

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 30, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2011AP550-CR

Cir. Ct. No. 2009CF1402

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

TROY A. KEYS,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Judgment affirmed in part and reversed in part; order reversed.*

¶1 BRUNNER, J.¹ Troy Keys appeals a judgment of conviction and an order denying his postconviction motion. He asserts the evidence was insufficient

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

to support his conviction for illegally possessing a prescription drug. We agree and reverse.

BACKGROUND

¶2 The State charged Keys with four counts of cocaine delivery, two counts of possession of a firearm by a felon, and one count each of possession with intent to deliver cocaine, maintaining a drug trafficking place, possession of THC, possession of drug paraphernalia, and possession of an illegally obtained prescription. A one-day jury trial was held on all charges.

¶3 At trial, a confidential informant testified that, while under the supervision of the drug task force, he purchased crack cocaine from Keys on four occasions. Based on the information gathered from the controlled buys, officers obtained a search warrant for Keys' residence. Officer Jason Katers testified that, during the search warrant execution, he found a pill container on Keys' coffee table, which contained two pills. He later identified the pills as Citalopram. Forensic scientist Michelle Gee confirmed the pills were Citalopram, which is a non-controlled prescription drug.² Keys did not testify.

¶4 The jury found Keys guilty of all charges. The court imposed an aggregate sentence of sixteen years, consisting of eight years' initial confinement and eight years' extended supervision. On the possession of an illegally obtained prescription conviction, the court sentenced Keys to six months' incarceration,

² A prescription drug is a drug that is available only on the prescription of a practitioner licensed to administer the drug. *See* WIS. STAT. § 450.01(20); *see also* 21 U.S.C. 353(b) (2006). A drug is non-controlled if it is not included in schedules I to V of the Uniform Controlled Substances Act. *See* WIS. STAT. § 961.01(4).

concurrent with the sentences imposed on the other counts. Keys filed a postconviction motion, alleging the evidence was insufficient to support his illegal possession of a prescription drug conviction. The court denied his motion.

DISCUSSION

¶5 On appeal, Keys asserts the evidence introduced at trial was insufficient to support his illegal possession of a prescription drug conviction. When reviewing a sufficiency of the evidence claim, we may not substitute our judgment for that of the jury unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no jury, acting reasonably, could have found guilt beyond a reasonable doubt. *State v. Poellinger*, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990). If any possibility exists that the jury could have drawn the appropriate inferences from the evidence introduced at trial to find the requisite guilt, we may not overturn a verdict even if we believe the jury should not have found guilt based on the evidence before it. *Id.*

¶6 To convict Keys of illegally possessing a prescription drug, the State needed to prove: (1) Keys possessed a prescription drug; (2) Keys knew or believed the substance was a prescription drug; and (3) the prescription drug was not dispensed to him by a prescription order issued by a practitioner. *See* WIS. STAT. § 450.11(7)(h); *see also* WIS JI—CRIMINAL 6112 (May 2010).

¶7 Keys concedes the evidence sufficiently supports the first element—that he possessed a prescription drug. However, Keys argues the evidence does not support the jury’s findings that he knew or believed the substance was a prescription drug and that he did not have a prescription for the substance.

¶8 The State argues that, based on all the drug-related evidence introduced at trial, “the jury [could] reasonably infer that Mr. Keys has a greater than average knowledge of drugs and the drug trade,” and thus infer Keys knew he possessed a prescription drug. The State also asserts that it proved the pills were non-prescribed because “the pills were not found in a labeled [prescription] container” and because “Katers determined the pills to be nonprescribed.”

¶9 We first determine whether there was sufficient evidence to support the jury’s determination that Keys knew or believed he possessed a prescription substance. There was no evidence presented by the State that Keys knew he possessed prescription medication or had any knowledge of prescription medication. Neither Katers nor the confidential informant discussed any dealing or knowledge Keys had of prescription drugs. Further, in the recorded statement given by Keys to the officers, there is no mention of the pills or Keys’ sale or use of prescription medication. We disagree with the State that, based solely on Keys’ proven knowledge of cocaine and marijuana, the jury could have reasonably inferred that Keys knew the two pills in his possession were a prescription drug. We determine such an inference from this evidence is unreasonable, *see Poellinger*, 153 Wis. 2d at 507, and conclude the State failed to meet its burden of proving Keys knew or believed the pills were a prescription drug.

¶10 Irrespective of whether Keys knew or believed the pills were a prescription drug, we also conclude the State failed to prove beyond a reasonable doubt that Keys did not possess a prescription for the pills. The State first argues it proved Keys did not possess a prescription because “Katers determined the pills to be nonprescribed” and “the jury heard no contradiction of the conclusion by police that the drugs were non-prescribed.” The State, however, overstates Katers’ testimony that the pills were “nonprescribed.”

¶11 When asked to identify the pills found at Keys’ residence, Katers testified, “This is a metal pill container which I located on the coffee table, and it contained these two pills which I later identified as a *nonprescribed* prescription, I guess you could say – a controlled prescription.” (Emphasis added.) When asked how he identified the pills, Katers explained he used the website Ident-A-Drug. The record shows Katers did not testify Keys lacked a prescription for the pills, and his use of the word “nonprescribed” was a misstatement that he immediately corrected.

¶12 Further, we disagree with the State that the jury could reasonably infer that, because the pills were found in a metal container instead of a labeled prescription bottle, Keys did not have a prescription for the drugs. We note that individuals frequently use alternative containers to carry or organize prescription medication. We conclude the inference, that an individual lacks a prescription solely because a small number of his or her pills are not kept in a labeled bottle, is entirely unreasonable. *See Poellinger*, 153 Wis. 2d at 507. The evidence presented at trial does not sufficiently support Keys’ conviction for illegal possession of a prescription drug.

By the Court.—Judgment affirmed in part and reversed in part; order reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

