[Cite as *State v. Brown*, 2012-Ohio-387.]

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

State of Ohio — Court of Appeals No. WD-10-078

Appellee — Trial Court No. 2009CR0332

v.

Chad Brown — **DECISION AND JUDGMENT**

Appellant — Decided: February 3, 2012

* * * * *

Paul Dobson, Wood County Prosecuting Attorney, and
Aaron Lindsey, Assistant Prosecuting Attorney, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶1} Chad Brown appeals a November 16, 2010 judgment of the Wood County Court of Common Pleas, entered after a jury trial. The judgment convicted Brown of receiving stolen property (a violation of R.C. 2913.51(A)) with specification and

sentenced him to imprisonment for 11 months. The jury trial proceeded in September 2010. In addition to finding appellant guilty of the receiving stolen property charge, the jury returned not guilty verdicts on charges of breaking and entering (a violation of R.C. 2911.13(A)) and theft (a violation of R.C. 2913.02(A)(1)).

{¶2} It was undisputed at trial that there was a break-in over the 2009 Memorial Day weekend at Dayton Freight Lines in Perrysburg, Ohio. Items stolen in the break-in included 15 cases of Promethazine Hydrochloride and Codeine Phosphate Syrup with an estimated street value of $100 to $115 per bottle. Codeine is a narcotic and a controlled substance.

{¶3} After the break-in at Dayton Freight Lines, police authorities in Wood and Henry Counties, Ohio, conducted a cooperative undercover operation to make an illegal drug buy of promethazine with codeine syrup. The objective was to buy drugs stolen from Dayton Freight to aid in investigation of the theft of the drugs.

{¶4} The plan was for the undercover informant to purchase the syrup from Alan Schiffler, a suspect. Schiffler was to deliver the drugs to the informant in Napoleon, Henry County, Ohio. On June 5, 2009, Detectives Moskowitz and Curtis of the Perrysburg Township Police Department placed Schiffler's residence at 1809 Broadway in Toledo under surveillance. Once surveillance was established, the detectives contacted Detective Schultheis of the Henry County Sheriff's Office to have the confidential informant proceed with the purchase from Schiffler.

{¶5} Moskowitz and Curtis continued the surveillance and observed Schiffler come out of his residence carrying a box and placing the box inside the rear cargo door of a Jeep Cherokee SUV. Perrysburg and Maumee police covered the two expected routes from Schiffler's residence to Napoleon. Schiffler, however, did not proceed directly to Napoleon. He drove a short distance to appellant's house instead.

{¶6} Detective Moskowitz testified that Schiffler's stop at appellant's house was unexpected, out of the blue. The drug buy was understood to be between Schiffler and the undercover informant.

{¶7} Detective Moskowitz testified that he and Detective Curtis together followed Schiffler's Jeep for a few blocks once he left his residence, starting about two to three cars behind. They passed Schiffler after Schiffler turned onto another street and then stopped and parked at appellant's residence. To avoid detection the detectives did not stop at the residence but continued by the house and around the block. They stopped at a place where they could see the street where they expected the Jeep to pass once Schiffler continued on to Napoleon.

{¶8} Detective Moskowitz testified that as they passed Schiffler's vehicle, he saw appellant walking from the residence and Schiffler standing behind the Jeep parked there. According to Detective Curtis, as they passed Schiffler, the rear cargo door of the Jeep was open and both Schiffler and Brown were standing at the back end of the vehicle.

{¶9} According to Detective Curtis, they were only able to observe Brown as they passed by the Jeep on Walbridge. Due to where they stopped afterwards, Curtis stated "I couldn't see or tell you what they did from the time we had passed them at that driveway to when they passed us on South Avenue. I can't tell you."

{¶10} Detective Curtis estimated that five minutes or less passed before Schiffler and Brown subsequently drove past them on the way to Interstate 75. Detective Moskowitz estimated that they waited three to four minutes before Schiffler and Brown passed. When the Jeep did pass the detectives, Schiffler was driving the vehicle. Brown was the front seat passenger. The detectives followed. Perrysburg police made a planned stop of the vehicle at the exit ramp for State Route 795 from southbound Interstate 75.

{¶11} Police searched the vehicle before it was towed from the scene. Police found one empty cardboard box and another cardboard box with 12 bottles of the promethazine with codeine syrup located at the rear cargo area of the Jeep. The cardboard box containing the syrup held individually boxed bottles of syrup. The box and its contents were placed in evidence at trial.

{¶12} The box and another empty box were the only objects found at the back of the Jeep after the vehicle was stopped. There were labels on two sides of the box. One label was a shipping label identifying the contents were drugs and that the box was shipped to Walgreens-Perrysburg on Oregon Road in Perrysburg, Ohio. The other label identified the contents were from Hi-Tech Pharmacal and were Promethazine HCL

w/COD. PHOS 473 ML. The label also identified quantity (12), expiration date, lot number and an NDC number. A third side of the box was imprinted in large print with "Hitech Pharmacol Co. Inc." The remaining side of the box was blank, containing no printing or label.

{¶13} Bill Nieset, the service center manager for Dayton Freight Lines at their Perrysburg, Ohio facility, testified at trial that markings on the box establish that the box was carton number 49 of 51 cartons and that it is one of the cartons taken from the Dayton Freight Lines facility during the break-in on Memorial Day weekend in 2009. Mr. Nieset testified that the contents of the box were bottles of promethazine identical in nature to those taken from the Dayton Freight Lines warehouse in the theft.

{¶14} Appellant asserts two assignments of error on appeal:

Assignment of Error I

> The trial court erred and thereby deprived Appellant of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and comparable provisions of the Ohio Constitution by overruling Appellant's Crim.R. 29 motion for judgment of acquittal, as the prosecution failed to offer sufficient evidence to prove beyond a reasonable doubt each and every element of the offense of receiving stolen property.

Assignment of Error II

> The trial court erred and thereby deprived Appellant of due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and comparable provisions of the Ohio Constitution by finding Appellant guilty, as the verdict for receiving stolen property was against the manifest weight of the evidence.

{¶15} Under the first assignment of error, appellant argues that the trial court erred in failing to grant appellant's Crim.R. 29 motion for an acquittal at trial due to insufficiency of the evidence to support a conviction for receiving stolen property. Such a motion is made under Crim.R. 29(A) and is treated on appeal under the same standard that is applied to claims challenging the sufficiency of the evidence to support a conviction. *State v. Witcher*, 6th Dist. No. L-06-1039, 2007-Ohio-3960, ¶ 20.

{¶16} A challenge to a conviction based upon a claim of insufficiency of the evidence presents a question of law on whether the evidence at trial is legally adequate to support a jury verdict on all elements of a crime. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). An appellate court does not weigh credibility when reviewing the sufficiency of evidence to support a verdict. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. A reviewing court considers whether the evidence at trial "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." *Id.*

{¶17} The elements of the offense of receiving stolen property are provided in R.C. 2913.51. R.C. 2913.51(A) provides: "(A) No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense."

{¶18} Appellant argues that the evidence at trial demonstrated merely that he was a passenger in Schiffler's car and that the state failed to prove that he received or was in possession of the codeine syrup. The state argues that constructive possession of the drugs by appellant is supported by circumstantial evidence.

> Actual physical possession of stolen property is not a requisite of the offense of receiving stolen property. A conviction may be based on the accused's constructive possession of the property. Constructive possession exists when an individual exercises dominion and control over an object, even though that object may not be within his immediate physical possession. *State v. Wolery* (1976), 46 Ohio St.2d 316, 348 N.E.2d 351. *State v. Rodriguez*, 6th Dist. No. WD-05-026, 2006-Ohio-2121, ¶ 38.

{¶19} The state argues that the evidence at trial demonstrated that Brown and Schiffler met for five minutes outside his residence at the open rear of the Jeep near the

box of narcotics. The state argues that labeling on the box was conspicuous and provided notice that the box contained narcotics. Under the state's argument, the immediacy of the event and the directness of the route to the drug buy also reflected knowledge of the narcotics' illegal nature.

{¶20} The evidence at trial was that Detectives Moskowitz and Curtis observed appellant approaching the Jeep or standing behind it only momentarily, as they drove by while maintaining surveillance on Schiffler. To avoid detection, Moskowitz and Curtis drove by appellant's residence and then waited out of sight for an estimated three, four, or five minutes. The detectives were unable to observe Schiffler and appellant during the period they waited.

{¶21} Moskowitz testified that when they drove by he saw appellant walking towards the rear of the Jeep. Curtis testified that he saw appellant exit a house and meet Schiffler at the back end of the Jeep with the rear cargo door open. Neither detective testified that he saw appellant handle or inspect the box. Although the box contained labeling, there was no evidence at trial as to whether a side of the box that included labeling faced the rear of the Jeep.

{¶22} The timing of events gave clear evidence as to Schiffler's involvement in sale of the drugs. After surveillance was established at his residence and instructions given for the confidential informant to contact Schiffler to make the buy, Schiffler exited his house with the box of drugs. He placed the drugs in the Jeep and left. When he was

stopped by police, he was using one of the two expected routes to drive to Napoleon, where delivery of the drugs was to be made and sale completed. Certainly the immediacy of the events and the route taken to the planned drug buy was evidence of Schiffler's active involvement in sale of the drugs at the time.

{¶23} The stop at appellant's residence was unexpected by police. The drug transaction was understood to be between Schiffler and the confidential informant. In our view, the length of time that appellant traveled as a passenger in the vehicle was too short to present circumstantial evidence that appellant was an active participant in the sale and thereby held constructive possession of the drugs. The vehicle was stopped in a Toledo suburb, a short distance from appellant's residence, not even remotely close to the place of intended delivery—Napoleon. There was no direct evidence at trial of appellant's intended destination or purpose for riding with Schiffler.

{¶24} The state also asserts that appellant was tied to the theft through his brother-in-law, Carl Beaty. The evidence at trial was that entry to the Dayton Freight Lines facility was limited. The front gates were locked with a chain and combination lock. Security procedures required use of access codes to gain entry through the dock door. The evidence demonstrated that the persons who stole the merchandise gained access to the facility through use of the security codes for the gates and door.

{¶25} The evidence at trial was that Carl Beaty had worked at Dayton Freight Lines as a dockworker at the facility and had knowledge of the security codes, of where

valuables were kept at the facility, and of work schedules. However, the service center manager for Dayton Freight testified that there were 25 dockworkers employed at any given time by the company at the facility with such knowledge. On any given night 50 drivers would gain entry to the docks through use of the codes.

{¶26} Furthermore, appellant was acquitted by jury verdicts in this case of charges of breaking and entering and theft arising from the theft of the drugs from Dayton Freight.

{¶27} Construing the evidence most favorably to the state, we conclude that the evidence at trial was insufficient to convict appellant of the offense of receiving stolen property and that the trial court erred in failing to grant appellant's Crim.R. 29 motion for acquittal on that ground. On that basis we find Assignment of Error No. 1 well-taken.

{¶28} We do not consider Assignment of Error No. 2 on the issue of whether the verdict convicting appellant of the offense is also against the manifest weight of the evidence as the issue is moot. *See* App.R. 12(A)(1)(c).

{¶29} We reverse the judgment of the Wood County Court of Common Pleas with respect to the conviction and sentence of appellant for the offense of receiving stolen property. We order the trial court to take all steps necessary to secure the immediate release of appellant from incarceration due to the conviction. Pursuant to App.R. 24, the state is ordered to pay the costs of this appeal.

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, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE