statutory ranges for the offenses at the time they were committed and exhibit no abuse of discretion.²¹ But the trial court erred by sentencing English on both counts of having weapons under a disability. We correct the error under the doctrine of plain error.²²

{¶43} R.C. 2923.13 proscribes “acquiring, having, carrying or using **any** firearm or dangerous ordnance if under a disability.” Significantly, the legislature used the word “any,” creating an ambiguity concerning the unit of prosecution.²³ This ambiguity must be

²¹ See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470; *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

²² Crim.R. 52(B).

²³ See *State v. Woods* (1982), 8 Ohio App.3d 56, 60, 455 N.E.2d 1289 (interpreting similarly worded R.C. 2923.12, the concealed-weapons statute).

resolved against the state and in favor of the accused.²⁴ Thus, courts have held that “the simultaneous, undifferentiated possession of weapons by a person under a disability constitutes *only one offense* and not separate offenses for each weapon.”²⁵

{¶44} In this case, the state attempted to differentiate the counts by naming the shotgun as the firearm in one of the counts. But English was convicted of having both weapons at the same time and in the same place while under the same disability, his 1997 drug-trafficking conviction. As conceded by the state in supplemental briefing, under the particular facts of this case, English’s possession was simultaneous and undifferentiated and, therefore, could have only constituted one offense. We decline to hold, however, that separate convictions are never proper when two weapons are found in the same residence.

{¶45} The trial court should have merged the two counts into a single conviction.²⁶ Thus, we vacate both weapons convictions and remand this case for the imposition of a single conviction for the two weapons counts. We note also that the imposition of a driver’s license suspension is not authorized for a violation of R.C. 2923.13.

{¶46} Accordingly, we affirm English’s drug possession-convictions but vacate his weapons-under-a-disability convictions, and we remand the case for resentencing on the weapons counts in accordance with this decision.

Judgment accordingly.

HENDON, P.J., SUNDERMANN and CUNNINGHAM, JJ.

Please Note:

The court has recorded its own entry on the date of the release of this decision.

²⁴ R.C. 2901.04(A).

²⁵ *Pitts*, 2000-Ohio-1986 (emphasis in original), citing *State v. Thompson* (1988), 46 Ohio App.3d 157, 159, 546 N.E.2d 441; see *State v. Haslam*, 7th Dist. No. 08MO3, 2009-Ohio-1663, at ¶72.

²⁶ See R.C. 2941.25(A).