Circuit Court for Prince George's County
Case No. CT150088X

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2549

September Term, 2017

FREDERICK ROBINSON

v.

STATE OF MARYLAND

Reed,
Friedman,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kenney, J.

Filed: July 26, 2019

A jury in the Circuit Court for Prince George's County convicted Frederick Robinson, appellant, of possession of a firearm by a prohibited person, possession of marijuana with intent to distribute, possession of a firearm with a nexus to a drug trafficking crime, and related counts. He was sentenced to an aggregate 20 years' incarceration with all but ten suspended, followed by two years of probation. On appeal, he asks:

> Is the evidence insufficient to sustain [his] conviction for possession of a firearm with a nexus to a drug trafficking crime?

For the following reasons, we answer the question in the negative and affirm the judgment of the circuit court.

FACTUAL AND PROCEDURAL BACKGROUND

On September 4, 2014 at about 4:30 a.m., the Prince George's County Police Department executed a search warrant at 6313 Spice Wind Terrace. A SWAT team composed of members of the Special Operations Team entered first to secure the location. Clearing each room, they gathered everyone found inside the residence in the living room.

When the residence had been secured, Detective Joseph Killo and other members of the Special Investigation Division Gang Unit entered the dwelling. Detective Killo introduced himself to the gathered residents and advised them of their Miranda rights. No one asked a question or gave a statement at that time. Detective Killo, after speaking with the home owner about appellant, conducted a search of the basement, which had been turned into a bedroom where appellant stayed.

Located next to the bed was the following: a shoebox containing a bag of marijuana; a digital scale; sandwich baggies; smaller clear plastic baggies; and $200 cash. It was stipulated that the bag contained 262 grams of marijuana.

Behind a washing machine in a closet area, Detective Killo recovered a handgun "approximately seven feet maybe" from the bed. He observed that the weapon was "laying on top of a pile of lint and dust," and that it was "relatively clean for being back there."

Detective Killo then returned to the living room and had appellant placed in handcuffs. When officers also handcuffed the woman sitting next to him, appellant said, "She had nothing to do with that. That's on me. That has nothing to do with her." Appellant was then taken to another room to be interviewed, and, after he was re-advised of his Miranda rights, he provided a written statement in which he claimed ownership of both the gun and marijuana found in the basement.[1]

An indictment charged appellant with possession of a firearm by a prohibited person, possession of marijuana with intent to distribute, possession of a firearm with a nexus to a drug trafficking crime, and related counts.

At trial, Detective Kyle Jernigan, who was qualified as an expert in the fields of identification, packaging, evaluation, and distribution of marijuana, testified that, in his

[1] Detective Killo acknowledged that he did not test the handgun for DNA and therefore, did not know whether appellant's DNA was on the gun. He also acknowledged that it appeared that nothing would prevent any of the other residents of the house from accessing the basement.

opinion, appellant possessed the marijuana recovered in this case with the intent to distribute. Detective Jernigan also testified that "weapons are oftentimes kept close in hand by dealers" to "protect [themselves] from other drug dealers who may be looking to rip them off or rob them, as well as other users who might be desperate." In his opinion, "based on the proximity of the firearm to the controlled dangerous substances . . . this firearm was being utilized as a nexus to further the drug trafficking crime."

At the close of the State's case in chief, defense counsel moved for judgment of acquittal as to the count of possession of a firearm with a nexus to a drug trafficking crime. The trial court denied that motion:

> Now, with respect to the nexus crime, the Defense argues that he's entitled to a judgment of acquittal on this charge because the handgun at issue was found behind the washing machine. Looking at the facts in the light most favorable to the State, I think there is sufficient circumstantial evidence from which a jury could conclude that the handgun had been placed there recently; one, the officer's testimony that the handgun didn't appear to have been behind the washing machine for any long period of time. Further, the evidence of [appellant's] statement saying that he was awakened by the police coming in — by the loud knock at the door, but that upon their entry he was in the bathroom.
>
> So, one, the jury could find circumstantially that [appellant], upon hearing the knock at the door, having been awakened, got out of the bed, grabbed the gun, threw it behind the washing machine and went into the bathroom, and I believe — and the State has argued that that is its theory. And so looking at the facts in the light most favorable to the State, circumstantially a jury could find that the gun, available to [appellant] such that they could find him guilty of nexus, possession of a firearm in connection with drug trafficking crime. So the motion for judgment of acquittal on that charge is also denied.

It is the conviction on that charge that appellant challenges in his timely appeal.

DISCUSSION

Standard of Review

When reviewing sufficiency of the evidence claims, our inquiry is whether, 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." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see Derr v. State*, 434 Md. 88, 129 (2013). As explained by the Court of Appeals:

> The purpose is not to undertake a review of the record that would amount to, in essence, a retrial of the case. Rather, because the finder of fact has 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. We recognize that the finder of fact has the ability to choose among differing inferences that might possibly be made from a factual situation, and we therefore defer to any possible reasonable inferences the trier of fact could have drawn from the admitted evidence and need not decide whether the trier of fact could have drawn other inferences from the evidence, refused to draw inferences, or whether we would have drawn different inferences from the evidence.

Titus v. State, 423 Md. 548, 557-58 (2011) (cleaned up).

Contentions

Appellant does not challenge the convictions for possession of the firearm and possession of marijuana with intent to distribute. He contends that the evidence was insufficient to sustain his conviction for possession of a firearm with a nexus to a drug trafficking crime under CL § 5-621(b). He argues that "something more than mere possession of a firearm during a drug trafficking crime is required." In his view, the

recovered firearm was not "close" to the drugs found in a shoebox near the bed, and "no evidence connected the gun to the drug-related items, and vice versa."

The State responds that appellant's exclusive focus on physical proximity is misplaced because (1) there was evidence from which the jury could infer that he had hidden the handgun behind the washing machine just moments before the police searched the basement bedroom, and (2) under the totality of the circumstances, the evidence was sufficient for a reasonable fact-finder to find a nexus between the handgun and the possession of drugs with the intent to distribute.

Analysis

Appellant was convicted under Md. Code Ann. (2012 Repl. Vol., 2018 Supp.), § 5-621[2] of the Criminal Law Article ("CL"), which provides in pertinent part:

(b) During and in relation to[3] a drug trafficking crime, a person may not:

[2] CL § 5-621 was formerly codified at Md. Code Ann. (1957, 1996 Repl. Vol.), Art. 27, § 281A.

[3] Appellant does not challenge the "during and in relation to" aspect of CL § 5-621(b)(1), and our review of Maryland case law reveals little analysis of that language. In *Smith v. United States*, 508 U.S. 223, 237-38 (1993), the Supreme Court explained the "during and in relation to" language in 18 U.S.C. § 924(c)(1):

> Using a firearm, however, is not enough to subject the defendant to the punishment required by § 924(c)(1). Instead, the firearm must be used "during and in relation to" a "crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1). Petitioner does not deny that the alleged use occurred "during" a drug trafficking crime. Nor could he. The indictment charged that petitioner and his companion conspired to possess cocaine with intent to distribute. There can be no doubt that the gun-for-drugs trade was proposed during and in furtherance of that interstate drug conspiracy. Nor can it be contended that the alleged use did not occur during the

> (1) possess a firearm under sufficient circumstances to constitute a nexus to the drug trafficking crime; or
>
> (2) use, wear, carry, or transport a firearm.

The Court of Appeals, in *Harris v. State*, 331 Md. 137 (1993), *superseded by statute as recognized in Johnson v. State*, 154 Md. App. 286 (2003), reversed a conviction for "use" of a firearm during and in relation to a drug trafficking crime, where the defendant and others were found on the first floor of his home, and the weapons and drugs were found on the second floor. The drugs ("96.6 grams of 70% pure cocaine,

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(…continued)

> "attempt" to possess cocaine with which petitioner also was charged; the MAC–10 served as an inducement to convince the undercover officer to provide petitioner with the drugs that petitioner sought.
>
> Petitioner, however, does dispute whether his use of the firearm was "in relation to" the drug trafficking offense. The phrase "in relation to" is expansive, cf. *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, 129 (1992)[.] . . . Nonetheless, the phrase does illuminate § 924(c)(1)'s boundaries. According to Webster's, "in relation to" means "with reference to" or "as regards." Webster's New International Dictionary, at 2102. The phrase "in relation to" thus, at a minimum, clarifies that the firearm must have some purpose or effect with respect to the drug trafficking crime; its presence or involvement cannot be the result of accident or coincidence. As one court has observed, the "in relation to" language "allay[s] explicitly the concern that a person could be" punished under § 924(c)(1) for committing a drug trafficking offense "while in possession of a firearm" even though the firearm's presence is coincidental or entirely "unrelated" to the crime. *United States v. Stewart*, 779 F.2d 538, 539 (9th Cir. 1985) (Kennedy, J.). Instead, the gun at least must "facilitat[e], or ha[ve] the potential of facilitating," the drug trafficking offense. *Id.* at 540.

(Cleaned up).

valued at $36,000") were found in a hallway closet, and the weapons (an Uzi semi-automatic 9mm firearm in plain sight in the bedroom, a loaded .357 handgun stuffed between pillows in a couch, a .22 caliber Derringer handgun containing one round in a dresser drawer, and three unloaded shotguns in the room closet) were found in appellant's room. *Id.* at 143. The *Harris* Court held that, under these circumstances, there was no evidence that the defendant "used" the firearms in connection with a drug trafficking offense, and that "use" required something more than mere possession of a firearm. *Id.* at 157.

We noted in *Johnson v. State*, 154 Md. App. at 306, that the General Assembly, in response to *Harris* in 1996, "amended section 281A(b) by expanding the crime to include a person who 'possesses' a firearm in conjunction with a drug trafficking offense." And, we stated that "the trier of fact is entitled to find that when (1) drugs are discovered under circumstances that indicate the person possessing those drugs intended to distribute them, and (2) a gun is discovered in close proximity to the drugs, the gun was possessed 'in relation to' a drug trafficking crime." *Id.* at 309. The defendant in *Johnson* was arrested with "a loaded nine-millimeter handgun in the left pocket of his jacket, and a ziplock baggie containing two ziplock baggies of crack cocaine in his left interior breast pocket." *Id.* In addition, the trier of fact had found that "just prior to being stopped, appellant had been selling crack cocaine." *Id.* The court held that the evidence was sufficient for the trier of fact to find a nexus between the firearm and the drug trafficking crime. *Id.*

In *Handy v. State*, 175 Md. App. 538, 570-72 (2007), police officers found the defendant in a kitchen of a house being used for "a large-scale drug operation," within "arms reach of at least four firearms," along with marijuana and distribution paraphernalia in plain sight. The defendant was convicted of four counts of "possession of a firearm in connection with a drug trafficking crime" in violation of CL § 5-621(b)(1). On appeal, he challenged the four separate sentences imposed by the court based on the four firearms. *Id.* at 543. Although Handy did not claim that there was an insufficient nexus between the firearms and the drug trafficking crime, the Court commented that "[s]uch a claim would obviously lack merit." *See id.* at 574.

The above Maryland cases involving challenges to convictions under CL § 5-621(b) are not on "all fours" with the facts of this case. For that reason, we will do as the *Johnson* Court did, and consider federal cases, including those cited by the appellant and the State.[4] They are not binding precedent, and, in doing so, we are mindful of language differences between the federal and Maryland statutes.

18 U.S.C. § 924(c)(1)(A) provides:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, **during and in relation to any crime of violence or drug trafficking crime** (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, **uses or carries a firearm, *or* who, in furtherance of any such crime, possesses a firearm**, shall, in addition to

[4] The *Johnson* Court, in reaching its decision, cited federal cases involving 18 U.S.C. § 924(c), without addressing any differences in language. 154 Md. App. at 307-08.

> the punishment provided for such crime of violence or drug trafficking crime--
> (i) be sentenced to a term of imprisonment of not less than 5 years[.] . . .

(Emphasis added).

Both the federal and state statutes prohibit possession of a firearm "during and in relation to a drug trafficking crime." CL § 5-621(b) prohibits possessing a firearm "under sufficient circumstances to constitute a nexus to the drug trafficking crime." 18 U.S.C. § 924(c)(1)(A) prohibits possessing a firearm "in furtherance of any [crime of violence or drug trafficking crime]." According to the U.S. Court of Appeals for the Tenth Circuit, "the 'in furtherance of' requirement that accompanies 'possession' 'is a slightly higher standard' than the 'during and in relation to' standard set out in the 'use' and 'carry' prongs, and therefore 'encompasses the 'during and in relation to' language.'" *United States v. Iiland*, 254 F.3d 1264, 1271 (10th Cir. 2001).

Black's Law Dictionary (7th ed.) defines "nexus" as "a connection or link, often a causal one." Merriam-Webster's Collegiate Dictionary (10th ed.) defines "furtherance" as "the act of furthering," and to "further" as "to help forward." We are persuaded that "in furtherance of" is a higher, or, at the very least, an equal standard with the "nexus" requirement, and therefore, cases dealing with the "in furtherance of" standard can inform our analysis. In short, the facts of a case satisfying the "in furtherance of" standard ordinarily would satisfy the Maryland "nexus" requirement.

In *United States v. Ceballos-Torres*, 218 F.3d 409, 412 (5th Cir. 2000), the U.S. Court of Appeals for the Fifth Circuit, construing § 924(c), cited a dictionary definition of

"furtherance" as the "act of furthering, advancing, or helping forward." It concluded that "firearm possession that furthers, advances, or helps forward the drug trafficking offense" violates § 924(c). *Id.* at 415. In its analysis, the court considered eight non-exhaustive factors: "[1] the type of drug activity that is being conducted, [2] accessibility of the firearm, [3] the type of the weapon, [4] whether the weapon is stolen, [5] the status of the possession (legitimate or illegal), [6] whether the gun is loaded, [7] proximity to drugs or drug profits, and [8] the time and circumstances under which the gun is found." *Id.* at 414-15; *see also United States v. Lomax*, 293 F.3d 701, 705 (4th Cir. 2002) (citing the same factors); *United States v. Mitten*, 592 F.3d 767, 777 (7th Cir. 2010) (citing the same factors).

The *Ceballos-Torres* Court explained:

> These factors help distinguish different types of firearm possession. For example, a drug dealer whose only firearms are unloaded antiques mounted on the wall does not possess those firearms "in furtherance" of drug trafficking. Nor will a drug trafficker who engages in target shooting or in hunting game likely violate the law by keeping a pistol for that purpose that is otherwise locked and inaccessible.

Id. at 415. The U.S. Court of Appeals for the Seventh Circuit explained in *United States v. Duran*, 407 F.3d 828, 840 (7th Cir. 2005), that the "in furtherance of" element of § 924(c) can be satisfied on the "legal theory" that "a possessed gun can forward a drug-trafficking offense by providing the dealer, his stash or his territory with protection." The court cautioned that "this type of possession-for-protection can be confused easily with circumstantial or innocent weapon possession," and saw the *Ceballos-Torres* factors as "useful in drawing [] distinction." *Id.* Both *Ceballos-Torres* and *Duran* distinguish

among legitimate reasons unrelated to drug activities for a "drug dealer" to possess a firearm in the home (e.g., for hunting or in the connection of antiques) and illegitimate reasons.

The *Ceballos-Torres* Court held that the evidence was sufficient to sustain a conviction under § 924(c) for a loaded 9mm Glock found on top of the bed, based on 569 grams of cocaine found in a hidden compartment of the bedroom closet. 218 F.3d at 411. Because the gun, which was "loaded and easily accessible in [his] apartment," was "possessed" illegally by him "in the apartment along with a substantial amount of drugs and money," sufficient evidence supported that he possessed the gun to "protect[] his drugs and money against robbery." *Id.* at 415.

In *United States v. Howard*, 773 F.3d 519 (4th Cir. 2014), the court held that the evidence was sufficient to support a conviction under § 924(c) even when only drug paraphernalia were found in the home. The gun was "hidden beneath a couch cushion in the living room," the "ammunition was stored nearby in the couch's center console," and the gun and drug paraphernalia were "in close proximity to one other, as they were found in adjoining rooms." *Id.* at 527. The court reasoned that "the theory that the presence of the firearm served to protect Howard from a potential theft of his drugs or profits is nevertheless a plausible one." *Id.*

In *United States v. Brown*, 732 F.3d 569 (6th Cir. 2013), the court held that the evidence was sufficient. There, a loaded Beretta, "a high-powered gun with the serial number scratched off," was found under the mattress in the second-floor bedroom. *Id.* at

576-77. Police also found an eighth of an ounce of crack cocaine in the defendant's pocket when he was arrested, and the gun was found within several feet of $4,700 in cash. *Id.* The court concluded that the gun was in "a strategic location" because "the house was small enough so that someone on the first floor could retrieve the gun within ten to fifteen seconds." *Id.* From the evidence, "a jury could reasonably infer that the gun was strategically located to be quickly and easily used during a drug deal." *Id.*

But, in *United States v. Iiland*, 254 F.3d 1264 (10th Cir. 2001), the U.S. Court of Appeals for the Tenth Circuit reversed a conviction under § 924(c), where police found cocaine in a storage unit that the defendant rented several miles away from his residence, and found the gun in his residence along with ammunition and scales. *Id.* at 1268, 1270. It explained:

> The facts here show only that a drug dealer possessed a gun. No evidence demonstrates that his possession furthered, promoted or advanced his illegal drug activity. There was no evidence that the gun and drugs were ever kept in the same place or that Mr. Iiland ever kept the gun accessible when conducting drug transactions. The fact that drug dealers in general often carry guns for protection is insufficient to show possession in furtherance of drug activity in Mr. Iiland's particular case. Because Mr. Iiland's possession of the gun was not shown to be "in furtherance of" any criminal activity, his conviction under section 924(c) cannot be sustained.

Id. at 1274.

Here, appellant was convicted for possession with intent to distribute marijuana. Next to his bed, officers found a shoebox containing 262 grams of marijuana, a digital scale, sandwich baggies, smaller clear plastic baggies, and $200 cash. Approximately seven feet away from the bed, they recovered a handgun behind a washing machine in the

closet area of the basement bedroom. As in *Howard*, 773 F.3d at 527 (gun and drug paraphernalia in adjoining rooms were in close proximity), and *Brown*, 732 F.3d at 576-77 (gun under the mattress in the second-floor bedroom), the handgun was accessible to appellant within seconds if he were in the basement bedroom.

The firearm was a handgun, which, as Detective Kyle Jernigan testified, is "oftentimes kept close in hand by dealers" to "protect [themselves] from other drug dealers [and] users[.]" And, according to Detective Killo, the weapon was "loaded with one round in the chamber" and "ready to be fired." There was no direct evidence that the gun was stolen, but appellant stipulated that he was legally prohibited from possessing a firearm.

In regard to the "time and circumstances under which the gun [was] found," the State introduced appellant's statement to police into evidence. In it, he stated that, on the day of the search, he "woke up to a loud knock at the door" and "police came in and started to round people up." When the police entered the house, he was located "in the bottom-level bathroom." The State argues that his statement demonstrates that he had "sufficient time to wake up and drop the handgun behind the washing machine before the police entered the basement." Detective Killo testified that even though the handgun was "laying on top of a pile of lint and dust," it was "relatively clean" and "did not contain any dust or lint as if it had been back there for any period of time" [sic]. The State argues that the jury could reasonably infer that appellant hid the gun behind the washing machine just before the police entered the basement.

In *United States v. Naranjo-Rosario*, 871 F.3d 86, 94 (1st Cir. 2017), cited by the State, the evidence showed that the defendant did not immediately open the bedroom door to let the police in after they announced their arrival, and that a gun was found in a paint bucket in the bedroom. In analyzing whether the defendant had constructive possession of the gun, the U.S. Court of Appeals for the First Circuit stated that "when police arrived at the house, the jury learned that Mr. Naranjo did not immediately open the door of the bedroom to let them in, supporting the reasonable inference that Mr. Naranjo was stalling because he was hiding something, i.e., the gun."[5] *Id.* at 94. As to the nexus between the drug crime and the gun, that court held that "because the evidence showed that the conspiracy involved large amounts of drugs and money, the gun was found in Mr. Naranjo's room in a bucket also holding large amounts of cash, and the gun was illegal and had an obliterated serial number, the jury reasonably could conclude that Mr. Naranjo possessed the gun in furtherance of the drug trafficking crime." *Id.* at 95.

In sum, finding the *Ceballos-Torres* factors to be instructive to the nexus analysis under CL § 5-621(b)(1), we hold that evidence was sufficient for the jury to find a nexus between appellant's possession of a firearm and his possession of drugs with the intent to distribute them.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.

[5] The *Naranjo-Rosario* Court was analyzing constructive possession of the firearm. Appellant does not deny possession.