UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0602

September Term, 2014

ARTHUR JOHNSON

v.

STATE OF MARYLAND

Wright,
Reed,
Alpert, Paul E.
(Retired, Specially Assigned),

JJ.

Opinion by Alpert, J.

Filed: June 18, 2015

Arthur Johnson, appellant, was convicted by a jury sitting in the Circuit Court for Prince George's County of possession of marijuana and possession of paraphernalia.[1] Appellant argues on appeal that the evidence was insufficient to sustain his convictions. Exercising the discretion given to us under Md. Rule 8-131(a), we agree that there was insufficient evidence to sustain his paraphernalia possession conviction. Accordingly, we shall reverse appellant's paraphernalia conviction but otherwise affirm the judgment.

FACTS

Around 2:30 a.m. on November 28, 2013, Prince George's County police officers Thomas Anderson and Desmond Hannon were in a marked police cruiser near Sheriff Road and Martin Luther King Jr. Highway in Hyattsville when they conducted a traffic stop of a station wagon for a broken brake light. Officer Anderson approached the driver side of the station wagon while Officer Hannon approached the passenger side. When Officer Anderson was directly next to the rolled-down driver's side window, he smelled the strong odor of burnt marijuana coming from inside the car and saw a baggie of what looked like marijuana on the gear shift. Officer Anderson asked the driver and sole occupant, appellant, for his license and registration, which appellant handed to him. Officer Anderson then asked appellant to exit the car, which he did. The officer told appellant that he smelled marijuana,

[1] The jury acquitted appellant of possession of cocaine with the intent to distribute and possession of cocaine. The court sentenced appellant to one year of imprisonment, all but three months suspended followed by one year of supervised probation for marijuana possession, and a suspended $500 fine for paraphernalia possession.

but appellant "adamantly" denied smoking marijuana and said there was no marijuana in the car.

Officer Anderson brought appellant to the back of the car while Officer Hannon searched it. Officer Hannon seized the baggie of suspected marijuana from the gear shift, about 10 inches from where appellant was sitting. From inside the center console arm rest, the officer seized 18 small clear vials containing suspected cocaine. Pictures of the suspected controlled dangerous substances found in the car were taken and admitted into evidence. No ash, burnt marijuana, or marijuana cigarettes were observed in the car. Appellant was searched and nothing of note was found.

A forensic chemist testified that the baggie contained marijuana and the vials contained a total of 8.47 grams of crack cocaine. Additionally, an expert testified that the crack cocaine, which could sell for $200 a gram, was meant for distribution based on the amount of cocaine, the packaging, and that no drug paraphernalia was found.

Appellant testified in his defense. He denied possessing the marijuana or cocaine in the car. He testified that he had bought the car two weeks earlier but had only taken possession of it the night he was stopped.

DISCUSSION

Appellant argues that the evidence was insufficient to sustain his two convictions. Citing *Dickerson v. State*, 324 Md. 163 (1991), appellant argues that we must reverse his possession of paraphernalia (the glass vials) conviction because that conviction was based

only on the glass vials containing the cocaine. Appellant argues that we must reverse his possession of marijuana conviction because there was no evidence that "he had knowledge of, or exercised dominion and control over" the marijuana seized from the car. The State responds that appellant has failed to preserve his sufficiency arguments for our review because he failed to raise them below in his motion for judgment of acquittal.

Preservation

After the State presented its case, defense counsel moved for judgment of acquittal, arguing:

> I would move for judgment of acquittal on all counts on the grounds that the State's evidence is not sufficient to allow a reasonable jury to convict my client of any of the charges. I would move particularly as to Count 5, which alleges that he maintained and kept a common nuisance [in his car] for the illegal distribution of CDS.

(Brackets added). The trial court granted the motion as to Count 5, but denied the motion as to the remaining counts. After appellant testified, defense counsel again moved for judgment of acquittal "on the same basis I alleged earlier." The trial court denied the motion.

When an argument is raised on appeal but not raised below in a motion for judgment of acquittal, we look to Md. Rule 8-131(a). That Rule provides:

> Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, *but the Court may decide such an issue if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal*.

(Emphasis added.) We have said:

> The purpose of Maryland Rule 8-131 is to allow the court to correct trial errors, obviating the necessity to retry cases had a potential error been brought to the attention of the trial judge. The Rule is also designed to prevent lawyers from "sandbagging" the judge and, in essence, obtaining a second "bite of the apple" after appellate review.

Sydnor v. State, 133 Md. App. 173, 183 (2000), *aff'd*, 365 Md. 205 (2001), *cert. denied*, 534 U.S. 1090 (2002).

The use of the word "ordinarily", permits "exceptions and we have occasionally decided cases on issues not previously raised." *Taub v. State*, 296 Md. 439, 441-42 (1983) (citations omitted). *See also Bible v. State*, 411 Md. 138 (2009)(addressing sufficiency of the evidence where not raised below); *Williams v. State*, 173 Md. App. 161 (2007) (addressing sufficiency of mens rea where not preserved below). An appellate court should take cognizance of unobjected to error when it is "'compelling, extraordinary, exceptional or fundamental to assure the defendant of [a] fair trial.'" *Conyers v. State*, 345 Md. 525, 563 (1997)(quoting *State v. Hutchinson*, 287 Md. 198, 203 (1980)). The Court of Appeals has written:

> [t]here is no fixed formula for the determination of when discretion should be exercised, and there are no bright line rules to conclude that discretion has been abused. . . . [W]hen presented with a plausible exercise of this discretion, appellate courts should make two determinations concerning the promotion or subversion of 8-131(a)'s twin goals. First, the appellate court should consider whether the exercise of its discretion will work unfair prejudice to either of the parties. . . . Second, the appellate court should consider whether the exercise of its discretion will promote the orderly administration of justice.

Bible, 411 Md. at 151-52 (quoting *Jones v. State*, 379 Md. 704, 714-15 (2004)).

Possession of paraphernalia

Appellant did not raise below the argument he raises on appeal as to his possession of paraphernalia conviction. Nonetheless, fairness and judicial economy persuade us to exercise the discretion given to us under Rule 8-131(a). As explained below, the error here fundamentally affected appellant's rights and our review would not work an unfair prejudice to the State. Moreover, another appeal would undoubtedly follow if we decline to review appellant's argument now.

Section 5-619(c) of the Crim. Law Art., Md. Code Ann., provides that "a person may not use or possess with intent to use drug paraphernalia to . . . store, contain, or conceal a controlled dangerous substance[.]" Section 5-101(p) defines drug paraphernalia to include:

> (ix) a capsule, balloon, envelope, or other container used, intended for use, or designed for use in packaging small quantities of a controlled dangerous substance;
>
> (x) a container or other object used, intended for us, or designed for use in storing or concealing a controlled dangerous substance[.]

Although the glass vials in which the cocaine was contained clearly falls within the definition of drug paraphernalia above, that does not end our analysis. Rather, our decision is informed by *Dickerson v. State*, 324 Md. 163 (1991). In *Dickerson*, the question on appeal was whether a conviction may lie for possession of paraphernalia when the conviction is premised solely on the use of the vial in which the cocaine was found. The Court of Appeals stated:

> the only conceivable purpose of the vial was to contain, store, or conceal the cocaine which formed the basis for petitioner's conviction for possession with intent to distribute. Because it was used for that purpose in contravention of § 287A [predecessor to and derived without substantive change to become §5-619], the vial was drug paraphernalia. Of that, there can be no question. The issue is not thereby resolved, however.
>
> The definition of drug paraphernalia is extremely broad; within it are included virtually everything in, or on, which something may be contained, stored, concealed or packaged. Given the breadth of the drug paraphernalia definition and the characteristics of many illegal drugs, it is clear that some of those drugs may only be possessed through the use of drug paraphernalia. That is certainly true of cocaine; unless held in the hand, cocaine, be it in the form of crack, as in this case, or a powder, may be possessed only with the aid of some kind of equipment, product, and/or material. In this case, the vial was used as drug paraphernalia, of course, which use as such was also incidental and necessary to petitioner's possession of the cocaine which it contained. Under the circumstances here presented, then, since the use of the vial had no purpose other than to contain the cocaine, for the possession of which petitioner has been convicted and sentenced, the possession of cocaine necessarily involved the use of drug paraphernalia. We do not believe the Legislature intended separate punishment for possession of the vial, which contained the cocaine.
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> * * *
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> We hold that, when there is no other drug paraphernalia, a defendant may only be convicted of possessing cocaine with the intent to distribute, even though the cocaine possessed is in a vial, which is thereby being used as drug paraphernalia.

Dickerson, 324 Md. at 172-74 (footnote omitted).

Here, the paraphernalia conviction was based on the glass vials that were used only to contain the cocaine. No other paraphernalia was mentioned during trial. In fact, a State's expert opined that the cocaine was not for personal use but was for distribution, in part, because of the lack of paraphernalia found. Like the facts in *Dickerson*, the glass vials here

were incidental and necessary for appellant to possess the cocaine. Accordingly, we shall reverse appellant's conviction for possession of paraphernalia.

Possession of marijuana

Appellant also failed to preserve for our review his sufficiency argument as to his possession of marijuana conviction. Unlike his possession of paraphernalia conviction, we decline to address that argument. Appellant's argument is essentially a factual dispute which is quintessentially a jury question, unlike appellant's previous argument which was purely a legal question that fundamentally affected his right to a fair trial. Accordingly, we decline to exercise our Rule 8-131(a) discretion and address his sufficiency argument as to his possession of marijuana conviction argument.

REVERSE POSSESSION OF PARAPHERNALIA CONVICTION; JUDGMENT OTHERWISE AFFIRMED.

COSTS TO BE PAID ½ BY APPELLANT AND ½ BY PRINCE GEORGE'S COUNTY.