[Cite as *State v. Dukes*, 2011-Ohio-1568.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95185

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CLAYTON E. DUKES

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTION AFFIRMED;
REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-529951

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

RELEASED AND JOURNALIZED: March 31, 2011

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Clayton Dukes, appeals his conviction for drug trafficking with a major drug offender specification and resultant ten-year sentence, raising three assignments of error.[1] After a thorough review of the record and relevant law, we affirm appellant's conviction, but remand for resentencing.

{¶ 2} Officer Joshua Rogers of the East Cleveland Police Department was on general patrol on October 11, 2009 with his partner, Officer Hussain, when he observed a large van stopped in the center lane of Euclid Avenue,

[1] Appellant's assignments of error are contained in the appendix to this Opinion.

obstructing traffic. Officer Rogers then observed a female waiting at a bus stop cross the street and enter the van. Cognizant of the fact that the area was known for prostitution, Rogers decided to initiate a traffic stop of the van based on the traffic infraction he had observed.

{¶ 3} Officer Rogers ordered the driver (appellant) out of the vehicle and interviewed him while Officer Hussain watched the passenger, Arlene Clipps. After initially giving the police permission to search, appellant withdrew it and then again granted permission. In an abundance of caution, Officer Rogers called for his supervisor, Sergeant Anissa Booker, and her police dog Keegan. After approximately five minutes, Sgt. Booker arrived and Keegan circled the van. He alerted on the front passenger door. Upon entering the vehicle, Keegan focused his attention on a pouch by the engine cover between the front passenger seats, where a small burnt marijuana cigarette was found. Keegan next hopped over a middle row of seats and alerted on the rear seat, where a blue coat was found. Sgt. Booker recovered a plastic baggy containing approximately 141 grams of crack cocaine from under the coat. Appellant was then arrested.

{¶ 4} Appellant was indicted on November 5, 2009 for possession and trafficking in crack cocaine with a major drug offender specification. Jury trial commenced on April 21, 2010, and the jury found him guilty of all charges. At sentencing, the state conceded that the convictions for

possession and trafficking should merge and elected for sentencing on the trafficking conviction. Appellant was sentenced to a mandatory period of incarceration of ten years and informed of a mandatory five-year term of postrelease control. Appellant then timely filed the instant appeal.

Law and Analysis

Sufficiency and Manifest Weight

{¶ 5} Appellant's first two assignments of error argue that the trial court erred when it denied his motion for acquittal under Crim.R. 29 because the state failed to present sufficient evidence to establish beyond a reasonable doubt the elements necessary to support the convictions and that his convictions are against the manifest weight of the evidence.

{¶ 6} Under Crim.R. 29, a trial court "shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, at the syllabus. "A motion for judgment of acquittal under Crim.R. 29(A) should be granted only where reasonable minds could not fail to find reasonable doubt." *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23, 514 N.E.2d 394.

{¶ 7} Thus, the test an appellate court must apply in reviewing a challenge based on a denial of a motion for acquittal is the same as a

challenge based on the sufficiency of the evidence to support a conviction. See *State v. Bell* (May 26, 1994), Cuyahoga App. No. 65356.

{¶ 8} In *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492, the Ohio Supreme Court set forth the test an appellate court should apply when reviewing the sufficiency of the evidence to support a conviction: "[T]he relevant inquiry on appeal is whether any reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt. In other words, an appellate court's function when 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. *State v. Eley* [(1978), 56 Ohio St.2d 169, 383 N.E.2d 132]." See, also, *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 9} "The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id.

at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. '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 a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652." *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶25.

{¶ 10} In the present case, appellant was convicted of drug trafficking in violation of R.C. 2925.03(A)(2). Division (A)(2) prohibits the knowing preparation for shipment, transport, delivery, preparation for distribution, or distribution of 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." Appellant was also found guilty of drug possession in violation of R.C. 2925.11, which prohibits the knowing possession or use of a controlled substance.

{¶ 11} The state's case was based on a theory of constructive possession of an amount of drugs sufficiently indicative of an intent to traffic. Appellant claims the state failed to adduce sufficient evidence that he had knowledge,

possession, or control over the crack cocaine found in the rear compartment of the van he was driving and admitted owning.

{¶ 12} "Mere presence of a person in the vicinity of contraband is not enough to support the element of possession; however, if the evidence demonstrates the defendant was able to exercise dominion or control over the illegal object, even though that object may not be within his immediate physical possession, the defendant can be convicted of violating R.C. 2925.11.

{¶ 13} "Moreover, where an amount of readily usable drugs is in close proximity to a defendant, this constitutes circumstantial evidence to support the conclusion that the defendant was in constructive possession of the drugs. Circumstantial evidence alone is sufficient to support the element of constructive possession." (Internal citations omitted.) *State v. Lundy*, Cuyahoga App. No. 87050, 2006-Ohio-3497, ¶18-19.

{¶ 14} "Constructive possession is sufficient for conviction of drug trafficking under R.C. 2925.03. 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. Williams* (1996), 117 Ohio App.3d 488, 492, 690 N.E.2d 1297.

{¶ 15} The state claims possession of the keys coupled with appellant's obvious nervousness is enough to demonstrate constructive possession because "presence in the vicinity of contraband, coupled with another factor

or factors probative of dominion or control over the contraband, may establish constructive possession." *State v. Brown*, Athens App. No. 09CA3, 2009-Ohio-5390, ¶20, citing *State v. Riggs* (Sept. 13, 1999), Washington App. No. 98CA39, 5. While nervousness alone during a police stop and investigation is not sufficient to demonstrate constructive possession, it is a factor. *State v. Greenwood*, Montgomery App. No. 19820, 2004-Ohio-2737, ¶23.

{¶ 16} Another factor is that appellant maintained control and ownership of the vehicle, and Clipps was never seen in the rear of the van. Officer Rogers was following the van the entire time Clipps was inside, and he did not see her in the rear of the vehicle. Further, Officer Hussain was observing Clipps for the majority of the time Officer Rogers was talking to appellant, and she did not attempt to get into the rear of the van.

{¶ 17} While appellant alleges that the drugs recovered belonged to Clipps, she was never present in the rear of the vehicle. No one but appellant had access to this area. In *Greenwood*, this court found sufficient evidence of constructive possession where a defendant was the sole occupant of a vehicle and demonstrated extreme nervousness when stopped by police. While Clipps was also an occupant of the vehicle, she was never observed by the police in the rear of the van as they followed the van the entire time she was inside.

{¶ 18} This case is distinguishable from *State v. Mayer*, Cuyahoga App. No. 80168, 2003-Ohio-1, where this court held that the state had offered insufficient evidence of possession of cocaine where cocaine was neither visible to defendant nor within his reach while he was seated and driving the vehicle. In that case, a passenger was seated in the area where cocaine was found. The state could not offer sufficient evidence to demonstrate that appellant, not the passenger, possessed the cocaine. When there is evidence that the passenger could not or did not possess the drugs in question, this court has upheld the drivers' convictions of drug trafficking. See *State v. Darling*, Cuyahoga App. No. 92120, 2009-Ohio-4198; *State v. Kutsar*, Cuyahoga App. No. 89310, 2007-Ohio-6990. Sufficient evidence of constructive possession was shown in this case to support convictions for drug trafficking and drug possession. This evidence also convinces this court that appellant's convictions for drug trafficking and drug possession are not against the manifest weight of the evidence. Officer Rogers described appellant as extremely nervous when being questioned. From the outset of the traffic stop, Officer Rogers observed appellant's hands shaking as they gripped the steering wheel of the van. Once out of the vehicle, appellant was visibly shaking. Appellant owned the van he was driving, although he had yet to title it in his name. Further, no one else had access to the rear of the vehicle. While there was a passenger, officers followed the van during the

entire time that Clipps was in the vehicle, and they never saw her enter the rear of the van. Appellant's first and second assignments of error are overruled.

Allied Offenses

{¶ 19} Appellant's sentencing entry indicates that he was sentenced to concurrent terms for drug trafficking and drug possession, convictions which all parties agreed should have merged. At the sentencing hearing, the state concurred with the finding of the trial court that the convictions are allied offenses that should merge for sentencing, and the state elected to proceed on the drug trafficking conviction. See *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182. The trial court then sentenced appellant on both convictions, but ran them concurrently. The trial court stated: "As to Count 1, trafficking in drugs, I sentence you to the Lorain Correctional institute [sic] for a period of 10 years.

{¶ 20} "And Count 2, I sentence you to 10 years to run concurrent to Count 1. They merge."

{¶ 21} The journal entry memorializing appellant's sentence states: "THE COURT FINDS THAT PRISON IS CONSISTENT WITH THE PURPOSE OF R.C. 2929.11. THE COURT IMPOSES A PRISON SENTENCE AT THE LORAIN CORRECTIONAL INSTITUTION OF 10 YEAR(S). 10 YEARS ON EACH COUNT, CONCURRENT."

{¶ 22} In *Whitfield,* the Ohio Supreme Court determined that "[w]hen the state elects which of the two allied offenses to seek sentencing for, the court must accept the state's choice and merge the crimes into a single conviction for sentencing, and impose a sentence that is appropriate for the merged offense. Thereafter, a 'conviction' consists of a guilty verdict and the imposition of a sentence or penalty. The defendant is not 'convicted' for purposes of R.C. 2941.25(A)[2] until the sentence is imposed." (Internal citations omitted.) Id. at ¶24.

{¶ 23} In this appeal, the state concedes that the journal entry improperly reflects that appellant was sentenced for allied offenses and that the concurrent nature of the sentences does not alleviate this problem. See *State v. Velasquez*, Cuyahoga App. No. 88748, 2007-Ohio-3913, ¶20. Because the trial court incorrectly sentenced appellant on both counts and incorrectly journalized the sentence in its entry, this case must be remanded for a new sentencing hearing where the trial court will impose sentence only on the count elected by the state.

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[2] This statute prohibits multiple punishments for allied offenses, stating "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one."

{¶ 24} This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant recover of said appellee 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.

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
COLLEEN CONWAY COONEY, J., CONCUR

APPENDIX

Appellant's assignments of error:

I. "Whether the trial court erred when it denied appellant's motion for acquittal under Criminal Rule 29 because the state failed to present sufficient evidence to establish beyond a reasonable doubt the elements necessary to support the convictions."

II. "Whether appellant's convictions are against the manifest weight of the evidence."

III. "Whether appellant's sentencing journal entry erroneously imposed concurrent prison terms for convictions that are allied offenses of similar import as reflected by the sentencing transcript and should be corrected pursuant to R.C. 2953.08(G)."