

[Cite as *State v. Byrd*, 2010-Ohio-2128.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

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STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23323
vs.	:	T.C. CASE NO. 2008-CR-794
	:	(Criminal Appeal from
CLIFFORD BYRD	:	Common Pleas Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 14<sup>th</sup> day of May, 2010.

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GRADY, J.:

{¶ 1} Defendant, Clifford Byrd, appeals from his conviction and sentence for possession of crack cocaine.

{¶ 2} In the early morning of February 16, 2008, Defendant's car struck a light pole on Melba Street in Dayton. A security

guard at a nearby apartment complex called his dispatch about the incident. The dispatch then called the City of Dayton Police Department to report the incident. Dayton Police Officer Robert Simison arrived at the scene shortly thereafter and approached Defendant's vehicle. Defendant was alone in the car and appeared to be sleeping.

{¶3} Officer Simison knocked on the driver's side window of Defendant's car and asked Defendant to step out of the car, which he did. He asked Defendant for identification, but Defendant did not have any. Officer Simison then asked Defendant to turn around and put his hands on the vehicle so that he could be patted down for officer safety.

{¶4} Before turning around, Defendant put his hands into his pockets. Officer Simison asked Defendant to take his hands out of his pockets. Defendant took his hands out of his pockets quickly and lunged forward with his arms on top of the car, making a throwing motion. Officer Simison grabbed Defendant by his pants in order to pull him back down off of the car. He then conducted a pat down for weapons.

{¶5} Dayton Police Officer Dickey arrived at the scene as Defendant was getting out of his car. After checking damage to the light pole, Officer Dickey walked around the car and found a plastic baggie containing crack cocaine sitting on the windshield

wipers on the passenger side of the car. Defendant was arrested for possession of crack cocaine.

{¶ 6} On March 19, 2008, Defendant was charged by indictment with one count of possession of crack cocaine in an amount that equaled or exceeded ten grams but was less than twenty-five grams, in violation of R.C. 2925.11(A). Defendant filed a motion to suppress all evidence obtained from Defendant, which the trial court overruled. After a jury trial, Defendant was found guilty as charged in the indictment. The trial court sentenced Defendant to three years in prison. Defendant filed a timely notice of appeal.

FIRST ASSIGNMENT OF ERROR

{¶ 7} "THE TRIAL COURT ERRED IN DENYING DEFENDANT'S RULE 29 MOTION. THE STATE'S EVIDENCE WAS NOT SUFFICIENT TO JUSTIFY DENIAL OF THE MOTION."

SECOND ASSIGNMENT OF ERROR

{¶ 8} "APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND THE TRIAL COURT'S DECISION SHOULD BE REVERSED."

{¶ 9} When considering a Crim.R. 29 motion for acquittal, the trial court must construe the evidence in a light most favorable to the State and determine whether reasonable minds could reach different conclusions on whether the evidence proves each element of the offense charged beyond a reasonable doubt. *State v.*

*Bridgeman* (1978), 55 Ohio St.2d 261. The motion will be granted only when reasonable minds could only conclude that the evidence fails to prove all of the elements of the offense. *State v. Miles* (1996), 114 Ohio App.3d 738.

{¶ 10} A Crim.R. 29 motion challenges the legal sufficiency of the evidence. A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380. The proper test to apply to appellate review of the denial of a Crim.R. 29 motion is set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶ 11} "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."

{¶ 12} Defendant argues that the trial court erred in overruling his Crim.R. 29 motion for acquittal based upon insufficient

evidence, because the evidence presented at trial fails to demonstrate that he knowingly possessed the crack cocaine police found in a baggie on the windshield wipers of his car.

{¶ 13} To prove the violation of R.C. 2925.11(A) charged, the State was required to prove beyond a reasonable doubt that Defendant knowingly possessed the plastic baggie that police found containing crack cocaine. "Knowingly" is defined in R.C. 2901.22(B):

{¶ 14} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 15} "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).

{¶ 16} The issue is not whether Defendant had constructive possession of the crack cocaine because he had dominion or control over the crack cocaine when it was found. Neither is the issue whether the access to the crack cocaine that Defendant had where it was found was insufficient to infer his possession of it. Rather, the issue is whether, from the totality of the

circumstantial evidence, the trier of fact could find, beyond a reasonable doubt, that Defendant had possessed the crack cocaine before police found it.

{¶ 17} There is no direct eyewitness testimony that the baggie of crack cocaine was found in Defendant's pocket or that the baggie was seen in Defendant's hand prior to its being discovered on the windshield wipers of Defendant's car. But circumstantial evidence and direct evidence possess the same probative value, *Jenks*, and from the evidence presented the trier of facts could reasonably infer that Defendant knowingly possessed the baggie of crack cocaine and then threw it onto the windshield of Defendant's car when Office Simison was preparing to pat down Defendant for weapons.

{¶ 18} Officer Simison testified that Defendant reached into his pockets and made an "extremely exaggerated" lunge onto the top of his car and a throwing motion. Officer Simison did not see what Defendant threw, but Officer Dickey shortly thereafter discovered the baggie of crack cocaine on the windshield wipers of Defendant's car. Viewing this evidence in a light most favorable to the State, as we must, we conclude that a rational trier of facts could find all of the essential elements of possession of crack cocaine proven beyond a reasonable doubt. Therefore, Defendant's conviction is supported by legally sufficient evidence.

{¶ 19} A weight of the evidence argument challenges the believability of the evidence in relation to the reasonable doubt standard, and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563, unreported.

The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 20} "The court, reviewing 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 lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *Thompkins*.

{¶ 21} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. In *State v. Lawson* (Aug. 22, 1997), Montgomery App.No. 16288, we observed:

{¶ 22} "Because the factfinder . . . has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what

extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness."

{¶ 23} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 24} In arguing that his conviction is against the manifest weight of the evidence, Defendant claims that there was no evidence of possession in this case because there was no testimony or evidence that Defendant had the baggie of crack cocaine on his person or in his control, only that the baggie was found on the windshield wipers of his car. We do not agree.

{¶ 25} From the combination of direct and circumstantial evidence in this case, the trier of facts could reasonably infer that Defendant knowingly possessed the plastic baggie of crack cocaine in his pocket and then threw the baggie onto the windshield wipers of his car when he made the exaggerated lunging and throwing motion in front of Officer Simison. It would be more speculative than logical to conclude that someone else who was never identified at the scene had thrown or left the baggie of crack cocaine on the windshield wipers of Defendant's car. The trier of facts did

not lose its way in choosing to believe the State's version of these events rather than Defendant's version, which it had a right to do. *State v. DeHass* (1967), 10 Ohio St.2d 230.

{¶ 26} Reviewing the record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trier of facts lost its way in choosing to believe the State's witnesses, or that a manifest miscarriage of justice occurred. Defendant's conviction for possession of crack cocaine is not against the manifest weight of the evidence.

{¶ 27} Defendant's first and second assignments of error are overruled. The judgment of the trial court will be affirmed.

BROGAN, J. and FROELICH, J. concur.

Copies mailed to:

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