[Cite as *State v. Miller,* 2011-Ohio-3600.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
		Nos. 10AP-1017
Plaintiff-Appellee,	:	(C.P.C. No. 09CR-12-7540)
		10AP-1018
v.	:	(C.P.C. No. 10CR-05-2984)
Niko C. Miller,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on July 21, 2010

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Niko C. Miller, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm that judgment.

Factual and Procedural Background

{¶2} On February 21, 2009, Columbus Police Officers Dwayne Mabry and Kevin George saw a car parked in a closed nightclub's parking lot. Officer Mabry saw three people in the car: a female driver, a male passenger, and a young baby in the backseat.

The male passenger, later identified as appellant, had his head down, so Officer Mabry approached the passenger side of the car and began to knock on the passenger side window. Appellant, who was holding what looked like a marijuana cigarette in one hand, saw the officer and tried to hide the cigarette under his seat. Officer Mabry yelled at him to stop.

{¶3} At this point, appellant rolled down his car window. Officer Mabry immediately smelled a strong odor of marijuana coming from the car. The officer asked appellant to get out of the car. Officer Mabry searched appellant and found a small baggie of marijuana, as well as almost $2,000 in cash. Officer Mabry placed appellant in his police cruiser and began to search the car. Officer Mabry's partner also removed the driver from the car. Behind appellant's seat, Officer Mabry found a large plastic bag filled with marijuana and a pantyhose that contained doses of Ecstasy. Subsequent testing confirmed that there were 375 grams of marijuana in the bag and almost 10 grams, seven unit doses, of Ecstasy in the pantyhose. Appellant told Officer Mabry that the drugs were not his, and that he was just transporting them for someone else.

{¶4} As a result of these events, a Franklin County grand jury indicted appellant with one count of possession of marijuana in violation of R.C. 2925.11 and one count of aggravated possession of drugs, also in violation of R.C. 2925.11. Appellant entered not guilty pleas to the charges and proceeded to a jury trial.

{¶5} At trial, Officer Mabry testified to the above version of events. Appellant, however, testified that he never told the officer that he was aware there were drugs in the car or that he was transporting the drugs for someone else. Instead, appellant denied

knowing there were drugs in the car and blamed other people who had been in the car earlier for putting the drugs there.

{¶6} The jury found appellant guilty of both counts, and the trial court sentenced him accordingly.[1]

{¶7} Appellant appeals and assigns the following errors:

> [I.] APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED UNDER THE STATE AND FEDERAL CONSTITUTIONS BECAUSE OF TRIAL COUNSEL'S FAILURE TO CHALLENGE THE UNLAWFUL POLICE SEARCH CONDUCTED IN VIOLATION OF THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 14, ARTICLE I OF THE OHIO CONSTITUTION.
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> [II.] THERE WAS INSUFFICENT COMPETENT CREDIBLE EVIDENCE TO SUPPORT THE JURY'S VERDICTS, THEREBY, DENYING APPELLANT DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS.
>
> [III.] THE GUILTY VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, THEREBY, DEPRIVING APPELLANT OF HIS DUE PROCESS PROTECTIONS UNDER THE STATE AND FEDERAL CONSTITUTIONS.

Second and Third Assignments of Error - Sufficiency and Manifest Weight of the Evidence

{¶8} Appellant contends in these assignments of error that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. We disagree.

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[1] His sentence in this case was to be served concurrently with his sentence in Case No. 10AP-1018, in which appellant pled guilty to one count of having a weapon while under disability. Although appellant did file a notice of appeal in that case, nothing in the briefing before this court relates to that conviction.

{¶9} Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally adequate to support a verdict. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. Whether the evidence is legally sufficient to support a verdict is a question of law. Id.

{¶10} In determining whether the evidence is legally sufficient to support a conviction, " ' the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶34 (quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus). A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484.

{¶11} In this inquiry, appellate courts do not assess whether the state's evidence is to be believed, but whether, if believed, the evidence admitted at trial supports the conviction. *State v. Yarbourgh*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79-80 (evaluation of witness credibility not proper on review for sufficiency of evidence); *State v. Bankston*, 10th Dist. No. 08AP-668, 2009-Ohio-754, ¶4 (noting that "in a sufficiency of the evidence review, an appellate court does not engage in a determination of witness credibility; rather, it essentially assumes the state's witnesses testified truthfully and determines if that testimony satisfies each element of the crime.").

{¶12} In order to be found guilty of either count of possession of drugs, the state had to prove beyond a reasonable doubt that appellant knowingly possessed the drugs. R.C. 2925.11.

{¶13} Possess, or possession, is defined 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 of a controlled substance may be actual or constructive. *State v. Burnett,* 10th Dist. No. 02AP-863, 2003-Ohio-1787, ¶19 (citing *State v. Mann* (1993), 93 Ohio App.3d 301, 308). A person has actual possession of an item when it is within his immediate physical control. Id. (citing *State v. Messer* (1995), 107 Ohio App.3d 51, 56). In the instant case, because the drugs were not found on appellant's person, the state was required to establish that appellant constructively possessed them. *Burnett* at ¶19.

{¶14} 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. Pilgrim,* 184 Ohio App.3d 675, 2009-Ohio-5357, ¶27 (citing *State v. Hankerson* (1982), 70 Ohio St.2d 87, syllabus). Although the mere presence of an individual in the vicinity of illegal drugs is insufficient to establish constructive possession, if the evidence demonstrates that the individual was able to exercise dominion or control over the drugs, he or she can be convicted of possession. *State v. Wyche,* 10th Dist. No. 05AP-649, 2006-Ohio-1531, ¶18; *Burnett* at ¶20. " 'All that is required for constructive possession is some measure of dominion or control over the

drugs in question, beyond mere access to them.' " *Burnett* (quoting *In re Farr* (Nov. 9, 1993), 10th Dist. No. 93AP-201).

{¶15} Circumstantial evidence alone may be sufficient to support the element of constructive possession. *Jenks* at 272-73; *State v. Alexander,* 8th Dist. No. 90509, 2009-Ohio-597, ¶25. Absent a defendant's admission, the surrounding facts and cir-circumstances, including the defendant's actions, constitute evidence from which the trier of fact can infer whether the defendant had constructive possession over the subject drugs. *State v. Norman,* 10th Dist. No. 03AP-298, 2003-Ohio-7038, ¶31; *State v. Baker,* 10th Dist. No. 02AP-627, 2003-Ohio-633, ¶23. Inherent in a finding of constructive possession is the determination that the defendant had knowledge of the drugs. *Alexander* at ¶23.

{¶16} Appellant contends the state failed to prove that he knowingly possessed the drugs found in the car. We disagree.

{¶17} First, and most important to this analysis, Officer Mabry testified that appellant told him that he knew the drugs were in the car but that he was only transporting them for a friend. This admission alone would support the conclusion that appellant knew the drugs were in the car and knowingly exercised dominion over them.

{¶18} Additionally, Officer Mabry testified that appellant was seated in the car's passenger seat. Officer Mabry found a large amount of marijuana and Ecstasy behind the passenger seat. (Tr. 24.) When a person is a passenger in a car in which drugs are within easy access, a trier of fact may find constructive possession. *State v. Reed*, 10th Dist. No. 09AP-84, 2009-Ohio-6900, ¶21 (passenger in car constructively possessed drugs found in trunk of car); *State v. Brittman* (Feb. 10, 1994), 10th Dist. No. 93AP-1005

(passenger in car knowingly possessed drugs found in car); *State v. Kelly* (Mar. 25, 1998), 9th Dist. No. 2670-M (defendant, who was passenger of car, knowingly possessed drugs found in trunk).

{¶19} Finally, in addition to the large amount of drugs found in the car, Officer Mabry found a large amount of cash on appellant. Both are circumstantial evidence that appellant constructively possessed the drugs in the car. *Reed* at ¶22 (citing *State v. Barbee,* 9th Dist. No. 07CA009183, 2008-Ohio-3587, ¶28) ("[T]he greater the amount of illegal drugs involved, the greater the likelihood that the defendant * * * [knew] the drugs were present."); *State v. Riley*, 9th Dist. No. 21852, 2004-Ohio-4880, ¶19 (noting that large amount of cash possessed by defendant is circumstantial evidence that defendant constructively possessed drugs).

{¶20} Viewing the totality of the evidence in a light most favorable to the state, the evidence is sufficient for reasonable minds to conclude that appellant knowingly possessed the drugs found in the car. Accordingly, appellant's convictions are supported by sufficient evidence.

{¶21} Appellant also contends that his convictions were against the manifest weight of the evidence. Again, we disagree.

{¶22} The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *Thompkins* at 387. Although there may be sufficient evidence to support a judgment, a court may nevertheless conclude that a judgment is against the manifest weight of the evidence. Id.

{¶23} When presented with a challenge to the manifest weight of the evidence, an appellate court may not merely substitute its view for that of the trier of fact, but must 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. Id. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " Id.; *State v. Strider–Williams,* 10th Dist. No. 10AP–334, 2010–Ohio–6179, ¶12.

{¶24} Appellant simply incorporates the same arguments he made in his sufficiency assignment of error to argue that his convictions are against the manifest weight of the evidence. Based on a review of the record, we find that the jury did not clearly lose its way so as to create a manifest miscarriage of justice. While appellant denied knowing the drugs were in the car at trial, Officer Mabry testified that appellant told him that he knew the drugs were in the car. Given the conflicting testimony, this is not the exceptional case in which the evidence weighs heavily against the convictions. Accordingly, appellant's convictions are not against the manifest weight of the evidence.

{¶25} Because appellant's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence, we overrule appellant's second and third assignments of error.

First Assignment of Error - Ineffective Assistance of Counsel

{¶26} Appellant contends in this assignment of error that he received ineffective assistance of trial counsel. Specifically, he contends that he received deficient representation because trial counsel failed to file a motion to suppress the evidence obtained from the officer's search of his car. We disagree.

{¶27} To establish a claim of ineffective assistance of counsel, appellant must show that counsel's performance was deficient and that counsel's deficient performance prejudiced him. *State v. Jackson*, 107 Ohio St.3d 53, 2005-Ohio-5981, ¶133 (citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064). The failure to make either showing defeats a claim of ineffective assistance of counsel. *State v. Bradley* (1989), 42 Ohio St.3d 136, 143 (quoting *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069) ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

{¶28} In order to show counsel's performance was deficient, the appellant must prove that counsel's performance fell below an objective standard of reasonable representation. *Jackson* at ¶133. The appellant must overcome the strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065. To show prejudice, the appellant must establish that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶204.

{¶29} Failure to file a suppression motion does not constitute per se ineffective assistance of counsel. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448 (citing

Kimmelman v. Morrison (1986), 477 U.S. 365, 384, 106 S.Ct. 2574, 2587). Failure to file a motion to suppress constitutes ineffective assistance of counsel only if, based on the record, the motion would have been granted. *State v. Beavers*, 10th Dist. No. 08AP-1070, 2009-Ohio-4214, ¶11; *State v. Lee,* 10th Dist. No. 06AP-226, 2007-Ohio-1594, ¶12 (citing *State v. Robinson* (1996), 108 Ohio App.3d 428).

{¶30} Appellant argues that his continued detention and the officers' search of the car were unlawful because they were based only on his possession of a small amount of marijuana that would only constitute a minor misdemeanor offense. Appellant contends that under Ohio law, a police officer may stop and detain someone for a minor misdemeanor offense, but the officer is not allowed to arrest that person and conduct a search incident to that arrest. Although these are correct statements of law, they are not relevant to the legal resolution of this assignment of error because the minor misdemeanor offense was not the basis for Officer Mabry's search of the car or appellant's continued detention.

{¶31} Here, Officer Mabry testified that he smelled the odor of marijuana when appellant opened his window. (Tr. at 22.) Because of the smell, the officer asked appellant to get out of the car. Officer Mabry detained appellant while he searched the car for drugs and weapons. "[T]he smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to conduct a search." *State v. Moore*, 90 Ohio St.3d 47, 53, 2000-Ohio-10; *State v. Coston*, 168 Ohio App.3d 278, 2006-Ohio-3961, ¶24 (probable cause to search car upon detecting odor of marijuana from car). Officer Mabry testified regarding his prior experience with drugs, including over 1,000 felony drug arrests in his career.

{¶32} Based on the smell of marijuana coming from the interior of the car, Officer Mabry had probable cause to search the car. *Moore*. Accordingly, the search was lawful, and a motion to suppress evidence obtained from that search would not have been granted. Accordingly, appellant cannot demonstrate ineffective assistance of counsel. Appellant's first assignment of error is overruled.

{¶33} In conclusion, we overrule appellant's three assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and CONNOR, JJ., concur.