

**COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO**

FILED
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CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OHIO

STATE OF OHIO :
Plaintiff : **CASE NO. 2016 CR 00532**
vs. : **Judge McBride**
JOHN THEODORE BARHAM : **DECISION/ENTRY**
Defendant :

Matt Wiseman, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Mark Tekulve, assistant public defender and counsel for John Theodore Barham, 302 E. Main Street, Batavia, Ohio 45103.

The defendant John Theodore Barham was indicted in this case on September 13, 2016 on one count of possession of heroin in violation of R.C. 2925.11(A), a felony of the fifth degree.

The defendant waived in writing his right to a trial by jury, and the court found that the defendant had knowingly, intelligently, and voluntarily waived his right to a trial by jury.

This cause came before the court for trial on May 9, 2017. At the conclusion of the trial, the court took the issues raised in the case under advisement.

Upon consideration of the record of the proceeding, the evidence presented for the court's consideration, the oral arguments of counsel, and the applicable law, the court now renders this written decision.

FINDINGS OF FACT

The court makes the following findings of fact based upon a consideration of the testimony of the witnesses that testified at trial as well as the exhibits that were introduced into evidence:

At approximately 5:10 p.m. on April 26, 2016, Officer Christopher Wilson, a police officer with the Union Township Police Department, parked his police cruiser at a gas pump located at a United Dairy Farmers (UDF) store located in Union Township, Clermont County, Ohio. The defendant John Theodore Barham and his fiancé Bridgette Pyles were also present at the UDF store at the time. They were seated in a parked minivan that Pyles owned, waiting for Pyles' coworker to arrive with money that they needed to purchase gas.

Officer Wilson was approximately eight to ten feet away from the couple when he spotted Ms. Pyles in the passenger seat with the defendant slumped over her from the driver's seat. Officer Wilson became concerned that the defendant had overdosed on drugs or was experiencing another medical emergency, and as a result, he approached the vehicle in which the defendant was located.

The defendant immediately sat up as Officer Wilson approached him, and he appeared to be alert and oriented. The defendant held tweezers in his hand. When

Officer Wilson asked the defendant if he was alright, the defendant explained that he was helping Ms. Pyles, the owner of the van, with a grooming issue on her lower body.

While Officer Wilson made this wellness check, he noticed a hypodermic needle cap on the floor of the vehicle near the defendant's foot. Officer Wilson asked the defendant to exit the vehicle and he called for a canine unit to be brought to the scene.

Officer Wilson observed that the defendant remained calm. Meanwhile, Ms. Pyles remained in the passenger seat of the minivan. When the canine unit arrived, and the canine was deployed, the canine alerted on the driver's side of the vehicle. The officers had Ms. Pyles exit the vehicle, and the law enforcement officers present at the scene conducted a vehicle search.

During the search, the officers found a hypodermic needle under the center console, an opioid first responder (Narcan) kit, and the hypodermic needle cap that Officer Wilson had initially seen. The cap was small and translucent in color.¹

Both the defendant and Ms. Pyles were heroin users. Officer Wilson asked the defendant if the needle and cap belonged to him. In response, the defendant denied that the needle and cap belonged to him.

The defendant had been picked up by Pyles from his grandmother's house shortly before the time of the encounter with Officer Wilson. The defendant credibly testified that he had not seen the cap on the floor or the syringe under the console and that he was unaware of their presence in the minivan.

Upon testing the hypodermic needle and cap, heroin residue was identified.²

¹ State's Ex. A.

² State's Exs. 2A and 2B.

STANDARD OF REVIEW

In a criminal case, it is the state's burden to prove the defendant's guilt beyond a reasonable doubt.³ R.C. 2901.05(E) describes reasonable doubt as follows:

"Reasonable doubt' is present when the [trier of fact], after * * * carefully consider[ing] and compar[ing] all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs."

LEGAL ANALYSIS

The Ohio Revised Code criminalizes the possession of heroin in R.C. 2925.11(A): "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog."⁴ The mental state "knowingly" is described as follows: "* * * A person has knowledge of circumstances when the person is aware that such circumstances probably exist. * * *"⁵

"To act knowingly, a defendant merely has to be aware that the result may occur."⁶ "Knowledge can be ascertained from the surrounding facts and circumstances of the case."⁷

³ R.C. 2901.05(A).

⁴ R.C. 2925.11(A).

⁵ R.C. 2901.22(B).

⁶ *State v. Fox*, 12th Dist. No. CA2008-03-009, 2009-Ohio-556, ¶ 13, citing *State v. Nutekpor*, 6th Dist. Wood No. WD-5-062, 2006-Ohio-4641, ¶ 15.

The knowledge requirement for a possession charge can be satisfied regardless of the amount.⁶ As such, a person can be found guilty of possessing a controlled substance even when there is only residue on a drug instrument.⁹

To “possess” or to have “possession,” as used in R.C. 2925.11(A), “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.”¹⁰ A person can either have actual or constructive possession of a drug.¹¹

“Actual possession occurs when the defendant ‘had the items within his immediate physical control.’”¹² A defendant has “constructive possession” of something when the defendant “is conscious of the item’s presence and is able to exercise dominion and control over it, even if the item is not within the accused’s immediate physical possession.”¹³

As with other elements, constructive possession must be shown beyond a reasonable doubt by proving that the defendant had control over the drug even though it

⁷ *State v. Anderson*, 12th Dist. Fayette No. CA2008-07-026, 2009-Ohio-2521, ¶28, citing *State v. Lott*, 51 Ohio St.3d 160, 168 (1990).

⁸ *State v. Garrod*, 12th Dist. Warren No. CA2006-01-011, 2006-Ohio-6071, ¶ 12, citing *State v. Teamer*, 82 Ohio St.3d 490, 492 (1998).

⁹ *Garrod*, 2006-Ohio-6071 at ¶ 12, citing *State v. Lynch*, 12th Dist. Warren No. CA2004-01-002, 2005-Ohio-683, ¶ 9.

¹⁰ R.C. 2925.01(K).

¹¹ *State v. Williams*, 12th Dist. Butler No. CA2014-09-180, 2015-Ohio-2010, ¶ 14, citing *State v. Brown*, 12th Dist. Butler No. CA2013-03-043, 2014-Ohio-1317, ¶ 17.

¹² *State v. Fykes*, 6th Dist. Wood No. WD-07-072, 2009-Ohio-2926, ¶ 36, quoting *State v. Jones*, 10th Dist. Nos. 07AP977, 07AP-978, 2008-Ohio-3765, ¶ 13.

¹³ *State v. Peyton*, 12th Dist. No. CA2015-06-112, 2017-Ohio-243, ¶ 44, quoting *State v. Jester*, 12th Dist. Butler No. CA2010-10-264, 2012-Ohio-544, ¶ 25. See *Williams*, 2015-Ohio-2010 at ¶ 15, quoting *State v. Alexander*, 8th Dist. Cuyahoga No. 90509, 2009-Ohio-597, ¶ 24 (“Inherent in a finding of constructive possession is that the defendant was conscious of the [drugs] and therefore had knowledge of [them].”); *Anderson*, 2009-Ohio-2521 at ¶ 27, citing *State v. Hankerson*, 70 Ohio St.2d 87, 90-91 (1982) (“For constructive possession, it must be shown that the person was conscious of the presence of the object.”).

was not directly in his possession.¹⁴ As such, “the circumstances, to have the effect of establishing an allegation of fact, must be such as to make the fact alleged appear more probable than any other; the fact in issue must be the most natural inference from the facts proved * * *.”¹⁵ The state may prove constructive possession using only circumstantial evidence.¹⁶

Unless the defendant provides a confession, “the surrounding facts and circumstances, including the defendant’s actions, are evidence that the trier of fact can consider in determining whether the defendant had constructive possession.”¹⁷ “The discovery of readily accessible drugs in close proximity to the accused constitutes circumstantial evidence that the accused was in constructive possession of the drugs.”¹⁸ Notably, a “person may knowingly possess or control property belonging to another; the state need not establish ownership to prove constructive possession.”¹⁹

In turning to the case at bar, the court finds that the defendant is not guilty of possession of heroin in violation of R.C. 2925.11(A) because the court is not convinced beyond a reasonable doubt that that defendant had knowledge or consciousness that he was in possession of heroin. As explained above, to be found guilty of possession of heroin, under R.C. 2925.11(A) the defendant must have “knowingly” possessed the heroin.²⁰ The defendant credibly testified that he did not have knowledge of the

¹⁴ *State v. Mayer*, 8th Dist. Cuyahoga No. 80168, 2003-Ohio-1, ¶ 8.

¹⁵ (Emphasis omitted.) *Mayer*, 2003-Ohio-1 at ¶ 8, quoting *State v. Duganitz*, 76 Ohio App.3d 363, 601 N.E.2d 632 (8th Dist. 1991).

¹⁶ *State v. Fletcher*, — N.E.3d —, 2017-Ohio-1006, ¶ 58 (12th Dist.), quoting *State v. Fultz*, 12th Dist. Butler No. CA2015-06-103, 2016-Ohio-1486, ¶ 12.

¹⁷ *Peyton*, 2017-Ohio-243 at ¶ 45, citing *Williams*, 2015-Ohio-2010 at ¶ 15.

¹⁸ *Fletcher*, 2017-Ohio-1006 at ¶ 58, quoting *Fultz*, 2016-Ohio-1486 at ¶ 13.

¹⁹ *Peyton*, 2017-Ohio-243 at ¶ 44, citing *Williams*, 2015-Ohio-2010 at ¶ 14.

²⁰ R.C. 2925.11(A).

hypodermic needle or cap, and the surrounding facts and circumstances of the case do not demonstrate beyond a reasonable doubt that the defendant had such knowledge.²¹

In looking at the surrounding facts and circumstances, the court finds that they support the defendant's claim that he was unaware of the presence of the needle and cap. First, the defendant was not in a vehicle he owned. It is reasonable to infer that he would have had less familiarity with the contents of the minivan than its owner, Ms. Pyles. Second, the needle was completely hidden from the defendant's view because it was underneath the center console at the time that Officer Wilson approached the vehicle. Third, the hypodermic needle cap could have been easily overlooked on the floorboard because it is small and translucent. Fourth, Officer Wilson described the defendant's demeanor as calm during the ordeal, which further supports the defendant's averment that he was unaware that there was heroin in the vehicle.²² Although a defendant can be found guilty of possessing heroin even when there is only residue on a drug instrument,²³ like the cap or hypodermic needle, the defendant still needs to know he was in possession of those instruments. Here, as the trier of fact, the court finds that the state has not proven beyond a reasonable doubt that the defendant had

²¹ *Anderson*, 2009-Ohio-2521 at ¶28, citing *Lott*, 51 Ohio St.3d at 168.

²² *Cf. State v. Fykes*, 6th Dist. Wood No. WD-07-072, 2009-Ohio-2926, ¶ 39 (explaining that the defendant's nervous demeanor during the search of a car was additional circumstantial evidence that he knowingly possessed cocaine); *State v. Kingsland*, 177 Ohio App.3d 655, 2008-Ohio-4148, 895 N.E.2d 633, ¶ 2 (4th Dist.) (finding evidence of possession insufficient where the only evidence linking the defendant to drugs found in the back of the truck that he was a passenger in was his nervousness and his blanket denial of ownership of any of the items in the truck bed).

²³ *Garrod*, 2006-Ohio-6071 at ¶ 12, citing *State v. Lynch*, 12th Dist. Warren No. CA2004-01-002, 2005-Ohio-683, ¶ 9.

the requisite mental state to find him guilty of possession of heroin. The court finds that the defendant was not aware that there was "probably" heroin in the vehicle.²⁴

Likewise, to show that the defendant had "constructive possession" of heroin, the state must prove that the defendant was "conscious" of the heroin's presence.²⁵ For the same reasons described above, the court finds that the defendant's credible testimony and the facts and circumstances surrounding his encounter with Officer Wilson do not demonstrate beyond a reasonable doubt that he was conscious that he was in the presence of, and therefore could exercise dominion and control over the heroin. As such, the court concludes that the state has not proven beyond a reasonable doubt that the defendant is guilty of possession of heroin under R.C. 2925.11(A).

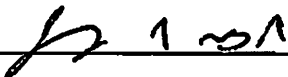
CONCLUSION

The court finds that the state not has proven beyond a reasonable doubt the defendant's guilt to the charge of possession of heroin, in violation of R.C. 2925.11(A), a felony of the fifth degree.

The court finds that the defendant is acquitted as to the offense charged.

IT IS SO ORDERED.

DATED: 6-3-17



Judge Jerry R. McBride

²⁴ R.C. 2901.22(B).

²⁵ *Peyton*, 2017-Ohio-243 at ¶ 44, quoting *Jester*, 2012-Ohio-544 at ¶ 25.