[Cite as *State v. Criswell*, 2014-Ohio-3941.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO,	:	Case No. 13CA3588
	:	
Plaintiff-Appellee,	:	
	:	DECISION AND
v.	:	JUDGMENT ENTRY
	:	
ANTWON L. CRISWELL,	:	
	:	**RELEASED: 9/5/2014**
Defendant-Appellant.	:	

APPEARANCES:

Bryan Scott Hicks, Lebanon, Ohio, for appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Pat Apel, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for appellee.

Harsha, J.

{¶1} Antwon Criswell appeals his convictions of drug possession and drug trafficking and argues that the state presented insufficient evidence to convict him of the offenses. Specifically, he claims that the state failed to prove beyond a reasonable doubt that he had either actual or constructive possession of the drugs found in the automobile. We agree. Because the state did not establish that Criswell knew of the cocaine or that he was ever able to exert dominion and control over the heroin, it failed to establish that he had constructive possession of the drugs. Likewise, there was no evidence that he ever had actual possession of either drug. Thus, the state failed to present sufficient evidence that Criswell possessed either the heroin or cocaine found in the automobile. We reverse his convictions.

I. FACTS

{¶2} The Portsmouth Police Department received a call from a confidential informant, who told them that Michelle Cabell would be traveling to Cincinnati to pick up several drug dealers and bring them back to Portsmouth. The informant planned to travel with Cabell and remain in contact with the police during the trip so they could initiate a traffic stop when Cabell and the dealers returned to Scioto County.

{¶3} While in Cincinnati Cabell picked up Criswell, along with two other men, and brought them back to Portsmouth. The traffic stop of Cabell's vehicle produced 152.7 grams of heroin and 71.1 grams of crack cocaine. The Scioto County Grand Jury returned an indictment charging Criswell with two counts of drug possession, two counts of drug trafficking and one count of tampering with evidence. Criswell waived his right to a jury trial and the trial court found him not guilty of tampering with evidence, but convicted him of the remaining drug offenses. At sentencing the court merged Criswell's drug possession and trafficking convictions and sentenced him to four years on each offense, to be served consecutively. This appeal followed.

II. ASSIGNMENTS OF ERROR

{¶4} Criswell raises two assignments of error for our review:

> 1. THE TRIAL COURT ERRED BY BRINGING MR. CRISWELL TO TRIAL AFTER THE 90 DAY DEADLINE FOR A SPEEDY TRIAL PURSUANT TO R.C. 2945.71(C) AND (E) HAD PASSED.
>
> 2. THE VERDICT WAS AGAINST THE SUFFICIENCY OF THE EVIDENCE.

III. LAW AND ANALYSIS

A. Sufficiency of the Evidence

{¶5} In his second assignment of error Criswell challenges the sufficiency of the evidence and argues that the state did not prove beyond a reasonable doubt that he

had either actual or constructive possession of the drugs seized from Cabell's vehicle. Specifically, Criswell contends that there was "no testimony that anyone saw drugs in [his] actual possession, nor were any drugs found on [him] * * *." Likewise, he claims that the state did not show that he had knowledge of the narcotics in the vehicle and thus there was insufficient evidence to establish that he had constructive possession. As a result, he claims the state failed to prove the "possession" element of his offenses.

B. Standard of Review

{¶6} "A claim of insufficient evidence invokes a due process concern and raises the question whether the evidence is legally sufficient to support the verdict as a matter of law." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118. "In reviewing such a challenge, '[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.'" *Id.* quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "'[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts.'" *Hunter* at ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Accordingly, a reviewing court will not overturn a conviction for insufficient evidence unless "reasonable minds could not reach the conclusion reached by the trier of fact." *State v. Tibbetts*, 92 Ohio St.3d 146, 162, 749 N.E.2d 226 (2001). The Double Jeopardy Clause precludes retrial once the reviewing court has found the evidence legally insufficient to support a conviction. *Tibbs v. Florida*, 457 U.S. 31, 40-41, 102 S.Ct. 2211, 72 L.Ed.2d

652 (1982). *See also State v. Thompkins,* 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).[1]

C. Possession

{¶7} Criswell was convicted of one count of possession of heroin, in violation of R.C. 2925.11(A) and (C)(6)(e), and one count of possession of cocaine in violation of R.C. 2925.11(A) and (C)(1)(a).[2] He was also convicted of one count of trafficking in heroin in violation of R.C. 2925.03(A)(2) and (C)(6)(f), and one count of trafficking in cocaine in violation of R.C. 2925.03(A)(2) and (C)(4)(f).

{¶8} R.C. 2925.11(A) provides: "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog." R.C. 2925.03(A)(2) provides: "No person shall knowingly * * * [p]repare for shipment, ship, transport,

[1] There is a notable distinction between a reversal based upon insufficient evidence and one resting upon the weight of the evidence. *State v. Thompkins,* 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). In contrast, a finding that the jury's verdict was against the weight of the evidence does not preclude a retrial under the Double Jeopardy Clause. *Tibbs v. Florida,* 457 U.S. 31, 43, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). *See also Thompkins* at 387.

[2] Our review of the indictment shows that the grand jury found Criswell did: "knowingly obtain, possess, or use a compound; mixture; preparation; or substance containing a controlled substance, to wit; cocaine, in an amount more than 27 grams and less than 100 grams in violation of the Ohio Revised Code, Title: POSSESSION OF DRUGS/COCAINE, Section 2925.11(A)/2925.11(C)(1)(a), a felony of the first degree * * *." Likewise, the trial court found Criswell guilty of "possession of drugs/cocaine in violation of O.R.C. 2925.11(A)/2925.11(C)(1)(a), a felony of the first degree[.]" However, the version of R.C. 2925.11(C) in effect at the time of the indictment stated: "Whoever violates division (A) of this section is guilty of one of the following: (1) If the drug involved in the violation is a compound, mixture, preparation, or substance included in the schedule I or II, with the exception of * * * cocaine * * *, whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as follows: (a) Except as otherwise provided in division (C)(1)(b), (c), (d), or (e) of this section, aggravated possession of drugs is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison sentence on the offender." A similar version of (C)(1)(a) is presently in effect. R.C. 2925.11(C)(4) deals with "possession of cocaine," and subsection (e) states: "if the amount of the drug involved equals or exceeds twenty-seven grams but is less than one hundred grams of cocaine, possession of cocaine is a felony of the first degree * * *." Thus, it would seem that the indictment references the incorrect statute. However, this was neither brought to the trial court's attention nor raised by either party on appeal. Likewise, we will not address it.

deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person."

{¶9} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). The Revised Code defines "possession" as "having control over a thing or substance, but 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). "Possession may be actual or constructive." *State v. Moon*, 4th Dist. Adams No. 08CA875, 2009-Ohio-4830, ¶ 19, citing *State v. Butler*, 42 Ohio St.3d 174, 175, 538 N.E.2d 98 (1989) ("[t]o constitute possession, it is sufficient that the defendant has constructive possession").

{¶10} "'Actual possession exists when the circumstances indicate that an individual has or had an item within his immediate physical possession.'" *State v. Kingsland*, 177 Ohio App.3d 655, 2008-Ohio-4148, 895 N.E.2d 633, ¶ 13 (4th Dist.), quoting *State v. Fry*, 4th Dist. Jackson No. 03CA26, 2004-Ohio-5747, ¶ 39. "Constructive possession exists when an individual knowingly exercises dominion and control over an object, even though that object may not be within his immediate physical possession." *State v. Hankerson*, 70 Ohio St.2d 87, 434 N.E.2d 1362 (1982), syllabus; *State v. Brown*, 4th Dist. Athens No. 09CA3, 2009-Ohio-5390, ¶ 19. For constructive

possession to exist, the state must show that the defendant was conscious of the object's presence. *Hankerson* at 91; *Kingsland* at ¶ 13. Both dominion and control, and whether a person was conscious of the object's presence may be established through circumstantial evidence. *Brown* at ¶ 19.

{¶11} "Although a defendant's mere proximity is in itself insufficient to establish constructive possession, proximity to the object may constitute some evidence of constructive possession. * * * Thus, presence in the vicinity of contraband, coupled with another factor or factors probative of dominion or control over the contraband, may establish constructive possession." *Kingsland* at ¶ 13.

D. The Evidence

{¶12} At trial, Detective Joshua Justice of the Portsmouth Police Department testified that a confidential informant, Sarah Schuman, contacted him on the day in question. Schuman explained that she planned to travel to Cincinnati with Cabell to pick up "three to four" drug dealers and bring them back to Portsmouth. Before they left, he met with Schuman and she agreed to stay in contact with him during the trip. If she confirmed that the dealers were bringing back drugs, Justice planned to initiate a traffic stop upon their return in Portsmouth.

{¶13} After arriving in Cincinnati, Schuman text messaged Jackson that she and Cabell had picked up three men, Desmond Jenkins, Antonio Spikes and a third male she did not recognize. Jackson testified that Schuman did not know the third man's name and described him as "unknown."

{¶14} Law enforcement stopped Cabell's van in the evening hours; Jackson described it as "dark" and confirmed that he could not see in the vehicle or what the

occupants were doing. Jackson ordered the occupants out of the van one at a time, and testified that he was "100% sure that Mr. Criswell was the first one out of the vehicle." After all of the occupants had exited, another officer and his dog conducted a sniff of the van's exterior. The dog alerted on the vehicle and they found crack cocaine and heroin between the driver and passenger seats in a plastic Kroger bag containing trash. Jackson also stated that the items in the bag were tested for fingerprints, including the bags containing drugs, but the only prints found were on a Red Bull can and a Kit Kat wrapper and they matched Antonio Spikes.

{¶15} Jackson testified on cross-examination that law enforcement was actively investigating heroin trafficking from Cincinnati to a particular home on Fifth Street in Portsmouth. During this investigation, law enforcement sent informants into the home to make controlled buys. Jackson testified that to his knowledge Criswell had not previously been in Portsmouth. He also stated that Schuman called him from a bathroom in a gas station after they began their return trip and told him they had picked up three suspected dealers. Schuman also believed that Jenkins and Spikes were armed with handguns and "advised that each one of them had a package of heroin on them."

{¶16} Lee Bower, a detective with the Southern Ohio Drug Task Force, testified that he was present at the scene with his police canine. His dog conducted a sniff of the van's exterior and the dog altered on the "door seam" between the driver's door and the rear sliding door. Bower testified that he searched the van and found a bag of trash that contained heroin and crack cocaine in between the driver and front passenger seat. Bower stated that when he found the bag, the drugs were in "plain view" when looking

directly into it. He also testified that they were unable to recover any fingerprints from the bags containing drugs.

{¶17} Sarah Schuman, testified that Cabell called and asked her to drive to Cincinnati because Cabell needed to pick up two to three "dope boys," which Schuman described as "guys that come to Portsmouth and sell drugs." Specifically she testified on cross-examination without objection that Desmond Jenkins had called Cabell and asked her to pick him and Antonio Spikes up in Cincinnati and bring them back to Portsmouth. Schuman also testified that she had bought heroin from both Jenkins and Spikes at the Fifth Street house identified during the investigation.

{¶18} Schuman had previously accompanied Cabell on approximately five similar trips and testified that Jenkins and Spikes "always" had packages of heroin when she and Cabell picked them up. Schuman described this as their "routine." Before leaving, she contacted Detective Justice and they agreed that she would remain in contact with him during the trip through text messaging and when they returned to Portsmouth, law enforcement would initiate a traffic stop of Cabell's vehicle.

{¶19} Schuman testified that after they arrived in Cincinnati, they waited outside an apartment complex for "hours," and eventually began driving around downtown. Jenkins called and they met him and Spikes in a downtown parking lot. Both men got into Cabell's van and Jenkins directed Cabell to drive to a second location to pick up someone else. Schuman testified that they traveled to another parking lot, where Criswell got out of black car and entered Cabell's van. Cabell was in the driver's seat, Schuman was in the passenger's seat, both Criswell and Spikes were sitting on the

second row bench, Criswell behind Cabell and Spikes behind Schuman, and Jenkins was sitting in the third row alone.

{¶20} Before heading back to Portsmouth they stopped at another apartment complex. Jenkins got out of the van and briefly went inside, while Spikes and Criswell remained in the van with the women. Schuman testified that both Jenkins and Spikes each had a bag of heroin. She described the bags as "baggie[s] of a bunch of heroin." She testified when Jenkins got out of the van, he handed his bag of heroin to Spikes. And then while they were waiting for Jenkins to return, Spikes gave some heroin to Cabell and she injected it. Schuman testified that she pretended to also inject heroin, but squirted it onto the side of van's door.

{¶21} Schuman stated that during this time she noticed Criswell had a clear plastic "baggie" in his lap, but because part of the bag was between his legs she could not see its contents. Criswell was "messing with" the bag and when Jenkins returned they began the trip back to Scioto County. She also explained that the men in the back were talking but "with the music up you couldn't really hear anything * * *."

{¶22} Schuman testified that shortly after leaving Cincinnati, they stopped at a gas station. She explained that during the trips "the boys would always split" the cost of gas; each would give Cabell one half to a whole gram of heroin and $50. Schuman further testified that Jenkins and Spikes paid Cabell for this trip but she did not know if Criswell contributed anything. She explained that she told Detective Justice during the trip that she had seen both Jenkins and Spikes with heroin.

{¶23} Schuman testified that as they entered Portsmouth Cabell announced that they were "about to get pulled over," and gave Schuman a syringe to throw out the

window. After law enforcement initiated the traffic stop everybody was "moving around"; Cabell and the men were "fidgeting," but Schuman did not see anyone hide the drugs in the Kroger bag next to her seat. She also explained that before the traffic stop there was nothing in the bag except garbage and she knew this because she put garbage in the bag during the trip and saw no drugs. Schuman also admitted that she is a drug addict and has used heroin on and off for over 16 years. She also explained that she is a convicted felon, but recently completed drug rehabilitation and has been clean for three months.

E. Failure of Proof

{¶24} Based on Schuman's testimony, we believe the state presented evidence from which the trial court could reasonably conclude that Criswell knew of the heroin in Cabell's van. She testified that he was present when Jenkins handed his bag of heroin to Spikes and when Spikes gave heroin to Cabell and she injected it. However, mere knowledge of an illegal substance is insufficient to establish constructive possession. *See Kingsland*, 177 Ohio App.3d 655, 2008-Ohio-4148, 895 N.E.2d 633, at ¶ 13 (4th Dist.). The state must also show that the defendant had the ability to exercise dominion and control over the substance or the place where the substance is found. *See id.* (constructive possession exists when an individual is able to exercise dominion and control over an item and is conscious of its presence); *State v. Harris*, 8th Dist. Cuyahoga Nos. 98183, 98184, 2013-Ohio-484, ¶ 18 (constructive possession can be established by knowledge of an illegal substance or goods and the ability to exercise dominion or control over the substance or the premises on which the substance is found).

{¶25} This is not a case where the defendant was either the driver or owner of the automobile in which the drugs were found. *See Brown*, 4th Dist. Athens No. 09CA3, 2009-Ohio-5390, at ¶ 21 (as the driver, the defendant's "possession of the keys provided a strong indication of control over the drugs found in the automobile"); *State v. Chaffins*, 4th Dist. Scioto No. 13CA3559, 2014-Ohio-1969, ¶ 33 (a fact finder may conclude that a defendant who exercises dominion and control over an automobile also exercises dominion and control over illegal drugs found in it). Nor is this a case where the state showed that the drugs were in an area accessible to Criswell during the trip. Schuman's testimony showed that Jenkins and Spikes both had the bags of heroin when they entered Cabell's van and Jenkins gave his bag to Spikes when he left to enter the apartment complex. The state presented no evidence that Spikes ever gave up possession of either of these bags during the trip or that Criswell, a passenger in the vehicle, ever had access to them. Schuman testified that before the traffic stop there were no drugs in the Kroger bag, a point which the state concedes in its brief. Nor did Schuman see anyone "stash" any drugs in the bag after law enforcement stopped the vehicle. Moreover, Detective Jackson testified that Criswell was the first person to exit the vehicle after the stop. Because the state did not show that Criswell ever had the ability to exert dominion or control over the heroin, we conclude that it failed to show he had constructive possession. *See State v. Giles*, 8th Dist. Cuyahoga No. 63709, 1994 WL189590, *2 (May 12, 1994) ("constructive possession cannot be inferred from someone being a passenger in a car where the defendant passenger did not exercise dominion or control over the drugs or car").

{¶26} Turning to the cocaine found in the van, our review of the record shows that the state failed to establish that Criswell knew there was cocaine inside Cabell's automobile. In fact, Schuman's testimony showed that she never saw any cocaine during the trip, nor did she see Criswell actually possess any drugs. Rather, she only saw a plastic "baggie" in his lap when she briefly turned around to throw away trash. However, because the bag was in between Criswell's legs she could not see its contents. Schuman did not describe the plastic bag other than being clear and thus we cannot assume it was consistent with the type of bags found in the van containing drugs. Because the state did not show that Criswell had knowledge there was crack cocaine in the van, it failed to establish he had constructive possession of the drug. *See Hankerson*, 70 Ohio St.2d at 91; *Kingsland*, 177 Ohio App.3d 655, 2008-Ohio-4148, at ¶ 13. *See also State v. Mitchell*, 190 Ohio App.3d 676, 2010-Ohio-5430, 943 N.E.2d 1072, ¶ 6 (1st Dist.) (finding defendant did not have constructive possession of marijuana found in an automobile because the only evidence connecting him to the drugs was his proximity, the officers could not see inside the vehicle during the traffic stop because the windows were tinted and other occupants in the automobile had access to location were marijuana was found).

{¶27} After viewing all of this evidence, in a light most favorable to the prosecution, we cannot say that a rational trier of fact could have concluded beyond a reasonable doubt that Criswell knowingly exerted dominion and control over either the heroin or crack cocaine found in the Kroger bag between the front driver and passenger seats. And because the state also based Criswell's trafficking charges on his alleged possession, we sustain his second assignment of error.

IV. CONCLUSION

{¶28} The state failed to present sufficient evidence to show Criswell possessed either the heroin or crack cocaine found in Cabell's vehicle. Even after viewing the evidence in a light most favorable to the prosecution, we conclude no rational trier of fact could have found beyond a reasonable doubt that he committed all the necessary elements of the charged offenses. We acknowledge that Criswell "probably" had possession of some illegal substance while in the van. Unfortunately for the state, "probably" does not meet the required burden of proof to satisfy the sufficiency requirement. Accordingly, we sustain his second assignment of error. Criswell's initial assignment of error is rendered moot and we decline to address it. *See* App.R. 12(A)(1)(c).

{¶29} We reverse the judgment of the trial court and remand with instructions to discharge the appellant.

JUDGMENT REVERSED
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS REVERSED and that the CAUSE IS REMANDED. Appellee shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Scioto County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, P.J. & Hoover, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.