

[Cite as *State v. Brooks*, 2011-Ohio-1679.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94978

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN BROOKS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-509212

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

RELEASED AND JOURNALIZED: April 7, 2011
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MARY J. BOYLE, P.J.:

{¶ 1} Defendant-appellant, John Brooks, appeals his conviction, raising the following two assignments of error:

{¶ 2} “[I.] The trial court erred when it entered a guilty verdict without sufficient evidence to sustain each and every element of the conviction.

{¶ 3} “[II.] The trial court erred when it entered a verdict that was inconsistent with the manifest weight of the evidence.”

{¶ 4} Because we find insufficient evidence to support the possession of criminal tools charge, we vacate that conviction but affirm the judgment as to the others.

Procedural History and Facts

{¶ 5} In February 2008, Brooks was indicted on the following seven counts: (1) carrying a concealed weapon, in violation of R.C. 2923.12(A)(2); (2) drug trafficking, in violation of R.C. 2925.03(A)(2); (3) drug possession, in violation of R.C. 2925.11(A); (4) improper handling of firearm in motor vehicle, in violation of R.C. 2923.16(B); (5) possession of criminal tools, in violation of R.C. 2923.24(A); and (6) – (7) having a weapon while under disability, in violation of R.C. 2923.13(A)(2) and (A)(3). All counts carried a forfeiture specification. He pleaded not guilty to the charges, and the matter proceeded to a bench trial where the following evidence was presented.

{¶ 6} Garfield Heights police officer John Marks testified that, on February 20, 2008 around 8:00 a.m., he clocked a vehicle speeding on Turney Road in a school zone and pulled it over. The vehicle was operated by Brooks, who identified himself and informed Officer Marks that he was driving with a suspended license. Officer Marks removed Brooks from the vehicle, patted him down, and then placed him in his patrol vehicle. Upon patting him down, Officer Marks found a “little baggie of marijuana,” two cell phones, and \$24 in Brooks’s left coat pocket. Officer Marks verified that Brooks’s license was under suspension and further discovered that there was an active arrest warrant for a previous traffic violation. Officer Marks then called for backup.

{¶ 7} On cross-examination, Officer Marks testified that Brooks was not the owner of the vehicle; the vehicle was registered to Larry Ingram. He further acknowledged that the vehicle had not been reported stolen.

{¶ 8} Officer Michael Danzey testified that he arrived on the scene and handled the inventory of Brooks's vehicle prior to it being towed. Inside the vehicle, Officer Danzey discovered a "plastic baggie" sticking out of the front cup holder, containing several small "baggies" with individual pieces of crack cocaine. He further discovered a loaded revolver in the map pocket attached to the rear of the passenger's seat. The revolver was test-fired and determined to be operable. According to Officer Danzey, both items were in reach of the driver.

{¶ 9} The state further offered into evidence the judgment entries of Brooks's prior convictions, supporting the allegations of the having weapon while under disability counts, which defense counsel stipulated to the validity of the prior judgments.

{¶ 10} Following the close of the state's case, Brooks moved for an acquittal of the charges under Crim.R. 29, which was denied by the trial court. The trial court ultimately found Brooks guilty of all seven counts. At sentencing, the trial court merged the drug trafficking and drug possession counts, and the state elected to proceed with the drug trafficking count. The trial court sentenced Brooks to a total of three years in prison on all the counts and indicated that he is subject to postrelease control for a period up to three years.

{¶ 11} Brooks now appeals his convictions.

Sufficiency of the Evidence

{¶ 12} Brooks argues in his first assignment of error that the state failed to present sufficient evidence to support a conviction for any of the seven counts.

{¶ 13} When an appellate court reviews a record upon a sufficiency challenge, “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. Leonard, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶77, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

A. *Weapon-Related Charges*

{¶ 14} Brooks was convicted of carrying a concealed weapon pursuant to R.C. 2923.12(A)(2), which provides that “[n]o person shall knowingly carry or have, concealed on the person’s person or concealed ready at hand * * * a handgun * * *.” He was convicted of improperly handling a firearm in a motor vehicle pursuant to R.C. 2923.16(B), which provides that “[n]o person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle.” And he was also convicted of having a weapon while under disability pursuant to

R.C. 2923.13(A)(2) and (3). R.C. 2923.13(A)(2) provides that “no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if * * * [t]he person * * * has been convicted of any felony offense of violence * * *.” Similarly, R.C. 2923.13(A)(3) prohibits the same if the person “has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse * * *.” Brooks argues that his convictions cannot stand because the state failed to present sufficient evidence to establish his “knowledge” or “possession” of the revolver.

{¶ 15} The gravamen of Brooks’s claim is that the trial court wrongly inferred that his mere access to the revolver was sufficient to establish both knowledge and possession. Relying on this court’s decision in *State v. Duganitz* (1991), 76 Ohio App.3d 363, 601 N.E.2d 642, he urges this court to vacate the convictions. We, however, find *Duganitz* distinguishable from the instant case.

{¶ 16} In *Duganitz*, we found insufficient evidence to sustain a carrying concealed weapon conviction against a driver where a .38 caliber revolver was found under a blanket near the front seat of the car. *Id.* Because the passenger of the vehicle had been left alone in the car for a period of time, and the gun was found in a location between the passenger and driver, we found that there was insufficient evidence to prove that the driver knew of the gun’s presence in the vehicle or that he possessed the gun. *Id.* at 368. Unlike the facts of *Duganitz*, however, Brooks was the sole occupant in the vehicle when it was pulled over.

{¶ 17} We note that the state was not required to prove actual possession to satisfy the elements of the offense; constructive possession is sufficient. *State v. Hardy* (1978), 60 Ohio App.2d 325, 397 N.E.2d 773. 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. Wolery* (1976), 46 Ohio St.2d 316, 329, 348 N.E.2d 351, certiorari denied (1976), 429 U.S. 932, 97 S.Ct. 339, 50 L.Ed.2d 301. If the evidence demonstrates that the defendant was in close proximity to the contraband, such that the defendant was able to exercise dominion or control over the contraband, this constitutes circumstantial evidence that the defendant was in constructive possession of the items. *State v. Whitted*, 8th Dist. No. 88979, 2007-Ohio-5069, at ¶11; *State v. Frazer*, 8th Dist. No. 89097, 2007-Ohio-5954, ¶138; *State v. Davis*, 8th Dist. No. 86144, 2005-Ohio-6721, ¶117; *State v. Hopkins*, 8th Dist. No. 80652, 2002-Ohio-4586; *State v. Pruitt* (1984), 18 Ohio App.3d 50, 480 N.E.2d 499. Further, circumstantial evidence alone is sufficient to support the element of constructive possession. *Id.*; see, also, *Jenks*, *supra*, at 272 (“Circumstantial evidence and direct evidence inherently possess the same probative value.”).

{¶ 18} Here, the state established that Brooks was operating the vehicle prior to it being pulled over and that no one else entered the vehicle prior to the police discovering the loaded revolver, which was in immediate physical reach to where Brooks was sitting. And although Brooks relies heavily on the fact that the revolver was not in plain sight when Officer

Marks stopped him, the record reveals that Brooks would have had sufficient time to conceal the revolver if he had not already done so. Construing this evidence in a light most favorable to the state, we find that any rational trier of fact could have found that Brooks knowingly possessed the revolver to satisfy the elements of the offenses.

B. Drug-Related Charges

{¶ 19} Next, Brooks argues that there was insufficient evidence to support the drug trafficking or drug possession counts. We disagree.

{¶ 20} Brooks was convicted of drug trafficking under R.C. 2925.03(A)(2), which provides that “[n]o person shall knowingly * * * [p]repare 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.” He was also convicted of drug possession under R.C. 2925.11(A), which states that “[n]o person shall knowingly obtain, possess, or use a controlled substance.”

{¶ 21} As to the drug possession, Brooks contends that the state failed to establish that he knowingly possessed the drugs because the drugs were not plainly visible in the vehicle, and there was no evidence that Brooks was aware of the drugs. We disagree. Again, possession can be constructive, and 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. The mere fact that the drugs were not in plain view when the police approached the vehicle does not negate the other circumstantial evidence establishing Brooks’s knowledge and possession of the drugs. As stated above, Brooks was the sole occupant of the vehicle when stopped by the police, and the drugs were in reach to where he was seated; they were discovered in the front cup holder of the front seat armrest. Additionally, part of the plastic bag containing the drugs was sticking out of the cup holder. Construing this evidence in a light most favorable to the state, we find that any reasonable trier of fact could conclude, beyond a reasonable doubt, that Brooks knowingly possessed the drugs found in the vehicle.

{¶ 22} As for the drug trafficking charge, we likewise find sufficient evidence to support the conviction. Having found sufficient evidence that Brooks knowingly possessed the drugs, we turn to his contention that there was insufficient evidence that he knowingly intended to sell the drugs. We find the manner in which the evidence was packaged compelling circumstantial evidence demonstrating Brooks’s intent of selling the drugs. Here, there were 12 individual smaller bags containing single pieces of crack cocaine, all packaged in a larger plastic bag. Officer Marks specifically testified that, in his experience in handling drug cases, people dealing drugs often package the drugs in individually wrapped “baggies” because it allows “easier access when they’re selling.” Based on this evidence, we find that the state satisfied its burden to overcome a Crim.R. 29 motion for an acquittal.

C. Possession of Criminal Tools

{¶ 23} Brooks lastly challenges the sufficiency of the evidence related to his possession of criminal tools charge under R.C. 2923.24(A), which states that “[n]o person shall possess or have under the person’s control any substance, device, instrument, or article, with purpose to use it criminally.” Brooks argues that, aside from merely possessing two cell phones and \$24, there is no evidence that the items were used for any drug-related activity. We agree. As this court recently observed, “[t]he ubiquitousness of cell phones is such that the mere possession of a cell phone is not ipso facto proof that it was used in drug trafficking.” *State v. Byers*, 8th Dist. No. 94922, 2011-Ohio-342, ¶9. Indeed, without any evidence showing that Brooks actually used the cell phones to aid in the trafficking of drugs, we find his mere possession insufficient. Similarly, we fail to see how evidence of Brooks possessing \$24 is sufficient to sustain a criminal tools count. We, accordingly, find merit to this argument and vacate Brooks’s possession of criminal tools count.

{¶ 24} The first assignment of error is overruled in part and sustained in part.

Manifest Weight of the Evidence

{¶ 25} In his second assignment of error, Brooks argues that his convictions are against the manifest weight of the evidence.

{¶ 26} In reviewing a claim challenging the manifest weight of the evidence, “[t]he question to be answered is whether there is *substantial* evidence upon which a jury could reasonably conclude that all the elements

have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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.” (Internal quotes and citations omitted.) *Leonard*, 104 Ohio St.3d at ¶81.

{¶ 27} “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.’” *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 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 fact finder’s resolution of the conflicting testimony. *Id.* at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶ 28} Brooks essentially raises the same arguments asserted in his first assignment of error in support of his claim that his conviction is against the manifest weight of the evidence.

He further asserts that the evidence revealed that he cooperated and acted appropriately while in the presence of Officer Marks, therefore bolstering his claim that he was unaware of the drugs or the loaded revolver in the vehicle. But after a thorough review of the record, we cannot say that the trier of fact “clearly lost its way.” Here, the state produced sufficient

circumstantial evidence to support all of the convictions, except the criminal possession count, and we cannot say that evidence of Brooks cooperating negates the state's evidence and renders it unpersuasive.

{¶ 29} The second assignment of error is overruled.

{¶ 30} Judgment affirmed in part and reversed in part. The conviction for possession of criminal tools is vacated. Case remanded for further proceedings consistent with this opinion.

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 in part, 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.

MARY J. BOYLE, PRESIDING JUDGE

FRANK D. CELEBREZZE, JR., J., and
JAMES J. SWEENEY, J., CONCUR