[Cite as *State v. See*, 2009-Ohio-2787.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

STATE OF OHIO	C. A. No. 08CA009511
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
BRIAN A. SEE	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellant	CASE No. 08CR075672

DECISION AND JOURNAL ENTRY

Dated: June 15, 2009

WHITMORE, Judge.

{¶1} Defendant-Appellant, Brian See, appeals from his conviction in the Lorain County Court of Common Pleas. This Court affirms.

I

{¶2} On March 21, 2008, Lieutenant Michael Freeman approached See in a parking lot after determining that the license plates on the vehicle he was driving were registered to a different vehicle. Upon requesting identification from See, Lieutenant Freeman learned that See's driver's license was suspended. Lieutenant Freeman determined the vehicle needed to be towed and began to inventory its contents once an assisting officer arrived. While conducting the inventory, Lieutenant Freeman found a baggy containing crack cocaine, a digital scale, and a razor blade under the rear seat of the vehicle on the passenger's side. See was then placed under arrest.

{¶3} On May 15, 2008, See was indicted on one count of possession of cocaine in violation of R.C. 2925.11(A), a third-degree felony; driving under suspension in violation of R.C. 4510.11(A), a first-degree misdemeanor; and possession of drug paraphernalia, in violation of R.C. 2925.14(C)(1), a fourth-degree misdemeanor. On November 3, 2008, the trial court held a bench trial. At the close of the State's case, See moved for acquittal, which the trial court denied. The trial court found See guilty of both possession charges, but not guilty of the driving under suspension charge. He was sentenced to a total of two years of incarceration for both offenses and his driver's license was further suspended for three years.

{¶4} See now appeals from his convictions and asserts one assignment of error for our review.

II

Assignment of Error

> "THE VERDICT IN THIS CASE IS AGAINST THE SUFFICIENCY AND MANIFEST WEIGHT OF THE EVIDENCE AND SHOULD BE REVERSED BECAUSE IT VIOLATES THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION 10 OF THE CONSTITUTION OF THE STATE OF OHIO."

{¶5} In his sole assignment of error, See argues that there was insufficient evidence from which to convict him and that his conviction is against the manifest weight of the evidence. Specifically, he asserts that the evidence supports a reasonable inference that he did not knowingly possess the cocaine or drug paraphernalia found in the back seat of the vehicle he was driving. See argues that the drugs could have been placed there by the owner of the car or by the passenger who was with him at the time of the stop. We disagree.

{¶6} A review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000),

9th Dist. No. 19600, at *1. "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." Id., citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id. at paragraph two of the syllabus; see, also, *Thompkins*, 78 Ohio St.3d at 386.

In *State v. Roberts*, this Court explained:

> "[S]ufficiency is required to take a case to the jury[.] *** Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." (Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462, at *2.

Accordingly, we address See's challenge to the weight of the evidence first, as it is dispositive of his claim of sufficiency.

{¶7} In determining whether a conviction is against the manifest weight of the evidence an appellate court:

> "[M]ust review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine 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." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶8} A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the

manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. Therefore, this Court's "discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶9} It is a violation of R.C. 2925.11(A) to "knowingly obtain, possess, or use a controlled substance." A person is guilty of possession under this section "[i]f the drug involved *** is cocaine[.]" R.C. 2925.11(C)(4). Additionally, it is a violation of R.C. 2925.14(C)(1) to "knowingly use, or possess with purpose to use, drug paraphernalia." Drug paraphernalia includes "any equipment *** of any kind that is used by the offender, intended by the offender for use, or designed for use, in *** processing, preparing, *** packaging, *** ingesting, [or] inhaling, *** a controlled substance[.]" R.C. 2925.14(A). "A scale or balance for weighing or measuring a controlled substance" is considered drug paraphernalia. R.C. 2925.14(A)(6).

{¶10} Possession is defined under R.C. 2925.01(K) as "hav[ing] control over a thing or substance[.]" 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). We have previously concluded that "a person may knowingly possess a substance or object through either actual or constructive possession." *State v. Hilton*, 9th Dist. No. 21624, 2004-Ohio-1418, at ¶16; see, also, *State v. Bewsey* (June 16, 1993), 9th Dist. No. 15857, at *5. Furthermore,

> "There are many types of evidence or factors, such as owning the premises or proximity to contraband, that on their own do not establish constructive possession. However, viewing these factors together as a whole can be used as circumstantial evidence to establish constructive possession. For instance, readily usable drugs or other contraband in close proximity to a defendant may constitute sufficient and direct circumstantial evidence to support a finding of constructive

> possession. In addition, evidence that the defendant owns, leases, or occupies the premise along with the defendant's presence or proximity to the contraband, can be considered in establishing constructive possession." (Internal citations and quotations omitted.) *State v. Owens*, 9th Dist. No. 23267, 2007-Ohio-49, at ¶23.

Additionally, "[c]ircumstantial evidence is itself sufficient to establish dominion and control over the controlled substance." *Hilton* at ¶16.

{¶11} At trial, Lieutenant Freeman testified that he was on patrol on March 21, 2008, when he noticed a green Chevy Camaro quickly turn into a lighting store immediately after he had turned around in his cruiser upon reaching the North Ridgeville city limits. Despite having parked, See and his passenger, Keith West, remained inside the Camaro while Lieutenant Freeman passed. Lieutenant Freeman testified that, based on this suspicious conduct, he decided to run a vehicle registration check on the Camaro's plates. Upon doing so, he learned that the plates were registered to a 1995 purple Ford vehicle. Based on this information, Lieutenant Freeman believed the vehicle might have been stolen, so he turned around again, parked along the street adjacent to the store, and called for back-up assistance. In the interim, See had started backing out of the parking spot, as if to leave the store, but as Lieutenant Freeman parked nearby, See pulled back into the parking spot. Lieutenant Freeman testified that See and West subsequently exited the vehicle, entered the store, and shortly thereafter returned to the vehicle. Lieutenant Freeman immediately approached them before they could leave, despite not having any back-up officer at the scene yet.

{¶12} Lieutenant Freeman testified that when he requested identification from See, See gave him an Ohio Identification card, which alerted Lieutenant Freeman to the fact that See did not have a valid driver's license. Upon returning to his cruiser and performing a records check on See, Lieutenant Freeman found multiple license suspensions, confirming his initial thought. See informed Officer Freeman that he did not own the Camaro and asserted that a person named

Tyrone Jackson did. See indicated that he was the vehicle's primary driver and was making payments to Jackson for the vehicle. Upon later investigation, Lieutenant Freeman determined that Jackson was the person to whom the license plates were registered, but that the vehicle was actually owned by Good Deal Used Cars in Elyria.

{¶13} Lieutenant Freeman placed See in the back of his police cruiser, then approached West for questioning. West indicated that he did not own the Camaro either. According to Lieutenant Freeman's testimony, West informed him that he and See were headed to the mall, despite their vehicle being headed in the opposite direction from the mall when Lieutenant Freeman first spotted it.

{¶14} Lieutenant Freeman then placed West in the front of his cruiser and began to inventory the vehicle. Lieutenant Freeman testified that he found the rear passenger's seat cushion tilted forward, toward the front seat of the vehicle. Upon removing the seat cushion, Lieutenant Freeman found a baggy containing crack cocaine, a digital scale, and a razor blade. He further stated that the person in the driver's seat would have had the easiest access to remove and replace the seat cushion.

{¶15} Lieutenant Freeman arrested both men for possession of drugs and drug paraphernalia. While at the police station both men denied that the items found in the vehicle were theirs. They further declined to make any written statements about the incident. See did indicate to Lieutenant Freeman, however, that the drugs were not West's. At trial, See stipulated to the BCI report indicating that the baggy found in the car contained 5.4 grams of crack cocaine.

{¶16} On cross examination, Lieutenant Freeman testified that the drugs were not in plain view when he looked into the car. He further testified that Officer Szabo, who arrived as his back-up, had a drug sniffing dog who alerted on the passenger's side of the vehicle where the

contraband was found. Lieutenant Freeman admitted that, though trained to dust for fingerprints, he did not check for prints on the license plates, scale, or baggy he found in the vehicle, as the police do not customarily do so in such incidents.

{¶17} West testified as a defense witness, stating that See had picked him up about an hour before the incident and the two first stopped to meet with See's probation officer. Upon leaving that location, they were headed to the mall when Lieutenant Freeman stopped them. West testified that Lieutenant Freeman approached them, directed them to put their hands on the vehicle, and then started searching the vehicle. He testified that two other officers arrived with a dog and they had the dog circle the vehicle three or four times, but the dog never barked or made any noises while around the vehicle. West testified that the police did not find any drugs on him and he denied that the crack cocaine, digital scale, or razor found in the vehicle were his. Additionally, West testified he did not see any of those items in the vehicle while he was with See that day.

{¶18} Upon cross-examination, West admitted that the men were not headed toward the mall or shopping for lights when they were stopped, but were in fact, attempting to avoid Lieutenant Freeman's cruiser because See was driving on a suspended license. According to West, See had keys to the car and was the only person he had ever seen driving the Camaro around town.

{¶19} Next, See testified in his own defense. He stated that Tyrone Jackson owned the Camaro that he was driving and that "[Jackson] always had it[.]" See testified, however, that he was making $100 payments to Jackson every other week to try to purchase the vehicle from him for $1,500 so that See's wife could use it to get to work. See testified that he had made three or four payments on the Camaro thus far. See admitted he had never seen the title to the car, but

expected he would get it from Jackson once he had paid him in full for the vehicle. According to See, he was unaware, until the time of trial, that Jackson did not own the Camaro. He indicated he did not "have the car *** [but that Jackson] would let [See] use it to go see [his] PO" and then he would return it to Jackson. See testified that he did not search the vehicle or the back seat before driving the car and that people other than he and Jackson also drove the vehicle.

{¶20} See testified that he pulled into the lighting store to avoid Lieutenant Freeman because neither he nor West had a valid driver's license. See stated that when he came out of the store, Lieutenant Freeman informed him that the license plates on the vehicle did not match the vehicle and asked him who owned the Camaro. According to See, Lieutenant Freeman then patted him down, placed him in his cruiser, and returned to start talking to West. See stated that another officer arrived shortly thereafter with a dog. See testified that the officer had the dog circle the outside of the Camaro several times, but according to See, the dog never stopped, barked, or clawed at the vehicle at any time. See denied ever seeing or possessing the crack cocaine, digital scale, or razor blade found in the vehicle. See further noted that the items were not West's because he "doesn't do that type of stuff" and did not have those items with him when See picked him up.

{¶21} On cross examination, See admitted that he was convicted for trafficking and possessing cocaine in 2006 and for aggravated burglary in 2000. He testified that he knew the seat cushions in the back lifted up, but stated that when he was stopped, the seat cushions were down, not tilted up as Lieutenant Freeman testified. Upon redirect examination, See testified that, as a part of his probation from his previous convictions, he is randomly tested for drugs and has thus far not had a result where he tested positive.

{¶22} See directs this Court to an Eighth District case, *State v. Duganitz* (1991), 76 Ohio App.3d 363, in support of his argument that there are "competing constructions of evidence" which would support a finding that the cocaine, digital scale, and razor blades found in the vehicle were not his. See asserts that the facts support a construction of evidence that West, Jackson, or even another previous owner of the car, Adam Bolster, placed the items in the back seat without his knowledge. We note, however, that See's argument on appeal conflicts with his own testimony at trial, in that he previously testified that the items did not belong to West and that West did not bring anything with him into the vehicle when See picked him up earlier that day.

{¶23} We further note that the circumstantial evidence adduced by the State at trial supports of a finding that See had constructive possession of the cocaine and drug paraphernalia found in the vehicle. Specifically, the items found in the vehicle were within close proximity to See, were readily usable, and were accessible to him from his position in the driver's seat of the vehicle, all of which support a finding that he had constructive possession of them. *Owens* at ¶23. Despite See's testimony that Jackson owned and "always had" the Camaro, West testified that he had seen the vehicle around town and that See was the only person he had ever seen driving it. Moreover, this Court has previously noted that a conviction for cocaine possession is not against the manifest weight of the evidence simply because the defendant did not own the car in which the cocaine was found and denied that the cocaine was his. *State v. Grundy* (Dec. 9, 1998), 9th Dist. No. 19016, at *10 (noting that "[i]t is irrelevant that Defendant did not own *** the car, in which the cocaine was found *** [and] that he did not admit that the cocaine was his."). Furthermore, it is not error for the trial judge to credit the State's version of events over See's version of the same. *State v. Spaulding* (June 16, 1999), 9th Dist. No. 19197, at *2

(affirming a conviction for cocaine possession and noting that, where the defendant alleged another person stored drugs under his seat in the car and "that he was simply an innocent passenger[,]" defendant must do more than proffer another possible explanation, but must "at least [provide evidence] that the State's scenario was not possible"). Additionally, See admitted he was attempting to avoid Lieutenant Freeman and that he previously has been convicted of trafficking and possessing cocaine.

{¶24} Upon viewing the evidence in a light most favorable to the prosecution, we conclude that the trial court did not err in convicting See, because a rational trier of fact could have found that the essential elements of possession of cocaine and drug paraphernalia were proven beyond a reasonable doubt. Because we have determined that See's conviction was not against the weight of the evidence, we similarly dispose of his challenge to the sufficiency of the evidence. See *Roberts*, supra, at *2. Accordingly, See's assignment of error lacks merit.

III

{¶25} See's sole assignment of error is overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETH WHITMORE
FOR THE COURT

MOORE, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

PAUL A. GRIFFIN, Attorney at Law, for Appellant.

DENNIS WILL, Prosecuting Attorney and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for Appellee.