[Cite as *State v. Edwards*, 2009-Ohio-4365.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91841

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ROBERT EDWARDS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART;
REVERSED AND REMANDED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-494692

BEFORE: McMonagle, P.J., Stewart, J., and Dyke, J.

RELEASED: August 27, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B)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(C) 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(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant Robert Edwards was convicted after a bench trial of drug trafficking, drug possession, and possessing criminal tools. He contends on appeal that the evidence was insufficient to support his convictions. He also contends that he should not have been convicted of both drug trafficking and drug possession, as they are allied offenses of similar import. We affirm the convictions for drug possession, but reverse and remand with instructions to the trial court to vacate the convictions for drug trafficking and possession of criminal tools. Consequently, any argument about allied offenses is moot.

I

{¶ 2} In late February 2007, Cleveland Heights police investigator Chris Skok received information from a male in custody that a man he knew only as "E" was selling drugs at 3403 Altamont Avenue in Cleveland Heights. The tipster reported that people were both buying and using drugs in the house.[1]

{¶ 3} During the first week of March 2007, Skok conducted surveillance of the house. During the first surveillance, while parked in front of the house

[1]We consider this information as relevant to the issue of probable cause only; as to proof of the crime, it is clearly inadmissible as hearsay.

at approximately 8:15 a.m., Skok saw a male inside the house come to the front door. The man looked at Skok, made eye contact with him, and after approximately 30 seconds shut the door. Skok testified that he got a "clear view" of the man's face; when Skok subsequently helped execute a search warrant at the house, he recognized Edwards as the man he had seen in the door. On at least three other occasions that week, while parked outside the house in an undercover vehicle shortly after midnight, Skok observed numerous men and women enter the house, stay for a period of time and then leave.

{¶ 4} Skok subsequently learned that the house contained two apartments; the first-floor tenant was Wanda Alexander, a drug addict with previous drug convictions, and the upstairs unit was not occupied. Skok and Cleveland Heights police Sgt. Martin Lentz then "pulled" Alexander's trash. They found numerous "tear-offs," i.e., remnants of plastic baggies used to package drugs that contained a white powdery residue that tested positive for cocaine. They also found 12 or 13 Bic lighters from which the metal guards had been removed; according to Skok, removing the guards produces a bigger flame for smoking crack cocaine. They also found mail addressed to Alexander.

{¶ 5} Skok then obtained a search warrant, which he, Lentz, and several other Cleveland Heights police officers executed on March 7, 2007,

shortly after midnight. When the officers entered the home, Alexander was sitting on the couch in the living room. Edwards was standing barefoot between the living and dining rooms.

{¶ 6} The officers found $920 cash, a cell phone that Edwards admitted was his, and a plastic baggie containing cocaine on top of the microwave in the kitchen, only a few steps away from the door that Skok saw people use to enter and leave the house. They found an opened box of baggies on a shelf below the microwave, and a crack pipe and a lighter on a shelf above the kitchen sink. The officers also found a black digital scale, $250 cash, two baggies that contained marijuana, and a razor blade on the dining room table. None of the items contained Edwards's fingerprints.

{¶ 7} While the officers found none of Edwards's personal effects in the house, they found a subscription card for *Ebony* magazine on top of the refrigerator in the kitchen. The card was handwritten and ordered a two-year subscription to the magazine. Edwards's name was filled in on the card, the address listed was 3403 Altamont Avenue, and the box marked "Bill Me" was checked on the card. No evidence was introduced as to whose writing was upon the card.

{¶ 8} Sergeant Lentz also found an Ohio identification card with Edwards's name and picture on it on a dresser in the north bedroom of the house. Next to the ID card, he found a bill from Dominion Gas addressed to

Alexander, and a letter from the Cleveland Metropolitan Housing Authority, again addressed to Alexander. He also found a crack pipe on the dresser.

{¶ 9} Edwards was indicted on one count of drug trafficking with a schoolyard specification (count 1), one count of possession of drugs in an amount equal to or exceeding ten grams but less than 25 grams (count 2), one count of possession of drugs in an amount less than five grams (count 3), and one count of possessing criminal tools (count 4). The trial court subsequently granted Edwards's Crim.R. 29 motion for acquittal in part and dismissed the schoolyard specification. After a bench trial, the court found him guilty of all counts, and sentenced him to four years incarceration on counts 1 and 2, and nine months on counts 3 and 4, all counts to run concurrent.

II

{¶ 10} Edwards first argues that he was denied due process because the State "did not introduce enough evidence on any count to prove his guilt beyond a reasonable doubt."

{¶ 11} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury. *State v. Smith*, 80 Ohio St.3d 89, 113, 1997-Ohio-355. In essence, sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. If the State's evidence is found to have been insufficient, the State would have failed its burden of

production, and as a matter of due process, the issue should not have been presented to the jury. *Thompkins* at 386; *Smith* at 113.

{¶ 12} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386; *Smith* at 113. An appellate court's function in 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. A reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *Thompkins* at 390. Reviewing courts will not overturn convictions on sufficiency of evidence claims unless reasonable minds could not reach the conclusion reached by the trier of fact. See *State v. Tibbetts*, 92 Ohio St.3d 146, 2001-Ohio-132.

{¶ 13} The elements of drug possession, drug trafficking, and possession of criminal tools are set forth in the Ohio Revised Code. Under R.C. 2925.11, regarding drug possession, no person shall knowingly obtain, possess, or use a controlled substance. Under R.C. 2925.03(A)(2), regarding drug trafficking,

no person shall "*prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance,* when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person." (Emphasis added.) Finally, a person is guilty of possession of criminal tools if a person possesses or has under his control a "substance, device, instrument, or article, *with the purpose to use it criminally*." R.C. 2923.24. (Emphasis added.)

{¶ 14} The elements of knowledge and intent must be gathered from all the surrounding facts and circumstances. *State v. Teamer,* 82 Ohio St.3d 490, 1998-Ohio-193. Further, the elements of an offense may be established by direct evidence, circumstantial evidence, or both. See *State v. Durr* (1991), 58 Ohio St.3d 86. Circumstantial and direct evidence are of equal evidentiary value. *Jenks*, 61 Ohio St.3d at 272.

{¶ 15} Edwards first contends that the evidence was insufficient to support his convictions because the circumstantial evidence that he lived at 3403 Altamont Avenue was "inconclusive." He notes that the police found no clothes or toiletries belonging to him at the house, did not find any mail addressed to him when they pulled the trash, and never saw his car parked in the driveway. Accordingly, he contends that the evidence established that he was only visiting the house and, because he was merely a visitor, it was unreasonable for the court to conclude that he owned or possessed any of the

drugs found in the house. He further contends that to convict him, the court was required to impermissibly stack an inference upon an inference, i.e., to infer that because his ID card and a subscription card with his name on it were found in the house, he resided there, and next, to infer that because he lived there, he possessed the drugs and prepared them for shipment.

{¶ 16} We are not persuaded. Edwards's arguments rest on a faulty premise, i.e., that the State was required to prove that he lived at 3403 Altamont Avenue. Not so. The State's theory was that Edwards did not live at the address in question, but was a frequent visitor to the home. The evidence was sufficient to support this theory.

{¶ 17} Edwards's cell phone, found on top of the microwave in the kitchen only steps from the back door, demonstrated that Edwards clearly felt comfortable enough in the home to leave his belongings lying around. Further, Edwards's phone was the only phone in the house; Alexander did not have her own phone and even asked to use Edwards's phone after his arrest. The unmailed subscription card, ordering a two-year subscription to *Ebony* magazine to be sent to Edwards at 3403 Altamont Avenue, was circumstantial evidence that even if Edwards did not live at the home, he was there often. The fact that Edwards was found shoeless and sockless in the house when the police executed the warrant further demonstrates that he was there frequently enough to feel "at home" in the house. Likewise, his Ohio identification card

was found in the back bedroom of the home next to Alexander's mail, an unlikely spot for Edwards's card to be if he were only an infrequent visitor to the home. The fact that Edwards's car was never seen in the driveway is meaningless, as he did not have a driver's license.

{¶ 18} Edwards next argues that even if the evidence demonstrated that he lived at the house, it was still insufficient to establish that he possessed any of the drugs found in the house because they were found in common areas of the house. He relies on *State v. Haynes* (1971), 25 Ohio St.2d 264, for this argument. In *Haynes*, the police found drugs in a residence leased by the defendant but also occupied by others. The Ohio Supreme Court found insufficient evidence to demonstrate that the defendant possessed the drugs. The court stated that when drugs are found on premises regularly occupied by others as co-tenants and in an area ordinarily accessible to all tenants, the mere fact that one is the owner or lessee of the premises is not, without further evidence, enough to establish possession in the owner or lessee. Id. at 270.

{¶ 19} But *Haynes* is easily distinguishable from this case. In *Haynes*, the only evidence connecting the defendant to the drugs was that he was the lessee of the premises. Further, he was not only absent at the time of the search but had not occupied the premises for a week prior to the search of the house. In this case, Edwards was seen at the house several days before the

search was executed, he was at the house during the search, and he was standing only a few feet from the drugs when the officers entered the apartment.

{¶ 20} Possession means "having control over a thing or substance," but it may not be inferred solely from "mere access to a thing or substance through ownership or occupation of the premises upon which the thing or substance is found." R.C. 2925.01(K). Possession may be actual or constructive. *Haynes* at 269-270. Constructive possession exists when an individual knowingly exercises dominion and control over an object, even though that object may not be within the individual's immediate physical possession. *State v. Hankerson* (1982), 70 Ohio St.2d 87, at the syllabus. It is not necessary to establish ownership of a controlled substance to establish constructive possession. *State v. Mann* (1993), 93 Ohio App.3d 301, 308. A sizable amount of readily usable drugs found in close proximity to the defendant may be sufficient circumstantial evidence to support the conclusion that the defendant was in constructive possession of such drugs. *State v. Gilbert*, 8th Dist. No. 86773, 2006-Ohio-3595, ¶39, citing *State v. Pruitt* (1984), 18 Ohio App.3d 50. Furthermore, knowledge of illegal goods on one's property is sufficient to show constructive possession of those goods. *State v. Perry*, 8th Dist. No. 84397, 2005-Ohio-27, ¶70.

{¶ 21} There was circumstantial evidence that Edwards knew about the cocaine in the kitchen as his cell phone was found right next to it. Edwards's close proximity to the drugs in the dining room when the search warrant was executed, along with the other circumstantial evidence presented by the State, when viewed in a light most favorable to the prosecution, could convince an average juror that Edwards also had constructive possession of the drugs found in the dining room. Accordingly, we find that the State produced sufficient evidence to support Edwards's convictions for drug possession.

{¶ 22} The State did not produce sufficient evidence to support Edwards's convictions for drug trafficking or possession of criminal tools, however. Regarding drug trafficking, the State was required to show that Edwards prepared, transported, or delivered the drugs with the intent to sell them. Although the police found a scale and baggies in the house, which might indicate the drugs were being resold, there was simply no evidence presented that Edwards, rather than Alexander (or anyone else), was the trafficker.

{¶ 23} With regard to possession of criminal tools, the State had to prove that Edwards had possession or control of a criminal tool with intent to use it criminally. *State v. Richardson* (Nov. 13, 1997), 8th Dist. No. 71626. The alleged criminal tools in this case were the money, scale, baggies, crack pipe, and cell phone found on the premises. Although Edwards admitted the cell phone was his, there was no evidence indicating that he ever used or intended

to use it to arrange a drug deal or otherwise for a criminal purpose. The evidence was likewise insufficient to demonstrate that Edwards had possession or control of the remaining items. The police never determined to whom the money belonged. Edwards was not in the kitchen, where the baggies and crack pipe were found, when the search warrant was executed. His fingerprints were not on any of the other items at issue. Even construing the evidence in a light most favorable to the prosecution, the evidence was insufficient to find Edwards guilty of possession of criminal tools.

{¶ 24} In sum, we hold that a defendant who is a frequent visitor to a dwelling may be convicted of possession of drugs that are not found upon his person, but rather observably in an area under his control, based upon a theory of "constructive possession." However, without additional evidence,[2] we cannot find that the defendant prepared those drugs for sale, transfer, etc. Likewise, while we hold that someone might be in "constructive possession" of the scale, razor blade, or crack pipe based upon their location and observability, we do not find that we can impute an "intent to use criminally" as required by the statute.

{¶ 25} Appellant's first assignment of error is overruled in part and granted in part. We affirm Edwards's convictions for drug possession, but

[2]E.g., fingerprints, a witness, a sale.

reverse and remand his convictions for drug trafficking and possession of criminal tools, with instructions to the trial court to vacate those convictions.

{¶ 26} In his second assignment of error, Edwards contends that he should not have been convicted of both drug trafficking and drug possession as they are allied offenses of similar import. Our resolution of the first assignment of error renders this assignment moot and, therefore, Edwards's second assignment of error is overruled.

Affirmed in part; reversed and remanded in part.

It is ordered that appellant and appellee share equally the 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 common pleas court 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.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

MELODY J. STEWART, J., CONCURS;
ANN DYKE, J., CONCURS IN JUDGMENT ONLY