

[Cite as *State v. Santiago*, 2011-Ohio-1691.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
**No. 95333**

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**JESUS SANTIAGO**

DEFENDANT-APPELLANT

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

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-533862

**BEFORE:** E. Gallagher, J., Blackmon, P.J., and Rocco, J.

**RELEASED AND JOURNALIZED:** April 7, 2011

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EILEEN A. GALLAGHER, J.:

{¶ 1} Appellant, Jesus Santiago (“Appellant”), appeals his convictions from the Cuyahoga County Court of Common Pleas. Appellant argues that the state of Ohio presented insufficient evidence to support his convictions, that his convictions are against the manifest weight of the evidence, that the trial court erred in instructing the jury regarding “constructive possession,” that he was denied the right to effective assistance of counsel, and that

cumulative error deprived him of a fair trial. Additionally, appellant suggests that the trial court's journal entries incorrectly reference forfeiture specifications that were dismissed. For the following reasons we affirm, in part, and reverse, in part.

{¶ 2} This case arose from the execution of a search warrant for a residence located at 3146 West 71<sup>st</sup> Street in Cleveland, Ohio. The search warrant was obtained after the Cuyahoga County Sheriff's Department made a controlled drug buy on October 15, 2009 at the property during which a confidential informant ("C.I.") purchased drugs from Henry Umpierre. The search warrant was executed on October 20, 2009. Henry Umpierre was arrested in the driveway of the residence after he was observed attempting to discard a bag of heroin in response to seeing the approaching sheriffs' deputies.

{¶ 3} Inside the residence, police found appellant and Reynaldo Umpierre. Reynaldo and Henry Umpierre are cousins. A search of the residence revealed twenty clear plastic bags with their corners cut off and containing white powder residue. Those bags were found in a black trash bag in the kitchen of the home. A K-9 unit with the Sheriffs' narcotics unit alerted to a small digital scale in the sink of the sole bathroom and a red Cavaliers jacket in a closet. Separate bags containing 97.7 grams of heroin

and 15.4 grams of cocaine were found in the pockets of the red jacket. Additionally, a safe box masked to appear as a dictionary was discovered from inside of which the deputies recovered \$132, an inhaler for asthma, and a bag of baking soda. Finally, two pieces of mail addressed to the appellant at the address of the residence were found in the apartment.

{¶ 4} Appellant was indicted on February 12, 2010 with two counts of drug trafficking in violation of R.C. 2925.03(A)(2), two counts of drug possession in violation of R.C. 2925.11(A) (Count 2: possession of heroin and Count 7: possession of cocaine), and one count of possessing criminal tools in violation of R.C. 2923.24(A). At trial, on May 17, 2010, appellant was found to be not guilty of the drug trafficking offenses, guilty of both drug possession charges and guilty of possessing criminal tools and was sentenced to a mandatory term of incarceration of eight years on Count 2, a mandatory term of incarceration of two years on Count 4 (to run consecutive to one another) and one year on Count 5 to run concurrent to the other sentences imposed.

{¶ 5} Appellant subsequently brought the present appeal raising the six assignments of error contained in the appendix to this opinion.

{¶ 6} In his first assignment of error, appellant argues that the State failed to present sufficient evidence that he committed the crimes of drug possession and possessing criminal tools.

{¶ 7} “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. 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, (superseded by statute and constitutional amendment on other grounds). 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.” *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541 (Cook, J., concurring).

{¶ 8} The elements of the offenses for which appellant was convicted are set forth in statute. Pursuant to R.C. 2925.11(A), no person shall knowingly obtain, possess, or use a controlled substance. Appellant was convicted of two counts of violating R.C. 2925.11(A) based on possessing cocaine and possessing heroin. Pursuant to R.C. 2923.24(A), no person shall possess or have under the person’s control any substance, device, instrument, or article, with purpose to use it criminally. At trial the jury specifically

found appellant violated R.C. 2923.24(A) in regards to possessing “two cell phones and/or money and/or one silver AWS digital scale and/or one brown safe containing one watch, one gold coin, one silver bracelet and/or packaging materials.” Appellant argues that the State failed to prove the element of possession with regard to each of his convictions and further failed to prove that he possessed criminal tools with a purpose to use the items criminally. We disagree.

{¶ 9} R.C. 2925.01(K) defines possession as, “\* \* \* having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.”

{¶ 10} Possession may be actual or constructive. *State v. Chandler*, Cuyahoga App. Nos. 93664 and 93665, 2011-Ohio-590, ¶55. Actual possession entails ownership or physical control, whereas constructive possession is defined as knowingly exercising dominion and control over an object, even though that object may not be within one’s immediate physical possession. *Id.*, citing *State v. Hankerson* (1982), 70 Ohio St.2d 87, 434 N.E.2d 1362. In the present instance, as no drugs were found on appellant’s person, the State must demonstrate that appellant constructively possessed the cocaine and heroin found in the red Cavaliers jacket.

{¶ 11} The Ohio Supreme Court has held that knowledge of illegal goods on one's property is sufficient to show constructive possession. *State v. Dozanti*, Cuyahoga App. Nos. 61534 and 62190, citing *Hankerson*. However, the mere fact that property is located within premises under one's control does not, of itself, constitute constructive possession. It must also be shown that the person was conscious of the presence of the object. *Hankerson*.

{¶ 12} The elements of an offense may be established by direct evidence, circumstantial evidence or both. *State v. Durr* (1991), 58 Ohio St.3d 86, 568 N.E.2d 674. Circumstantial and direct evidence are of equal evidentiary value. *Jenks*.

{¶ 13} In the present case, there was circumstantial evidence that the appellant knew of the cocaine and heroin found in the red Cavaliers jacket. Appellant's co-defendants, Reynaldo Umpierre and Henry Umpierre, both testified that the jacket did not belong to them and that the drugs found in the jacket did not belong to them. Reynaldo, who moved into the residence at the invitation of appellant less than a month prior to appellant's arrest, testified that the jacket was in the closet of appellant's residence at the time he moved in but, as it was summertime, he did not see anyone wearing it. Henry testified that he never left items of clothing inside appellant's residence.

{¶ 14} The facts of this case are similar to the factual scenario presented to us in *State v. Chandler*, Cuyahoga App. Nos. 93664 and 93665, 2011-Ohio-590. In *Chandler*, the defendant challenged the sufficiency of the evidence linking him to possession of drugs found on an apartment balcony. As police kicked in the door to the apartment, Chandler was seen coming out of the apartment onto the balcony. *Id.* at ¶27. The police officer who observed Chandler on the balcony ordered him back inside the apartment and did not see Chandler do anything on the balcony. The subsequent search of the apartment elicited, amongst other items, a red purse discovered on the balcony containing 363.22 grams of marijuana and 67.56 grams of cocaine. *Id.* at ¶29. In *Chandler*, we held that the circumstantial evidence linking Chandler to the drugs was sufficient to sustain his convictions despite the presence of other men in the apartment when the search was executed because only Chandler had been connected to the balcony. *Id.* at ¶61.

{¶ 15} The evidence in this case, if believed, established that the jacket found in appellant's residence did not belong to his houseguest, Reynaldo Umpierre, or to Reynaldo's cousin, Henry Umpierre. Furthermore, the evidence presented indicated that the red jacket was present in appellant's residence before he even invited Reynaldo to live with him. This was sufficient circumstantial evidence to establish that appellant was not only



aware of the drugs in the jacket but that he had dominion and control over them.

{¶ 16} Similarly, the evidence was sufficient to establish that appellant had constructive possession of the small silver digital scale found in plain view in the sink of the residence's only bathroom. Appellant argues, that in regards to establishing the elements of possessing criminal tools under R.C. 2923.24(A), the State failed to demonstrate that appellant possessed the scale with a "purpose to use it criminally." At trial, however, the State presented the testimony of Detective Michael Twombly who explained that in his experience as a narcotics officer he had seen scales such as the one recovered.

Detective Twombly testified that a small scale such as this is often used to weigh illegal narcotics. Furthermore, Detective Twombly's K-9 dog, trained in narcotics detection, alerted him to the presence of the scale. Reynaldo Umpierre and Henry Umpierre both testified that the scale did not belong to them. Henry admitted that he personally used a scale to weigh drugs that he sold, but not to using the scale discovered in appellant's residence. He testified that he had never touched or seen that particular scale. Reynaldo Umpierre also testified that he had never seen the scale before and did not know to whom it belonged.

{¶ 17} In addition to the testimony regarding the ownership and nature

of the scale, the State presented the testimony of Sheriff Deputy James Pavlas who found a black garbage bag in the kitchen of appellant's residence. Inside the bag, Pavlas found numerous clear lunch bags with their corners torn off and with white powder residue evident. Deputy Pavlas testified that based on his three years of experience with the Sheriff's narcotics unit, it was a common packaging practice for drug traffickers to place cocaine in the corner of such bags, tie it off and cut away the remaining bag.

{¶ 18} We find that the above evidence, if believed, was sufficient to establish that not only did appellant constructively possess the scale that was found in plain sight as well as the packaging materials seized but that he did so with purpose to use them criminally. Appellant's first assignment of error is overruled.

{¶ 19} Appellant argues in his second assignment of error that his convictions were against the manifest weight of the evidence. The question to be answered when a manifest-weight issue is raised 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 citations and quotations omitted.) *State v. Leonard* (2004), 104 Ohio St.3d 54, 68, 818 N.E.2d 229, 252, 2004-Ohio-6235.

{¶ 20} The weight of the evidence and the credibility of the witnesses are 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 power to reverse a judgment of conviction as against the manifest weight must be exercised with caution and in only the rare case in which the evidence weighs heavily against the conviction. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 21} In challenging his convictions as against the manifest weight of the evidence, appellant raises the same arguments that he presented in his first assignment of error, challenging the sufficiency of the evidence. Additionally, appellant argues that the jury lost its way in this case due to the trial court’s jury instruction on constructive possession. Appellant argues that the trial court’s instruction was error and presents this issue in his third assignment of error. As discussed below, we find no error with the jury instruction and, therefore, appellant’s argument lacks merit. Furthermore, after reviewing the entire record, weighing all of the evidence and considering the credibility of witnesses, we find that this was not the exceptional case where 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.” *Leonard*. Appellant’s second assignment of error is overruled.

{¶ 22} In his third assignment of error, appellant argues that the trial court incorrectly instructed the jury on the definition of constructive possession. Appellant did not object to this instruction at trial and, therefore, we review the instruction for plain error.

{¶ 23} The trial court in the case instructed the jury as follows:

{¶ 24} “Possession means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.

{¶ 25} “\* \* \*

{¶ 26} “Possession within the meaning of the law may be either actual or constructive.

{¶ 27} “Actual Possession. A person exercises actual possession when he knows he has the thing or substance on or about his person.

{¶ 28} “Constructive possession is also sufficient to prove possession. Possession may not be inferred from mere access to the thing or substance; however, a person constructively possesses a thing or substance when he

knowingly exercises, or is able to exercise, dominion or control over the thing or substance, or over the premises on which the thing or substance is found or concealed, even though the thing or substance is not in his physical possession.

{¶ 29} “Knowledge of illegal goods on one’s property is sufficient to show constructive possession. However, the mere fact that property is located within premises under one’s control does not, of itself, constitute constructive possession. It must also be shown that the person was conscious of the presence of the object.”

{¶ 30} Appellant presents the same argument presented in *Chandler*: that the trial court erred because it went beyond the statutory definition of possession under R.C. 2925.01(K). As in *Chandler*, we find that the trial court’s instruction here substantially complies with that which this court has previously found permissible. See, e.g., *State v. Warren*, Cuyahoga App. No. 87726, 2006-Ohio-6415; *State v. Powell*, Cuyahoga App. No. 82054, 2003-Ohio-4936; *State v. Loper*, Cuyahoga App. Nos. 81297, 81400, 81878, 2003-Ohio-3213. This court has recognized that constructive possession can be established by knowledge of an illegal substance or goods and the ability to exercise dominion or control over the substance or the premises on which the substance is found. *Chandler*, citing *Hankerson*.

{¶ 31} As in *Warren* and *Chandler*, the jury instructions in this instance, when read in their entirety, established that possession “may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.”

{¶ 32} Appellant’s third assignment of error is overruled.

{¶ 33} Appellant argues in his fourth assignment of error that his trial counsel was ineffective in two respects. First, appellant maintains that his counsel was ineffective for failing to object to the jury instruction on constructive possession. As we determined above that the trial court did not err in instructing the jury on constructive possession, appellant’s counsel was not ineffective for failing to object to the instruction. Appellant additionally claims that his counsel was ineffective for failing to object to the trial court’s response to a jury question.

{¶ 34} During deliberations, the jury presented the following question:

{¶ 35} “Is knowing that drugs are being trafficked by someone staying in your house considered to be aiding and abetting?”

{¶ 36} Without objection, the trial court responded to the jury question by re-reading the aiding and abetting instruction provided earlier. Where, during the course of its deliberations, a jury requests further instruction, or clarification of instructions previously given, a trial court has discretion to

determine its response to that request. A reversal of a conviction based upon a trial court's response to such a request requires a showing that the trial court abused its discretion. *State v. Carter*, 72 Ohio St.3d 545, 552-553, 1995-Ohio-104, 651 N.E.2d 965.

{¶ 37} In order to demonstrate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of the appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 38} In the present instance, trial court's response to the question, referring the jury to clear and complete written instructions on the issue of aiding and abetting, was appropriate. Indeed, appellant does not argue that the trial court's jury instruction on aiding and abetting was erroneous in any manner. Because the court's action did not constitute error, trial counsel's failure to object cannot be considered deficient. *State v. Lindsey*, 87 Ohio St.3d 479, 488, 2000-Ohio-465, 721 N.E.2d 995. Appellant's fourth assignment of error is overruled.

{¶ 39} In his fifth assignment of error, appellant maintains that cumulative errors deprived him of a fair trial. Specifically, appellant argues

that the “pervasive nature” of his perceived error in the trial court’s jury instruction on possession allowed the jury to apply an impermissibly broad definition of constructive possession and, therefore, find him guilty of possession outside the bounds of the law. As we find no error in the trial court’s jury instruction regarding constructive possession, appellant’s cumulative error argument lacks merit and is overruled.

{¶ 40} Appellant’s sixth and final assignment of error asserts that the journal entries for the verdict and appellant’s sentence contain a clerical error in that they include forfeiture specifications that the State had requested be deleted. The State agrees that this is a clerical error and the forfeiture specifications should not have been included in the journal entries for the verdict and sentence. We find appellant’s sixth assignment of error to be well taken and reverse, in part, with instructions that the trial court issue a nunc pro tunc entry correcting this error.

Judgment affirmed in part and reversed in part.

It is ordered that appellant and appellee share 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.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the



Rules of Appellate Procedure.

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EILEEN A. GALLAGHER, JUDGE

PATRICIA A. BLACKMON, P.J., and  
KENNETH A. ROCCO, J., CONCUR

## Appendix

*Assignment of Error No. 1:*

“Mr. Santiago’s convictions are not supported by legally sufficient evidence as required by state and federal due process.”

*Assignment of Error No. 2:*

“Mr. Santiago’s convictions are against the manifest weight of the evidence.”

*Assignment of Error No. 3:*

“The trial court plainly erred when it instructed the jury regarding ‘constructive possession.’”

*Assignment of Error No. 4:*

“Mr. Santiago was denied his Sixth Amendment right to effective assistance of counsel because his counsel failed to object to the plainly erroneous jury instruction regarding possession and the misleading answer to a jury question.”

*Assignment of Error No. 5:*

“The cumulative errors committed in this case deprived Mr. Santiago of a fair trial.”

*Assignment of Error No. 6:*

“The journal entries incorrectly reference forfeiture specifications that were dismissed.”

