

Circuit Court for Caroline County
Case No. 05-K-15-011307

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 2474

September Term, 2016

LAMONTRA FOUNTAIN

v.

STATE OF MARYLAND

Kehoe,
Leahy,
Alpert, Paul E.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: February 14, 2018

*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.

After a bench trial in the Circuit Court for Caroline County on October 12, 2016, Lamontra Fountain was convicted of possession of cocaine and possession of drug paraphernalia with intent to use. Appellant was sentenced to a one year suspended sentence for cocaine possession, eighteen months of supervised probation, and a \$250 fine. The trial court declined to impose a sentence for the drug paraphernalia conviction. Appellant argues on appeal that the evidence was insufficient to sustain his convictions. We agree with respect to his conviction for possession of drug paraphernalia. Accordingly, we shall reverse appellant's paraphernalia conviction but otherwise affirm the judgment.

Background

A short time after midnight on March 30, 2016, Officer Michael Stivers, a patrol officer with the Federalsburg Police Department, stopped a vehicle for a registration tag light violation. John Knowles was driving the vehicle, Fountain was riding in the front passenger seat, and Tashiko Osborn was in the rear passenger seat directly behind Fountain. Officer Stivers testified that, as he approached the driver's side of the vehicle, he noticed a marijuana cigar in the ashtray. Having seen contraband, Officer Stivers decided to conduct a search and asked Holmes to step outside the vehicle. After he finished searching Holmes, Officer Stivers escorted him to the patrol car parked behind the vehicle to wait with a back-up officer, then returned to the passenger side of the car and asked Fountain to exit. Officer Stivers testified that, before Fountain exited the vehicle, he "reached over to his left-hand side, [and] fumbled around the car for a brief

second.” According to Officer Stivers, appellant “reach[ed] with both hands to his left side and delay[ed] exiting the vehicle.” Once he was outside the vehicle, Officer Stivers searched Fountain for contraband and weapons, neither of which he recovered. After walking Fountain behind the car to wait with the second patrol officer, Officer Stivers asked Osborn to exit the vehicle. On cross examination, Officer Stivers acknowledged that Osborn was outside of his field of vision for a period of time while he escorted Fountain to the rear of the vehicle.

Once all of the occupants were removed, Officer Stivers searched the vehicle and recovered an orange pill bottle in the passenger seat by the seat belt buckle. Officer Stivers testified that he could see inside the bottle, which had no label, and he observed a “white powder substance.” He also searched Osborn’s purse and recovered two pipes used to smoke cocaine. When questioned about the cocaine found inside the vehicle, none of its occupants claimed ownership of the pill bottle or its illegal contents, and all three denied knowing that the container was inside the vehicle. Officer Stivers placed Fountain under arrest on suspicion that the powder was cocaine. The Maryland State Police Crime Laboratory tested the powdery substance and determined that it was cocaine.

Analysis

Appellant was convicted of possession of cocaine and possession of drug paraphernalia for the bag in which it was contained. He contends that the evidence is insufficient to sustain either conviction because the State failed to establish that “he had knowledge of, or exercised dominion and control over” the cocaine seized from the car. The State responds that the evidence was sufficient to support a reasonable inference, beyond a reasonable doubt, that appellant knowingly possessed the cocaine and was in actual or constructive possession of it. We agree with the State.

When we review the legal sufficiency of evidence supporting a conviction, the proper standard 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, 319 (1979)) (emphasis in *Jackson*). Because the trier of fact “possesses the unique opportunity to view the evidence and to observe first-hand the demeanor and to assess the credibility of witnesses during their live testimony, we do not re-weigh the credibility of witnesses or attempt to resolve any conflicts in the evidence.” *Id.* at 185. Thus, this Court solely concerns itself with “whether the verdict was supported by sufficient evidence, direct or circumstantial, which could fairly convince a trier of fact of the defendant’s guilt of the offenses charged beyond a reasonable doubt.” *Taylor v. State*, 346 Md. 452, 457 (1997). In reviewing an appeal from a judgment entered following a bench trial, we “will review the case on both the law and the

evidence [and] will not set aside the judgment of the trial court on the evidence unless clearly erroneous.” Maryland Rule 8–131(c).

Appellant was convicted of violating § 5-601(a)(1) of the Criminal Law Article (“CL”), Maryland Code (2012 Repl. Vol.) by possessing a controlled dangerous substance (“CDS”), specifically, cocaine, which is classified as a Schedule II CDS under CL § 5-403(b)(3). Appellant was also convicted of possession of drug paraphernalia with intent to use, in violation of CL § 5-619(c). Both crimes require proof of the element of possession, and “possess,” as defined under CL § 5–101(u), means “to exercise actual or constructive dominion or control over a thing by one or more persons.” The Court of Appeals has identified four factors that are relevant in determining whether evidence is sufficient to support a finding of possession of CDS:

[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.

State v. Gutierrez, 446 Md. 221, 234 (2016) (quoting *Smith*, 415 Md. at 198).

Appellant asserts that the evidence presented by the State does not prove his actual or constructive possession of the cocaine seized from the car. He contends that the State failed to establish his proximity to the cocaine because it could have been placed in his seat by Osborn, the rear passenger, when Officer Stivers briefly lost sight of her. Further, appellant maintains that because it was dark at the time of the traffic stop and the

prescription bottle containing the cocaine may have obscured its contents, the evidence was insufficient for a rational trier to infer that he knew the cocaine was in the car. He further contends that the State presented no evidence of his mutual use or enjoyment of the cocaine, as the police found two pipes for smoking cocaine in Osborn's purse, but did not find any contraband on his person. Finally, he contends that there was no evidence that he had a possessory or ownership interest in the vehicle in which the cocaine was discovered.

Appellant compares the facts in this case to *Taylor*, 346 Md. at 458, and maintains that the evidence was insufficient to prove possession. In that case, Taylor was in a motel room he was occupying with four friends when police officers responded to investigate a complaint of possible drug activity. *Id.* at 455. The officers observed clouds of smoke in the room that smelled like marijuana and requested to conduct a search, which revealed baggies of marijuana inside a “multi-colored bag” and rolling papers inside a wallet “which was secreted in another bag that did not belong to [Taylor].” *Id.* at 455-56. The trial court convicted Taylor of possession, finding that he was in close proximity to the marijuana, that he “knew” there was marijuana in the room because people were smoking it in his presence, and that he had a possessory right in the premises. *Id.* at 456. The Court of Appeals reversed, holding that because Taylor “was in joint rather than exclusive possession of the hotel room, his 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.” *Id.* at 463.

Appellant’s reliance on *Taylor* is misplaced. Here, the cocaine was not secreted inside a bag, wallet, or some other compartment within the car. Instead, it was discovered within arm’s reach of the passenger seat, which he had vacated moments before when he was asked to exit the car. According to Officer Stivers, before appellant stepped out of the car, he delayed his exit while he “fumbled around” near his seatbelt “with both hands.” From this evidence, a rational trier of fact could conclude that appellant was in actual possession of the cocaine before attempting to hide it in the passenger seat to avoid detection during the pat down. The trial court was not required to believe appellant’s argument that the cocaine was planted in his seat by the back seat passenger over Officer Stivers’ testimony that he took longer than necessary to exit the car while both of his hands were moving near the seatbelt. Accordingly, we conclude that there was sufficient evidence from which a rational trier of fact could find, beyond a reasonable doubt, that appellant possessed the cocaine and affirm the judgment.

II.

Citing *Dickerson v. State*, 324 Md. 163 (1991), appellant argues that we must reverse his possession of paraphernalia conviction because that conviction was based solely upon the plastic bag containing the cocaine. The State agrees, and so do we.

In *Dickerson*, the defendant challenged his convictions for possession of cocaine with intent to distribute and for use of drug paraphernalia where “the latter conviction [was] based solely on the possession of the vial containing the cocaine on which the former conviction [was] based.” *Id.* at 164. The Court of Appeals reversed the conviction and

held that “where there is no other drug paraphernalia, a defendant may only be convicted of possession of cocaine with intent to distribute, even though the cocaine possessed is in a vial, which is thereby being used as drug paraphernalia.” *Id.* at 174.

The record indicates that the charges for possession of cocaine and possession of paraphernalia were both predicated on a single plastic bag containing cocaine. Under *Dickerson*, appellant’s conviction for drug paraphernalia must be reversed.

THE CONVICTION FOR POSSESSION OF PARAPHERNALIA WITH INTENT TO USE IS REVERSED; THE JUDGMENT OF THE CIRCUIT COURT FOR CAROLINE COUNTY IS OTHERWISE AFFIRMED.

COSTS TO BE PAID: ONE HALF BY APPELLANT AND ONE HALF BY THE COUNTY COMMISSIONERS OF CAROLINE COUNTY.