[Cite as *State v. Barron*, 2009-Ohio-5785.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 09AP-458 (C.P.C. No. 08CR05-4590)
Christopher Barron,	:	(ACCELERATED CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on November 3, 2009

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins*, *IV*, for appellee.

David L. Engler and *Mark G. Kafantaris*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Defendant-appellant, Christopher Barron ("appellant"), appeals from the judgment of the Franklin County Court of Common Pleas, convicting him after a bench trial of one count of possession of drugs in violation of R.C. 2925.11(A), a felony of the fifth degree, and sentencing him to two years of community control in the intensive supervision probation program, with the first 30 days of that period to be served in jail.

{¶2} The following evidence was adduced at trial. On October 1, 2007, Reynoldsburg police narcotics Detective Tye Downard and Officer Shane Mauger were performing surveillance at 2185 Pine Tree Lane, Apartment J, in Reynoldsburg, Ohio. They were conducting the surveillance because, since July 23, 2007, officers had received numerous anonymous tips regarding a black male selling marijuana out of that address while the female tenant was away at work.[1] Based upon these tips, officers had conducted several surveillance "spot checks" at the address in the preceding two months. During several of these checks Downard and Mauger had observed appellant outside of the apartment working on a broken-down vehicle. Downard testified that they knew that the car was inoperable because they could see the undercarriage hanging down onto the ground.

{¶3} On October 1, 2007, Downard and Mauger arrived at the residence at approximately 3:15 p.m. and parked about 60 yards down the street. Within minutes of their arrival, Downard and Mauger observed an "unidentified male black and a female black" walk out of the front entrance of Apartment J. The male sat down in a lawn chair in front of the apartment, while the female stood next to him. Then Downard and Mauger saw appellant exit the apartment and walk toward the broken-down vehicle.

{¶4} At the same time, they observed an unknown black male walk from an apartment across the street to meet appellant behind the broken-down car. The unknown male approached appellant with one hand in his pocket, whereupon both men briefly reached out their hands toward each other. The encounter lasted no more than two

[1] The trial court admitted testimony regarding the anonymous tips strictly for the purpose of explaining why the officers were conducting surveillance, but not to establish identity, prior acts, or for any other purpose.

seconds, after which the unknown man immediately turned and walked back toward the apartment across the street. Based on his training and experience, Downard testified that these movements were characteristic of a "narcotics transaction." Mauger was unable to say exactly what he believed to be the nature of the encounter.

{¶5} Following this encounter appellant walked over to the man and woman and spoke with them for a few moments and then walked into the apartment. No one followed him into the apartment and the front door was the only means of ingress and egress to the apartment. After observing the suspicious encounter between appellant and the individual who had come from across the street, Downard and Mauger decided to conduct a "knock and talk," a police practice whereby officers approach an address, knock on the door, identify themselves, and attempt to speak to a suspect. At the same time that Mauger raised his fist to knock on the door of Apartment J, appellant opened the door as if he was on his way outside again. When the door opened, both officers smelled raw marijuana. Downard and Mauger immediately identified themselves as Reynoldsburg police and asked appellant if he would like to talk. The man and woman who were situated outside the apartment immediately left the area. Appellant stated "that he didn't want * * * people knowing his business" and invited the officers inside. (Tr. 19.)

{¶6} As the door opened further, Downard and Mauger saw a pistol-grip shotgun on the floor in front of them and a large bag of marijuana on the kitchen counter, which was 15 to 20 feet away from the door. They could also see a digital scale and a metal grinder on the counter. Appellant stood between the officers and the contraband. Upon seeing the shotgun, Downard asked appellant to put up his hands and, while Mauger performed a pat-down of appellant, Downard searched each room and closet of the

residence to ensure that no one else was concealed in the apartment. Throughout the searching, appellant was cooperative and nonchalant, according to the police, and acted as if he was "going about his business." (Tr. 29.)

{¶7} Appellant told the officers that he did not rent the apartment. Mauger contacted the apartment manager, who informed him that the tenant was a woman named Jamelia Mauzy. Mauger contacted Mauzy, who was at work, and asked her to return home for questioning. When Mauzy arrived, she informed police that the shotgun belonged to her, but denied that the marijuana, scale or grinder were hers. She signed a consent form to allow the police to search the rest of the apartment.

{¶8} The police found a small baggie of marijuana and several empty clear plastic baggies, marijuana seeds in an ash tray, and metal screens typically used for smoking marijuana. According to Mauger, the presence of these items "indicated that there was possibly trafficking in marijuana in the apartment" since drug dealers often use a digital scale to "break the marijuana down in weight and then put it in the baggie for sale." (Tr. 25-26.) A metal grinder is "usually used to remove some of the stems * * * from the marijuana so that you don't have stems either to sell or smoke." (Tr. 27.) Downard had seen similar contraband in "hundreds" of narcotics cases. (Tr. 22.) Laboratory testing demonstrated that the bags contained a total of 457 grams of marijuana. The items seized were tested for fingerprints, but no fingerprints were recovered. Other than the contraband that the officers attributed to appellant, police found nothing in Apartment J that belonged to appellant.

{¶9} In an eight-page decision the trial court found appellant guilty as charged. Following a pre-sentence investigation, the court sentenced appellant to two years of

community control, with the first 30 days to be spent in jail. Appellant timely appealed and advances the following assignments of error for our review:

> FIRST ASSIGNMENT OF ERROR
>
> THE TRIAL COURT ERRED IN DETERMINING THAT THERE WAS SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT POSSESSED MARIJUANA IN VIOLATION OF R.C. 2928.11 [sic].
>
> SECOND ASSIGNMENT OF ERROR
>
> THE TRIAL COURT ERRED TO THE PREJUDICE OF THE APPELLANT DURING SENTENCING BY GIVING UNDUE CONSIDERATION TO SUSPICIONS OF TRAFFICKING NEITHER CHARGED NOR PROVEN.

{¶10} In his first assignment of error, appellant maintains that the evidence was insufficient to prove that he possessed marijuana. "Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. Sufficiency is a test of adequacy. Id. We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387." *State v. Pilgrim*, 10th Dist. No. 08AP-993, 2009-Ohio-5357, ¶24.

{¶11} Appellant was convicted of violating R.C. 2925.11, which provides, in relevant part, that "[n]o person shall knowingly obtain, possess, or use a controlled substance." He maintains that the evidence was insufficient to establish that he possessed the marijuana found in Apartment J. 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).

{¶12} Possession of a controlled substance may be actual or constructive. *State v. Saunders*, 10th Dist. No. 06AP-1234, 2007-Ohio-4450, ¶10. A person has actual possession of an item when it is within his immediate physical control. *Saunders; State v. Norman*, 10th Dist. No. 03AP-298, 2003-Ohio-7038, ¶29. Constructive possession exists when a person knowingly exercises dominion and control over an object, even though the object may not be within the person's immediate physical possession. *State v. Hankerson* (1982), 70 Ohio St.2d 87, syllabus. Because the marijuana in this case was not found on appellant's person, the state was required to prove that he constructively possessed it.

{¶13} Circumstantial evidence alone may be sufficient to support the element of constructive possession. *Jenks* at 272-73. Absent a defendant's admission, the surrounding facts and circumstances, including the defendant's actions, constitute evidence from which the trier of fact can infer whether the defendant had constructive possession over the drugs in question. *Norman* at ¶31; *State v. Baker*, 10th Dist. No. 02AP-627, 2003-Ohio-633, ¶23. "Circumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof. When the state relies on circumstantial evidence to prove an essential element of the offense charged, there is no need for such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction." *Jenks*, paragraph one of the syllabus.

{¶14} The mere presence of an individual in the vicinity of illegal drugs is insufficient to establish the element of possession, but if the evidence demonstrates the individual was able to exercise dominion or control over the drugs, he or she can be convicted of possession. *Saunders* at ¶11, citing *State v. Wyche*, 10th Dist. No. 05AP-649, 2006-Ohio-1531, ¶18. "The discovery of readily accessible drugs in close proximity to a person constitutes circumstantial evidence that the person was in constructive possession of the drugs." Id.; *State v. Jones*, 10th Dist. No. 07AP-977, 2008-Ohio-3765, ¶14. In other words, "[c]onstructive possession can be inferred from a totality of the evidence where sufficient evidence, in addition to proximity, supports dominion or control over the contraband." *Norman* at ¶31.

{¶15} Appellant argues that this case is like *State v. Chandler* (Aug. 9, 1994), 10th Dist. No. 94APA02-172, in which we reversed a conviction for attempted drug abuse because we determined the state had presented insufficient evidence that the defendant possessed the drugs in question. Appellant argues that this case is like *Chandler* because here, as in *Chandler*, appellant was convicted based solely upon his mere access to the drugs or his mere presence on the premises. We disagree. In *Chandler*, "[t]here was no evidence presented to establish that defendant was anything more than an observer of the [drug] activity" and "there was direct evidence that someone other than defendant attempted to possess the drugs." Id. In *Chandler*, police observed four men, including Chandler, huddled around a trash can lid that had crack cocaine resting on it. Police also found a homemade crack pipe about two feet from the trash can lid. One of the four men (not Chandler) had put his left hand on the ground as soon as he saw police. In *Chandler*, all the defendant did was look at the drugs in question. The

evidence was devoid of any evidence establishing the defendant's exercise of dominion and control over the drugs.

{¶16} The evidence adduced at appellant's trial, however, when viewed in the light most favorable to the prosecution, is sufficient to prove that appellant was in constructive possession of the marijuana found in Apartment J. Appellant was the only person in the apartment at the time the marijuana was found, in plain view, merely 15 to 20 feet from where appellant was standing. Police observed appellant freely enter and exit the apartment at will just before their discovery of the drugs. Moreover, in the moments between appellant's last exit from the apartment and his final return to the apartment, appellant engaged in some sort of exchange with another person, which one of the police officers described, based on his training and experience, as being indicative of a drug trafficking exchange. This evidence establishes far more than appellant's mere presence in the apartment or that appellant was a mere observer of drug activity, like the defendant in *Chandler*.

{¶17} For the foregoing reasons, we conclude that appellant's conviction is supported by sufficient evidence and we overrule his first assignment of error.

{¶18} In his second assignment of error, appellant argues that the trial court erred in sentencing appellant because the court placed undue emphasis upon appellant's arrest for drug possession ten days after his arrest on the charge of which he was convicted in this case. The pre-sentence investigation revealed that on October 1, 2007, Downard and Mauger told appellant that they would come by his apartment in ten days to take his fingerprints. When they arrived on October 11, 2007, appellant invited them in and they discovered 23 individually wrapped baggies of marijuana, totaling 64.8 grams. The pre-

sentence investigation also revealed that appellant had tested positive for marijuana twice before sentencing and appellant admitted to smoking marijuana to "self-medicat[e]" his schizophrenia and back problems. (Sentencing Tr. 4-5.)

{¶19} We note initially that, pursuant to R.C. 2953.08(G), "an appellate court may modify a sentence or remand for resentencing if the appellate court clearly and convincingly finds: (1) the record does not support the sentence, or (2) the sentence is contrary to law." *State v. Chatman*, 10th Dist. No. 08AP-803, 2009-Ohio-2504, ¶59. We must " 'look to the record to determine whether the sentencing court considered and properly applied the [non-excised] statutory guidelines and whether the sentence is otherwise contrary to law.' " Id., quoting *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶9.

{¶20} Appellant argues that the trial court gave him a harsher sentence than it would otherwise have because of its consideration of appellant's second arrest, though we observe that appellant was sentenced to two years of community control with 30 days of that time spent in jail, when he could have been sentenced to up to 12 months in prison. R.C. 2929.14(A)(5). When imposing community control, a sentencing court is authorized to impose any of the sanctions set forth in, inter alia, R.C. 2929.16 and 2929.17. *State v. Lemaster,* 3d Dist. No. 14-03-04, 2003-Ohio-4415; see also R.C. 2929.15. R.C. 2929.16 authorizes a term of up to six months in jail. R.C. 2929.17 authorizes a period of intensive supervision probation.

{¶21} Here, the trial court appropriately and reasonably applied the sentencing guidelines. The trial court explained:

> I'll try two years of community control. I want the next 30 days in the county jail. During that time, I want a Netcare evaluation to find out what Mr. Barron's mental health issues are. And I want him to do without self-medication of marijuana for 30 days and see what that does to help his mental health.

(Sentencing Tr. 8-9.)

{¶22} Clearly, the trial court believed that appellant needed a mental health evaluation and imposed a brief jail sentence in order to purge appellant's system of drugs and prevent further "self-medication." The court also placed appellant in intensive supervision probation to further assist appellant in addressing his mental health and drug issues. This was a thoughtful and reasonable application of the available sanctions.

{¶23} It is true that the trial court discussed appellant's arrest on October 11, 2007, for the drugs found in his own apartment. But "[i]n passing sentence, a judge may consider evidence that could not be presented at trial * * * [including] arrests for other crimes even where no conviction results." *State v. Mitchell* (Sept. 25, 1984), 10th Dist. No. 83AP-556, citing *State v. Downs* (1977), 51 Ohio St.2d 47, 54, and *State v. Burton* (1977), 52 Ohio St.2d 21; see also *State v. Daniel*, 10th Dist. No. 05AP-564, 2006-Ohio-4627 (trial court may take into consideration conduct of which defendant was charged and acquitted).

{¶24} In consideration of all of the foregoing, and upon a thorough review of the record and the parties' arguments, we conclude that the record supports appellant's sentence and that the sentence is not contrary to law. For this reason, appellant's second assignment of error is overruled.

{¶25} Having overruled both of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and CONNOR, JJ., concur.

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