

[Cite as *State v. Tate*, 2010-Ohio-4671.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93921

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JERONE V. TATE

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-523497

BEFORE: Cooney, J., Kilbane, P.J., and Dyke, J.

RELEASED AND JOURNALIZED: September 30, 2010

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Jerone Tate (“Tate”), appeals his convictions for two counts of drug trafficking, one count of drug possession, and one count possession of criminal tools. We find not merit to the appeal and affirm.

{¶ 2} In April 2009, Tate was charged with one count of drug trafficking in violation of R.C. 2925.03(A)(2), a third degree felony; one count of drug trafficking in violation of R.C. 2925.03(A)(2), a fifth degree felony; one count of drug

possession in violation of R.C. 2925.11(A); and one count of possession of criminal tools in violation of R.C. 2923.24(A). After executing a jury waiver, the case proceeded to a bench trial, at which the following evidence was presented.

{¶ 3} In the evening hours of April 7, 2009, Cleveland police officer Thomas Barry (“Barry”) was patrolling the Parkwood and Grantwood neighborhood in response to several complaints of elevated violence and gang activity. Barry observed Tate driving a Cadillac Escalade with tinted windows and ran the license plate, which identified the owner as Sophia Townsend,¹ an elderly woman who did not have a valid driver’s license. Officer Barry stopped the vehicle and observed a male driver and a male passenger, so he immediately called for backup. When Tate failed to produce a valid driver’s license, Barry instructed him to step out of the car at which time Barry smelled marijuana coming from the vehicle.

{¶ 4} Tate stepped out of the vehicle, and Barry patted him down for weapons. Despite repeated requests to keep his hands on the car, Tate kept reaching toward his pants. Barry discovered two bags of marijuana and learned that Tate’s driving privileges were suspended, so he arrested him.

{¶ 5} Meanwhile, Officers Hageman and Moore arrived on the scene and assisted with the passenger, later identified as Derek Nolden (“Nolden”). Officer Barry conducted an inventory search of the vehicle and found a plastic bag with

several ecstasy pills between the driver's seat and the center console. Tate had approximately \$130 dollars cash and a cell phone on his person. When the officers questioned Tate and Nolden about the ecstasy pills, they both denied ownership of them.

{¶ 6} Cynthia Lewis, a forensic scientist with the Scientific Investigative Unit of the Cleveland Police Department, testified that the pills found in the Cadillac Escalade tested positive for benzyloperazine, a.k.a. ecstasy. She counted the pills and determined there were 22 pills and many small broken pieces. Lewis opined that "each pill could be considered a unit dose."

{¶ 7} At the conclusion of the trial, Tate moved for acquittal pursuant to Crim.R. 29. The court denied the motion and found Tate guilty of all four charges. Tate now appeals his convictions.

{¶ 8} In his sole assignment of error, Tate makes two arguments: (1) that there was insufficient evidence to convict him of drug possession, and (2) that there was insufficient evidence to prove that the amount found in his grandmother's Escalade was equal to or greater than the bulk amount.

{¶ 9} A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the State has met its burden of production at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541. On review for sufficiency, courts are to assess not whether the State's

¹ Sophia Townsend is Tate's grandmother.

evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id.* 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, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 10} In the first part of his argument, Tate challenges the sufficiency of the evidence to prove that he possessed the ecstasy found in the Escalade. R.C. 2925.11(A), which proscribes possession of drugs, provides that “[n]o person shall knowingly obtain, possess, or use a controlled substance.” Tate argues there was insufficient evidence that he possessed the ecstasy because there was no direct evidence establishing each element of the offense. The State, however, contends that Tate constructively possessed the ecstasy.

{¶ 11} Possession can be actual or constructive. *State v. Wolery* (1976), 46 Ohio St.2d 316, 329, 348 N.E.2d 351. 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.

{¶ 12} Circumstantial evidence alone is sufficient to prove constructive possession. *Jenks* at 272-73. Although the mere presence of an individual in the vicinity of illegal drugs is insufficient to establish the element of possession, *State*

v. Haynes (1971), 25 Ohio St.2d 264, 270, 267 N.E.2d 787, if the evidence demonstrates that the defendant was able to exercise dominion or control over the drugs, the defendant can be convicted of possession. *Wolery* at 316, 329. This court has specifically held that the discovery of readily accessible drugs in close proximity to a person constitutes circumstantial evidence that the person was in constructive possession of the drugs. *State v. Pavlick*, Cuyahoga App. No. 81925, 2003-Ohio-6632.

{¶ 13} Although there was no direct evidence that Tate actually exercised dominion and control over the drugs when the Escalade was stopped, the drugs were on the floor between the driver's seat and the console and therefore were within Tate's reach, readily usable and in view. Thus, Tate was situated so that he could exercise dominion or control over the bag of ecstasy that was located on the floor next to his seat. Viewing the evidence in a light most favorable to the State, we find there was sufficient evidence to convince the average mind that Tate possessed the drugs beyond a reasonable doubt.

{¶ 14} In the second part of his argument, Tate argues the State failed to prove that the amount of ecstasy found in the Escalade was equal to or greater than the bulk amount. The "bulk amount" for ecstasy, a schedule I drug, is "[a]n amount equal to or exceeding thirty grams or ten unit doses." R.C. 2925.01(D)(1)(c). The use of the word "or" clearly indicates the state is required to prove either weight or dosage, but not both. *State v. Howell* (1981),

5 Ohio App.3d 92, 93, 5 OBR 206, 449 N.E.2d 523. Here, the state chose to prove bulk amount under the dosage description, which provides:

“ ‘Unit dose’ means an amount or unit of a compound, mixture, or preparation containing a controlled substance, such amount or unit being separately identifiable and in such form as to indicate that it is the amount or unit by which the controlled substance is separately administered to or taken by an individual.”

R.C. 2925.01(F).

{¶ 15} Cynthia Lewis, the police forensic scientist, testified that she counted 22 pills of ecstasy, not counting several crumbled pieces. She further testified that “each pill could be considered a unit dose.” Although Lewis also stated that the ecstasy weighed a total of 6.92 grams, which is significantly less than the 30 grams mentioned in the statute defining the “bulk amount,” the weight is of no consequence here because the State chose to prove the bulk amount under the dosage description. Since each pill is equal to one unit dose and there were 22 pills, i.e., 22 unit doses, we find there was sufficient evidence to prove that Tate possessed more than the bulk amount of ecstasy.

{¶ 16} Therefore, the sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant 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.

COLLEEN CONWAY COONEY, JUDGE

MARY EILEEN KILBANE, P.J., and
ANN DYKE, J., CONCUR