

[Cite as *State v. Johnson*, 2004-Ohio-511.]

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT  
COUNTY OF CUYAHOGA  
NO. 82946

STATE OF OHIO

Plaintiff-Appellee :

**VS.**

ARCHIE JOHNSON

Defendant-Appellant

## JOURNAL ENTRY

and

## OPINION

DATE OF ANNOUNCEMENT  
OF DECISION:

February 5, 2004

CHARACTER OF PROCEEDING:

Criminal appeal from  
Court of Common Pleas  
Case No. CR-430178

**JUDGMENT:**

AFFIRMED

DATE OF JOURNALIZATION: \_\_\_\_\_

APPEARANCES:

For Plaintiff-Appellee:

WILLIAM D. MASON  
Cuyahoga County Prosecutor  
PATRICK J. LAVELLE, Assistant  
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Cleveland, Ohio 44113

For Defendant-Appellant:

ROBERT L. TOBIK  
Cuyahoga County Public Defender  
PATRICIA KOCH WINDHAM, Assistant  
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COLLEEN CONWAY COONEY, J.

{¶1} Defendant-appellant Archie Johnson (“Johnson”) appeals his conviction for possession of drugs. Finding no merit to this appeal, we affirm.

{¶2} In November 2002, Johnson was indicted for possession of drugs, possession of criminal tools, and tampering with evidence. The case proceeded to a jury trial in March 2003, where the following evidence was presented.

{¶3} On September 2, 2002, at approximately 3:30 p.m., Cleveland Police Strike Force Detectives Farid Alim, Bruce Kotnik, and Michael Myer were patrolling the area of East 105<sup>th</sup> Street and Gooding Avenue in an unmarked police vehicle. They were assigned to the area based on reported drug activity.

{¶4} Det. Alim testified that he observed Johnson and another male, later identified as Devin Hall, standing in front of a convenience store and motioning to passing cars. He explained that the two men would make a circling motion when a car slowed. The detectives observed Hall enter the passenger side of one car that stopped in response to the men's motioning. Det. Alim stated that the car drove once around the block and then dropped off Hall in front of the convenience store, at which point, Hall and Johnson engaged in a hand-to-hand transaction. Based on his thirteen years' experience with the Cleveland police strike force, Det. Alim opined that such behavior was consistent with drug activity.

{¶5} In response, the detectives drove around the block to further observe Johnson and Hall for approximately 15 minutes. As Det. Kotnik parked in front of the store, the detectives observed Johnson walk rapidly into the store. Det. Kotnik followed Johnson and Det. Alim apprehended Hall as he entered the store.

{¶6} Det. Kotnik testified that as he entered the store, he was closely watching Johnson's hands for a possible weapon. He saw Johnson standing at the counter and observed him as he made a subtle "flip," discarding something in his hand. Det. Kotnik apprehended Johnson and retrieved a plastic baggie containing crack cocaine.

{¶7} Det. Alim testified that he grabbed Hall immediately upon his entrance into the store, and Hall never made any throwing motions. Det. Myer testified that in the course of patting-down Johnson and Hall, he discovered \$100 on Hall and \$21 on Johnson.

{¶8} At the close of the State's case, Johnson moved for an acquittal of all the charges, pursuant to Crim.R. 29. The trial court granted the motion as to the charge of tampering with evidence but denied it as to the remaining charges.

{¶9} Johnson testified in his own defense, stating that the crack cocaine was not his nor had he ever possessed it. He claimed that he walked to the convenience store to purchase some juice, "swishers,"<sup>1</sup> and marijuana for himself and his friends. He coincidentally met Hall while walking to the convenience store and noticed that Hall was carrying a bag of three "stones" of crack cocaine. When they reached the store, Johnson stated he waited outside the store for approximately 15 to 20 minutes. While waiting to buy marijuana, Johnson testified that he and Hall were "hanging out," talking in front of the store.

{¶10} After buying the marijuana, Johnson entered the store to buy juice and swishers. Upon exiting the store, he remembered he also wanted to buy one "Black and

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<sup>1</sup> Johnson explained that "swishers" are cigars used to make "blunts" by removing the tobacco from the cigar and replacing it with marijuana.

Mild”<sup>2</sup> cigar, so he handed the bag with his purchases to Hall and returned inside the store.

Johnson further testified that while standing at the counter, preparing to pay for the one “Black and Mild,” an officer grabbed him. At the time the officer entered the store, Johnson stated he was pulling money out of his pocket while, simultaneously, he saw Hall throw the baggie of crack cocaine into the store.

{¶11} Johnson denied motioning to cars and denied that Hall ever got into a car and drove around the block. Johnson further denied seeing the police detectives approach the store when he went back inside to purchase his “Black and Mild.”

{¶12} Devin Hall claimed that he threw the bag of crack cocaine when the police arrived at the store. He testified that when he saw the police approach, he hid behind a “little brick ledge” and threw the bag onto a ledge outside the front door. Although he was not sure how the bag landed inside the store, he speculated that because there were cracks in the ledge, the bag could have fallen, ultimately landing on the floor inside.

{¶13} On cross-examination, Hall acknowledged that he is a good friend of Johnson and Johnson’s brothers. He further stated that despite having \$100 in his pocket, he had not made any drug sales that day. Contrary to the testimony of the detectives and

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<sup>2</sup>Johnson distinguished a Black and Mild cigar as a quality cigar commonly used as a “chaser” after smoking marijuana, as compared to the lesser quality cigars used for making “blunts.”

Johnson, Hall stated that he and Johnson were outside the front of the store for only a minute and a half before Johnson went inside the store. Additionally, Hall stated that he met Johnson in front of the store, contradicting Johnson's statement that they met while walking to the store.

{¶14} The jury found Johnson not guilty of possession of criminal tools but guilty of possession of drugs. The trial court sentenced him to six months in prison. Johnson appeals, raising one assignment of error.

#### Manifest Weight of the Evidence

{¶15} In his sole assignment of error, Johnson contends that the jury's verdict finding him guilty of drug possession is against the manifest weight of the evidence. Specifically, he argues that his testimony combined with Hall's testimony overwhelmingly demonstrates that he did not possess any drugs.

{¶16} In evaluating a challenge to the verdict based on manifest weight of the evidence, a court sits as the thirteenth juror, and intrudes its judgment into proceedings which it finds to be fatally flawed through misrepresentation or misapplication of the evidence by a jury which has "lost its way." *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. As the Ohio Supreme Court declared:

**"Weight of the evidence concerns 'the inclination of the greater amount of credible evidence offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the**

**burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.’ \* \* \***

**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 clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” Id. at 387.**

{¶17} Upon review of the evidence presented at the trial, this court cannot find that the jury clearly lost its way when it found Johnson guilty of possession of drugs.

{¶18} R.C. 2925.01 defines possession 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.” Possession may be actual or constructive. *State v. Haynes* (1971), 25 Ohio St.2d 264; *State v. Hankerson* (1982), 70 Ohio St.2d 87, syllabus.

{¶19} In the instant case, Det. Kotnik testified that he observed Johnson “flip” the bag of crack cocaine from his hand. Likewise, Det. Alim testified that Hall never threw any bag. Although both Johnson and Hall testified that Hall possessed the crack cocaine and that Hall threw the bag, the jury obviously found the detectives’ testimony more credible.

{¶20} Moreover, given the inconsistencies between the testimony of Hall and Johnson, we cannot find that the jury clearly lost its way in finding Johnson guilty of possessing the crack cocaine. Johnson stated that he and Hall were outside the store talking for approximately fifteen minutes, whereas Hall indicated that they were outside the store for less than two minutes. Johnson claimed that Hall walked to the store with him, while Hall testified that they met at the store.

{¶21} Additionally, Johnson and Hall repeatedly contradicted themselves. Johnson initially indicated that he brought \$25 from home but when questioned as to how he bought the marijuana, he recanted his earlier testimony, stating he had \$30. Likewise, both Johnson and Hall claimed that Hall had not sold any drugs that day, but Det. Myer found \$100 on Hall. Additionally, Hall testified that he threw the baggie of crack cocaine to the outside ledge; however, it is undisputed that the baggie was discovered on the floor inside the store. Finally, considering Hall's friendship with Johnson, the jury could reasonably find his testimony less credible.

{¶22} Accordingly, after reviewing the record, weighing the evidence, and considering the credibility of the witnesses, we cannot say that the jury clearly lost its way. We find substantial, competent, credible evidence to support the jury's verdict.

{¶23} The sole assignment of error is overruled.

{¶24} The judgment is affirmed.



Judgment affirmed.

PATRICIA ANN BLACKMON, P.J., and TIMOTHY E. McMONAGLE, J. , concur.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

COLLEEN CONWAY COONEY JUDGE

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc. App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct.Prac.R. II, Section 2(A)(1).