[Cite as *State v. Walker*, 2021-Ohio-4489.]

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

STATE OF OHIO,	:	Case No. 21CA3737
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
TORRANCE WALKER,	:	**RELEASED: 12/16/2021**
Defendant-Appellant.	:	

APPEARANCES:

Dennis W. McNamara, Columbus, Ohio, for Appellant.

Jeffrey C. Marks, Ross County Prosecuting Attorney, and Pamela C. Wells, Assistant Ross County Prosecutor, Chillicothe, Ohio, for Appellee.

Wilkin, J.

{¶1} This is an appeal from a Ross County Court of Common Pleas judgment of conviction in which a jury found Appellant, Torrance Walker, guilty of possession of heroin. Walker appeals and in the first assignment of error, claims the jury's verdict is not supported by sufficient evidence because the state failed to prove he constructively possessed the heroin. Similarly, in the second and final assignment of error, Walker maintains the jury lost its way when it convicted him because the evidence was against the manifest weight of the evidence.

{¶2} We overrule both assignments of error. When the SWAT Team entered the residence at 354 East Second Street, known to be a drug-trafficking house, Walker was found in the small upstairs bathroom. In the uncovered toilet was a clear bag filled with 46.685 grams of heroin. The heroin was in close

proximity to Walker and in plain view. In addition, Walker had approximately $1,300 in cash and two cellphones on him. We determine the state established Walker constructively possessed the heroin and the jury did not lose its way in finding him guilty.

FACTS AND PROCEDURAL BACKGROUND

{¶3} On January 22, 2018, the Chillicothe Police Department was surveilling the residence at 354 East Second Street, after receiving several complaints of drug activity. Sergeant John Silvey of The Ohio State Highway Patrol assisted the Chillicothe Police Department with the surveillance and had a clear view of the front door but not the back door. Officer Samantha Taczak with the Chillicothe Police Department, then narcotics detective, was also on surveillance duty that day and had a view of the front door only. During surveillance, they observed heavy foot traffic of people entering the residence, stay a short amount of time, then leave.

{¶4} Based on the officers' observations and experience with drug trafficking, the officers determined that drug trafficking was in progress at the residence. Their suspicion was corroborated by a confidential informant who was inside the residence that day and saw Nathaniel Powe with a softball size of heroin in a bag and approximately the same amount of crack cocaine. On the same day as the surveillance was conducted and within three hours from contact with the confidential informant, Officer Taczak applied for a search warrant. The search warrant was granted that same day.

{¶5} After the search warrant was obtained, the Chillicothe SWAT Team made the initial entry and cleared the home of any person who was inside. The SWAT Team placed everyone found inside the house on the porch and placed identifiers on them. The SWAT Team removed Walker and Enddasey Johnson from the upstairs bathroom.

{¶6} Sergeant Silvey assisted with the search of the residence after the SWAT Team cleared the house. Inside the toilet of the upstairs bathroom, the only bathroom upstairs, the Sergeant located a clear bag containing a gray powder. There was no running water in the toilet, so the clear bag was placed on top of fecal matter that was already in the toilet. Sergeant Silvey was also the officer who searched Walker and found two cellphones, his ID, and approximately $1300 in cash on him.

{¶7} The gray powder located inside the clear ziplock bag was tested and weighed. It contained 46.685 grams of heroin. On November 1, 2019, Walker was indicted on two felony offenses: possession of controlled substance in an amount that exceeds 10 grams but less than 50 grams, and tampering with evidence. Walker pleaded not guilty and the matter proceeded to a one-day jury trial. The state presented the testimony of four witnesses including Sergeant Silvey and Officer Taczak.

{¶8} At the conclusion of the state's case-in-chief, Walker orally moved the trial court for dismissal of the charges pursuant to Crim.R. 29 arguing insufficient evidence establishing he possessed the drugs. The trial court overruled the motion finding:

> Alright, I will say this as far as rule twenty-nine's go this is as about as close as I've ever seen. Um, I'm going to overrule the rule twenty-nine and part of the basis for that is the bathroom is not a large bathroom. It's a rather small bathroom. I would note that the defendant was in very close proximity to where the toilet, necessarily it would have been in very close proximity to where the toilet was. I would note that as Ms. Charles has correctly stated it appears to have been freshly placed atop the waste that was already inside the toilet. I would also note that the defendant was found with a large amount of cash on his person as well. Taking all of those factors into account I believe that it gets by the rule twenty-nine.

{¶9} Walker did not present any evidence and rested after the trial court denied his motion. The jury found Walker guilty of possession of heroin with an amount greater than 10 grams but less than 50 grams, and not guilty of tampering with evidence. Prior to sentencing, Walker submitted a motion for judgment of acquittal renewing his claim that the state presented insufficient evidence he possessed the heroin. The trial court again denied his motion but indicated it was a "very close call." Walker was then sentenced to a mandatory prison term of three years.

ASSIGNMENTS OF ERROR

I. TORRANCE WALKER WAS DENIED HIS RIGHT TO DUE PROCESS BECAUSE THE JURY'S VERDICT WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

II. TORRANCE WALKER WAS DENIED HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL WHEN THE JURY CONVICTED HIM OF POSSESSION OF HEROIN AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR I

{¶10} Under this assignment of error, Walker maintains that the state failed to prove he possessed the heroin when the only evidence was his vicinity near the toilet. There was no additional evidence to support a finding that Walker constructively possessed the heroin in which he did not make any inculpatory statement, he was not seen during the informant's controlled buy, there was no evidence he was nervous, and no evidence linking Walker to the residence. Walker highlights that there was no DNA evidence or fingerprints linking him to the bag of heroin. Also, there was no evidence at the time Walker was discovered in the bathroom as to whether or not the toilet seat was uncovered with the drugs within his view.

{¶11} The state disagrees and asserts that the large quantity of heroin was in plain view next to Walker. The drugs were recently placed in the toilet. Moreover, a large sum of money, two cellphones and loose currency were discovered on Walker's person. Thus, the evidence established Walker's constructive possession of the heroin.

Law and Analysis

{¶12} "When a court reviews a record for sufficiency, '[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. Maxwell*, 139 Ohio St.3d 12, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 146, quoting *State v. Jenks*, 61 Ohio

St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶13} Walker was convicted of possession of heroin in violation of R.C. 2925.11(A) that provides: "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog."

> A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

R.C. 2901.22(B).

{¶14} "Possess" or "possession" is defined in R.C. 2925.01(K) 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." Possession may be actual or constructive. *State v. Butler*, 42 Ohio St.3d 174, 175, 538 N.E.2d 98 (1989). "Actual possession exists when the circumstances indicate that an individual has or had an item within his immediate physical possession." *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. "Dominion and control may be established by circumstantial evidence

alone." *Fry* at ¶ 39, citing *State v. Taylor*, 78 Ohio St.3d 15, 676 N.E.2d 82 (1997); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991).

{¶15} "A defendant's mere presence in an area where drugs are located is insufficient to demonstrate that the defendant constructively possessed the drugs." *Fry* at ¶ 40, citing *State v. Cola*, 77 Ohio App.3d 448, 450, 602 N.E.2d 730 (11th Dist.1991). "It must also be shown that the person was conscious of the presence of the object." *State v. Hankerson*, 70 Ohio St.2d 87, 91, 434 N.E.2d 1362 (1976). "Therefore, presence in the vicinity of contraband, coupled with another factor or factors probative of dominion or control over the contraband, may establish constructive possession." *State v. Brown*, 4th Dist. Athens No. 09CA3, 2009-Ohio-5390, ¶ 20, citing *State v. Riggs*, 4th Dist. Washington No. 98CA39, 1999 WL 727952, *5 (Sept. 13, 1999).

{¶16} One of the factors that is applicable here is whether the drugs were in plain view. "[C]onstructive possession may be established when the defendant occupies the premises with others, the drugs are found in the defendant's living area, and the drugs are in plain view throughout the apartment." *State v. Fugate*, 4th Dist. Washington No. 97 CA 2546, 1998 WL 729221, *8 (October 2, 1998), citing *State v. Boyd*, 63 Ohio App.3d 790, 796-797, 580 N.E.2d 443 (8th Dist.1989).

{¶17} When the SWAT Team stormed the residence on East Second Street, Walker was located in the small upstairs bathroom.[1] The SWAT Team

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[1] Walker claims that the testimony of his location in the bathroom is hearsay and should not be considered by this Court. Walker did not object at trial to Sergeant Silvey and Officer Taczak's testimony that he was removed by the SWAT Team from the bathroom. Further, Walker here did

removed all persons inside and gathered them on the porch as Sergeant Silvey and others went inside to search the residence for contraband. Sergeant Silvey discovered the clear bag of 46.685 grams of heroin inside the toilet of the upstairs bathroom. The state's exhibits included photos demonstrating the small size of the bathroom and the uncovered toilet seat with the heroin placed on top of fecal matter that was already inside the toilet—the toilet did not have running water. Walker did not object to the admission of the photos. The photos demonstrate that Walker could not have been more than a couple of feet away from the heroin that was visible in a clear bag atop the fecal matter.

{¶18} In addition to the heroin being in close proximity to Walker and in plain view, the residence was under surveillance due to it being a drug-trafficking house, and Walker had over $1,300 in cash on his person and two cellphones. *See Westlake v. Wilson*, 8th Dist. Cuyahoga No. 96948, 2012-Ohio-2192, ¶ 38 ("Although this court has recognized that having a cell phone is ubiquitous and therefore possession of one cell phone is not ipso facto proof that it was used in drug trafficking, the same cannot be said about having two cell phones.")

{¶19} Moreover, simply because Ms. Johnson was also located in the small bathroom does not command reversal of Walker's conviction. As we previously held, "two or more persons may have joint constructive possession of the same object." *State v. Brown*, 4th Dist. Athens No. 09CA3, 2009-Ohio-5390, ¶ 19, citing *State v. Riggs*, 4th Dist. Washington No. 98CA39, 1999 WL 727952, *4 (Sept. 13, 1999). It is true that no DNA or fingerprints linked Walker to the bag of

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not raise an assignment of error challenging the admission of their testimony. Wherefore, since the evidence was admitted and considered by the jury, we will also consider it in our analysis.

heroin, but that is because testing for fingerprints and DNA was not requested by law enforcement. The lack of such evidence was an appropriate argument by Walker against his finding of guilt; however, it was not fatal to the proof of elements or absolve him of the crime.

{¶20} Viewing all of the evidence in a light most favorable to the state, we conclude that the jury's finding that Walker possessed 46.685 grams of heroin is supported by the sufficiency of the evidence. Accordingly, Walker's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

{¶21} Walker reasserts his claims under the first assignment of error and additionally argues that none of the officers were familiar with him prior to January 22, 2018. Walker maintains that the heroin located in the bathroom was similar in size to the heroin the confidential informant saw with the known drug-dealer Powe. According to Walker, this all demonstrates that the drugs belonged to Powe and his conviction is thus against the manifest weight of the evidence.

{¶22} The state disagrees as Powe was not found in the bathroom less than a foot from the heroin. In addition, the state reiterates the circumstantial evidence of the drugs freshly placed in the toilet, and the sums of money and two cellphones located on Walker. Finally, the state notes that Powe disposed of drugs by throwing them out of the window and based on the time frame could not have disposed of the heroin.[2]

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[2] The state's claim is not supported by the record of the case. No testimony was presented as to Powe's location in the residence at the time the SWAT Team made entry or that he disposed of contraband. The inventory of the items collected at the residence and admitted as State's Exhibit

Law and Analysis

{¶23} In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court reviews 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. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris Co. v. Foley Const. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶24} "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins* at 387. But the weight and credibility of evidence are to be determined by the trier of fact. *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 132. The trier of fact "is free to believe all, part or none of the testimony of any witness," and we "defer to the trier of fact on these evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility." *State v. Dillard*, 4th Dist. Meigs No. 13CA9, 2014-Ohio-

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14 indicated that Powe was located in a middle bedroom without any reference to contraband he disposed of through a window.

4974, ¶ 28, citing *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23.

{¶25} Walker did not present any evidence so there was no conflicting testimony disputing Walker's close proximity and dominion over the heroin as we concluded in the first assignment of error. The jury did not lose its way simply because it rejected Walker's theory that the heroin belonged to Powe. The moment the SWAT Team stormed the residence, Powe was located in the middle bedroom and not in the only bathroom upstairs. "[W]hen sufficient evidence exists on the whole to support a conviction, a jury is entitled to reject even plausible theories of innocence." *State v. Johnson*, 4th Dist. Ross No. 14CA3459, 2016-Ohio-867, ¶ 17, citing *United States v. Tierney*, 266 F.3d 37, 40 (1st Cir.2001). And we are not going to second-guess the jury's rejection of Walker's theories and plausible scenarios.

{¶26} The jury could reasonably have concluded Walker constructively possessed the 46.685 grams of heroin and did not lose its way by finding him guilty. Therefore, Walker's second assignment of error is overruled.

SENTENCING

{¶27} Although not raised as an issue by either party, we sua sponte remand the case for the proper inclusion of postrelease control in the judgment entry of conviction. Walker was convicted of possession of heroin as a second-degree felony. Pursuant to R.C. 2967.28(B)(2)'s version when Walker's disposition hearing was held, his sentence included mandatory postrelease

control of three years.[3] The trial court advised Walker at the sentencing hearing of the mandatory three-year postrelease control:

> Keep in mind because it's a second degree felony, you're going to be subject to a three year mandatory period of post release control in Ohio Revise[d] Code section 2967.28.
> * * *
> Yes, he's got the three year mandatory.

However, in the judgment entry of sentence, the trial court indicated that postrelease control was mandatory but not for the full term of three years:

> It is further order of the court that the defendant is subject upon release from prison to a mandatory period of post-release control of up to three (3) years if the parole board in accordance with Ohio Revised Code Section 2967.28(D) determines that a period of post release control is necessary for the defendant.

{¶28} This is a clerical error that may be corrected by the trial court through a nunc pro tunc judgment entry of sentence. Trial courts retain jurisdiction to correct judgment entries to reflect what the court actually decided. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, 856 N.E.2d 296, ¶ 19; *see also* Crim.R. 36 ("Clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time.")

{¶29} In the matter at bar, Walker's sentence includes a mandatory three-year postrelease control which he was properly advised of at the sentencing hearing. The error in the judgment entry of sentence should be corrected to reflect the postrelease control applicable to Walker. Therefore, we sua sponte

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[3] On September 30, 2021, a new version of R.C. 2967.28 took effect. Under the new version, postrelease control is discretionary up to 3 years for second-degree felonies but not less than 18 months. R.C. 2967.28(B)(3).

remand the matter to the trial court to issue a nunc pro tunc entry that properly imposes a mandatory postrelease control of three years.

CONCLUSION

{¶30} Having overruled both of Walker's assignments of error, we affirm the trial court's judgment entry of conviction but remand the matter for the court to issue a nunc pro tunc entry that correctly reflects Walker's mandatory postrelease control.

JUDGMENT AFFIRMED AND CAUSE REMANDED FOR NUNC PRO TUNC ENTRY.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED AND CAUSE REMANDED FOR NUNC PRO TUNC ENTRY and that appellant 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 Ross County Common Pleas Court 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 60 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 60-day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-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 60 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, J. and Hess, J.: Concur in Judgment and Opinion.

For the Court,

BY: ____________________________
Kristy S. Wilkin, 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.