

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

Appellant,

vs.

IBRAHNIM IBRAHIM,

Appellee.

) SUPREME COURT CASE
) NO. 13 - 0676
)
) APPEAL FROM THE
) NINTH DISTRICT COURT
) OF APPEALS, CASE NUMBER
) 12CA0048-M
)
) MEDINA COUNTY
) COMMON PLEAS COURT
) CASE NO. 08-CR-0433
)

MEMORANDUM IN SUPPORT OF JURISDICTION

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**EXPLANATION OF WHY THIS FELONY CASE IS A MATTER OF PUBLIC OR
GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL
CONSTITUTIONAL QUESTION**

The court of appeals in this case failed to review this case in a light most favorable to the State because it did not defer to the factual findings of the trier of fact but instead conducted de novo review under its erroneous interpretation of *State v. Thompkins*, 78 Ohio St. 3d 380, 386, 678 N.E.2d 541 (1997) (noting that sufficiency is a “question of law”). The Ninth District Court of Appeals regularly applies this interpretation of *Thompkins* and it is apparent that the court of appeals did so in this case as well.

The court of appeals also added an element to the offense of possession of drugs under R.C. 2925.11(A) and (C)(1)(a) by requiring that the State prove that the defendant had “authority” over the item. After grafting a new element to the offense the court of appeals determined that the State failed to adduce evidence on that question and therefore reversed. By adding an element to the offense, the court of appeals, a judicial body, created a new element for a criminal offense, defined by legislative enactment. The court of appeals not only overstepped its constitutional power under the Ohio Constitution but its analysis is incorrect.

Finally, this case presents constitutional issues because the court of appeals faulted the State for not performing and introducing evidence of interrogations of the other passengers in the car and using their statements against Ibrahim, questioning Ibrahim and using his statements against him, and testing Ibrahim for the presence of drugs in his system. Asking for this evidence, however, presents several problems. To cure the constitutional errors the court below invites, this Court should reverse.

STATEMENT OF THE CASE AND FACTS

Ohio State Highway Patrol Trooper John Beeler responded to a traffic accident on Interstate 71 South on May 30, 2008, shortly after 2:30 p.m. (Tr. at 27.) When he arrived at milemarker 218 just north of Route 18, Trooper Beeler observed a silver Honda Odyssey in the center lanes of the interstate. (Tr. at 27-28.)

Several people were sitting on the shoulder of the freeway, some injured. (Tr. at 28.) While at the scene, one man asked if he could get his cell phone charger from the van which was still sitting in the middle of the interstate. (Tr. at 36.) Traffic was still going by in the other lanes. (Tr. at 36.)

As Trooper Beeler arrived, so did an ambulance for those injured in the accident. (Tr. at 28.) The van was badly damaged and not capable of being driven from the middle of the freeway, sitting perpendicular to the road. (Tr. at 30.) Additional Troopers arrived on scene, as did a tow truck which towed the van to a Wendy's parking lot of Route 18 just off the interstate. (Tr. at 28.) Trooper Beeler followed the tow truck to Wendy's, where he began an inventory search. (Tr. at 28, 31.)

When Trooper Beeler opened the door of the Odyssey, it was very apparent that there was a dry, green plant-like substance, khat, littered throughout the vehicle. (Tr. at 32.) Trooper Beeler testified that it appeared as if confetti had been thrown throughout the vehicle. (Tr. at 33.) It was in the cupholders, on the seats, on the floorboards, in the first and second rows, and in the trunk well. (Tr. at 33.) In the third row was a black suitcase with thirty-seven (37) individually packaged bags of the green plant-like material. (Tr. at 34.) The trunk area had a cardboard box with twenty-four (24) more individually packaged bags of khat and another white plastic bag with a large Ziploc bag

which had been opened and spilled its contents. (Tr. at 34.) Trooper Beeler recovered the suitcase from underneath the third (3rd) row seat, stuffed underneath the bench. (Tr. at 63.) The suitcase was stuffed under the seat, not thrown there during the accident. (Tr. at 78.) The cardboard box in the trunk area was similarly not thrown around during the collision because it was still sitting upright. (Tr. at 78.)

Trooper Beeler had not previously encountered khat in the field, and called for supervisors to come to the scene to assist due to his belief that the substance was a drug from the way it was packaged and concealed in the vehicle. (Tr. at 35.) Sergeant Witmer and Lieutenant Swindell arrived on scene and began to assist. (Tr. at 35.) Trooper Beeler informed his supervisors of the occupants' ethnicity – Somalian – and the Troopers believed the substance could be khat. (Tr. at 36-37.)

Khat, or *catha edulis*, is a kind of shrub native to Eastern Africa and the Middle East whose leaves are chewed for their stimulant properties. (Tr. at 86.) The leaves contain the chemical Cathinone, a Schedule I drug. (Tr. at 86.) Over time, Cathinone degrades into Cathine. (Tr. at 86.) Cathine is a Schedule IV controlled substance. (Tr. at 101.) When khat leaves are dried (turned into “graba”), the conversion from Cathinone to Cathine is delayed or stopped. (Tr. at 90.)

Trooper Beeler, who has since found khat on two (2) other occasions after this incident and testified that it was the same substance as he saw in this case, seized the khat from the vehicle. (Tr. at 38-39.) Trooper Beeler brought the evidence back to the Highway Patrol Post, packaged it for shipment to the Ohio State Highway Patrol Crime Lab, and mailed the khat to the Crime Lab that day. (Tr. at 39.)

After securing the vehicle and evidence, Trooper Beeler, Sgt. Witmer and Lt. Swindell responded to Medina General Hospital where all five (5) occupants of the vehicle were being treated. (Tr. at 40.) The occupants spoke broken English at best and it was difficult to understand them. (Tr. at 40.)

Photographs taken of the inside of the van show green/brown leaf material strewn throughout the car. Exhibit 10, a photograph of the floor of the van, shows voluminous plant material on the floor, loose. (Ex. 10.) Trooper Beeler stated that the leaf material was clearly visible on the floor when entering and exiting the vehicle. (Tr. at 73.) Had the leaves been throw from the collision, Trooper Beeler noted that one would expect to find the leaves/crumbs on the dashboard or in the headliner. (Tr. at 74.) No leaves or crumbs were found in those places. It was only in the cupholders, on the seats, and on the floor. (Tr. at 74.)

Troopers found approximately four thousand eight hundred and sixteen (4816) grams of khat leaves in the vehicle. (Tr. at 92-93.) Brandon Werry, the Crime Lab Director of the Ohio State Highway Patrol Crime Lab in Columbus, Ohio, conducted an initial screening test using gas chromatograph and a conclusive test using gas chromatograph/mass spectrometer. (Tr. at 88.) Representative sampling of the evidence submitted for testing showed conclusively that the evidence seized contained Cathinone and Cathine. (Tr. at 88, 91, 92-93; Ex. 19.)

Hawo Khamis, Ibrahim's mother, testified that she and Ibrahim left Somalia a long time ago. Despite living in Somalia for forty-nine (49) years, and khat being prevalent in Somalia, Khamis testified that she did not know what khat was or what it looked like. (Tr. at 118, 120.) She even went so far as to claim that she had never heard

the word “khat” in her life. (Tr. at 121.) Ibrahim’s mother also testified that Ibrahim moved approximately three (3) years ago and was not living at the same address as when he went to Columbus. (Tr. at 124.)

Ibrahim himself testified at trial, and stated that while he lives in a Somali community in Maine, he did not know what Cathinone looked like, and saw the khat for the first time when Trooper Beeler was checking the car. (Tr. at 140, 132.) Ibrahim admitted to being in the vehicle and sitting in the second row. (Tr. at 134.)

Ibrahim also admitted that the van stopped in Buffalo, New York, but claimed to not remember for how long because he was sleeping. (Tr. at 135.) Ibrahim claimed that he slept from Buffalo until the accident in Medina, Ohio. (Tr. at 135.) Ibrahim further claimed that he never saw green leafy substances in the van and never saw anyone bring any green leafy substances in the van. (Tr. at 136.) Ibrahim also contradicted himself in his testimony though, claiming on the one hand that he would not have ridden in the van if he knew there was khat in the car while on the other hand claiming that he did not know khat was illegal. (Tr. at 149.)

The Medina County Grand Jury indicted Ibrahim Ibrahim on October 8, 2008, charging him with possession of drugs (Cathinone) in violation of R.C. 2925.11(A) and (C)(1)(a), a felony of the fifth degree. Three (3) years later Ibrahim was arrested on the outstanding arrest warrant. He pleaded not guilty at arraignment.

The case proceeded through the pre-trial process until it came upon for trial. A jury found Ibrahim guilty as charged in the indictment. The trial court then sentenced Ibrahim to a residential community control sanction of forty-eight (48) days in jail with credit for forty-eight (48) days.

Ibrahim appealed to the Ninth District Court of Appeals, which on March 18, 2013 reversed his conviction on the basis that the trial court should have granted Ibrahim's motion for acquittal at the close of the State's case. *State v. Ibrahim*, 9th Dist. No. 12CA0048-M, 2013 Ohio 983. The State of Ohio respectfully asks this Court to accept its jurisdictional appeal.

LAW & ARGUMENT

APPELLANT'S PROPOSITION OF LAW

I. REVIEW BY AN APPELLATE COURT WHETHER THERE WAS SUFFICIENT EVIDENCE OR WHETHER A MOTION FOR ACQUITTAL SHOULD BE GRANTED REQUIRES APPROPRIATE DEFERENCE, NOT DE NOVO REVIEW.

As this Court explained in *State v. Carter*, 72 Ohio St. 3d 545, 553, 1995 Ohio 104, an appellate court reviews the denial of a motion under Crim. R. 29 using the same standard used to review a claim of insufficient evidence. A review of the sufficiency of the evidence requires an appellate court 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." *State v. Jenks*, 61 Ohio St. 3d 259, 574 N.E.2d 492 (1991), at paragraph two of the syllabus. "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." *Id.*; see also *Jackson v. Virginia*, 443 U.S. 307 (1979).

The court of appeals in this case failed to review the evidence in a light most favorable to the State. At best, the court of appeals reviewed the evidence neutrally or with a jaundiced eye in favor of the defendant. At several points the court said that it

would be “unreasonable” to make inferences from certain evidence or in the absence of certain evidence. *See Ibrahim*, 2013 Ohio 983, at ¶ 21 (“It is unreasonable to infer that [Ibrahim] would have had any authority to open closed containers containing only the female occupant’s personal items.”); *id.* at ¶ 22 (“While it may be reasonable to infer that this one bag of leaves was open to allow for its use in the van by those who knew it was there and had authority to use the leaves”). The appellate court substituted its judgment for that of the trier of fact when there is evidence which can be read, in a light most favorable to the State, to support the conclusion that Ibrahim knowingly possessed Cathinone.

The United States Supreme Court went to some lengths in 2011 to stress that *Jackson* “makes clear that it is the responsibility of the jury – not the court – to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury’s verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury.” *Cavazos v. Smith*, 565 U.S. ___, 132 S. Ct. 2, 2 (2011) (*per curiam*). “Because rational people can sometimes disagree, the inevitable consequence of this settled law is that judges will sometimes encounter convictions that they believe to be mistaken, but that they must nonetheless uphold.” *Id.* Because this Court’s decision in *Jenks* is specifically dependent on *Jackson*, the *Cavazos*’ Court’s explanation should apply equally to cases analyzed under *Jenks*. *See Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (“*Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.”).

The Ninth District did not defer to the jury as required. Instead, the Ninth District in this case followed what it has repeatedly said – that sufficiency is a question of law

which it reviews *de novo*. See, e.g., *State v. Whitfield*, 9th Dist. No. 11CA010048, 2012 Ohio 5019, at ¶ 16, citing *State v. Salupo*, 177 Ohio App. 3d 354, 2008 Ohio 3721 (9th Dist.), at ¶ 4 (“Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews *de novo*.”). The Ninth District’s line of authority relies on this Court’s statement in *Thompkins*, 78 Ohio St. 3d at 386, that “[w]hether the evidence is legally sufficient to sustain a verdict is a question of law.”

For this assertion, however, *Thompkins* cites to pre-*Jenks* and pre-*Jackson* authority. See *Thompkins*, 78 Ohio St. 3d at 386, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). The United States Supreme Court clarified in *Jackson*, which *Jenks* followed, that review for sufficiency involves deferential review of the determination of the trier of fact. *Jenks*, 61 Ohio St. 3d 259, at paragraph two of the syllabus, citing *Jackson*, 443 U.S. 307.

Because *de novo* review and deferential review of considering the evidence in a light most favorable to the State are mutually exclusive, this Court should accept the instant case to resolve the conflict being created by the Ninth District between sufficiency being a question of law thus requiring *de novo* review, *Salupo*, 177 Ohio App. 3d 354, at ¶ 4, and review for sufficiency of the evidence deferring to the rational choices made by jurors, *Jenks*, 61 Ohio St. 3d 259, at paragraph two of the syllabus; *Cavazos*, 565 U.S. ___, 132 S. Ct. at 2.

When the evidence presented in this case is reviewed in a light most favorable to the State, the evidence was sufficient for a jury to decide that Ibrahim knowingly was in joint constructive possession of the Cathinone with the other occupants of the vehicle, including the female owner/driver. Rather than decide the case as if the appellate court

was the initial trier of fact and therefore substituting its own judgment on the case for the conclusion of the trier of fact, the appellate court should have deferred to the findings of the actual trier of fact and affirmed.

The appellate court conducted *de novo* review in this case on both questions of fact as well as issues of law. As evidenced by its opinion at paragraphs fourteen and fifteen (14-15), the appellate court faults the State and the Highway Patrol for not conducting an investigation to determine who might have exercised dominion and control over the khat leaves and then proceeds to describe efforts Trooper Beeler undertook to investigate this case. *Ibrahim*, 2013 Ohio 983, at ¶ 14-15. The Court further indicates that there was no evidence that Ibrahim had knowledge of the khat leaves, *id.* at ¶ 20-21. but ignores the evidence of old khat leaves being strewn about the vehicle in a manner that it was clearly visible to anyone entering or exiting the van. (Tr. at 73.) And the court of appeals analyzed the khat leaves strewn about the van as only supporting the reasonable inference that “the leaves had not been recently chewed, further failing to show that Ibrahim had any ability to exercise dominion and control over the cathinone.” *Id.* at ¶ 23. The court of appeals only analyzed the inference *it* independently determined was reasonable. The appellate court therefore failed to consider whether it was reasonable for the jury to draw a contrary inference. *See Cavazos*, 565 U.S. ___, 132 S. Ct. at 2. Because the court of appeals exceeded its limited review powers in this case by focusing its review on what it would have done had it been the trier of fact, this Court should reverse the decision below and remand for an appropriately deferential review.

There was strong circumstantial evidence that Ibrahim was in joint constructive possession of the Cathinone in this case. He was riding with a group of people he

claimed to have never previously met in a minivan traveling from Portland, Maine to Columbus, Ohio with approximately sixty-two (62) individually-packaged baggies of khat leaves. Ignoring that circumstantial evidence and focusing on the *lack* of evidence adduced in this case, *Ibrahim*, 2013 Ohio 983, at ¶ 14, 20, 23, the appellate court disregarded the mandate of *Jenks* and focused its review on the inference *the court* would have drawn and not on whether the evidence, read in a light most favorable to the State, supported the jury's finding of guilt.

This Court should accept jurisdiction to resolve the apparent conflict between reviewing sufficiency claims *de novo* and affording deference to the trier of fact. The Court should determine that language in *Thompkins* which appears to suggest that sufficiency is a question of law and therefore supports *de novo* review was inartfully phrased and clarify that *Jenks* requires deferential review. *See Cavazos*, 565 U.S. ___, 132 S. Ct. at 2. When the evidence in this case is analyzed appropriately, the appropriate conclusion is that the State presented sufficient evidence to establish that Ibrahim knowingly constructively possessed Cathinone in violation of R.C. 2925.11(A) and (C)(1)(a).

II. THE COURT OF APPEALS FUNCTIONALLY ADDED AN ELEMENT TO THE OFFENSE OF POSSESSION OF DRUGS UNDER R.C. 2925.11 BY REQUIRING THE STATE TO SHOW AUTHORITY OVER THE CONTRABAND.

The appellate court below observed that “[i]nherent in the notions of dominion and control is some authority over the object, not merely the ability to have access to it.” *Ibrahim*, 2013 Ohio 983, at ¶ 8, citing R.C. 2925.01(K). This statement, together with repeated references to the fact that some of the Cathinone was found in the suitcase of the

female driver and the observation that there was no direct evidence that Ibrahim knew of the other open “bag [of khat leaves]” presence, could reach it, or that he had any authority to use the leaves,” *id.* at ¶ 22, demonstrates that the court of appeals was analyzing not just whether Ibrahim possessed the controlled substance but whether he had authority over the contraband. In analyzing whether Ibrahim had authority over the drug as a necessary predicate to affirming his conviction for possession of drugs under R.C. 2925.11(A) and (C)(1)(a), the court of appeals added an element to the offense.

“‘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 can be either actual or constructive. *E.g. State v. See*, 9th Dist. No. 08CA009511, 2009 Ohio 2787, at ¶ 10. As this Court held in *State v. Hankerson*, 70 Ohio St. 2d 87, 434 N.E.2d 1362 (1982), at syllabus, “constructive possession exists when an individual knowingly exercises dominion and control over an object, even though that object may not be within his immediate physical possession.” *See also State v. Wolery*, 46 Ohio St. 2d 316, 329, 348 N.E.2d 351 (1976).

Nothing about the definition of possession requires proof of “authority” or “ownership” over the item. Consider, for example, the hypothetical case of a courier of drugs arrested while driving from one location to another. The courier knows of the drugs’ presence in usable form in close proximity yet in every functional sense the courier has absolutely no authority to dispose of the drugs in whatever manner the courier sees fit. It is universally understood that certain consequences would befall the courier in the drug organization if the courier could dispose of the drugs in some manner

inconsistent with the will of the organizational leadership. Certainly no one would seriously contend that the courier is not in “possession” of the drugs despite his or her total lack of authority over the item. No serious person would so contend because the courier has dominion and control over the items *physically* even if he or she lacks *authority* over those items.

Appending the requirement that the State show authority over the items heightens the level of proof the State must present beyond that which the legislature has required. In this sense, the court of appeals violated the doctrine of separation of powers by attempting to add an element to the offense of possession of drugs. Adding the requirement that the State show that a defendant had authority over the items also undermines the State’s legitimate goal of law enforcement.

Nothing in the statute or in this Court’s precedence requires the State to prove authority. In grafting on to the offense of possession of drugs the requirement that the State show the defendant had authority over the drugs, the court of appeals wrongfully reversed the defendant’s conviction. This Court should accept the jurisdictional appeal, reverse the decision of the court of appeals and remand for proper analysis of the actual elements of the offense.

III. A COURT OF APPEALS ERRS IN VIOLATION OF DEFENDANTS’ RIGHTS WHEN IT REQUIRES THE STATE TO INTERROGATE A SUSPECT, TAKE BLOOD SAMPLES TO SHOW LEVEL OF INTOXICATION, AND QUESTION SUSPECTED CO-DEFENDANTS FOR USE AT TRIAL IN ORDER TO SUSTAIN A CONVICTION.

The court of appeals below faults the State for failing to present evidence which it seems in the court’s opinion would have helped prove that Ibrahim knowingly possessed

the Cathinone. See *Ibrahim*, 2013 Ohio 983, at ¶ 14, 23. Specifically the court of appeals notes that the State did not question co-defendants about Ibrahim's involvement, question Ibrahim himself, or test Ibrahim for the presence of Cathinone in his system. *Id.* The court of appeals' analysis is confounding because for the State to do these things would only invite reversible constitutional error. It would not necessarily prove the case.

The court says the State should have interviewed the other passengers. *Id.* at ¶ 14. The only reason to suggest that course of investigation would be to introduce it at trial. If the other passengers are also charged and are being tried together with the defendant in a joint trial, introduction of the co-defendant's statements violate the Confrontation Clause of the Sixth Amendment. See *Bruton v. United States*, 391 U.S. 123, 126 (1968); *Lee v. Illinois*, 476 U.S. 530, 542 (1986); *In re Watson*, 47 Ohio St. 3d 86, 90, 548 N.E.2d 210 (1989).

Even if the defendant was not being tried together with the other passenger co-defendants, the co-defendants have a right against self-incrimination under the Fifth Amendment to refuse to answer questions. *Miranda v. Arizona*, 384 U.S. 436, 460 (1966). What then of the inability to present evidence against the defendant? And if the co-defendants refuse to testify, their statements to police prior to trial are still inadmissible hearsay. Evid. R. 801. Not only is it hearsay, but because the statements are most certainly "testimonial" under the Sixth Amendment, admission of any of those statements would constitute a violation of the Confrontation Clause of the Sixth Amendment. See *Crawford v. Washington*, 541 U.S. 36, 53 (2004).

And the appellate court expressed its preference for the police to interview the defendant about his own involvement. *Ibrahim*, 2013 Ohio 983, at ¶ 23. Ibrahim has a

Fifth Amendment right against self-incrimination and could refuse to answer questions. *Miranda*, 384 U.S. at 460. Faulting the State for failing to present evidence of Ibrahim's own statements to police invites the State to violate one Constitutional guarantee to vindicate its legitimate interest in ensuring that the guilty are punished.

The appellate court further faults the State also for failing to secure a blood sample from the defendant. As was plain even before the United States Supreme Court's recent decision in *Missouri v. McNeely*, 569 U.S. ___, (Slip Op. at 4-5) (April 17, 2013), the Court had held in *Schmerber v. California*, 384 U.S. 757 (1966), blood draws are searches under the Fourth Amendment. If the search conducted in the name of satisfying the court of appeals of a defendant's guilt is found to be unreasonable or otherwise held unlawful, everything seized as a result is suppressed. See *Wong Sun v. United States*, 371 U.S. 471, 491 (1963) (fruit of the poisonous tree doctrine).

The court of appeals is not a party to the case and does not sit as the trier of fact deciding whether evidence supports the conviction. A court of appeals should not fall for the defense tactic of indicating the lack of evidence in a case – the court's review is limited to determining whether the evidence *actually presented*, when reviewed in a light most favorable to the State, was sufficient to convict. Because there was such evidence, the Court should accept the State's appeal, reverse the judgment, and remand.

CONCLUSION

For the foregoing reasons, the State of Ohio respectfully requests that this Honorable Court accept jurisdiction over the instant matter and reverse the decision of the Ninth District Court of Appeals and remand for the appellate court to consider issues it deemed moot.

Respectfully submitted,

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PROOF OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was sent by regular U.S. Mail to David C. Sheldon, Counsel for Morris, 669 W. Liberty Street, Medina, Ohio 44256, and the Office of the Ohio Public Defender, 250 E. Broad Street, Suite 1400, Columbus, OH 43215, this 30th day of April, 2013.



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STATE OF OHIO)
COUNTY OF MEDINA)

COURT OF APPEALS
IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT
13 MAR 18 AM 11:10

STATE OF OHIO

Appellee

v.

IBRAHNIM IBRAHIM

Appellant

FILED
DAVID B. WADSWORTH
MEDINA COUNTY
CLERK OF COURTS
C.A. No. 12CA0048-M

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF MEDINA, OHIO
CASE No. 08CR0433

DECISION AND JOURNAL ENTRY

Dated: March 18, 2013

CARR, Judge.

{¶1} Appellant Ibrahim Ibrahim appeals his conviction for possession of drugs. This Court reverses and remands.

I.

{¶2} In May 2008, Ibrahim, a resident of Maine, was riding in a van with four other people when the van became disabled as a result of an accident. After the five occupants were taken to the hospital, a trooper with the Ohio State Highway Patrol had the van towed from the interstate to a nearby parking lot where he conducted an inventory search of the vehicle. The search disclosed numerous small plastic bags of a dry, green plant-like material. Believing that the leaves were not marijuana, but suspecting that they were another illegal substance, the trooper collected the bags as evidence and mailed them to the crime lab for analysis. More than four months later, the Grand Jury indicted Ibrahim on one count of possession of cathinone, a Schedule I drug, a felony of the fifth degree. Although the prosecutor immediately requested the

COURT OF APPEALS, NINTH JUDICIAL DIST-STATE OF OHIO,
MEDINA COUNTY S.S. I hereby certify that this is a true copy of
the original on file in said Court. WITNESS my hand and the seal
of said Court at Medina, Ohio this 22nd day of April
2013 David B. Wadsworth, Clerk of Courts.
By Mitchell W. [Signature] Deputy

issuance of a warrant upon indictment on Ibrahim at his last known address in Maine, Ibrahim was not served with the indictment for approximately three years.

{¶3} Ibrahim pleaded not guilty at arraignment and the matter was tried to a jury. The jury found Ibrahim guilty of the lone charge. Two weeks later, Ibrahim filed a motion for acquittal pursuant to Crim.R. 29, arguing that the State failed to present sufficient evidence to convict him and that the State violated his right to a speedy trial by failing to serve him with the indictment for three years. The trial court continued sentencing to allow time for consideration of the motion. Immediately prior to sentencing, the trial court denied Ibrahim's motion for acquittal and sentenced him to 48 days in jail, with credit for the 48 days he served. Ibrahim timely appealed and raises two assignments of error for review. We consider the second assignment of error first as it is dispositive of the appeal.

II.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED WHEN IT OVERRULED APPELLANT'S MOTION TO ACQUIT UNDER CRIM.R. 29 AFTER THE STATE RESTED ITS CASE BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT APPELLANT POSSESSED CATHINONE.

{¶4} Ibrahim argues that the trial court erred by denying his motion for acquittal pursuant to Crim.R. 29 after the State rested. This Court agrees.

{¶5} Crim.R. 29 provides, in relevant part:

The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.

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. Galloway, 9th Dist. No. 19752, 2001 WL 81257 (Jan. 31, 2001) quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

{¶6} The test for sufficiency requires a determination of whether the State has met its burden of production at trial. *State v. Walker*, 9th Dist. No. 20559, 2001 WL 1581570 (Dec. 12, 2001); *see, also, State v. Thompkins*, 78 Ohio St.3d 380, 390 (1997) (Cook, J., concurring).

{¶7} Ibrahim was convicted of possession of cathinone in violation of R.C. 2925.11(A)(C)(1)(a), which states, in relevant part: "No person shall knowingly obtain, possess, or use a controlled substance * * *." R.C. 2901.22(B) states that "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶8} "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). R.C. 2901.21(D)(1) states that "[p]ossession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for a sufficient time to have ended possession." This Court has repeatedly held that "a person may knowingly possess a substance or object through either actual or constructive possession." *State v. See*, 9th Dist. No. 08CA009511, 2009-Ohio-2787, ¶ 10, quoting *State v. Hilton*, 9th Dist. No. 21624, 2004-Ohio-1418, ¶ 16. "Constructive possession exists when an individual knowingly

exercises dominion and control over an object, even though that object may not be within his immediate physical possession.” *State v. Reis*, 9th Dist. No. 26237, 2012-Ohio-2482, ¶ 7, quoting *State v. Hankerson*, 70 Ohio St.2d 87 (1982), syllabus. This Court continues to recognize that “the crucial issue is not whether the accused had actual physical contact with the article concerned, but whether the accused was capable of exercising dominion [and] control over it.” (Internal quotations omitted) *Reis* at ¶ 7, quoting *State v. Graves*, 9th Dist. No. 08CA009397, 2011-Ohio-5997, ¶15, quoting *State v. Ruby*, 149 Ohio App.3d 541, 2002-Ohio-5381, ¶ 30 (2d Dist.). Inherent in the notions of dominion and control is some authority over the object, not merely the ability to have access to it. *See* R.C. 2925.01(K). Nevertheless, “constructive possession may be inferred from the drugs’ presence in a usable form and in close proximity to the defendant.” *State v. Figueroa*, 9th Dist. No. 22208, 2005-Ohio-1132, ¶8, citing *State v. Thomas*, 9th Dist. No. 21251, 2003-Ohio-1479, ¶11. In addition, “[c]ircumstantial evidence is itself sufficient to establish dominion and control over the controlled substance.” *Hilton* at ¶16.

{¶9} A “controlled substance” is “a drug, compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V.” R.C. 3719.01(C). At the time relevant to this matter, cathinone was classified as a Schedule I controlled substance. *See* former R.C. 3719.41 Schedule I (E)(2).

{¶10} The State presented the testimony of two witnesses.

{¶11} Trooper John Beeler of the Ohio State Highway Patrol testified that he responded to a traffic accident on May 30, 2008, around 2:30 p.m., on interstate 71 involving a Honda Odyssey van. The van was in the middle of the interstate and perpendicular to the roadway. The five occupants of the van, including one woman and four men, were standing on the side of the

road. Trooper Beeler testified that one of the men, whom he could not identify as Ibrahim, was frantic at the scene and asked to be able to retrieve his cell phone charger from the van. The trooper found the request to retrieve a cell phone charger odd given that occupants of the van had been injured in the crash. All five occupants were taken to the hospital and the disabled van was towed from the roadway.

{¶12} Trooper Beeler began conducting an inventory search and noticed a lot of dry, green plant-like material littered throughout the van “like confetti” on the seats, floorboards, in cup holders, in the first and second passenger rows, and the “trunk” portion of the van. Significantly, the trooper testified that the leaves inside the van were “worn into the vehicle[,]” making it clear to him that “[i]t wasn’t freshly strewn about.” He found a suitcase pushed underneath the third row of seats and a closed cardboard box in the trunk area of the van. When Trooper Beeler opened the suitcase he found women’s clothing packed on top of 37 individually packaged plastic bags of a dry, green plant-like material. When he opened the cardboard box, he found women’s clothing on top of 24 individually packaged plastic bags full of the same plant-like material. Finally, also in the trunk area, which he described as a “tub” that “sinks down” for storage, the trooper found a white plastic shopping bag that contained a large, open zipper-style plastic bag containing a similar plant-like material. Because of the manner in which the packages had been concealed, Trooper Beeler believed that the packages contained drugs. He, therefore, called his supervisor to help him identify the material.

{¶13} Trooper Beeler testified that he told his supervisor that the occupants of the van were Somalis, and the supervisor surmised that the plant-like material was khat, a chewable leafy green substance common in Somalia. Trooper Beeler admitted that no one at the scene told him they were Somalis; rather, he testified that he knew they were Somalis “[j]ust by seeing and

speaking with them[.]” He testified that he then packaged the material found in the van as evidence and mailed it to a crime lab in Columbus.

{¶14} Trooper Beeler testified that he went to the hospital and spoke with some of the van’s occupants, although he could not remember whether he spoke with Ibrahim. He was able to determine that the sole female occupant was the owner and driver of the van. He did not know where Ibrahim had been sitting in the van. Although the trooper took witness statements from some of the van’s occupants, he did not take a statement from Ibrahim. In fact, he conceded that no one questioned Ibrahim from the time of the accident until the time of the indictment about what he knew about the accident or the plant-like material. The trooper admitted, however, that none of the other occupants implicated Ibrahim with having anything to do with the green plant-like material. Moreover, he admitted that no one made any effort to determine to which occupant the plant-like material belonged; rather, he just “assumed” that everyone inside the van “possessed” it. He further admitted that there was no investigation to determine who might have exercised dominion and control over the material. Trooper Beeler testified that Ibrahim was never tested for drugs in his system, and he did not appear intoxicated at the scene.

{¶15} Trooper Beeler identified numerous photographs he took at the scene of the outside and inside of the van. Although photographs showed dry, leafy material throughout the van, the trooper was not able to testify to the areas of the van reflected in each picture. He could identify some areas in the front seat and the recessed trunk area, but he was not able to distinguish most areas depicted in the photographs. Trooper Beeler testified that the speed limit on the interstate was 65 mph, and that he would expect that a collision at that speed would be a violent event which would reasonably propel dry leaves throughout the van. He thought it was significant that the cardboard box in the recessed trunk area had remained upright.

{¶16} Finally, Trooper Beeler testified that Abdi Aden, one of the other occupants in the van, admitted that he knew there was plant-like material in the van and that some people had been using it. Although Aden told him that two of the van's occupants left the vehicle when they stopped in Buffalo, New York, on their way from Maine to Columbus, Aden did not identify either person and did not explained what the people might have been doing.

{¶17} Brandon Werry is the director at the Ohio State Highway Patrol Crime Lab in Columbus. He testified that his primary responsibility is to review the casework by analysts at the lab for accuracy. He testified that he analyzed the evidence Trooper Beeler sent in this case, and that he has analyzed substances for the presence of cathinone on approximately twelve prior occasions. He testified that cathinone is a Schedule I drug¹ found in the khat plant, a shrub native to Eastern Africa and the Middle East. Although Ohio law banned the possession of cathinone at the time, Mr. Werry testified that possession of the khat plant is not illegal. He testified that the leaves are chewed for its stimulant properties. Mr. Werry explained that, once cut, the cathinone in khat rapidly degrades within 24-48 hours into cathine, a Schedule IV stimulant, unless it is dried to halt the chemical conversion.

{¶18} Mr. Werry testified that he bundled the 62 bags of green plant material he received from Trooper Beeler into groups of 8, 8, 8, 8, 7, 6, 6, 6, 4, and 1 bags for testing. He testified that the items he received for testing contained both cathinone and cathine. He received

¹ On December 20, 2012, Sub. H.B. No. 334 went into effect, amending R.C. 3719.41, which lists the Schedules of controlled substances, and deleting cathinone as a Schedule I stimulant. The legislation added a new category of Schedule I stimulants called "Substituted cathinones." On March 13, 2013, R.C. 3719.41 was again amended. Cathinone is not listed as a Schedule I stimulant, although "Substituted cathinones" comprise a lengthy category. R.C. 3719.41 Schedule I (E)(7)(a)-(d).

only the plastic bags found in the suitcase, cardboard box, and white shopping bag. He did not receive for testing any of the loose leaves that Trooper Beeler saw throughout the van. Mr. Werry testified that one cannot tell simply by looking at the leaves whether they contain cathinone. Because of the rapid degradation process, he testified that the leaves must be analyzed to determine whether they contain cathinone.

{¶19} Finally, Mr. Werry testified that, although fingerprints were taken from the plastic bags found in the van, he did not conduct any fingerprint analysis.

{¶20} When the State first rested, it had presented no evidence that Ibrahim knowingly possessed cathinone. There was no evidence that Ibrahim had any leaves on his person or that he was tested for the presence of drugs in his system. Trooper Beeler admitted that Ibrahim did not appear intoxicated at the scene.

{¶21} The State argues that Ibrahim constructively possessed cathinone because he was in the van where dry, green plant-like material tested positive for the presence of cathinone, and he was capable of exercising dominion and control over the drug. The evidence presented by the State, however, indicated that 61 of the 62 bags of leaves found to contain cathinone were found in either a closed suitcase or closed cardboard box, both of which otherwise contained only women's clothing. The owner and driver of the van was a woman. The State presented no evidence to link Ibrahim to the suitcase or cardboard box. It is unreasonable to infer that he would have had any authority to open closed containers containing only the female occupant's personal items.

{¶22} Moreover, although the trooper found an open plastic bag of leaves inside a shopping bag, he found it in the recessed "tub" portion of the van's trunk. The State did not present any evidence to show where Ibrahim was sitting in the van. Although cathinone was

present in a usable form in the van, the State failed to present evidence that it was in close proximity to Ibrahim or that he could access it. Furthermore, mere access to the bag was not enough to establish dominion and control. While it may be reasonable to infer that this one bag of leaves was open to allow for its use in the van by those who knew it was there and had authority to use the leaves, there was no evidence that Ibrahim knew of the bag's presence, could reach it, or that he had any authority to use the leaves.

{¶23} Although there were remnants of leaves throughout the van, indicating their one-time use, Trooper Beeler testified that they were "worn into the vehicle," and it was clear that they "[weren't] freshly strewn about," giving rise to the reasonable inference that the leaves had not recently been chewed, further failing to show that Ibrahim had any ability to exercise dominion and control over the cathinone. Moreover, Ibrahim was not tested for drugs in his system and Trooper Beeler testified that he did not appear intoxicated. Accordingly, Ibrahim's constructive possession of cathinone cannot be inferred merely from the presence of the drug in a usable form in a recessed area of the van and in the absence of evidence of Ibrahim's authority over the drug's use or the distribution of those leaves to anyone in the van. Moreover, no one questioned Ibrahim regarding the cathinone, and no other occupant of the van linked Ibrahim to the cathinone. Because the State failed to present evidence that Ibrahim had constructive possession, i.e., any ability or authority to exercise dominion and control, of any cathinone found in the van, there was insufficient evidence to take the case to the trier of fact. Accordingly, the trial court erred when it denied Ibrahim's motion for judgment of acquittal pursuant to Crim.R. 29. Ibrahim's second assignment of error is sustained.

ASSIGNMENT OF ERROR I

THE POST-INDICTMENT DELAY BY THE STATE TO ARREST APPELLANT AND SERVE HIM WITH THE INDICTMENT VIOLATED HIS RIGHT TO SPEEDY TRIAL UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

{¶24} Ibrahim argues that the State's three-year delay in serving him with the indictment violated his right to speedy trial. Based on our resolution of the second assignment of error, Ibrahim's first assignment of error is moot and we decline to address it. *See* App.R. 12(A)(1)(c).

III.

{¶25} Ibrahim's second assignment of error is sustained. We decline to address his first assignment of error. The judgment of the Medina County Court of Common Pleas is reversed and the cause remanded for the trial court to vacate Ibrahim's conviction for possession of cathinone.

Judgment reversed,
and cause remanded.

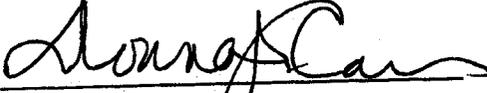
There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, 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(C). 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 Appellee.


DONNA J. CARR
FOR THE COURT

MOORE, P. J.
BELFANCE, J.
CONCUR.

APPEARANCES:

STEPHEN P. HANUDEL, Attorney at Law, for Appellant.

DEAN HOLMAN, Prosecuting Attorney, and MATTHEW A. KERN, Assistant Prosecuting Attorney, for Appellee.