

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio

Court of Appeals No. L-09-1058

Appellee

Trial Court No. CR0200803187

v.

Jeffrey K. Joyner

DECISION AND JUDGMENT

Appellant

Decided: June 18, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Claudia A. Ford, Assistant Prosecuting Attorney, for appellee.

John F. Potts, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which convicted appellant of one count of cocaine possession in violation of R.C.

2925.11(A) and (C)(4)(a), a felony of the fifth degree. For reasons set below, this court reverses the judgment of the trial court.

{¶ 2} Appellant, Jeffery K. Joyner, sets forth the following single assignment of error:

{¶ 3} "ASSIGNMENT OF ERROR. The conviction of appellant on count one is not supported by sufficient evidence and is against the manifest weight of evidence."

{¶ 4} The following undisputed facts are relevant to the issues raised on appeal. On February 5, 2009, the Toledo Police Department Vice Division executed a "no-knock" search warrant at a residence located in Toledo, Lucas County, Ohio. Prior to the search, officers received information from an anonymous source regarding illicit drug trafficking. Based on this information, the residence was put under surveillance. In conjunction with the surveillance, the investigating officers facilitated a controlled purchase of narcotics from the premises, utilizing a confidential informant. The record contained no evidence of a connection between the controlled purchase and appellant.

{¶ 5} When the warrant was executed and the premises entered, officers recovered small amounts of what was subsequently determined to be cocaine on a plate in the living room. In addition, a woman was standing in the living room. Appellant was present inside the home, on the stairwell leading down to the living room, at the time police entered.

{¶ 6} In the course of securing the premises, officers searched appellant's person. No illicit narcotics or contraband were recovered from appellant's person. Appellant's driver's license reflected a different address from the premises being searched. None of the mail recovered was addressed to appellant. No utilities were registered in appellant's name. The premises were not owned or leased by appellant.

{¶ 7} On January 19, 2009, appellant waived the right to jury trial and the case proceeded to a bench trial. Appellant was convicted of possession of cocaine, a felony of the fifth degree. Appellant was sentenced to a 12-month term of incarceration. The term of incarceration was suspended and the appellant was placed under community control for 24 months. Timely notice of appeal was filed.

{¶ 8} At the outset, we note that R.C. 2925.01(L) defines possession as follows:

{¶ 9} "'Possess' or 'possession' means 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."

{¶ 10} In his single assignment of error, appellant asserts that the conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. The underlying inquiry to assess sufficiency of evidence is whether a rational trier-of-fact could have established the elements of the offense beyond all reasonable doubt. *State v. Wilson*, 8th Dist. No. 84593, 2005-Ohio-511. In determining whether a judgment was against the manifest weight of evidence, an appellate court "weighs the evidence and all

reasonable inferences, and considers the credibility of witnesses." *State v. Tompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. The court then sits as a "thirteenth juror" and determines whether the factfinder lost its way, resulting in a manifest miscarriage of justice, such that the conviction must be reversed. *Id.*

{¶ 11} Appellant asserts that the location of the cocaine was of such a distance from him that he could not have been in possession of it. Appellant cites the case of *State v. Richardson* (June 2, 1994), 5th Dist. No. 93-CA-44/45 in support of his assertion that his mere presence in proximity to the cocaine is insufficient to result in a conviction. In *State v. Richardson*, police officers discovered cocaine floating in a toilet bowl of the bathroom at defendants' house. *Id.* In addition to the cocaine, officers found in the bathroom a \$50 dollar bill, police scanner, pager, and razor blades without razors. *Id.* In that case, the 5th District reasoned that although defendants owned the premises where the cocaine was found, solicited four previous controlled purchases with authorities, and were found within three feet of the contraband recovered, the evidence did not adequately address whether defendants were in possession of the narcotics found in the toilet. Likewise, in this case, there is insufficient evidence to support a factual determination that appellant was in possession of the cocaine on the plate within the meaning of the statute.

{¶ 12} No illicit narcotics or contraband were found on appellant's person. No evidence demonstrated that persons entering the premises purchased narcotics from

appellant. Appellant was further away in proximity from the cocaine than defendants were described in *Richardson*.

{¶ 13} The mere presence of appellant in the residence where illegal drugs were found is, without more, insufficient to establish constructive possession. *Cincinnati v. McCartney* (1971), 30 Ohio App. 2d 45. Appellant's presence on a stairwell does not establish dominion and control over a place in the living room to the extent that possession is defined in R.C. 2925.01(L). Wherefore, we find appellant's assignment of error well-taken.

{¶ 14} The judgment of the Lucas County Court of Common Pleas is reversed. Appellee is ordered to pay the costs of appeal pursuant to App.R. 24.

JUDGMENT REVERSED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.

JUDGE

Thomas J. Osowik, P.J.
CONCUR.

JUDGE

<p>This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: http://www.sconet.state.oh.us/rod/newpdf/?source=6.</p>
