

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 24764

Appellee

v.

NEMON HOBBS, JR.

Appellant

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 2008-05-1475(A)

DECISION AND JOURNAL ENTRY

Dated: February 10, 2010

BELFANCE, Judge.

{¶1} Defendant-Appellant Nemon Hobbs appeals his conviction from the Summit County Court of Common Pleas for one count of possession of cocaine. We affirm the conviction.

INTRODUCTION

{¶2} Nemon Hobbs was driving a 1996 Chevrolet Tahoe on Route 8 near Route 271. Gregory Williams, the registered owner of the Tahoe, was riding as a passenger. Officer Roy Cunningham of the Macedonia Police Department was driving behind the Tahoe and saw that the vehicle had a temporary tag. He decided to check the temporary tag by entering the tag information into the computer in his police cruiser. The check revealed that the tag was registered to a 1994 Saturn sedan rather than a 1996 Tahoe. Officer Cunningham stopped the Tahoe to investigate the discrepancy.

{¶3} Upon approaching the driver's side of the vehicle, he noticed the smell of alcohol emanating from the vehicle and observed clear, cellophane, cigar wrappers containing tobacco on the floor inside the automobile. Officer Cunningham suspected that the tobacco had been removed from the cigars and replaced with marijuana. Officer Cunningham first investigated the tag issue. Although he was unable to fully resolve the discrepancy to his satisfaction, he decided not to tow the vehicle. Officer Cunningham then turned his attention to investigating his suspicion that Hobbs and Williams had marijuana. He asked Hobbs if he would consent to a search of the Tahoe. Hobbs indicated that he did not care and would defer to Williams because he owned the car. Officer Cunningham asked Williams for consent to search the vehicle. Williams initially declined to consent. After further discussion as to what Officer Cunningham might find in the vehicle, Williams consented. Officer Cunningham found cocaine in the headliner of the vehicle and arrested Hobbs and Williams. Later, two pieces of a clear, plastic bag with a white, powdery substance were found in Hobbs' sock. The substance tested positive for cocaine.

{¶4} Hobbs filed a motion to suppress the evidence obtained during the search of Williams' vehicle on the grounds that Officer Cunningham illegally detained the two men after the purpose of his traffic stop had been met. The trial court denied Hobbs' motion. Hobbs went to trial and the jury found him guilty of one count of possession of cocaine. Hobbs has appealed the conviction and has assigned two errors for our review.

MOTION TO SUPPRESS

{¶5} In his first assignment of error, Hobbs argues that the trial court erred in denying his motion to suppress the evidence obtained as a result of the search of the vehicle.

{¶6} An appeal from a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, at ¶8. This Court must defer to the trial court's findings of fact as the trial court is in the best position to evaluate the evidence and determine the credibility of the witnesses. *State v. Kurjian*, 9th Dist. No. 06CA0010-M, 2006-Ohio-6669, at ¶10. A reviewing court accepts the trial court's findings of fact if they are supported by competent, credible evidence. *State v. Metcalf*, 9th Dist. No. 23600, 2007-Ohio-4001, at ¶6. However, this Court will review the trial court's application of the law to the facts de novo. *Id.*

{¶7} Officer Cunningham was the sole witness to testify at the suppression hearing. He stated that he initially observed a red Chevrolet Tahoe that was traveling ahead of him. He decided to check the temporary tag on the vehicle and his check revealed that the tag was registered to a 1994 Saturn rather than a 1996 Tahoe. Officer Cunningham pulled the vehicle over to investigate.

{¶8} Officer Cunningham asked Hobbs for a license and registration. Hobbs first produced an Ohio identification card and no registration. Ultimately, Hobbs produced his license. Officer Cunningham also ran a computer check that showed that Hobbs had a valid license. Officer Cunningham copied the VIN of the Tahoe from the dashboard and then ran a computer check on the vehicle. The check revealed that Williams was the owner of the vehicle. Officer Cunningham asked Williams about the temporary tag and Williams told him that he had recently transferred title to the vehicle to his girlfriend because his own license was suspended. Officer Cunningham then asked Williams to come back to the police car to verify Williams' story or determine whether the temporary tag was fictitious.

{¶9} Officer Cunningham spent ten or fifteen minutes running the numbers through his computer. He was unable to determine whether the discrepancy was a BMV error or whether the temporary plate was fictitious. Officer Cunningham then turned his attention to investigating his observations concerning alcohol and marijuana. He administered the horizontal gaze nystagmus test on Hobbs and found no evidence of alcohol impairment. Officer Cunningham had also noticed empty plastic wrappers from “Black & Mild” cigars with more tobacco residue than was normal. Knowing that such cigars are often hollowed out to be used to smoke marijuana, Officer Cunningham decided to ask for consent to search the vehicle. Williams initially refused to give consent. Officer Cunningham told Williams he would only be given a ticket if a small amount of marijuana was found. Williams then told Officer Cunningham that there was an open container in the vehicle. Officer Cunningham assured Williams that he would only be given a ticket for an open container violation. Williams then consented to the search. Officer Cunningham found cocaine in the vehicle and then arrested Hobbs and Williams.

{¶10} Hobbs concedes that Officer Cunningham’s initial traffic stop of the Tahoe was justified due to the apparent temporary tag violation. Furthermore, Hobbs does not challenge the trial court’s findings of fact, but instead argues that the trial court erred as a matter of law. Hobbs contends that his detention beyond the scope of the investigation of the tag discrepancy was not justified because no new facts arose in the course of the initial detention that constituted reasonable suspicion of criminal activity.

{¶11} A traffic stop constitutes a seizure for purposes of the Fourth Amendment to the United States Constitution. *State v. Swann*, 9th Dist. No. 23529, 2007-Ohio-3235, at ¶6. Thus, an officer must demonstrate “specific and articulable facts which, taken together with rational inferences from those facts” lead to a reasonable suspicion of criminal activity to justify the

intrusion. *Terry v. Ohio* (1968), 392 U.S. 1, 21. The government must also present facts that justify the duration of the seizure. *Florida v. Royer* (1983), 460 U.S. 491, 500. When one has been detained so that the police may investigate a traffic violation, the police may detain the individual for the length of time necessary to check the driver's license and registration, and the vehicle's license plates. *State v. Batchili*, 113 Ohio St.3d 403, 2007-Ohio-2204, at ¶12. If, during the investigation of the events that gave rise to the initial stop, the officer discovers additional facts from which it is reasonable to infer additional criminal activity; the officer is permitted to lengthen the duration of the stop to investigate such suspicions. *Id.* at ¶15; *State v. Robinette* (1997), 80 Ohio St.3d 234, 241.

{¶12} We consider the totality of the circumstances to determine whether the length of the seizure is justified. *Batchili* at ¶12. One circumstance to consider is whether the officer unnecessarily delayed the detention by failing to diligently pursue the investigation. *United States v. Sharpe* (1985), 470 U.S. 675, 685. See, also, *Batchili* at ¶12.

{¶13} Hobbs argues that once Officer Cunningham concluded his investigation regarding the temporary tag, he had no further articulable facts justifying further investigation. He argues that Officer Cunningham did not observe furtive movements, did not smell or see any marijuana, and did not observe any drug paraphernalia. Although Officer Cunningham observed cellophane cigar wrappers with tobacco inside, Hobbs reasons that because possession of tobacco is legal, this observation could not have provided reasonable articulable suspicion of potential criminal activity. We disagree.

{¶14} Officer Cunningham originally stopped the vehicle driven by Hobbs due to a possible traffic violation concerning the vehicle's license plates. Officer Cunningham initially focused his attention on investigating the possible tag violation. Hobbs does not contend that the

duration or scope of this part of the investigation was excessive. Instead, he argues that once Officer Cunningham completed his investigation regarding the tag issue, Hobbs should have been released because Officer Cunningham lacked reasonable articulable suspicion of criminal activity. However, it is undisputed that after stopping the vehicle, Officer Cunningham made additional observations which caused him to suspect additional criminal activity. He smelled alcohol and observed the cigar wrappers and tobacco. Officer Cunningham testified that in his experience, cigars are often hollowed out to be used to smoke marijuana, in other words, such cigars are in essence drug paraphernalia used to facilitate smoking marijuana. Based on these facts, we find that Officer Cunningham had reasonable articulable suspicion to conclude that other criminal activity was possibly afoot, which in turn warranted a further brief, investigatory detention. *Batchili* at ¶15; *Robinette*, 80 Ohio St.3d at 241. Thus, Hobbs' contention that once the officer completed the tag investigation, he was required to release Hobbs is not well taken.

{¶15} We further observe that Hobbs has not argued that the length of the investigation concerning the alcohol and suspected marijuana possession was excessive.¹ Rather, he argues that because there was no basis at all for further detention, and because Williams' subsequent consent was involuntary, his consent to the search could not convert an otherwise illegal seizure into a legal one.

{¶16} The record reveals that Hobbs initially agreed to the search of the vehicle, but then deferred to Williams because he owned the car. Subsequently, Williams consented to the

¹ The record does not reveal precisely how long the dialogue between Williams and Officer Cunningham lasted which ultimately resulted in Williams' consent to search the vehicle. However, the record reveals that once Officer Cunningham completed his investigation regarding the tag discrepancy, he turned his attention to the suspected alcohol and marijuana possession and determined he would ask for consent to search the vehicle. This resulted in what appears to be a brief exchange with Williams as to what might be found in the vehicle and

search. Thus, his argument that consent was not voluntary raises the question of whether Hobbs has standing to assert that Williams' consent was invalid. However, we do not reach the issue because Hobbs did not raise this argument in the trial court. *State v. Schwarz*, 9th Dist. No. 02CA0042-M, 2003-Ohio-1294, at ¶14, citing *Belvedere Condominium Unit Owners' Assn. v. R. E. Roark Companies, Inc.* (1993), 67 Ohio St.3d 274, 279. In his motion to suppress and at the suppression hearing, Hobbs exclusively argued that it was impermissible for Officer Cunningham to detain Hobbs and Williams beyond the length of time necessary to investigate the alleged temporary tag violation. As Hobbs did not preserve the issue of consent for appeal and has not argued plain error, we decline to address it. *State v. Meyers*, 9th Dist. Nos. 23864, 23903, 2008-Ohio-2528, at ¶42.

{¶17} Based on the above analysis, we conclude that the trial court properly denied Hobbs' motion to suppress. Hobbs' first assignment of error is overruled.

SUFFICIENCY OF THE EVIDENCE

{¶18} In his second assignment of error, Hobbs argues that there was insufficient evidence to support his conviction for possession of cocaine and that his conviction is also against the manifest weight of the evidence. Whether a conviction is supported by sufficient evidence is a question of law that we review de novo. *State v. Williams*, 9th Dist. No. 24731, 2009-Ohio-6955, at ¶18, citing *State v. Thompson* (1997), 78 Ohio St.3d 380, 386. The relevant inquiry is whether the prosecution has met its burden of production by presenting sufficient evidence to sustain a conviction. *Thompson*, 78 Ohio St.3d at 390 (Cook, J., concurring). In reviewing the evidence, we do not evaluate credibility and make all reasonable inferences in favor of the State. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. The State's evidence is

Officer Cunningham's assurances that a ticket would ensue for either an open container violation

sufficient if, when viewing the evidence in a light most favorable to the prosecution, it allows a reasonable jury to conclude that the essential elements of the charged crime were proven beyond a reasonable doubt. *Id.*

{¶19} Hobbs was convicted of violating R.C. 2925.11(A), (C)(4), which provides that no one shall “knowingly obtain, possess, or use” cocaine. A person acts knowingly when, regardless of his purpose, he is aware of the existence of the facts and that his conduct will probably cause a certain result or be of a certain nature. R.C. 2901.22(B).

{¶20} The term possession, under the Ohio Revised Code, “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 can be actual or constructive. See *State v. Mack*, 9th Dist. No. 22580, 2005-Ohio-5808, at ¶13. Actual possession requires ownership or physical control. *Id.* However, constructive possession exists “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.” *State v. Graves*, 9th Dist. No. 08CA009397, 2009-Ohio-1133, at ¶18, quoting *State v. Lamb*, 9th Dist. No. 23418, 2007-Ohio-5107, at ¶12. A person’s dominion and control over an item may be proven through circumstantial evidence. See *Jenks*, 61 Ohio St.3d at 272-273. “[C]onstructive possession may be inferred from the drugs’ presence in a usable form and in close proximity to the defendant.” *State v. Fletcher*, 9th Dist. No. 23171, 2007-Ohio-146, at ¶20, quoting *State v. Figueroa*, 9th Dist. No. 22208, 2005-Ohio-1132, at ¶8. Additionally, “[p]ossession of a drug includes possessing individually, or jointly

or possession of a minor amount of marijuana.

with another person. Joint possession exists when two or more persons together have the ability to control an object, exclusive of others.” (Citations and internal quotations omitted.) *Fletcher* at ¶20.

{¶21} Hobbs argues that the State did not present sufficient evidence from which the jury could infer that he knowingly possessed the cocaine found in the headliner. The evidence demonstrated that the portion of the vehicle’s headliner directly above the steering wheel was loose and that a bag of cocaine was found in this loose portion. Hobbs was driving the vehicle, thus, he was sitting directly below where the drugs were found. Moreover, when Officer Cunningham discovered the remnants of a plastic bag that had contained cocaine in Hobbs’ sock, Hobbs admitted that he had used cocaine earlier that same day. Thus, the State presented sufficient evidence from which the jury could infer that Hobbs had at least joint, constructive possession of the cocaine because it was found in its usable form, readily available to Hobbs in the automobile in which he and Williams were travelling. See *Fletcher* at ¶20.

MANIFEST WEIGHT OF THE EVIDENCE

{¶22} In his second assignment of error, Hobbs also contends that his conviction is against the manifest weight of the evidence. When determining whether a conviction is supported by the manifest weight of the evidence,

“an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Cepec*, 9th Dist. No. 04CA0075-M, 2005-Ohio-2395, at ¶6, quoting *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

We must only invoke the discretionary power to grant a new trial in “extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant.” *State v. Flynn*, 9th Dist. No. 06CA0096-M, 2007-Ohio-6210, at ¶9, citing *Otten*, 33 Ohio App.3d at 340.

When reviewing a conviction pursuant to the manifest weight standard, we must determine whether the State met its burden of persuasion. *Cepec* at ¶6.

{¶23} However, we do not address Hobbs' contention that his conviction is against the manifest weight of the evidence because Hobbs has failed to adequately argue that claim on appeal. Pursuant to App.R. 16(A)(7), Hobbs must present an argument with respect to each assignment of error which includes "the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which [Hobbs] relies." In his merit brief, Hobbs has made the conclusory statement that his conviction is against the manifest weight of the evidence. He has not directed this Court to conflicts in the evidence or credibility issues with the testimony that would indicate that the jury "lost its way" when it found him guilty of possession of cocaine. *Cepec* at ¶6, quoting *Otten*, 33 Ohio App.3d at 340. "It is not the function of this court to construct a foundation for [an appellant's] claims; failure to comply with the rules governing practice in the appellate courts is a tactic which is ordinarily fatal." (Alteration in original.) *Catanzarite v. Boswell*, 9th Dist. No. 24184, 2009-Ohio-1211, at ¶16, quoting *Kremer v. Cox* (1996), 114 Ohio App.3d 41, 60.

{¶24} Consequently, we affirm Hobbs' conviction for possession of cocaine.

CONCLUSION

{¶25} The judgment of the Summit County Court of Common Pleas is affirmed with respect to its decision on Hobbs' motion to suppress and Hobbs' subsequent conviction for

possession of cocaine is also 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.

EVE V. BELFANCE
FOR THE COURT

MOORE, P. J.
DICKINSON, J.
CONCUR

APPEARANCES:

DIANE L. DOUGHERTY, Attorney at Law, for Appellant.

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