[Cite as *State v. Stradford*, 2011-Ohio-1566.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95116

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTHONY STRADFORD

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-517932

BEFORE: Celebrezze, J., Boyle, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: March 31, 2011

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Anthony Stradford, appeals from his April 14, 2010 conviction for drug possession. Raising three assignments of error, appellant argues that his conviction is against the sufficiency and manifest weight of the evidence, and the trial court improperly imposed the maximum prison sentence because he exercised his right to a jury trial. After a thorough review of the record and case law, we affirm.

{¶ 2} On November 10, 2008, members of the Cleveland Police Department arrested appellant and co-defendant Denario McCants on suspicion of drug trafficking. On December 2, 2008, appellant was named in

three counts of a five-count indictment. Appellant was charged with drug possession in violation of R.C. 2925.11(A), a felony of the fourth degree; drug trafficking in violation of R.C. 2925.03(A)(2), a felony of the fourth degree; and possession of criminal tools in violation of R.C. 2923.24(A), a fifth-degree felony. Appellant pled not guilty to all charges.

{¶ 3} On September 29, 2009, the case proceeded to a jury trial. On October 5, 2009, the jury returned verdicts of not guilty on the counts of drug trafficking and possession of criminal tools; however, the jury was unable to reach a verdict as to the drug possession charge.

{¶ 4} On April 12, 2010, a second jury trial commenced on the remaining charge of drug possession. On April 14, 2010, the jury returned a verdict of guilty on that count, a fourth-degree felony. The trial court proceeded immediately to sentencing, and appellant was sentenced to 18 months in prison.

Statement of the Facts

{¶ 5} On November 10, 2008, members of the Cleveland Police Department were conducting surveillance of an area that had been the subject of numerous complaints of drug activity. Detectives David Gibson and Thomas Barnes were parked in an unmarked police car located approximately one block away from the area they were monitoring. From this vantage point, they observed appellant and McCants standing in front of

a convenience store. Twice they observed that appellant was approached by an individual, engaged in a brief conversation, then walked a short distance to a parked vehicle. Appellant then entered the front driver's side of the vehicle, remained in the vehicle for a brief period of time, then returned to the corner where he made a hand-to-hand exchange with the person who had approached him. Although the detectives did not see what was exchanged, both Dets. Gibson and Barnes testified that they believed this to be drug activity.

{¶ 6} Following the second hand-to-hand transaction, Dets. Gibson and Barnes called in take-down units that were stationed nearby. Upon seeing the police, appellant fled inside the convenience store. Subsequently, appellant was detained; however, no drugs were found on his person at that time. Appellant told the detectives that he did not have identification on him, but that his ID might be in the car. With appellant's permission, Det. Barnes removed the keys to the vehicle from appellant's pants pocket and, along with Cleveland Police patrolman Nathan Gobel, entered the vehicle to look for identification. In the course of looking for appellant's identification, Officer Gobel found a bag of marijuana in the center console and a plastic baggie containing suspected crack cocaine under the driver's seat. Det. Barnes testified that the crack cocaine was located in the same area of the vehicle where he and Det. Gibson had observed appellant. Officer Gobel

testified that the crack cocaine could be reached by a person sitting in the driver's seat. It was later determined that the owner of the vehicle was not appellant, but a female who was not linked to appellant.

{¶ 7} Appellant now appeals from his drug possession conviction, raising three assignments of error for review.

Law and Analysis

Sufficiency and Manifest Weight of the Evidence

{¶ 8} In his first two assignments of error, appellant argues that there was insufficient evidence to support his conviction for drug possession and that the conviction was against the manifest weight of the evidence. He specifically contends that the state failed to present any evidence that he actually possessed an illegal substance on November 10, 2008.

{¶ 9} "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. Sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. Id. at 386. 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." (Emphasis deleted.) Id. at 387. Weight is not a question of mathematics, but depends on its effect in inducing belief. Id.

{¶ 10} When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court examines 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, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 11} The manifest weight of the evidence standard of review requires us to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *State v. Otten* (1986), 33 Ohio App.3d 339, 515 N.E.2d 1009, paragraph one of the syllabus. "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as the "'thirteenth juror'" and disagrees with the factfinder's resolution of the conflicting testimony." *Thompkins*, 78 Ohio St.3d at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶ 12} Nevertheless, we are mindful that the weight to be given to the evidence and the credibility of the witnesses are matters primarily for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill* (1964), 176 Ohio St. 61, 67, 197 N.E.2d 548. An appellate court may not merely substitute its view for that of the jury. *In re Wheeler*, Cuyahoga App. No. 90766, 2008-Ohio-3656, ¶25. Therefore, reversal on manifest weight grounds is reserved for "the exceptional case where the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 13} To sustain appellant's conviction for drug possession in violation of R.C. 2925.11(A), the state had to prove that appellant knowingly obtained, possessed, or used a controlled substance. In arguing that his conviction was based on insufficient evidence and was against the manifest weight of the evidence, appellant relies on the fact that there were no drugs found on his person at the time of his arrest and that the vehicle was not registered to him. Additionally, appellant contends there was no evidence that he knew that crack cocaine was in the vehicle parked near the scene. We are not persuaded.

{¶ 14} First, we note that ownership of the vehicle is not a prerequisite to a conviction for drug possession. See *State v. Edwards*, Cuyahoga App. No. 91841, 2009-Ohio-4365, ¶16 (finding that an individual does not have to reside at a particular address in order to possess drugs found inside).

{¶ 15} Likewise, appellant was not required to be in actual possession of a controlled substance in order to be convicted under R.C. 2925.11(A). Possession can be actual or constructive. *State v. Haynes* (1971), 25 Ohio St.2d 264, 267 N.E.2d 787. Actual possession entails ownership or physical control, whereas constructive possession is defined as "knowingly exercising dominion and control over an object, even though [the] object may not be within his immediate physical possession." *State v. Hankerson* (1982), 70 Ohio St.2d 87, 434 N.E.2d 1362, syllabus. "Although the mere presence of an individual in the vicinity of illegal drugs is insufficient to establish the element of possession, [*Haynes*, at 270], if the evidence demonstrates that the defendant was able to exercise dominion or control over the drugs, the defendant can be convicted of possession." *State v. Tate*, Cuyahoga App. No. 93921, 2010-Ohio-4671, at ¶12.

{¶ 16} The state may show constructive possession of drugs by circumstantial evidence alone. *State v. Trembly* (2000), 137 Ohio App.3d 134, 141, 738 N.E.2d 93. Absent a defendant's admission, the surrounding facts and circumstances, including the defendant's actions, are evidence that

the trier of fact can consider in determining whether the defendant had constructive possession over the subject drugs. *State v. Norman*, Franklin App. No. 03AP-298, 2003-Ohio-7038, ¶31; *State v. Baker*, Franklin App. No. 02AP-627, 2003-Ohio-633, ¶23. Inherent in a finding of constructive possession is the determination that the defendant had knowledge of the drugs. *State v. Alexander*, Cuyahoga App. No. 90509, 2009-Ohio-597, ¶24.

{¶ 17} A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist. R.C. 2901.22(B). Whether a person acted knowingly generally must be determined from all the surrounding facts and circumstances. See *State v. Huff* (2001), 145 Ohio App.3d 555, 763 N.E.2d 695.

{¶ 18} In the case at bar, ample evidence was presented to establish that appellant was knowingly in constructive possession of the crack cocaine found in the vehicle. Dets. Gibson and Barnes each testified that they observed appellant have a brief conversation with an individual, walk over to the vehicle in question where he entered the driver's side of the car for less than a minute, and then return to the individual where a hand-to-hand exchange was made. Appellant had keys to the vehicle in which the drugs were found and was the only person who exercised dominion or control over the car

during the detectives' surveillance. Further, the quantity of crack cocaine discovered by Officer Gobel was located just underneath the driver's seat where appellant was seen sitting, and Officer Gobel testified that the drugs were situated in such a way that it would have been accessible to someone sitting in the driver's seat.

{¶ 19} Although based on circumstantial evidence, we find that the detectives' testimony and the circumstances surrounding appellant's actions on November 10, 2008 were sufficient to establish that appellant knowingly possessed crack cocaine.

{¶ 20} Additionally, we are unable to conclude that this is the exceptional case in which the evidence weighs heavily against the conviction. The state presented competent, credible evidence as to each element of the offense of which appellant was convicted. The detectives testified to the facts and circumstances supporting appellant's drug possession conviction, and at no time did the detectives offer contradicting testimony. In light of the circumstantial evidence presented by the state, we find that the jury did not clearly lose its way when it rejected appellant's denial and convicted him of drug possession. *State v. White*, Franklin App. No. 09AP-1168, 2010-Ohio-3033, ¶16 (noting that a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution's witnesses). Therefore, appellant's conviction for drug possession was

supported by sufficient evidence and was not against the manifest weight of the evidence.

{¶ 21} Accordingly, appellant's first and second assignments of error are without merit and are overruled.

Sentencing

{¶ 22} In appellant's third assignment of error, he argues that the trial court improperly imposed the maximum sentence, in part because he refused to plead guilty and exercised his right to trial by jury. We disagree.

{¶ 23} "A defendant is guaranteed the right to a trial and should never be punished for exercising that right or for refusing to enter a plea agreement." *State v. Evans*, Cuyahoga App. No. 85396, 2007-Ohio-3278, at ¶10, citing *State v. O'Dell* (1989), 45 Ohio St.3d 140, 147, 543 N.E.2d 1220. It is improper to sentence a defendant more severely simply because he exercised his right to trial. *Columbus v. Bee* (1979), 67 Ohio App.2d 65, 425 N.E.2d 409. The United States Supreme Court has held that a trial court violates the Due Process Clause of the Fourteenth Amendment when it imposes a harsher sentence motivated by vindictive retaliation. *N. Carolina v. Pearce* (1969), 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656.

{¶ 24} "The court cannot punish an accused for rejecting an offered plea bargain and electing to proceed to trial." *State v. Paul*, Cuyahoga App. No. 79596, 2002-Ohio-591, 15, quoting *O'Dell*, supra, at paragraph two of the

syllabus. Vindictiveness on the part of a sentencing court is not presumed merely because the sentence imposed is harsher than one offered in plea negotiations. *State v. Mitchell* (1997), 117 Ohio App.3d 703, 691 N.E.2d 354. To determine whether a court acted with vindictiveness, we look to see whether the record affirmatively shows retaliation as a result of the rejected plea bargain. *Paul*, supra, citing *State v. Warren* (1998), 125 Ohio App.3d 298, 307, 708 N.E.2d 288. There must be some positive evidence that portrays a vindictive purpose on the court's part. *State v. Finley*, Montgomery App. No. 19654, 2004-Ohio-661.

{¶ 25} In the case at bar, appellant argues that there were two occasions where the trial court improperly engaged in conversations with him regarding possible disposition of the case should he decide to go forward with a jury trial. The first was during a break in jury selection, in which the following dialogue took place:

{¶ 26} "COURT: And it is your intention to have this case tried to the jury?

{¶ 27} "APPELLANT: Yes.

{¶ 28} "COURT: Okay, and you have no anticipation that you would take a plea agreement in this particular case?

{¶ 29} "APPELLANT: No, ma'am.

{¶ 30} "COURT: I want you to understand that if you were able to work something out — and this is just for conversation sake, since we are, in fact, picking a jury right this minute. So it really makes no difference to me either way.

{¶ 31} "I just want you to be aware of the fact that I know that there was some talk about a possible plea, at least from the State of Ohio's perspective, and that if you were to accept responsibility, that I would — that would go a long way with me.

{¶ 32} "When I have to hear the facts of the case and if you were possibly convicted, as far as sentencing is concerned, that is something that I would take into consideration, as well. Do you understand?

{¶ 33} "APPELLANT: Yes.

{¶ 34} "COURT: Okay. So I want to be clear and I want you to go into this with your eyes open. I want you to know that when the officers come in and I hear testimony about the circumstances of the case, if, in fact, a jury were to convict you, that would be something that I would take into consideration pretty significantly. Do you understand?

{¶ 35} "APPELLANT: Yes.

{¶ 36} "COURT: Okay. And it is your intention to continue; is that correct?

{¶ 37} "APPELLANT: Yes."

{¶ 38} At the conclusion of the trial, the court proceeded immediately to sentencing, at which time the following dialogue took place:

{¶ 39} "COURT: I gave you an opportunity to accept responsibility prior to the commencement of trial and I know that I spoke to you pretty clearly about how I felt after I would hear the circumstances of the case involved. You know that I was not here to hear the first case, but I certainly was here with regards to this particular trial.

{¶ 40} "I told you what I thought after the conclusion of hearing these officers and their testimony, you know, that things would change for you. And you remember me saying that. Do you recall?

{¶ 41} "APPELLANT: Yes ma'am."

{¶ 42} Trial courts have full discretion to impose a prison sentence within the statutory range, and we find that the trial court considered the appropriate factors when sentencing appellant. R.C. 2929.11; see *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124.

{¶ 43} Despite the dialogue cited by appellant, we find no evidence demonstrating that the trial court had a vindictive purpose in sentencing him. During the plea colloquy, the trial court expressed no intent to give a particular sentence on a plea versus a conviction at trial. Rather, the trial judge merely informed appellant of the types of circumstances she is permitted to weigh when issuing a sentence, i.e. the testimony of the state's

witnesses. During the course of receiving evidence, a trial judge may gain "a fuller appreciation of the nature and extent of the crimes charged." *Mitchell* at 706. Here, the testimony of the detectives clearly established the criminal nature of appellant's conduct, and the trial judge was permitted to consider this testimony when issuing appellant's sentence. Further, appellant's criminal record, while not lengthy, is significant, and the trial court was free to consider it as an aggravating factor under R.C. 2929.12(D)(5).

{¶ 44} While we caution trial courts to carefully choose words that do not give even an intimation that a sentence is based on a defendant exercising his right to trial, we cannot find in the instant case that the court gave him a greater sentence because he exercised that right. Rather, appellant's sentence was based upon the circumstances of this case and his previous criminal record. Appellant's third assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from 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.

FRANK D. CELEBREZZE, JR., JUDGE

MARY J. BOYLE, P.J., and
JAMES J. SWEENEY, J., CONCUR