

[Cite as *State v. Byers*, 2011-Ohio-342.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94922

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

GREGORY BYERS

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-526685 B

BEFORE: Stewart, P.J., Boyle, J., and Gallagher, J.

RELEASED AND JOURNALIZED: January 27, 2011

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MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, Gregory Byers, appeals from his conviction for multiple counts of drug trafficking, drug possession, and possession of criminal tools. He complains that the jury's verdict was unsupported by the weight and sufficiency of the evidence and that trial counsel was ineffective for failing to file a motion to suppress evidence.

I

{¶ 2} We first address Byers argument that the state failed to offer sufficient evidence to establish the elements of drug possession. He argues that he was merely a passenger in a car driven by his codefendant, Robert Mitchell, and that the state failed to prove that drugs found hidden beneath the center console of the car could be found to have been in his possession.

A

{¶ 3} When reviewing a claim that there is insufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to determine whether 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.

B

{¶ 4} The state charged Byers with drug possession under R.C. 2925.11(A). That section states: “No person shall knowingly obtain, possess, or use a controlled substance.” 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. 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.

{¶ 5} The state’s evidence showed that codefendant Mitchell’s mother rented the car that Byers and Mitchell occupied at the time of their arrest. The police testified that they had been on routine patrol near a carry-out restaurant when they heard loud music coming from Mitchell’s parked car. After circling around the block, they found the car was still playing loud music. The police parked behind the car and determined from a license plate check that the car had been rented. Intending to issue the driver a citation for loud music, they approached the car: one officer approached the driver’s side of the car; the other officer approached the passenger side. Mitchell, the driver, rolled down his window and the officers immediately smelled marijuana. Mitchell admitted that he had been smoking a “blunt.” The officers told Mitchell to produce the blunt. When Mitchell reached under his seat, the officers feared that he might be reaching for a weapon. They ordered Mitchell out of the car to handcuff him for their safety. As Mitchell exited the car, the other officer went to the driver’s side to offer assistance to his partner. One of the officers kept an eye on Byers as they secured Mitchell. He saw Byers making a “movement” toward the sleeve area of his

jacket. The officer was able to discern a small plastic bag containing something with a white or off-white color in a sleeve pocket of Byers's jacket. Based on his experience, the officer suspected that the packet contained cocaine. Rather than immediately communicate this suspicion to the other officer and run the risk that Byers might flee, the officer simply told his partner to remove Byers from the car and handcuff him. After the officers secured the handcuffs, they saw Byers trying to pull his sleeve down to access the pocket. The officer who saw the plastic bag then told the other that he thought the pocket contained cocaine. Byers started to struggle with the officers and there was a short entanglement of hands as the officers worked to secure the pocket. They saw a small plastic bag fall out of the pocket and then discovered that the pocket contained more small plastic bags with cocaine. The officers placed Byers in the patrol car and then inventoried the contents of the car in preparation for it to be towed. One of the officers pulled a cup-holder insert from the center console and found a black sock beneath it. The black sock contained more cocaine. A more thorough search of Byers after he had been brought to the police station uncovered a scale that had been manufactured to look like a cell phone. He also carried more than \$700 in cash.

{¶ 6} Viewing this evidence most favorably to the state, we find sufficient circumstantial evidence to show that Byers constructively possessed

the drugs hidden beneath the cup-holder. The discovery of drugs partially hidden in the sleeve of Byers's jacket, the recovery of a drug scale disguised as a cell phone, and the large amount of cash found on Byers were facts showing his intent to traffic. With an intent to traffick drugs being manifest from the evidence, the jury could rationally conclude that additional drugs found beneath the cup- holder were likewise intended for use in drug trafficking. These drugs were obviously hidden, but nonetheless within the quick and easy reach of both Byers and Mitchell, thus indicating his ability to exercise dominion and control over them. This was circumstantial evidence of possession. *State v. Stewart*, 8th Dist. No. 83428, 2004-Ohio-4073 (concluding that sufficient circumstantial evidence of constructive possession exists when the drug was within the defendant's reach and he was able to exercise dominion and control over the drug); *State v. Jackson*, 8th Dist. No. 90471, 2009-Ohio-733, ¶33.

C

{¶ 7} Byers also argues that there was no evidence to show that he used the cell phone to make any drug transactions for purposes of proving possession of criminal tools.

{¶ 8} R.C. 2323.24(A) 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.”

{¶ 9} Although innocuous devices like cell phones can be used as criminal tools, *State v. Bowling*, 8th Dist. No. 93052, 2010-Ohio-3595, ¶60, this is not a case where the evidence showed that the defendant actually used the cell phone to traffick drugs; for example, by calling an accomplice. See, e.g., *State v. Ponce*, 8th Dist. No. 91329, 2010-Ohio-1741, ¶22; *State v. Harris*, 8th Dist. No. 93758, 2010-Ohio-323. The state offered no evidence to prove that Byers used the cell phone at any time in the course of events described by the police officers, nor did it offer any documentary evidence that might suggest he used the cell phone to make or solicit offers to sell drugs. The 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.

{¶ 10} The criminal tools count, however, listed more than just the cell phone; it also listed the cash found on Byers and the scale. When a single count of indictment lists multiple criminal tools, only one of those items need be used for a criminal purpose to sustain a conviction. See *State v. Hicks*, 186 Ohio App.3d 528, 2009-Ohio-5302, 929 N.E.2d 461, ¶10, citing *State v. Hegler* (Dec. 20, 1979), 8th Dist. No. 39840. The jury could have rationally found that Byers's constructive possession of a scale designed to look like a cell phone was for no other purpose than to aid in the trafficking of drugs. The state thus offered sufficient evidence to prove the criminal tools count.

{¶ 11} Byers next argues that his conviction is against the manifest weight of the evidence. Although he offers a boilerplate recitation of the law on the manifest weight of the evidence, he offers no additional argument other than that made in support of his arguments that the evidence was legally insufficient to sustain a conviction. He also makes the puzzling assertion that “[i]f the radio had not been so loud, this would not even be here.” This is a violation of the App.R. 16(A)(7) requirement to give “reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies.”

{¶ 12} As this court has noted ad nauseam, the concepts of the sufficiency of the evidence and the manifest weight of the evidence are different. See *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus (“The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different.”). It follows that a manifest weight of the evidence argument that does nothing more than reincorporate the same arguments made in an argument on the sufficiency of the evidence is invalid.¹ We have

¹For reasons that elude us, Byers’s appellate counsel not only fails to divide this difference, but does so after being repeatedly advised of that fact by this court. See, e.g., *State v. Judd*, 8th Dist. No. 89278, 2007-Ohio-6811, ¶46; *State v. Shelton*, 8th Dist. No. 88477, 2007-Ohio-3900, ¶60; *State v. Smith*, 8th Dist. No. 88689, 2007-Ohio-3908, ¶14; *State v. Walker*, 8th Dist. No. 87677, 2007-Ohio-6188, ¶75; *State v. Williams*, 8th Dist. No. 81949, 2003-Ohio-3950, ¶9.

considered the merits of a manifest weight of the evidence argument on our own initiative and find them wanting — the jury did not lose its way by finding that a person who possessed drugs, a large amount of cash, and a scale disguised as a cell phone possessed and trafficked in drugs.

III

{¶ 13} Byers's final argument is that trial counsel was ineffective for failing to file a motion to suppress evidence.

{¶ 14} A trial counsel's failure to file a motion to suppress evidence is not per se ineffective assistance of counsel — the appellant must show that there was a basis for the motion and that trial counsel's failure to file the motion caused the appellant prejudice. See *State v. Garcia*, 8th Dist. No. 94386, 2010-Ohio-5780, ¶8. There is no showing of prejudice from trial counsel's failure to file a motion to suppress evidence when there is no reasonable probability of success. *State v. Nields*, 93 Ohio St.3d 6, 34, 2001-Ohio-1291, 752 N.E.2d 859. In other words, trial counsel has no duty to file futile motions. *State v. Allen*, 8th Dist. No. 90552, 2008-Ohio-5251, ¶18.

{¶ 15} We find no reasonable grounds on which trial counsel could have raised a motion to suppress evidence. As a passenger in a car rented by Mitchell's mother, Byers had no possessory interest in it and thus no right to exclude others from it. *United States v. Harris* (C.A. 11, 2008), 526 F.3d 1334, 1338. He thus lacked standing to challenge the police search that

uncovered drugs beneath the cup-holder. *State v. Conner*, 6th Dist. No. L-09-1187, 2010-Ohio-4163, ¶11.

{¶ 16} Even if Byers did have standing to object to the search of the car, the search was supported by probable cause. When the police officers discovered that the occupants of the vehicle had been smoking marijuana, the automobile exception to the Fourth Amendment warrant requirement applied and allowed a search of the vehicle for drugs. See *State v. Moore*, 90 Ohio St.3d 47, 2000-Ohio-10, 734 N.E.2d 804, syllabus (“The smell of marijuana, alone, by a person qualified to recognize the odor, is sufficient to establish probable cause to conduct a search.”). Having probable cause to conduct a search of the car, the officers were justified in searching “every part of the vehicle and its contents that may conceal the object of the search.” *United States v. Ross* (1982), 456 U.S. 798, 825, 102 S.Ct. 2157, 72 L.Ed.2d 572. The search that uncovered drugs hidden beneath the cup-holder violated none of Byers’s rights.

{¶ 17} As to the search of Byers person, the police are justified in removing the occupants of the car and conducting a pat-down if they believe that their safety might be at risk, *Muehler v. Mena* (2005), 544 U.S. 93, 100, 125 S.Ct. 1465, 161 L.Ed.2d 299, and Mitchell’s act of reaching beneath the seat when ordered to produce the marijuana blunt constituted an act that could put a reasonable police officer in fear that the occupants of the vehicle

could be armed and dangerous. *Knowles v. Iowa* (1998), 525 U.S. 113, 118, 119 S.Ct. 484, 142 L.Ed.2d 492.

{¶ 18} Finally, apart from questions of officer safety, the police officers were justified in conducting a pat-down of Byers after seeing him reaching for his sleeve pocket in a suspicious manner as they were handcuffing Mitchell. *State v. Bobo* (1987), 37 Ohio St.3d 177, 524 N.E.2d 489; *United States v. Edmonds* (C.A.D.C. 2001), 240 F.3d 55, 61 (“[F]urtive gestures in response to the presence of the police can serve as the basis of an officer’s reasonable suspicion.”). Viewed in the context of a traffic stop for marijuana use, Byers’s act of reaching to his sleeve to cover up a plastic bag containing a white substance were enough to create a reasonable suspicion that Byers had been engaged in criminal activity, thus permitting the police to conduct a pat-down. The assigned errors are overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its 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 Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, PRESIDING JUDGE

MARY J. BOYLE, J., and
SEAN C. GALLAGHER, J., CONCUR