[Cite as *In re D. P.*, 2009-Ohio-4335.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

IN RE: D. P.	C. A. No. 24591
	APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. DL 07-6-2367

DECISION AND JOURNAL ENTRY

Dated: August 26, 2009

SLABY, Judge.

{¶1} Appellant, D.P., appeals the order of the Summit County Court of Common Pleas, Juvenile Division, that adjudicated him delinquent and ordered him to serve time in detention. This Court affirms.

{¶2} On July 14, 2007, a complaint issued that alleged D.P. to be a delinquent child by virtue of possessing crack cocaine in violation of R.C. 2925.11(C)(1), a fourth-degree felony if committed by an adult, and misrepresenting his identity in violation of Akron City Code §136.15, a first-degree misdemeanor if committed by an adult. The juvenile court referred the case to a magistrate. D.P. admitted the charge of misrepresenting his identity, but denied the charge of drug possession. The magistrate adjudicated D.P. delinquent on each charge. D.P. objected to the magistrate's decision, arguing that the adjudication was based on insufficient evidence and was against the manifest weight of the evidence and that the magistrate unconstitutionally diminished the burden of proof by failing to require the State to prove that

D.P. actually possessed the drugs at issue. The trial court overruled D.P.'s objections, adjudicated him a delinquent child, and committed him to sixty-one days of detention. This appeal followed.

ASSIGNMENT OF ERROR I

> "THE TRIAL [COURT] ERRED IN RULING THAT OHIO'S JUDICIALLY CREATED DOCTRINE OF JOINT AND CONSTRUCTIVE POSSESSION DID NOT UNCONSTITUTIONALLY DIMINISH THE STATE'S BURDEN OF PROOF."

ASSIGNMENT OF ERROR II

> "THE TRIAL COURT ERRED IN FAILING TO OVERRULE THE JUVENILES [SIC] ADJUDICATION FOR POSSESSION OF COCAINE WHERE THE STATE FAILED TO PROVE ACTUAL POSSESSION, OR CONSTRUCTI[VE] POSSESSION TO THE EXCLUSION OF DOMINION AND CONTROL OF ALL OTHER OCCUPANTS OF THE VEHICLE BECAUSE THERE WAS NO EVIDENCE OF KNOWLEDGE."

{¶3} D.P.'s assignments of error argue that his adjudication for possession of cocaine is based on insufficient evidence. He also argues, as he did in his objection to the magistrate's decision below, that his adjudication based on constructive possession of drugs unconstitutionally excused the State from proving the element of possession.

{¶4} A juvenile court's determination to adopt, reject, or modify a magistrate's decision is reviewed for abuse of discretion. See *In re Gochneaur*, 11th Dist. No. 2007-A-0089, 2008-Ohio-3987, at ¶16. Under this standard, we must determine whether the trial court's decision was arbitrary, unreasonable, or unconscionable – not merely an error of law or judgment. See *State v. Adams* (1980), 62 Ohio St.2d 151, 157. When a juvenile argues that his adjudication of delinquency is supported by insufficient evidence, this Court's considerations are the same as those in reviewing the denial of a Crim.R. 29 motion in a criminal case. See *In re*

R.T., 9th Dist. Nos. 05CA008728, 05CA008742, 2006-Ohio-1311, at ¶6-7. In reviewing a challenge to the sufficiency of the evidence:

> "An appellate court's function *** 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, paragraph two of the syllabus.

To make this determination, we view the evidence in the light most favorable to the State. Id.; *State v. Feliciano* (1996), 115 Ohio App.3d 646, 653. "In essence, sufficiency is a test of adequacy." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386.

{¶5} The complaint against D.P. alleged that he was a delinquent child by virtue of violating R.C. 2925.11(A)/(C)(1), which provides that "[n]o person shall knowingly obtain, possess, or use a controlled substance" that is a schedule I or II drug. "'Possess' or '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." R.C. 2925.01(K). Possession may be actual or constructive and may be proven through circumstantial evidence. *State v. Carroll*, 9th Dist. No. 24109, 2009-Ohio-331, at ¶14. "Constructive possession will be found when a person knowingly exercises dominion or control over an item, even without physically possessing it. While mere presence in the vicinity of the item is insufficient to justify possession, ready availability of the item and close proximity to it support a finding of constructive possession." (Internal citations omitted.) *State v. Lamb*, 9th Dist. No. 23418, 2007-Ohio-5107, at ¶12. While some factors, such as mere access to drugs, are insufficient to establish constructive possession on their own, "viewing these factors together

as a whole can be used as circumstantial evidence to establish constructive possession." *State v. Owens*, 9th Dist. No. 23267, 2007-Ohio-49, at ¶ 23.

{¶6} In this case, Akron police officer Eric Wood testified that he responded to a dispatch regarding suspected drug activity in the Goodyear Heights neighborhood. Upon arrival, Officer Wood noted five individuals in a red Ford Focus. He recalled that, as he approached the driver, three males in the backseat became "real fidgety." D.P. was seated behind the driver's seat. According to his own testimony, the individuals seated in the backseat with him were his cousins, juveniles T.G. and T.B. Officer Patrick Armstead testified that he arrived on the scene shortly thereafter and kept an eye on D.P. after another officer informed him that the youth "had been reaching around on the floorboard" of the car. Officer Armstead stated that when the three occupants of the backseat had been removed from the vehicle, he found an item that appeared to be a rock of crack cocaine on the floorboards behind the driver's seat, "where [D.P.'s] right foot would have been probably."

{¶7} Viewing this evidence in this case in the light most favorable to the State, we conclude that the trial court did not abuse its discretion by determining that D.P.'s adjudication for possession of cocaine was based on legally sufficient evidence. D.P. maintains nonetheless that to require the State to prove less than actual possession of drugs unconstitutionally lowers the burden of proof at trial. The Supreme Court of Ohio, however, has consistently recognized the validity of constructive possession, defined in the same manner as in R.C. 2925.01(K). See, e.g., *State v. Wolery* (1976), 46 Ohio St.2d 316, 329. We decline to second guess the Supreme Court of Ohio.

{¶8} D.P.'s assignments of error are overruled, and the judgment of the Summit County Court of Common Pleas, Juvenile Division, is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

LYNN C. SLABY
FOR THE COURT

CARR, P. J.
WHITMORE, J.
CONCUR

(Slaby, J., retired, of the Ninth District Court of Appeals, sitting by assignment pursuant to, §6(C), Article IV, Constitution.)

APPEARANCES:

CEDRIC B. COLVIN, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.