

[Cite as *State v. Gale*, 2011-Ohio-1236.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94872

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

PRESTON GALE

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-521130

BEFORE: Keough, J., Blackmon, P.J., and Jones, J.

RELEASED AND JOURNALIZED: March 17, 2011

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KATHLEEN ANN KEOUGH, J.:

{¶ 1} Defendant-appellant, Preston Gale (“Gale”), appeals his convictions of drug possession, drug trafficking, and possession of criminal tools. Finding merit to the appeal, we reverse, and vacate his convictions.

{¶ 2} In 2009, Gale was charged with drug trafficking, drug possession, and possession of criminal tools, each count containing forfeiture specifications relating to a cell phone, digital scale, and money. Gale waived

his right to a jury trial and the case was tried to the bench, where the only testimony given was from Detective Robert Miles.

{¶ 3} Detective Miles testified that he and his partner were working undercover in the area of West 89th Street and Madison Avenue in the city of Cleveland when their unmarked police vehicle crossed paths with a green Buick LeSabre. As the vehicles passed each other, Miles made eye contact with the driver, later identified as Gale. Miles stated that Gale looked “stunned” and then turned his head away very quickly. Thinking this was suspicious, Miles turned his police car around and began following Gale to run the license plate. As the police car approached the vehicle, Gale speeded up and then ran a stop sign. Once the traffic violation occurred, Miles activated his lights in pursuit. Gale turned into a driveway and then exited the vehicle, fleeing from the scene. Miles testified that after scaling a fence, Gale looked back, and Miles again got a good look at him. Gale fled from the scene without being apprehended.

{¶ 4} Miles and his partner went back to the abandoned vehicle and began inventorying it for towing purposes. Inside the vehicle they found a cell phone and a receipt from Rainbow Muffler. The receipt was dated this same day and it revealed that the vehicle being inventoried recently received maintenance service. The receipt also showed the name of “Preston Gale,” a cell phone number, and an address. The paperwork attached to it identified

a VIN number, which matched that of the vehicle being inventoried. When the officers dialed the cell number, the phone in the vehicle began to ring.

{¶ 5} Miles then contacted radio and asked them to run the name “Preston Gale” with the address. From this request, the officers received a social security number, which they entered into their computer. The social security number identified Gale, and the photograph that came up matched the person who had earlier fled from Miles and his partner. The officers also learned that Gale possibly had a warrant for his arrest.

{¶ 6} They, along with uniformed officers, then went to the address listed on the maintenance receipt to see if they could locate Gale. A young lady, allegedly named Brianna Gale answered the door. Miles testified that she appeared to know Gale, and she allowed them to enter the home. Miles asked Brianna where Gale’s room was located in the house, and she walked away from them, heading up the stairs. Miles testified that they stopped her and advised her that they wanted to “search for their own safety.” According to Miles, “[w]e were going to search the house for the male that had bailed out of the car.” When the prosecutor asked if they went to a specific room first, Miles responded that they went to the bedroom that was located at the top of the stairs.

{¶ 7} Inside the bedroom and in plain view, Miles observed a digital scale, two large rocks of suspected crack cocaine, an expired Ohio driver’s

license belonging to Gale, and \$277 that was strewn about on top of a dresser.

Gale was not present in the bedroom or house where the evidence was located.

{¶ 8} Following the State's case, the trial court denied Gale's Crim.R. 29 motion for judgment of acquittal. The defense then rested and renewed its Crim.R. 29 motion, which was again denied.

{¶ 9} The trial court found Gale guilty of all charges and forfeiture specifications, except the cell phone specification, and sentenced Gale to eight months in prison.

{¶ 10} Gale now appeals, raising as his sole assignment of error that the trial court violated his rights to due process and a fair trial because it relied on inadmissible and improper evidence in finding him guilty.

{¶ 11} Gale contends that the trial court improperly allowed Detective Miles to testify as an expert about the drug trade and allowed hearsay testimony to be admitted, specifically the Rainbow Muffler receipt found in the car and the interactions between the police officers and Brianna Gale.

{¶ 12} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus. Therefore, "an appellate court [that] reviews the trial court's admission or exclusion of evidence must limit its review to whether the lower court abused its discretion." *State v.*

Finnerty (1989), 45 Ohio St.3d 104, 107, 543 N.E.2d 1233. A trial court abuses its discretion when its decision to admit or exclude the evidence was arbitrary, unreasonable, or unconscionable and not merely an error of judgment. *State v. Xie* (1992), 62 Ohio St.3d 521, 527, 584 N.E.2d 715, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 1287

{¶ 13} We note that Gale did not challenge during the trial whether Detective Miles was qualified to testify as an expert. Failure to object at the time of trial waives all but plain error. *State v. Sutton*, Cuyahoga App. No. 90172, 2008-Ohio-3677, _35, citing *State v. Childs* (1968), 14 Ohio St.2d 56, 263 N.E.2d 545. “A plain error does not exist unless, but for the error, the outcome of the trial would have been different.” *State v. Joseph*, 73 Ohio St.3d 450, 455, 1995-Ohio-288, 653 N.E.2d 285.

{¶ 14} Even if Gale had objected, Detective Miles’s testimony was not offered as expert testimony and Evid.R. 702 was not implicated. Rather, Detective Miles’s testimony actually constituted lay opinion.

{¶ 15} Evid.R. 701 provides: “[i]f the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.” Also, Evid.R. 704 provides: “[t]estimony in the form of an opinion or inference otherwise

admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact.” “A police officer may testify to matters within his experience and to his own observations which may assist the trier of fact in understanding other testimony.” *State v. Crenshaw* (June 4, 1992), Cuyahoga App. No. 60671, citing *State v. Jells* (1990), 53 Ohio St.3d 22, 559 N.E.2d 464.

{¶ 16} Here, Miles testified that he had been a police officer with the city of Cleveland for nearly fifteen years, and assigned to the detective unit for the past three years. Previously he was assigned to the Community Service Unit, but detailed to the vice unit for about six months. While on vice, he handled drug, prostitution, and liquor cases. Miles testified that as a police officer and detective, he was involved in “hundreds, if not in the thousands” of drug arrests and investigations. He testified that he was familiar with crack cocaine, and knew how it is packaged and its street value. He further testified that prior to packaging, crack cocaine is usually weighed by a digital or hand-held scale. Based on Miles’s experience, his testimony about the way drugs are prepared, packaged, and weighed, their street value, and forms of payment for drugs was properly admitted by the trial court under Evid.R. 701.

{¶ 17} We also find that the trial court did not abuse its discretion in allowing Miles to testify regarding the receipt located in the vehicle. Again

we note that Gale did not object to this testimony or the admission of the receipt into evidence, thereby waiving all but plain error. *Sutton* and *Joseph*, supra. Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Evid.R. 801(C).

{¶ 18} Here, the receipt was not used to prove the truth of the matter asserted, i.e., that the Buick LeSabre received maintenance from Rainbow Muffler. Miles testified that the information on the receipt was used to determine whether the name on the receipt matched the person who fled from them. Therefore, the information was used to explain subsequent investigative conduct of the officers in identifying the individual who fled from them earlier. See *State v. Thomas* (1980), 61 Ohio St.2d 223, 232, 400 N.E.2d 401. Accordingly, any testimony from the receipt was not hearsay, and thus properly admitted.

{¶ 19} We also find that the trial court properly excluded any hearsay testimony elicited regarding what Brianna Gale may have told the officers, either verbally or through her actions, by properly ruling on defense objections. Accordingly, the testimony that was before the trial court regarding the interactions between the officers and Brianna Gale was proper.

However, we agree with Gale that the trial court acted erroneously in

considering inadmissible testimony in finding him guilty of the offenses charged.

{¶ 20} The trial court gave a lengthy explanation of its decision when it rendered its verdict. The trial judge, first noted that when the case began, he wondered whether the State could make its case with only the testimony of the officer. The trial court recognized the central issue in the case when it stated: “[but] for whatever reason, the crossing of the threshold and getting to the specific room in question is the principal problematic issue in terms of the flow of the evidence for this Court. We don’t have the testimony of the young lady saying, ‘Yes, I said Preston lives here.’ We don’t have the testimony saying, ‘Yes, you may search the home.’ We don’t have her testimony saying, ‘That’s Preston’s room.’”

{¶ 21} In ultimately concluding that the evidence was sufficient to prove beyond a reasonable doubt the elements of the offenses charged, the court stated, “[b]ut what’s uncontroverted is that the police engage her in conversation. They go to a specific room. They find this evidence. Is that enough to circumstantially prove a charge true beyond a reasonable doubt? I conclude it is.”

{¶ 22} Appellate courts presume that a trial court will only consider relevant and admissible evidence in a bench trial. See *State v. Chandler*, Cuyahoga App. No. 81817, 2003-Ohio-6037, ¶17, citing *State v. Post* (1987), 32

Ohio St.3d 380, 384, 513 N.E.2d 754. When the trial court is the trier of fact, the judge is presumed capable of disregarding improper hearsay evidence and unless it is demonstrated that the court relied on inadmissible hearsay, a conviction will not be reversed. *In re Sims* (1983), Ohio App.3d 37, 41, 468 N.E.2d 111.

{¶ 23} Here, however, it is apparent that in rendering its verdict, the trial court relied on testimony that had been deemed inadmissible. During the trial, the court sustained a number of objections made by defense counsel, and excluded Miles's testimony regarding (1) the relationship between Brianna and Gale, (2) whether Brianna indicated if Gale lived in the house, (3) whether Brianna indicated if Gale was currently at the house, and (4) whether Brianna indicated verbally or non-verbally where Gale's bedroom was located in the house.

{¶ 24} The only admissible evidence that linked Gale to the house was the address on the Rainbow Muffler receipt. The only admissible testimony that linked Gale to the bedroom where the drugs were found was Gale's expired driver's license on the dresser next to the drugs. No other testimony was given that the bedroom belonged to Gale or that he had control over that bedroom. All other testimony was ruled inadmissible by sustained defense objections. Therefore, removing all of the inadmissible testimony from consideration, we find that the trial court only had before it the testimony

that the officers went to the bedroom at the top of the stairs and found the drugs, digital scale, money, and Gale's expired driver's license on top of a dresser. There was no admissible testimony that this bedroom belonged to Gale. This testimony was insufficient to establish a conviction for drug possession, possession of criminal tools, and drug trafficking.

{¶ 25} R.C. 2925.11(A), regarding drug possession, provides that "no person shall knowingly obtain, possess, or use a controlled substance." R.C. 2923.24(A), regarding possession of criminal tools, provides that "no person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally." R.C. 2925.01(K) defines possession as "having control over a thing or substance." Possession can be actual or constructive. *State v. Brown*, Cuyahoga App. No. 87932, 2007-Ohio-527. Actual possession entails ownership or physical control, whereas constructive possession exists when an individual knowingly exercises dominion and control over an object, even though the object may not be within his or her immediate physical possession. *Id.*; *State v. Hankerson* (1982), 70 Ohio St.2d 87, 434 N.E.2d 1362. Knowledge and possession may be constructive in nature and may be proven entirely through circumstantial evidence. *State v. Haynes* (1971), 25 Ohio St.2d 264, 267 N.E.2d 787; *State v. Trembly* (2000), 137 Ohio App.3d 134, 738 N.E.2d 93.

{¶ 26} The State’s case was entirely circumstantial, and was centered on Gale’s constructive possession of the drugs and tools. Although proof of guilt may be made by circumstantial evidence, the admissible testimony and evidence presented to the trial court for consideration was insufficient to find Gale guilty of possession of drugs, criminal tools, or trafficking drugs. As previously stated, the only evidence linking Gale to the drugs, digital scale, and money was the expired driver’s license. Without more, we cannot say there was sufficient evidence linking Gale to the drugs and tools. Just as mere physical presence in the same room as illegal drugs is insufficient to establish the element of possession, the mere presence of an expired driver’s license in the same room as illegal drugs is insufficient to establish the element of possession. See *State v. Tate*, Cuyahoga App. No. 93921, 2010-Ohio-4671, _12, citing *Haynes* at 270. The trial court had nothing more before it to consider.

{¶ 27} Because the evidence was insufficient for a conviction of possession of drugs and criminal tools, the evidence is equally insufficient for drug trafficking. R.C. 2925.03(A)(2) provides that no person shall knowingly “prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows * * * the controlled substance is intended for sale or resale by the offender or another person.” In order to ship a controlled substance, deliver it, distribute it, or

prepare it for shipping, a person must have control over it, i.e., possession. See, generally, *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, _30.

{¶ 28} Accordingly, we sustain Gale's assignment of error and find that the trial court improperly considered inadmissible testimony in finding him guilty of the offenses, thus depriving him of his rights to due process and a fair trial. The judgment of the trial court is reversed and remanded with instructions to vacate Gale's convictions.

{¶ 29} This cause is reversed and remanded for proceedings consistent with this opinion.

It is ordered that appellant recover from appellee his 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.

KATHLEEN ANN KEOUGH, JUDGE

PATRICIA A. BLACKMON, P.J., and
LARRY A. JONES, J., CONCUR