IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs September 10, 2013

STATE OF TENNESSEE v. CHRISTOPHER RUTHERFORD

Appeal from the Circuit Court for Madison County
No. 11-442 Donald H. Allen, Judge

No. W2012-01723-CCA-R3-CD - Filed December 3, 2013

The Defendant, Christopher Rutherford, was convicted by a jury of possession of marijuana with the intent to sell, a Class E felony. The trial court denied the Defendant's request for judicial diversion and imposed a two-year sentence, with 160 days' confinement as "shock incarceration" and the balance on probation. On appeal, the Defendant challenges the sufficiency of the evidence supporting his conviction and the denial of judicial diversion. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which THOMAS T. WOODALL and JAMES CURWOOD WITT, JR., JJ., joined.

George Morton Googe, District Public Defender; and Gregory D. Gookin, Assistant Public Defender, for the appellant, Christopher Rutherford.

Robert E. Cooper, Jr., Attorney General and Reporter; J. Ross Dyer, Senior Counsel; James G. Woodall, District Attorney General; and Shaun A. Brown, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

FACTUAL BACKGROUND

On August 1, 2011, the Defendant was indicted for possession of marijuana with the intent to sell, possession of marijuana with the intent to deliver, and violation of the vehicle registration law. See Tenn. Code Ann. §§ 39-17-417, 55-5-114. At the ensuing trial, Investigator Tikal Greer of the Jackson Metro Narcotics Unit testified that, on March 5, 2011, he was conducting surveillance at the home of Jarvis Merriweather, a known drug dealer. Inv. Greer had arrested Merriweather approximately a week earlier "with nine and

a half ounces of marijuana." Lee Kelvin Young, III (Young), the co-defendant in this case, was with Merriweather at that time.

While observing Merriweather's house on the day in question, Inv. Greer saw a blue Honda Accord, occupied by two men, arrive at the residence. According to Inv. Greer, Merriweather came out of the house with "two small plastic bags inside his hand" and "walked up to the driver's door." The driver of the vehicle, later identified as the Defendant, opened the door, and Merriweather "leaned in toward the vehicle" and gave the bags to the individuals inside the car. Inv. Greer could not determine which of the two men Merriweather actually gave the packages to. After the transaction, lasting "a couple of minutes[,]" was complete, Merriweather went back inside the house, and the vehicle drove away. Inv. Greer said that, based upon his experience and training, he "believed a drug transaction had [taken] place."

Inv. Greer followed the vehicle as it drove away and radioed for backup assistance. As Inv. Greer followed, he conducted a check of the Honda's tag information, which revealed that the vehicle, registered as a white rather than a blue Honda Accord, belonged to the Defendant. Once a backup officer was nearby, Inv. Greer initiated a traffic stop of the vehicle. Upon approaching the driver's side, Inv. Greer requested the Defendant's driver's license and registration information; he also noticed the odor of marijuana and inquired therein. The Defendant was unable to produce a vehicle registration form at the scene.[1] The other investigator arrived on the scene, and Inv. Greer had asked the occupants, the Defendant and his passenger, Young, to step out of the vehicle. According to Inv. Greer, the Defendant "really didn't say too much" at that point, and Young "started doing all of the talking." Young explained to the officers that he and the Defendant had smoked a "blunt" earlier that day inside the car and that was the reason for the smell.

After consent to search was given by the Defendant, the officers discovered two bags of marijuana hidden behind the glove compartment on the passenger's side of the car. Inv. Greer further described the marijuana's location, explaining that it was not a "normal" place to store items:

> Actually, you actual[ly] pull the glove compartment down. You open it and there will be two little I guess you call them springs on both sides. All they had to do was push those in and then the actual seat and all of that would fall down and that's where the marijuana was was [sic] behind that.

[1] A valid registration form for the vehicle was produced and admitted as an exhibit at trial; the only discrepancy Inv. Greer discovered was the listed color of the car.

Inv. Greer opined that these bags were the same ones that he observed Merriweather take out to the car earlier. Merriweather's residence was also searched following the traffic stop, and officers "found another five and a half ounces of marijuana and digital scales[.]"

Later testing by the Tennessee Bureau of Investigation (TBI) determined the marijuana found inside the Defendant's vehicle weighed a total of 110.3 grams, almost four ounces. When asked about the "street value" for that amount of marijuana, Inv. Greer opined, "It would be in probably about four ounces, each ounce depending on what type of weed it is, roughly I'd give each ounce probably about 265 bucks each." He later described this as a "low-end estimate on it."

Young, the Defendant's cousin, testified at trial. Young testified that he "had a play on some marijuana" and asked the Defendant to drive him to Merriweather's house in order to transport four ounces of marijuana. Young testified that, upon their arrival, Merriweather came outside and sat in the back seat of the car behind the Defendant and then handed the marijuana to Young, who placed it behind the glove box. Young said that no money was exchanged at this time and that the Defendant did not say anything during the transaction. Young was also charged in connection with these events and had already entered a guilty plea, receiving two years' probation.

According to Young, the Defendant was informed about the purpose of the transport and "willingly" helped move the marijuana from one location to another. For assisting, the Defendant was to receive $25 in gas money from the $150 Young planned to get from making the delivery. When Young noticed the officer following them, he told the Defendant not to worry because the marijuana belonged to him.

The jury convicted the Defendant of possession of marijuana with the intent to sell or deliver in Counts 1 and 2, but found him not guilty of Count 3, violating the vehicle registration law. At the conclusion of trial, the trial court allowed the Defendant to remain on bond and, as a condition of that bond, ordered the Defendant to report to Community Corrections, with supervision including random drug testing and a 6:00 p.m. curfew. The trial judge told the Defendant, "I do want you to remain drug free."

At the sentencing hearing which followed, Brandon Massey testified that he supervised the twenty-year-old Defendant following his conviction in this case. According to Mr. Massey, the Defendant was positive for marijuana all five times he was tested and admitted to smoking it on three occasions, one date being the day he was convicted. The Defendant lived with his grandmother, and all curfew checks "were successful." The presentence report was admitted into evidence; the Defendant did not have any criminal convictions, other than a ticket for violation of the responsibility law, which it appeared had

been paid in full. The report also showed that the Defendant was a high school graduate and that he had attended Nashville Auto Diesel College but left due to money concerns. The Defendant said he worked at JCPenney until his arrest in the present matter. He also reported that he volunteered at the Salvation Army.

The trial court ordered a drug test on the Defendant. The Defendant again tested positive for marijuana, although he claimed he had not again smoked the substance. The trial court then revoked the Defendant's bond and recessed the hearing for a drug court assessment. In that subsequent drug court assessment, it was reported that the Defendant claimed he had a drug problem since the age of fourteen and admitted to using marijuana on a regular basis, in increasingly larger amounts. The Defendant asked for help with his drug problem.

Following the subsequent arguments of counsel, the trial court merged the jury verdicts in Counts 1 and 2 into a single conviction, for which it sentenced the Defendant to two years' incarceration and denied his request for judicial diversion. The trial court ordered the Defendant to serve 160 days' "shock incarceration," followed by probation. This appeal followed, wherein the Defendant raises as issues the sufficiency of the evidence and the denial of judicial diversion.

ANALYSIS

I. Sufficiency of the Evidence

The Defendant argues that the evidence is insufficient to support his conviction for possession of marijuana with the intent to sell. Specifically, he notes the following facts in support of his sufficiency argument: (1) his co-defendant claimed the marijuana as his own and stated that the Defendant was merely providing transportation, for which he would be compensated $25; and (2) although the Defendant knew the purpose of driving between the locations, he "had no other involvement in the case[] and did not handle the marijuana," according to the co-defendant. The Defendant concludes that, for these reasons, he is guilty of only facilitation, not the principal offense. The State disagrees, contending that the evidence presented at trial established that the Defendant "was more than just a driver for his friend and that the [D]efendant had, at least, constructive possession of marijuana." The State also notes the amount of marijuana involved, 110.3 grams, revealed that it was more than for personal use and evidenced possession with intent.

An appellate court's standard of review when a defendant questions the sufficiency of the evidence on appeal 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 beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319 (1979). This court does not reweigh the evidence; rather, it presumes that the jury has resolved all

conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the State. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions regarding witness credibility, conflicts in testimony, and the weight and value to be given to evidence were resolved by the jury. See State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997).

A guilty verdict "removes the presumption of innocence and replaces it with a presumption of guilt, and [on appeal] the defendant has the burden of illustrating why the evidence is insufficient to support the jury's verdict." Id.; State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982). "This [standard] applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of [both] direct and circumstantial evidence." State v. Pendergrass, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999). The standard of proof is the same, whether the evidence is direct or circumstantial. State v. Dorantes, 331 S.W.3d 370, 379 (Tenn. 2011). Likewise, appellate review of the convicting evidence "'is the same whether the conviction is based upon direct or circumstantial evidence.'" Id. (quoting State v. Hanson, 279 S.W.3d 265, 275 (Tenn. 2009)). The duty of this court "on appeal of a conviction is not to contemplate all plausible inferences in the [d]efendant's favor, but to draw all reasonable inferences from the evidence in favor of the State." State v. Sisk, 343 S.W.3d 60, 67 (Tenn. 2011).

The jury found the Defendant guilty in Count 1 of possession of marijuana with the intent to sell and in Count 2 of possession of marijuana with the intent to deliver. The Defendant's possession with the intent to sell or deliver 110.3 grams of marijuana is a Class E felony. See Tenn. Code Ann. § 39-17-417(g)(1). As alternate theories of the same offense, the trial court merged the two convictions.

Our criminal statutes provide that it is an offense to knowingly sell or deliver a controlled substance. Tenn. Code Ann. § 39-17-417(a)(2) & (3). "[A] person . . . acts knowingly with respect to the conduct or to circumstances surrounding the conduct when the person is aware of the nature of the conduct or that the circumstances exist." Tenn. Code Ann. § 39-11-302(b). "Possession may be actual or constructive." State v. Williams, 623 S.W.2d 121, 125 (Tenn. Crim. App. 1981). Constructive possession occurs when a person knowingly has the "power and the intention at a given time to exercise dominion and control over an object, either directly or through others." Id. (quoting United States v. Craig, 522 F.2d 29 (6th Cir. 1975)). The mere presence of a person in an area where drugs are discovered is not, alone, sufficient to support a finding that the person possessed the drugs. State v. Cooper, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987) (citations omitted). However, as stated above, circumstantial evidence alone may be sufficient to support a conviction. State v. Tharpe, 726 S.W.2d 896, 899-900 (Tenn. 1987); State v. Gregory, 862 S.W.2d 574, 577 (Tenn. Crim. App. 1993). Further, it is permissible for the jury to draw an

inference of intent to sell or deliver when the amount of the controlled substance and other relevant facts surrounding the arrest are considered together. Tenn. Code Ann. § 39-17-419.

Furthermore, it appears from the record that the trial court instructed the jury on a theory of criminal responsibility.[2] As relevant here, Tennessee Code Annotated section 39-11-402 provides that a person is criminally responsible for the conduct of another if, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense[.]" Tenn. Code Ann. § 39-11-402(2). Criminal responsibility is not a separate crime; rather, it is "solely a theory by which the State may prove the defendant's guilt of the alleged offense . . . based upon the conduct of another person." State v. Lemacks, 996 S.W.2d 166, 170 (Tenn. 1999). To prove guilt through a theory of criminal responsibility the State must establish that the defendant "'knowingly, voluntarily and with common intent unite[d] with the principal offender[] in the commission of the crime.'" State v. Maxey, 898 S.W.2d 756, 757 (Tenn. Crim. App. 1994) (quoting State v. Foster, 755 S.W.2d 846, 848 (Tenn. Crim. App. 1988)).

It also appears that the trial court charged the lesser-included offense of facilitation. Tennessee Code Annotated section 39-11-403(a) provides that "[a] person is criminally responsible for the facilitation of a felony if, knowing that another intends to commit a specific felony, but without the intent required for criminal responsibility under § 39-11-402(2), the person knowingly furnishes substantial assistance in the commission of the felony." Facilitation of the commission of a felony is an offense of the next class below the felony facilitated. Tenn. Code Ann. § 39-11-403(b).

Here, the Defendant was driving a vehicle, owned by and registered to him, in which the co-defendant was a passenger and almost four ounces of marijuana were found. At trial, Inv. Greer estimated the street value of the marijuana at over $1,000. Knowledge may be inferred from control over the vehicle in which the contraband is secreted. State v. Brown, 915 S.W.2d 3, 7 (Tenn. Crim. App. 1995) (citation omitted). Moreover, Young testified that the Defendant was a willing participant in the transport, knowing that the purpose of the visit to Merriweather's house was to retrieve and carry a quantity of marijuana to another location. The marijuana, once obtained from Merriweather, was hidden behind the glove compartment of the vehicle. According to Young, the Defendant was to get $25 from the $150 Young was to receive once the exchange was complete. Also, the vehicle smelled of marijuana when Inv. Greer approached the driver's side. We conclude that the evidence was sufficient for a reasonable juror to find the Defendant guilty of possession of marijuana with the intent to

[2] Although the jury instructions are not included in the record on appeal, the trial court stated on the record its intention to so charge.

sell or deliver. The Defendant used his vehicle to transport a sizeable amount of marijuana, expecting compensation for so doing, and was fully aware of the presence and location of the drugs inside the car. See, e.g., State v. Patterson, 966 S.W.2d 435, 445 (Tenn. Crim. App. 1997) (finding constructive possession when contraband was found in the front seat of car occupied and driven by defendant and passenger testified defendant had handled it); Brown, 915 S.W.2d at 7-8 (discussing the nature of constructive possession and finding that the driver owner of a car from which the passenger tossed bags of cocaine constructively possessed the cocaine).

This is not a situation where a passenger was merely present inside a car in which drugs were discovered and merely associated with a person who did in fact control the drugs. At a minimum, the proof demonstrated the Defendant, "[a]cting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, . . . solicit[ed], direct[ed], aid[ed], or attempt[ed] to aid" Young in the commission of possession of marijuana with the intent to sell or deliver. See Tenn. Code Ann. § 39-11-402(2). We agree with the State that "[t]he [D]efendant's failure to negotiate a better deal for himself does not negate the fact that he was to benefit from the proceeds of the criminal transaction or his intent to assist in the commission of the transaction." The Defendant's argument, that he is only guilty of facilitation, is without merit.

II. Judicial Diversion

Next, the Defendant contends that the trial court erred in denying his request for judicial diversion. Specifically, he argues that the court erred by relying "entirely on [his] use of marijuana" and that "[t]here were several positive factors that outweighed [his] use of marijuana." The State responds that the trial court considered all the required factors in arriving at its decision and that decision is supported by the record.

A "qualified defendant" is eligible for judicial diversion if he or she is found guilty or pleads guilty to a Class C, D, or E felony, has not previously been convicted of a felony or a Class A misdemeanor, has not been granted judicial diversion previously, and is not seeking deferral under an excluded offense. Tenn. Code Ann. § 40-35-313(a)(1)(B)(i). The decision to grant judicial diversion lies within the discretion of the trial court and will not be disturbed on appeal unless it is shown that the trial court abused its discretion. State v. Parker, 932 S.W.2d 945, 958 (Tenn. Crim. App. 1996). In other words, a denial of judicial diversion will not be overturned if the record contains any substantial evidence to support the trial court's action. Id.

When making a determination regarding judicial diversion, the trial court must consider the following factors: (1) the defendant's amenability to correction; (2) the circumstances of the offense; (3) the defendant's criminal record; (4) the defendant's social

history; (5) the defendant's mental and physical health; and (6) the deterrent effect of the sentencing decision to both the defendant and other similarly situated defendants. State v. Lewis, 978 S.W.2d 558, 566 (Tenn. Crim. App. 1997). The decision should be based on whether the grant of diversion will serve the ends of justice for both the public and the defendant. Id. The trial court may consider the following additional factors: "[the defendant's] attitude, behavior since arrest, prior record, home environment, current drug usage, emotional stability, past employment, general reputation, marital stability, family responsibility and attitude of law enforcement." State v. Washington, 866 S.W.2d 950, 951 (Tenn. 1993) (quotation omitted). A trial court must weigh all of the required factors in determining whether to grant judicial diversion. State v. Electroplating, Inc., 990 S.W.2d 211, 229 (Tenn. Crim. App. 1998) (citing State v. Bonestel, 871 S.W.2d 163, 168 (Tenn. Crim. App. 1993)).[3] Finally, this court has previously held that "a trial court should not deny judicial diversion without explaining both the specific reasons supporting the denial and why those factors applicable to the denial of diversion outweigh other factors for consideration." State v. Cutshaw, 967 S.W.2d 332, 344 (Tenn. Crim. App. 1997) (citing Bonestel, 871 S.W.2d at 168).

In rendering its sentencing determination and in denying the Defendant's request for judicial diversion, the trial court made the following findings:

> This was an offense where officers testified that they had stopped the vehicle in which [the Defendant] was driving and I believe there was a front passenger, Mr. Lee Kelvin Young, who was also found in the vehicle. . . . Officers testified that upon approaching the vehicle that they could smell the heavy odor of marijuana coming from inside the vehicle and upon searching

[3] The State cites to a recent opinion of this court applying the Bise standard of review to judicial diversion, see State v. Kiara Tashawn King, No. M2012-00236-CCA-R3-CD, 2013 WL 793588, at *6-7 (Tenn. Crim. App. Mar. 4, 2013), perm. app. granted, (Tenn. Aug. 14, 2013). See also State v. Lewis Green, No. W2011-02593-CCA-R3-CD, 2013 WL 1282319, at *9 n.1 (Tenn. Crim. App. Mar. 28, 2013), perm. app. filed, (Tenn. May 29, 2013). These cases stand for the propositions that (1) the Bise standard of review affording trial court sentencing decisions a presumption of reasonableness applies to a court's grant or denial of judicial diversion and (2) the previous principles guiding this court to reverse a denial of judicial diversion for a trial court's failure to consider expressly "one or more of the seven legally-relevant factors (or merely because it failed to specify why some factors outweighed others)" is no longer good law. Green, 2013 WL 1282319, at *9 n.1; King, 2013 WL 793588, at *6-7. However, we respectfully disagree with those cases and conclude that we are bound by Electroplating, Inc. and Parker. In so concluding, we join in the rationales provided in the concurring opinions of State v. Paresh J. Patel, No. M2012-02130-CCA-R3-CD, 2013 WL 3486944 (Tenn. Crim. App. July 10, 2013) (Tipton, P.J., concurring and dissenting) (Witt, J., concurring).

the vehicle I believe recovered in excess of 100 grams of marijuana which I believe had a street value of about $500.[4]

. . . .

. . . I certainly consider the nature and characteristics of the criminal conduct involved which, you know, possession of illegal drugs and marijuana certainly is a serious problem we have in this community and I have to look at this based upon the harm it could cause to the community.

. . . The [D]efendant chose not to testify at trial, but he did make a statement as part of this drug court assessment whereby he has stated that he's 20 years of age. Apparently he's been having a drug problem since he was about 14 years old. Apparently using marijuana on a regular basis. According to this report he stated that he'd been smoking over one-quarter of an ounce of marijuana per day. Certainly he has a fairly substantial drug problem smoking marijuana.

Certainly the [c]ourt will consider his potential for rehabilitation and also his potential for treatment in this case.

Now, in this case his attorney . . . has requested that the [c]ourt consider judicial diversion . . . and the [c]ourt has been presented with an Application for Certification of Eligibility which indicates that he at least is qualified based upon no prior criminal record for diversion on this Class E felony offense. Now, in determining whether the [D]efendant would be a good candidate for diversion, the [c]ourt has to consider the circumstances of the offense and obviously this involves possession of narcotic drugs with intent to sell or deliver. It is an E felony, but as I said, this is certainly a serious problem within our Twenty-Sixth Judicial District. I weigh that against granting diversion.

The [D]efendant's criminal record. Now, according to this report, he has no prior criminal history other than a conviction for Violation of the Financial Responsibility Law. I do find that based upon lack of criminal history, that would weigh in favor of granting diversion.

The [c]ourt also considers the [D]efendant's social history, his physical and mental condition. Certainly there doesn't appear to be anything physically or mentally wrong with the [D]efendant other than a fairly severe drug problem which the [c]ourt does consider that in weighing against judicial diversion.

Also the [c]ourt has to consider the [D]efendant's attitude and behavior since his arrest. Now, in this case it appears that the [D]efendant since being released out on bond has continued to violate the law by using drugs.

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[4] At trial, the stated street value of $1,000 was challenged on cross-examination of Inv. Greer

> Certainly there is no question about that. He's tested positive after he was granted a bond in this matter and after he was convicted at trial and allowed to remain out on bond. I ordered that he be drug tested and he's failed to remain drug free. So I do find that his current drug usage is a factor that weighs against his granting of judicial diversion and it also indicates his behavior since his arrest, that is he's failed to obey the law by using marijuana since being out on bond.
>
> Because of that the [c]ourt finds that the [D]efendant is not an appropriate candidate for any type of judicial diversion based upon his current drug usage.

The Defendant does not argue that the trial court failed to consider all the relevant factors but merely failed to properly weigh those factors. As noted above, a defendant's "current drug usage" is a relevant consideration in determining whether judicial diversion is appropriate. Lewis, 978 S.W.2d at 566. In the present case, the Defendant's marijuana usage both prior to and subsequent to his conviction for the instant drug-related offense provides substantial evidence to support the trial court's finding of criminal behavior in this case and the great weight it gave to it. See, e.g., State v. Beverly, 894 S.W.2d 292, 293-94 (Tenn. Crim. App. 1994) (affirming denial of judicial diversion based upon defendant's prior criminal behavior involving marijuana use); State v. Aune Kornegay, No. E2007-00645-CCA-R3-CD, 2008 WL 1901115, at *6-7 (Tenn. Crim. App. Apr. 30, 2008) (trial court properly considered defendant's criminal behavior of possessing and using marijuana over the course of five years and, especially, after being convicted of a drug-related charge, in its decision to deny diversion). Moreover, the trial court's finding regarding the Defendant's criminal behavior relates to his amenability to correction. See Kornegay, 2008 WL 1901115, at *7. Our review of the record reflects that the trial court gave full and proper consideration to the criteria that must be considered prior to the grant or denial of judicial diversion. The evidence in the record supports the trial court's conclusion; therefore, we may not revisit the issue. We cannot conclude that the trial court abused its discretion.

CONCLUSION

Based upon the foregoing, we conclude that the evidence was sufficient to support the Defendant's conviction for possession of marijuana with the intent to sell and that the trial court did not abuse its discretion in denying diversion. Accordingly, the judgment of the Madison County Circuit Court is affirmed.

D. KELLY THOMAS, JR., JUDGE