

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1320

September Term, 2016

GEORGE NASH BRISCOE

v.

STATE OF MARYLAND

Graeff,
Friedman,
Raker, Irma S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Graeff, J.

Filed: August 28, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

George Nash Briscoe, appellant, was convicted by a jury in the Circuit Court for Dorchester County of possession of a regulated firearm by a prohibited person, possession of ammunition by a prohibited person, and possession of a controlled dangerous substance (“CDS”). The court imposed a sentence of three years on the conviction for possession of a firearm by a prohibited person and one year, concurrent, on the conviction for illegal possession of ammunition.¹

On appeal, appellant presents the following two questions for this Court’s review:

1. Was the evidence legally sufficient to sustain [appellant’s] convictions for possession of a firearm by a prohibited person and possession of ammunition by a prohibited person?
2. Did the trial judge err in imposing separate sentences for possession of a firearm by a prohibited person and possession of ammunition by a prohibited person?

For the reasons set forth below, we shall reverse the judgments of the circuit court.²

FACTUAL AND PROCEDURAL BACKGROUND

On September 25, 2015, at approximately 9:00 a.m., Detective Timothy Ebeling, a criminal and narcotics detective with the Dorchester County Sheriff’s Office, conducted a search of a three-bedroom apartment in Cambridge, Maryland. The “main resident” of the apartment, Andrea Mollock, was detained outside the residence. Four other people were

¹ The court did not impose a sentence for the conviction of possession of CDS, and appellant does not challenge that conviction on appeal.

² Because we are reversing appellant’s convictions for possession of a firearm by a prohibited person and possession of ammunition by a prohibited person, we need not address appellant’s second question.

found inside the apartment, including appellant, who was in the kitchen, and appellant's pregnant girlfriend, Kennysa Wicker, who was in one of the bedrooms.³ Two other individuals also were present, but Detective Ebeling did not interview them, and he did not know how long either of them had been at the apartment.

The "items of interest" found during the search came from "bedroom two," which contained a small bed and a "regular size" dresser. On top of the dresser, Detective Ebeling found two identification cards, with appellant's name on them, and a plastic straw that he believed contained "some kind of residue of a controlled dangerous substance." A forensic chemist from the Maryland State Police Regional Laboratory testified that the straw contained a trace amount, i.e., less than .01 grams, of heroin.

Detective Ebeling also found a "paper gift bag," which contained "documents and sonogram photos" as well as a firearm, on the floor behind the headboard of the bed.⁴ The firearm contained five .357 cartridges, and four additional cartridges were found underneath the bed in a plastic bag inside a "female shoe." Detective Ebeling did not attempt to lift fingerprints from the paper gift bag, the shoe, or the straw.

Detective Ebeling subsequently advised appellant of his *Miranda* rights⁵ and asked him about the firearm found in the bedroom. Appellant "denied knowledge and/or

³ Ms. Wicker and appellant were married at the time of trial, and Ms. Wicker invoked her spousal privilege not to testify.

⁴ There was a small, approximately six-inch, gap between the headboard and the wall.

⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966).

ownership of the revolver,” stating that he “didn’t know where it came from [and] that someone else must have put it in his room.” Detective Ebeling subsequently clarified that appellant referred to the room as “their room,” meaning his and Ms. Wicker’s room. Appellant stated that he stayed in the room “part time,” and “people were always going into his room.” Detective Ebeling did not determine whether anyone else had stayed in the bedroom during the previous week, or how recently appellant had stayed there.

At the conclusion of the State’s case, appellant’s counsel moved for judgment of acquittal on all counts, arguing that the State had not presented sufficient evidence of possession. Specifically, counsel argued that appellant’s “mere presence” on the property was insufficient to support a finding of possession of a regulated firearm by a prohibited person and possession of ammunition by a prohibited person, asserting that there was “no evidence whatsoever” that appellant had a “restraining or directing influence” over the firearm, which was in a gift bag, and the ammunition, which was in a “female shoe under the bed.”

The State argued that appellant referred to the bedroom as “their bedroom,” meaning his and Ms. Wicker’s, who was pregnant, and that the gun was found “in a bag full of maternity things, sonograms, things that the State would argue were related to the fact that his girlfriend at the time was in fact pregnant.” The State conceded that it was not “the strongest nexus ever,” but it argued that the gun was behind a headboard, and it was a permissible inference “that when they laid their heads down at night they were inches away from a gun in their room.”

The court agreed with the State. It denied the motion for judgment of acquittal, noting that, unlike the cases relied on by appellant, the items in this case were found “in their bedroom,” and therefore, a reasonable trier of fact could determine that appellant was in possession of the contraband found.⁶

DISCUSSION

Appellant contends that the evidence was insufficient to sustain his convictions for possession of a firearm and possession of ammunition, arguing that the evidence did not support a rational inference that he had knowledge, dominion, or control of the firearm or the ammunition.⁷ Appellant asserts that his “part-time, joint occupancy of the bedroom in which the contraband was found” was insufficient to show constructive possession when the items were not in plain view, there was no circumstantial evidence that he knew about the items, and there was “‘evidence to the contrary’ – namely, the location of those items inside a gift bag containing maternity-related materials and a female shoe, indicating that they were possessed by a female resident such as Ms. Wicker.”

The State contends that the evidence was sufficient to support appellant’s convictions for possession of the firearm and the ammunition. It asserts that, “[w]hen a person tells police that he lives in a place, and his personal identification papers are in that place, and there is hidden contraband there, a jury may infer that the person had knowledge

⁶ The court did grant the defense motion for judgment of acquittal on the charge of possession of a regulated firearm by a person under 21.

⁷ Appellant does not appear to dispute his conviction for possession of CDS.

of the presence of the contraband and therefore find the person guilty of possession of it.” At oral argument, the State asserted that joint occupancy of a bedroom, by itself, was sufficient to support a conviction for possession of contraband found in that bedroom.

In his Reply Brief, appellant characterizes the State’s argument as a “startlingly broad proposition” that “runs contrary to a long line of Maryland cases holding that joint occupancy of a place, without more, is insufficient to support a rational inference that an individual possessed contraband.” He further asserts that the State’s argument, which focuses only on the defendant’s possessory interest in the location, “eviscerates the traditional approach taken in Maryland,” which looks to multiple factors to determine “whether an individual was in possession of contraband.” Appellant asserts that, where the firearm and ammunition in this case “were hidden from view inside items attributable to a female resident,” his “joint occupancy of the bedroom, without more, only gives rise to a speculative inference that he possessed these items.”

In reviewing the sufficiency of the evidence to support a criminal conviction, our inquiry is “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Smith v. State*, 415 Md. 174, 184 (2010) (quoting *Jackson v. Virginia*, 443 U.S. 307, 318 (1979)). In applying this standard, we give deference to any reasonable inferences made by the jury and seek to determine only whether those inferences are supported by evidence. *State v. Mayers*, 417 Md. 449, 466-67 (2010).

A conviction based on circumstantial evidence may be upheld as long as that evidence amounts to more than a strong suspicion or mere probability of the defendant's guilt and the evidence does not require the fact finder to resort to speculation or conjecture. *Smith*, 415 Md. at 185; *Bible v. State*, 411 Md. 138, 157 (2009). As this Court recently stated in *Ross v. State*, 232 Md. App. 72, 98 (2017):

Even in a case resting solely on circumstantial evidence, and resting moreover on a single strand of circumstantial evidence, if two inferences reasonably could be drawn, one consistent with guilt and the other consistent with innocence, the choice of which of these inferences to draw is exclusively that of the fact-finding jury and not that of a court assessing the legal sufficiency of the evidence. The State is **NOT** required to negate the inference of innocence. It is enough that the jury must be persuaded to draw the inference of guilt.

The appellate court will “not second-guess the jury’s determination where there are competing rational inferences available.” *Id.* (quoting *Smith*, 415 Md. at 183) (emphasis omitted).

In addressing whether the evidence was sufficient to support appellant’s convictions of possession of the firearm and the ammunition, we begin with the elements of the offense of possession of contraband. The term “possess” is defined as “to exercise actual or constructive dominion or control over a thing by one or more persons.” Md. Code (2012 Repl. Vol.) § 5-101(v) of the Criminal Law Article (“CL”). To prove dominion and control, “the ‘evidence must show directly or support a rational inference’” that the accused “‘exercised some restraining or directing influence’” over the contraband. *Jefferson v. State*, 194 Md. App. 190, 214 (2010) (quoting *Garrison v. State*, 272 Md. 123, 142 (1974)). *Accord State v. Gutierrez*, 446 Md. 221, 233 (2016). Knowledge of the presence of the

contraband is required to exercise dominion and control. *State v. Suddith*, 379 Md. 425, 432 (2004). Such knowledge may be proven by circumstantial evidence and by inferences drawn therefrom. *State v. Smith*, 374 Md. 527, 537 (2003).

Four factors are relevant in determining whether evidence is sufficient to support a finding of possession:

[1] the defendant's proximity to the [contraband], [2] whether the [contraband was] in plain view of and/or accessible to the defendant, [3] whether there was indicia of mutual use and enjoyment of the [contraband], and [4] whether the defendant has an ownership or possessory interest in the location where the police discovered the [contraband]. None of these factors are, in and of themselves, conclusive evidence of possession.

Gutierrez, 446 Md. at 234 (quoting *Smith*, 415 Md. at 198).⁸

As indicated, the parties disagree regarding the significance of evidence of joint occupancy of a bedroom as it relates to a conviction for possession of contraband concealed in that bedroom.⁹ At oral argument, the State asserted that joint occupancy, by itself, was enough to support a conviction, barring unusual circumstances not present in this case. It argued that, pursuant to the Court of Appeals decision in *Gutierrez*, 446 Md. at 238-41,

⁸ Although many cases address constructive possession in the context of illegal drugs and drug paraphernalia, "this Court has employed the same analysis in cases involving constructive possession of other contraband." *Handy v. State*, 175 Md. App. 538, 564, *cert. denied*, 402 Md. 353 (2007). See *State v. Gutierrez*, 446 Md. 221, 236 (2016) (applying same analysis to possession of drugs and a handgun).

⁹ The evidence here, viewed in the light most favorable to the State, permits the inference that the bedroom was jointly occupied by appellant and Ms. Wicker.

“access and residency” were sufficient to support a conviction for possession of contraband in a shared space.

Appellant, however, argues that “joint occupancy of a place, without more, is insufficient to support a rational inference that an individual possessed contraband. He asserts that the State’s argument, which focuses only on the defendant’s possessory interest in the location, disregards the other factors that are relevant to the determination of possession. Appellant also disputes the applicability of *Gutierrez*, asserting that the case differs from this one in several respects.

The parties cited only one case involving the sufficiency of evidence to support a conviction for possession of contraband concealed in a jointly occupied bedroom. *Joppy v. State*, 232 Md. App. 510, 546-47, *cert. denied*, ___ Md. ___ (July 28, 2017). In that case, however, there was significant evidence that the drugs found in the bedroom closet belonged to appellant, including that the police had been involved in a months long investigation of appellant as an active participant in a drug distribution network. That case is not helpful in the analysis here, where the State is arguing that appellant’s joint occupancy of the bedroom, by itself, is sufficient to support his convictions.

Thus, we turn to other cases where the Maryland appellate courts have addressed the issue of constructive possession where the defendant was a co-occupant of a residence. In *Davis v. State*, 9 Md. App. 48, 55 (1970), this Court reversed Mr. Davis’ conviction for possession of marijuana sold by a female co-occupant of his apartment, Ms. Green, noting that the only evidence linking him to the marijuana “was that he was a co-lessee of the

premises, resided there at least two nights weekly, and had an intimate personal relationship with the co-lessee Green.” Under the circumstances of that case, where there was no evidence that Mr. Davis knew marijuana was on the premises, this Court held:

The conviction of Davis for exercising restraining or directing influence over the marihuana sold by Green . . . would appear to rest entirely on the fact of his co-occupancy of the apartment and his relationship with Green. To convict Davis because, as a joint occupant of the premises from which the marihuana was sold, he had non-exclusive access thereto is to infer his guilt solely on account of his intimate relationship and association with Green. We think this, without more, too thin a nexus upon which to predicate guilt.

Id.

Similarly, in *Garrison v. State*, 272 Md. 123, 126-30 (1974), the Court of Appeals reversed a possession conviction where Ms. Garrison, a lessee and a resident of the premises, was found in a bedroom while her husband was flushing a plastic bag containing heroin down a toilet in a separate bathroom. The Court held that there was no evidence to support a rational inference that appellant exercised dominion or control over the heroin being discarded by her husband. *Id.* at 141-42.

And in *Puckett v. State*, 13 Md. App. 584, 585-87 (1971), *cert. denied*, 265 Md. 742 (1972), this Court reversed Mr. Puckett’s conviction of possession of marijuana with intent to distribute after sixteen marijuana plants were found growing on property that he and his wife jointly owned, and lived in, although “Mr. Puckett spent most of his time on construction work in Pennsylvania.” *Id.* This Court stated that the

sole evidence incriminating him consisted of the presence of the plants on the property jointly owned by the appellants and on which they made their home. . . . Ownership and exclusive possession of property may in some circumstances be sufficient to create a rational inference that the owner was

in possession of a prohibited substance growing thereon. However, we cannot here overlook the findings of the trial judge that Mrs. Puckett was the active party, and the total absence of evidence of Mr. Puckett's involvement.

Id. at 587-88; *see also Taylor v. State*, 346 Md. 452, 463 (1997) (reversing conviction of possession of marijuana found in another person's bag in a motel room, holding that Mr. Taylor's "mere proximity to the contraband found concealed in a travel bag and his presence in a room containing marijuana smoke were insufficient to convict him").

Although none of the above cases directly address whether joint occupancy of a bedroom, by itself, is sufficient to establish possession of contraband concealed in that room, appellant argues that they support his proposed rule, i.e., that joint occupancy of a place, without more, is insufficient to support a conviction for possession of contraband. He points to the following statements in *Rich v. State*, 205 Md. App. 227, 237 (2012), which he characterized as a synthesis of the holdings in the above cases:

While [knowledge of the presence of contraband] may be inferred from a defendant's exclusive possession, ownership, or control of the premises, when a defendant is not in exclusive possession of the premises or location where the [contraband was] found, knowledge may not be inferred unless there are other circumstances tending to support an inference of knowledge or control.

Although the facts in *Rich* are not analogous to the present case, this Court set forth the principle that, although "non-exclusive possession may suggest that all the occupants of a residence . . . had knowledge of the contraband found there, mere suspicion is not enough," and "[s]ome evidence that connects a defendant with the contraband is required." *Id.*

In addition to the above cases, appellant also points to several federal cases that specifically address the issue raised here. In *United States v. Taylor*, 113 F.3d 1136, 1146

(10th Cir. 1997), the United States Court of Appeals for the Tenth Circuit held that “joint occupancy of a bedroom, without more, is insufficient to support a conviction of constructive possession of a gun found in a bedroom.” In that case, the police discovered contraband in a bedroom, i.e., drugs, a handgun, and ammunition in a closet and another handgun under the mattress of the bed. Additionally, the police found, in an entertainment center in the bedroom, drugs, digital scales, plastic baggies, Western Union money transfers in Mr. Taylor’s name, and pawn tickets later discovered to belong to Mr. Taylor. *Id.*

In arguing that there was sufficient evidence to support the conviction for possession of the gun found in the closet, the government asserted, similar to the argument here, that items in the bedroom belonging to Mr. Taylor established a sufficient nexus between Mr. Taylor and the gun found in the closet.¹⁰ The court rejected that argument, noting that, although the Western Union receipts and pawn shop tickets found in the bedroom belonged to Mr. Taylor, the documents were found in the entertainment center, a different location from where the gun was found, in the closet. *Id.* at 1445. Thus, the Western Union receipts and the pawn shop tickets established a connection between Mr. Taylor and the bedroom, but they did not establish a connection between Mr. Taylor and the gun. *Id.* at 1146. The court explained that, if the government had established that Mr. Taylor was the sole occupant of the bedroom, his conviction could be sustained “on the basis of the Western

¹⁰ The jury acquitted Mr. Taylor of possession of the gun found under the mattress. *United States v. Taylor*, 113 F.3d 1136, 1145 (10th Cir. 1997).

Union receipts and pawn shop tickets.” *Id.* Because the evidence indicated joint occupancy of the bedroom, however, constructive possession of the handgun, “from the mere fact Mr. Taylor was one of the bedroom’s occupants, could not be inferred. *Id.* at 1146.

Similarly in *United States v. Boyd*, 803 F.3d 690, 692 (D.C. Cir. 2015), the United States Court of Appeals for the District of Columbia stated that, “[i]n this circuit . . . the government may not establish a defendant’s constructive possession of concealed contraband solely by showing that the defendant occupied the room containing the contraband if, as here, the defendant shared the room with others.” The court noted that, in a joint-occupancy setting where contraband is concealed from view, the government must present some additional evidence establishing knowing dominion and control over contraband, i.e., some “‘other evidence’ from which the jury could have inferred the defendant’s constructive possession” or, alternatively, evidence that would allow the jury to conclude that the defendant was the room’s sole occupant. *Id.* In that case, the government did present such other evidence, i.e., a statement by another person that Mr. Boyd was the owner of the bag containing the ammunition, and therefore, “the jury could reasonably have concluded that [Mr.] Boyd constructively possessed the ammunition.” *Id.* at 693.

In *United States v. Bonham*, 477 F.2d 1137, 1138 (3d Cir. 1973) (en banc), the police found heroin “secreted in a hidden recess above the bedroom doorway, . . . behind the door frame” of a shared bedroom. The Third Circuit agreed with the argument that “the evidence

provided no more than an occasion to speculate” who “knew of the [presence of] hidden heroin and exercised control over it.” *Id.* at 1139. The court explained:

Where a person is the sole occupant of a room and has the right to exclude all others from it, it may logically be inferred that he has knowing dominion and control over objects so situated in his room that he is likely to be aware of their presence. But the situation is different where two persons share the occupancy of a room and the right to exclude others from it. Depending upon the circumstances, either or both may have knowing dominion and control over a particular chattel, and [the] choice between these alternatives must be based on more than speculation.

Id. at 1138 (internal citation omitted). *Accord United States v. Mergerson*, 4 F.3d 337, 349 (5th Cir. 1993) (evidence insufficient to support conviction of possession of pistol found under mattress of bed in shared bedroom where “the weapon was not in plain view and there were no other circumstantial indicia that established that [Mr.] Mergerson even knew of the weapon.”), *cert. denied*, 510 U.S. 1198 (1994).

We agree with the reasoning of these cases. Accordingly, we hold that joint occupancy of a bedroom, by itself, is insufficient to support a conviction for possession of contraband found in the bedroom. There must be other evidence to show, or allow the jury to infer, that the accused had knowledge of, and dominion and control over, the contraband. Such evidence could include evidence that the contraband was in plain view, as opposed to being concealed, as it was in this case, or that the accused acted suspiciously or made statements indicating knowledge or ownership of the contraband. Certainly, there are other circumstances that could provide a nexus between the accused and the contraband.

Here, however, there were no such “other circumstances” to support an inference that appellant had knowledge or control of the items of contraband. Although appellant’s

identification was found in the bedroom, it was not found near the handgun or ammunition, and as in *Taylor*, 113 F.3d at 1146, it established nothing more than that appellant and Ms. Wicker jointly occupied the bedroom.

The rule that we apply here, that joint occupancy of a bedroom, by itself, is insufficient to establish possession of contraband found in the bedroom, is consistent with the four-factor test the Maryland appellate courts have consistently applied to determine whether there was constructive possession. Rather than focus exclusively on whether the accused had an ownership or possessory interest in the location where the contraband was discovered, we factor in the defendant's proximity to the contraband, whether the contraband was in plain view or accessible to the defendant, and whether there was indicia of mutual use and enjoyment of the contraband. *See Gutierrez*, 446 Md. at 234 (listing four factors).

Applying these factors, we note that, when the search was conducted, appellant was in the kitchen, not in the bedroom where the firearm and ammunition were found. The firearm and ammunition were not in plain view, but rather, they were in a bag and a woman's shoe under the bed. And there was no indicia of mutual use and enjoyment of the firearm and ammunition; if anything, the evidence suggested that Ms. Wicker possessed the contraband. Applying the four-factor test leads to the conclusion that the evidence was insufficient to show that appellant had knowledge of, or dominion or control over, the contraband, and therefore, the evidence was insufficient to support appellant's convictions

of possession of a regulated firearm by a prohibited person and of possession of ammunition by a prohibited person.

Finally, we note that we are not persuaded by the State's argument that *Gutierrez* is indistinguishable from this case and compels a finding that the evidence was sufficient to sustain appellant's convictions. In that case, the police executed a search warrant for a small, one bedroom apartment. 446 Md. at 224. The police found drugs in a bathroom cabinet, "visible immediately upon its opening," on a shelf in a hallway closet, along with passports and a receipt with Gutierrez' name, and under the kitchen sink. *Id.* at 225. Baggies and a grinder, items used in drug trafficking, were found in plain view. *Id.* at 224-25, 239.

In concluding that a rational trier of fact could have concluded that two defendants had joint constructive possession of the contraband, the Court of Appeals found that they had "a possessory interest in the apartment, such that they had the ability and intent to exercise dominion and control." *Id.* at 236-37. "Personal papers belonging to both of them also were found in the apartment; Gutierrez's passports and receipt were found in the same hallway closet where some of the cocaine was located." *Id.* at 237. The Court found that, given the small size of the apartment and the location of the drugs, Gutierrez was in close proximity to the drugs. The Court also indicated that evidence of mutual use and enjoyment was shown by the quantity of the drugs, as well as the grinder and baggies, items related to drug trafficking. *Id.* at 237-39. Under those circumstances, the Court held that

Gutierrez and his co-defendant constructively possessed the drugs and gun found in the small apartment. *Id.* at 541.

Here, by contrast, the factors, other than possessory interest in the bedroom indicate insufficient evidence of constructive possession of the contraband found in that room. As indicated, the contraband was not in plain view, appellant was not near the contraband, and there was no evidence of mutual enjoyment of the contraband. *Gutierrez* does not support the State's position on appeal, i.e., that joint occupancy of a bedroom, by itself, supports a reasonable inference of constructive possession of concealed contraband in the bedroom.

In sum, we hold that joint occupancy of a bedroom, without more, is insufficient to support a conviction for constructive possession of contraband found in that bedroom. Here, there was no other evidence supporting an inference that appellant had knowledge of the contraband in the shared bedroom. Accordingly, we must reverse appellant's convictions.

**JUDGMENTS OF THE CIRCUIT
COURT FOR DORCHESTER
COUNTY REVERSED. COSTS
TO BE PAID BY DORCHESTER
COUNTY.**