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

STATE OF OHIO : **CASE NOS. 2018 CR 00127**
Plaintiff : **2018 CR 00407**
vs. : **Judge McBride**
: **DECISION/ENTRY**
RANDALL S. MICKEY :
Defendant :

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

Hal R. Arenstein, counsel for the defendant Randall S. Mickey, 114 East 8th Street, Cincinnati, Ohio 45202

These consolidated cases came before the court for a bench trial on October 15, 2018 and November 26, 2018. At the conclusion of the trial, the court took the issues raised in the cases under advisement.

The defendant Randall S. Mickey was indicted in Case No. 2018 CR 00127 on February 13, 2018 on the following counts: (1) having weapons while under disability in violation of R.C. 2923.13(A)(3), a felony of the third degree, (2) improperly handling firearms in a motor vehicle in violation of R.C. 2923.16(B), a felony of the fourth degree, and (3) resisting arrest in violation of R.C. 2921.33(A), a misdemeanor of the second degree.

The defendant was indicted in Case No. 2018 CR 000407 on May 22, 2018 on the following counts: (1) aggravated trafficking in drugs in violation of R.C. 2925.03(A)(2), a felony of the third degree, (2) aggravated possession of drugs in violation of R.C.

2925.11(A), a felony of the third degree, and (3) possession of cocaine in violation of R.C. 2925.11(A), a felony of the fifth degree. The cases were consolidated on August 2, 2018, and on October 15th the defendant waived his right to a jury trial.

Upon consideration of the record of the proceedings, 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 above charges arise from an incident that occurred on February 3, 2018 in Miami Township, which is located in Clermont County, Ohio. On February 3rd, Officer Todd Taylor, an officer with the Miami Township Police Department, was out on road patrol during the day shift. Officer Taylor has 17 years of police experience and has made hundreds of drug related arrests.

As Officer Taylor was leaving Pebble Brooke Apartments around 12:00 p.m., he noticed a gray Honda Accord enter the apartment complex. Pebble Brooke Apartments is an area with high drug activity. As the gray car passed him, Officer Taylor detected an odor of burnt marijuana.

Officer Taylor turned his vehicle around and began following the gray car into the apartment complex. At first he lost sight of it, but he found it again parked in a space to his left.¹ The car was parked in front of 1285 Pebble Brooke Trail, which was in the middle of the apartment complex.

¹ State's Ex. 13.

Officer Taylor exited his vehicle and approached the gray car, noticing that the smell of marijuana became stronger. An individual, later identified as the defendant, was in the front passenger seat, had his door open, and was trying to close it as Officer Taylor approached. No one was in the driver seat. Officer Taylor grabbed the door so that the defendant could not close it. The defendant made furtive movements, and Officer Taylor instructed the defendant to keep his hands where he could see them.

While this occurred, Officer Taylor observed a small bag of marijuana sitting in plain view in an open console space.² The console was not a center console, but more of a cubby that was underneath the stereo and ended at the gearshift. The console had a door, but it was open.

The defendant became argumentative with Officer Taylor and tried to exit the vehicle, stating that this was not his car. Officer Taylor attempted to keep the defendant in the vehicle for his own safety. Officer Taylor then pointed out the marijuana to the defendant, who handed the bag to him. While Officer Taylor placed the marijuana on the car's hood, the defendant continued to try and exit. Officer Taylor kept repeating to the defendant to stay where he was and to keep his hands visible.

When Officer Taylor had the defendant exit the car, he tried to turn the defendant around so he could be detained for safety purposes. The defendant spun around and flailed his arms. He would not allow Officer Taylor to place handcuffs on him and began trying to escape. While this was unfolding, an unidentified man stood in the breezeway of an apartment building and watched Officer Taylor. Officer Taylor told the man to remove his hands from his pockets.

² State's Ex. 4.

At this point, the defendant tried to break free again. Officer Taylor grabbed the back of the defendant's hoodie, and they began scuffling in the middle of the parking lot. Officer Taylor repeatedly told the defendant to stop resisting but to no avail. The defendant yelled at the unidentified man "Get this! Help!" and threw something into the air. As the struggle continued, Officer Taylor and the defendant made their way to the opposite side of the parking lot. They fell onto the side of a black Mazda, as another officer, Officer Kyle Ball, arrived on the scene to assist. Officer Taylor and the defendant were engaged in between the black Mazda and a gold Honda CRV when Officer Ball reached them.³

Officer Ball saw that the defendant was holding a white phone charger and what appeared to be a computer mouse.⁴ Officer Ball got ahold of the defendant, and they fell to the ground. Once on the ground, the defendant stopped resisting, and Officer Ball was able to secure him. Officer Ball could not find the computer mouse when he stood up. Officer Ball then placed the defendant into Officer Taylor's cruiser. When patting the defendant down, Officer Taylor found \$647 stuffed into the defendant's sock.⁵

Officer Taylor returned to the grey Honda and noticed for the first time that there was a young woman in the back seat. He could not see her before because the car's windows were heavily tinted. The woman was the defendant's girlfriend, and she was found to have a small amount of marijuana and alcohol in her purse. The woman, who was underage, was charged with minor crimes for marijuana possession and underage consumption, and officers drove her home.

³ State's Exs. 15 and 17.

⁴ State's Ex. 10.

⁵ State's Ex. 9.

Officer Taylor and Officer Ball searched the gray car. Officer Taylor located a loaded 9 mm Kahr handgun with a bullet in the chamber underneath the front passenger seat, where the defendant had been seated.⁶ The gun was positioned towards the very front of the seat. Testing later revealed that the gun was operable.⁷ Officer Taylor asked the defendant about the gun, and the defendant initially denied that it was his. However, the defendant then admitted that it was his, and he explained that he kept it for protection because he had been previously shot.

Officer Taylor also found a clear baggy of what appeared to be a large amount of cocaine, heroin, or fentanyl in the open console.⁸ It had been placed farther back than the marijuana, but there were no items obstructing Officer Taylor's view of it when he looked in the console.⁹ The baggy was sitting on top of a large pile of lottery ticket forms, which are often used to package drugs for sale.¹⁰ Testing revealed that the bag contained 31.448 grams of fentanyl.¹¹ Officer Taylor asked the defendant about the bag of powder, but he denied that it was his.

Sargent Robert Hirsch arrived on the scene at 12:08 p.m. to provide assistance. He helped search for the unidentified man, who had since fled the scene, as well as for any nearby evidence. In between the gold Honda CRV and the black Mazda where Officer Taylor and the defendant had struggled, Sargent Hirsch found the black computer mouse that Officer Ball had previously seen the defendant holding.¹² Another officer,

⁶ State's Exs. 1, 2, 24-26.

⁷ State's Ex. 11.

⁸ State's Ex. 3.

⁹ State's Exs. 21 and 22.

¹⁰ State's Exs. 21 and 22.

¹¹ State's Ex. 1.

¹² State's Ex. 19.

Officer Ben Hays, opened the mouse and found it was actually a digital scale. There was white powder covering the interior.¹³ The white powder was tested and found to be fentanyl and cocaine.¹⁴

The police were never able to locate the driver of the vehicle, even after searching the apartment area and inquiring with residents. A man did call the police department alleging that he was the driver and said he would come in for questioning, but he did not. He also stated that his name was that of a famous UFC fighter, which the police officers believed to be false.

The defense stipulated that the defendant had previously been convicted of crimes that disqualified him from being able to have or carry a firearm. Those offenses include a prior conviction for trafficking heroin in 2014 in Case No. B 140087, and a prior conviction for trafficking in cocaine in 2005 in Case No. B 0408911.¹⁵

STANDARD OF REVIEW

In a criminal case, it is the state's burden to prove the defendant's guilt beyond a reasonable doubt.¹⁶ R.C. 2901.05(E) describes reasonable doubt as follows:

"'Reasonable doubt' is present when the [triers 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

¹³ State's Ex. 20.

¹⁴ State's Ex. 1.

¹⁵ See State's Exs. 6, 7, and 8.

¹⁶ R.C. 2901.05(A).

ordinary person would be willing to rely and act upon it in the most important of the person's own affairs.”

Further, “[i]t is axiomatic that the state must prove each and every element of an offense * * *.”¹⁷

As the trier of fact, the court “* * * makes the determinations of credibility and the weight to be given to the evidence.”¹⁸ The trier of fact is in the best position to take into account any inconsistencies of evidence, “along with manner and demeanor to determine witness credibility,” and is free to believe or disbelieve all or any of the testimony.¹⁹

LEGAL ANALYSIS

I. HAVING WEAPONS WHILE UNDER DISABILITY

In Count I of Case No. 2018 CR 000127 the defendant is charged with having weapons while under disability in violation of R.C. 2923.13(A)(3), a felony of the third degree. Having weapons while under disability is criminalized in R.C. 2923.13(A), which provides:

¹⁷ *State v. Jones*, 91 Ohio St. 3d 335, 347, 744 N.E.2d 1163 (2001). See *State v. Brown*, 12th Dist. Warren No. CA2006-10-120, 2007-Ohio-5787, ¶ 29 (“The state has a duty to present evidence, beyond a reasonable doubt, as to each and every element of the crime as set forth in the indictment.”)

¹⁸ *State v. Burrell*, 12th Dist. Fayette No. CA2016-04-005, 2016-Ohio-8454, ¶ 22, citing *State v. Clements*, 12th Dist. Butler No. CA2009-11-277, 2010-Ohio-4801, ¶ 20. See *State v. Shaver*, 12th Dist. Butler No. CA90-12-241, 1991 WL 170164, *3 (Sept. 3, 1991), citing *State v. Thomas*, 70 Ohio St.2d 79, 434 N.E.2d 1356 (1982) (stating that “it is the accepted rule in Ohio that the weight to be given evidence and the credibility of the witnesses in a criminal proceeding are primarily for the trier of fact.”).

¹⁹ *State v. Cope*, 12th Dist. Butler No. CA2009-11-284, 2010-Ohio-6430, ¶ 47, citing *State v. Johnson*, 10th Dist. Franklin No. 10AP-137, 2010-Ohio-5440, ¶ 18.

"(A) Unless relieved from disability under operation of law or legal process, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply: * * *

(3) The person is under indictment for or has been convicted of any felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse."²⁰

R.C. 2923.13(B) provides: "Whoever violates this section is guilty of having weapons while under disability, a felony of the third degree."

The mental state "knowingly" is described as follows: "*** * * A person has knowledge of circumstances when the person is aware that such circumstances probably exist. * ***"²¹ "To act knowingly, a defendant merely has to be aware that the result may occur."²²

A "firearm" is defined as "any deadly weapon capable of expelling or propelling one or more projectiles by the action of an explosive or combustible propellant. 'Firearm' includes an unloaded firearm, and any firearm that is inoperable but that can readily be rendered operable."²³ Thus, a charge of having a weapon while under disability requires the state to prove beyond a reasonable doubt that the firearm in question was operable.²⁴

²⁰ R.C. 2923.13(A).

²¹ R.C. 2901.22(B).

²² *State v. Fox*, 12th Dist. Fayette No. CA2008-03-009, 2009-Ohio-556, ¶ 13, citing *State v. Nutekpor*, 6th Dist. Wood No. WD-5-062, 2006-Ohio-4641, ¶ 15.

²³ R.C. 2923.11(B)(1).

²⁴ *State v. Coleman*, 12th Dist. Butler No. CA2017-02-023, 2017-Ohio-8036, ¶ 25, citing *State v. Zehenni*, 12th Dist. Warren No. CA2016-03-020, 2016-Ohio-8233, ¶ 28.

Moreover, “[t]o ‘have’ a firearm within the meaning of R.C. 2923.13(A), a person must have actual or constructive possession of the firearm.”²⁵ To “possess” or to have “possession,” includes “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.”²⁶ “[P]ossession of a firearm in violation of R.C. 2923.13 may be inferred when the defendant has exercised dominion and control over the *area* where the firearm was found.”²⁷

In examining the case at bar, the defendant does not contest that he had a weapon while under disability. The defense stipulated that the defendant had previously been convicted of crimes that disqualified him from being able to have or carry a firearm. Those offenses include a prior conviction for trafficking heroin in 2014 in Case No. B 140087, and a prior conviction for trafficking in cocaine in 2005 in Case No. B 0408911.²⁸

The defendant admitted to Officer Taylor that the 9 mm Kahr handgun underneath his passenger seat was his and explained that he kept it because he had previously been shot. His confession demonstrates that his possession was done “knowingly.” Further, the evidence demonstrates that the defendant had constructive possession over the firearm because the defendant exercised dominion and control over the area where it was found. The firearm was located just under his seat, positioned towards the front. Additionally, the gun was operable, as Officer Matt Davila testified to. Given the defendant's admission and the surrounding circumstances, the court concludes

²⁵ *State v. Brown*, 12th Dist. Butler No. CA2013-03-043, 2014-Ohio-1317, ¶ 16, citing *State v. Leide*, 12th Dist. Butler No. CA2005-08-363, 2006-Ohio-2716, ¶ 29.

²⁶ R.C. 2925.01(K).

²⁷ (Emphasis original.) *Brown*, 2014-Ohio-1317 at ¶ 17, quoting *State v. Sebastian*, 4th Dist. Highland No. 08CA19, 2009-Ohio-3117, ¶ 35.

²⁸ See State's Exs. 6, 7, and 8.

that the defendant is guilty of Count 1 in Case No. 000127, having a firearm while under disability, in violation of R.C. 2923.13(A)(3), a felony of the third degree.

II. IMPROPERLY HANDLING FIREARMS IN A MOTOR VEHICLE

In Count II of Case No. 2018 CR 000127 the defendant is charged with improperly handling firearms in a motor vehicle in violation of R.C. 2923.16(B), a felony of the fourth degree.

Improperly handling firearms in a motor vehicle is criminalized in R.C. 2923.16, which provides: "No person shall knowingly transport or have a loaded firearm in a motor vehicle in such a manner that the firearm is accessible to the operator or any passenger without leaving the vehicle."²⁹ A violation of R.C. 2923.16(B) is a felony of the fourth degree.³⁰

As mentioned, "[a] person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist."³¹

The court has already determined that the defendant's 9 mm Kahr handgun was a firearm in examining his charge of having a weapon under disability. The court also determined that the defendant knowingly had the firearm. At trial, the defense stated that

²⁹ R.C. 2923.16(B).

³⁰ R.C. 2923.16(I).

³¹ R.C. 2901.22(B).

the defendant did not contest the charge of improperly handling a firearm in a motor vehicle.

All that remains for the court to determine is whether the gun was loaded and whether the gun was accessible to the operator or any passenger without leaving the vehicle. Indeed, Officer Taylor testified that there was a bullet in the chamber of the gun and the magazine had bullets as well. Thus, the gun was loaded. Finally, the court finds that the gun was accessible to the defendant, as a passenger, without leaving the car. As explained, it was underneath his seat, positioned towards the very front of it. The defendant could have easily reached down to grab the gun at any moment while seated in the passenger seat.³² For these reasons, the court finds the state has proven the defendant guilty beyond a reasonable doubt of improperly handling a firearm in a motor vehicle, in violation of R.C. 2923.16(B), a felony of the fourth degree.

III. RESISTING ARREST

In Count III of Case No. 2018 CR 000127 the defendant is charged with resisting arrest, in violation of R.C. 2921.33(A). A violation of R.C. 2921.33(A) is a misdemeanor of the second degree.³³

³² See *State v. Walker*, 11th Dist. No. 2011-T-0069, 2012-Ohio-3303, 974 N.E.2d 1213, ¶ 48 (finding that evidence was sufficient to support the finding that the defendant acted knowingly, so as to support convictions for improper handling of firearms in a motor vehicle where the gun at issue was found in the defendant's vehicle, the defendant was the driver of the vehicle, the gun was found directly beneath the defendant under the driver's seat, the gun was partially exposed to the defendant, and the defendant admitted that gun was his and that he carried it for protection).

³³ R.C. 2921.33(D).

R.C. 2921.33 criminalizes resisting arrest as follows: "(A) No person, recklessly or by force, shall resist or interfere with a lawful arrest of the person or another."³⁴ "A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature."³⁵

An "arrest is 'lawful' if the surrounding circumstances would give a reasonable police officer cause to believe that an offense has been or is being committed."³⁶ Moreover, "an arrest encompasses placing a defendant in a police cruiser and transporting him to jail or a detention facility."³⁷ Therefore, "resisting arrest is appropriate where there is interference in this process."³⁸

In examining the instant case, the defendant does not contest that he resisted arrest. The evidence supports this conclusion. The arrest was lawful, since the court has determined already that the defendant is guilty of multiple crimes and Officer Taylor had seen marijuana resting on the grey car's console in plain view. Further, the defendant refused to follow Officer Taylor's instructions to stop resisting, stay in the car, and keep his hands where he could see him. The defendant also engaged in an active struggle to physically escape Officer Taylor, which occurred from the gray vehicle to the other side of the parking lot.³⁹ Accordingly, the court finds that the state has proven beyond a

³⁴ R.C. 2921.33(A).

³⁵ R.C. 2901.22(C).

³⁶ *In re A.M.I.*, 12th Dist. Warren No. CA2014-07-095, 2015-Ohio-367, ¶ 36, citing *State v. Mitchell*, 12th Dist. Butler No. CA2010-05-107, 2011-Ohio-2465, ¶ 33.

³⁷ *State v. Barnes*, 1st Dist. Hamilton No. C-170355, 2018-Ohio-3894, ¶ 9.

³⁸ *Id.*

³⁹ *State v. Williams*, 2d Dist. Montgomery No. 27696, 2018-Ohio-4344, ¶ 21 (defendant's conviction for resisting arrest was not against the manifest weight of the evidence where evidence showed that the defendant struggled to prevent the officers from placing handcuffs on her, that she broke free of one cuff, and that she did not comply with their instructions to walk to the cruiser);

reasonable doubt that the defendant resisted or interfered with his lawful arrest recklessly or by force. As such, the defendant is guilty of resisting arrest under R.C. 2921.33(A), a misdemeanor of the second degree.

IV. POSSESSION COUNTS

The Ohio Revised Code criminalizes the possession of controlled substances in R.C. 2925.11(A): "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog."⁴⁰ Pursuant to R.C. 3119.01(C), a "controlled substance" is "a drug, compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V." Fentanyl and cocaine are both Schedule II drugs.⁴¹

In turn, the mental state "knowingly" is described as follows: "* * * A person has knowledge of circumstances when the person is aware that such circumstances probably exist. * * *"⁴² "To act knowingly, a defendant merely has to be aware that the result may occur."⁴³ "Knowledge can be ascertained from the surrounding facts and circumstances of the case."⁴⁴ Moreover, the knowledge requirement for a possession charge can be satisfied regardless of the amount.⁴⁵ "The government need only produce sufficient

State v. Cookingham, 11th Dist. Ashtabula No. 2017-A-0023, 2017-Ohio-8362, ¶ 23 (finding conviction for resisting arrest was not against the manifest weight of the evidence where the defendant refused to cooperate when informed he was being arrested and asked to place his hands behind his back, could not be controlled, flailed, and spun away from the officers).

⁴⁰ R.C. 2925.11(A).

⁴¹ R.C. 3719.41.

⁴² R.C. 2901.22(B).

⁴³ *State v. Fox*, 12th Dist. Fayette No. CA2008-03-009, 2009-Ohio-556, ¶ 13, citing *State v. Nutekpor*, 6th Dist. Wood No. WD-5-062, 2006-Ohio-4641, ¶ 15.

⁴⁴ *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).

⁴⁵ *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).

evidence, direct or circumstantial, from which the [trier of fact] is able to identify the substance beyond a reasonable doubt[.]”⁴⁶ As such, a person can be found guilty of possessing a controlled substance even when there is only residue on a drug instrument.⁴⁷

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.”⁴⁸ A person can either have actual or constructive possession of a drug.⁴⁹ “Actual possession occurs when the defendant ‘had the items within his immediate physical control.’”⁵⁰ 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.”⁵¹

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

⁴⁶ *State v. Montoya*, 12th Dist. Clermont No. CA2012-02-015, 2013-Ohio-3312, ¶ 44, *aff’d*, 138 Ohio St.3d 345, 2014-Ohio-848, 6 N.E.3d 1172, ¶ 44 (2014).

⁴⁷ *Garrod*, 2006-Ohio-6071 at ¶ 12, citing *State v. Lynch*, 12th Dist. Warren No. CA2004-01-002, 2005-Ohio-683, ¶ 9.

⁴⁸ R.C. 2925.01(K).

⁴⁹ *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.

⁵⁰ *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.

⁵¹ *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.⁵² Accordingly, “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 * * *.”⁵³

The state may prove constructive possession using only circumstantial evidence.⁵⁴ 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.”⁵⁵ “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.”⁵⁶ Notably, a “person may knowingly possess or control property belonging to another; the state need not establish ownership to prove constructive possession.”⁵⁷

A. AGGRAVATED POSSESSION OF DRUGS

In Count II of Case No. 2018 CR 000407 the defendant is charged with aggravated possession of drugs (fentanyl) in violation of R.C. 2925.11(A), a felony of the third degree.

With limited exceptions, under R.C. 2925.11(C)(1)(b), whenever the controlled substance is a Schedule II drug or a compound, mixture, or preparation of a Schedule II

⁵² *State v. Mayer*, 8th Dist. Cuyahoga No. 80168, 2003-Ohio-1, ¶ 8.

⁵³ (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).

⁵⁴ *State v. Fletcher*, 2017-Ohio-1006, 86 N.E.3d 591, ¶ 58 (12th Dist.), quoting *State v. Fultz*, 12th Dist. Butler No. CA2015-06-103, 2016-Ohio-1486, ¶ 12.

⁵⁵ *Peyton*, 2017-Ohio-243 at ¶ 45, citing *Williams*, 2015-Ohio-2010 at ¶ 15.

⁵⁶ *Fletcher*, 2017-Ohio-1006 at ¶ 58, quoting *Fultz*, 2016-Ohio-1486 at ¶ 13.

⁵⁷ *Peyton*, 2017-Ohio-243 at ¶ 44, citing *Williams*, 2015-Ohio-2010 at ¶ 14.

drug, and the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated possession of drugs constitutes a felony of the third degree. The "bulk amount" for Schedule II drugs is the amount equal to or exceeding twenty grams * * *.⁵⁸ As mentioned, fentanyl is a Schedule II drug.⁵⁹ It is a synthetic opioid that is approximately 100 times more potent than morphine and 50 times more potent than heroin.⁶⁰

In applying these principles to the instant case, the state was required to prove beyond a reasonable doubt that the defendant knowingly possessed a controlled substance, that being fentanyl. The defense has argued that it was possible the unknown driver placed the fentanyl in the car without the defendant's knowledge. The court does not find this theory likely. The bag of 31.488 grams of fentanyl was discovered in an open console within the defendant's grasp from the passenger seat. No objects had to be moved in the console for it to be visible outside of the console. Moreover, the defendant had tried to dispose of a digital scale that had fentanyl on it, which also makes it more likely that he knew of the bag of fentanyl and wanted to dispose of evidence that would tend to show that he was trafficking it. Further, the defendant exerted great effort to try and escape from the vehicle and prevent his arrest. The court concludes that the surrounding facts and circumstances indicate that the defendant knowingly had constructive possession of the fentanyl.

The defense has also argued that the fentanyl could have been the defendant's girlfriend's, and that she could have placed it in the open console after the defendant

⁵⁸ R.C. 2925.01(D)(1)(d).

⁵⁹ R.C. 3719.41.

⁶⁰ *State v. Pountney*, 152 Ohio St.3d 474, 2018-Ohio-22, 97 N.E.3d 478, ¶ 2.

exited the gray car. However, the court finds this very unlikely. The woman was found with marijuana and alcohol in her purse, which she received charges for. It seems unlikely that she would hide some, but not all, of her contraband during the scuffle.

Finally, the court concludes that the 31.448 grams of fentanyl exceeds the bulk amount but is less than five times the bulk amount.

Accordingly, the court finds that the state has proven that the defendant is guilty beyond a reasonable doubt of aggravated possession of drugs, fentanyl, a Schedule II drug, as charged in Count 2 of Case No. 2018 CR 000407, in violation of R.C. 2925.11(A), a felony of the third degree.

B. POSSESSION OF COCAINE

In Count III of Case No. 2018 CR 000407 the defendant is charged with possession of cocaine in violation of R.C. 2925.11(A), a felony of the fifth degree.

With certain exceptions, under R.C. 2925.11(C)(4)(a), when a defendant possesses cocaine or a compound, mixture, preparation, or substance containing cocaine, the possession charge is a felony of the fifth degree.⁶¹

To be found guilty of possession of cocaine under R.C. 2925.11(A), the defendant must have "knowingly" possessed, controlled, or used the cocaine.⁶² The surrounding facts and circumstances of the case demonstrate beyond a reasonable doubt that the defendant possessed cocaine.⁶³

⁶¹ R.C. 2925.11(C)(4)(a).

⁶² R.C. 2925.11(A).

⁶³ *Anderson*, 2009-Ohio-2521 at ¶ 28, citing *Lott*, 51 Ohio St.3d at 168.

The defendant had actual possession of the cocaine as it was on his person, hidden in the digital scale disguised as a mouse. It is clear that the defendant knew that he had it, as he tried to dispose of the scale and called to an unnamed individual for assistance. The court finds that the defendant knowingly possessed and controlled cocaine. Accordingly, the state has proven that the defendant is guilty beyond a reasonable doubt of possession of cocaine as charged in Count 3 of Case No. 2018 CR 000407, a felony of the fifth degree.

V. AGGRAVATED TRAFFICKING IN DRUGS

In Count I of Case No. 2018 CR 000407 the defendant is charged with aggravated trafficking in drugs in violation of R.C. 2925.03(A)(2), a felony of the third degree. Under R.C. 2925.03(C)(1)(c), when a defendant traffics in a drug that “* * * is any compound, mixture, preparation, or substance included in schedule I or schedule II, with the exception of marihuana, cocaine, L.S.D., heroin, hashish, and controlled substance analogs, * * *” and “the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount,” aggravated trafficking in drugs is a felony of the third degree. Here, the substance is the Schedule II drug of fentanyl. As mentioned, the bulk amount for Schedule II drugs, like fentanyl, is an amount equal to or exceeding twenty grams.

Trafficking is criminalized in R.C. 2925.03(A):

“(A) No person shall knowingly do any of the following: * * *

(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled

substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person.”⁶⁴

As previously mentioned, fentanyl is a controlled substance because it is a Schedule II drug.⁶⁵

Trafficking in drugs requires the state “to prove ‘possession’ as an element of the crime.”⁶⁶ As described, the mental state “knowingly” means that person has knowledge of circumstances when the person is aware that such circumstances probably exist.⁶⁷ The defendant need only be aware that a result may occur,⁶⁸ and this can be ascertained by surrounding facts and circumstances.⁶⁹

Like possession, “[i]n addition to direct evidence, circumstantial evidence may be used to establish the offense of drug trafficking.”⁷⁰ Further, “[n]umerous courts have determined that plastic baggies, digital scales, and large sums of money are often used in drug trafficking which constitute circumstantial evidence that [the defendant] was using these items to commit that crime.”⁷¹

In the present case, the court has already found that the possession element for trafficking in fentanyl was satisfied when it found, in relation to Count 2 in Case No. 2018

⁶⁴ R.C. 2925.03(A)(2).

⁶⁵ See R.C. 3119.01(C) and R.C. 3719.41.

⁶⁶ *Williams*, 2015-Ohio-2010 at ¶ 13.

⁶⁷ R.C. 2901.22(B).

⁶⁸ *Fox*, 2009-Ohio-556 at ¶ 13, citing *Nutekpor*, 2006-Ohio-4641 at ¶ 15.

⁶⁹ *Anderson*, 2009-Ohio-2521 at ¶ 28, citing *Lott*, 51 Ohio St.3d at 168.

⁷⁰ *State v. Luna*, 12th Dist. Butler No. CA2008-04-115, 2009-Ohio-3421, ¶ 27, citing *State v. Harry*, 12th Dist. Butler No. CA2008-01-0013, 2008-Ohio-6380, ¶ 50. See *Harry*, 2008-Ohio-6380 at ¶ 50, citing *State v. Kutsar*, 8th Dist. Cuyahoga No. 89310, 2007-Ohio-6990, ¶ 20 (“Numerous courts have determined that plastic baggies, digital scales, and large sums of money are often used in drug trafficking which constitute circumstantial evidence that appellant was using these items to commit that crime.”).

⁷¹ *State v. Trammell*, 12th Dist. Butler No. CA2016-11-220, 2017-Ohio-8198, ¶ 48, quoting *Harry*, 2008-Ohio-6380 at ¶ 50.

CR 000407, that the defendant is guilty beyond a reasonable doubt of aggravated possession of drugs, that being 31.448 grams of fentanyl, which is greater than the bulk amount but less than five times the bulk amount.

The court further finds that the defendant was knowingly transporting, delivering, or distributing fentanyl intended for sale or resale. The circumstances indicate that the defendant was trafficking in fentanyl. First, the defendant possessed a large amount of fentanyl, especially considering that it is 50 times more potent than heroin.⁷² It seems that 31.448 grams of fentanyl would far exceed a supply for personal use. Second, the defendant was found with a large amount of cash in his sock, \$647. Not only is this a large amount of cash to carry on one's person at any given time, but it was hidden in a secretive location. Third, the large pile of lottery forms found underneath the fentanyl are often used for packaging drugs. Fourth, the defendant tried to dispose of a digital scale that had fentanyl on it. Fifth, the defendant was entering an apartment complex known to be an area of high drug activity. Sixth, the defendant tried to escape from Officer Taylor. Collectively, the evidence convinces the court beyond a reasonable doubt that the defendant knowingly trafficked fentanyl. Therefore the defendant is guilty of Count 1 in Case No. 2018 CR 000407, aggravated trafficking in drugs, fentanyl, in violation of R.C. 2925.03(A)(2), a felony of the third degree.

CONCLUSION

⁷² *Pountney*, 2018-Ohio-22 at ¶ 2.

The court finds that the state has proven the following counts beyond a reasonable doubt, and as such the court finds that the evidence is sufficient to prove the defendant guilty of the following:

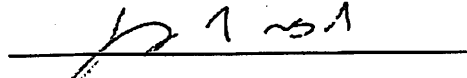
- Count 1 in Case No. 2018 CR 000127, having weapons while under disability, in violation of R.C. 2923.13(A)(3), a felony of the third degree,
- Count 2 in Case No. 2018 CR 000127, improperly handling firearms in a motor vehicle, in violation of R.C. 2923.16(B), a felony of the fourth degree,
- Count 3 in Case No. 2018 CR 000127, resisting arrest, in violation of R.C. 2921.33(A), a misdemeanor of the second degree,
- Count 1 in Case No. 2018 CR 000407, aggravated trafficking in drugs in violation of R.C. 2925.03(A)(2), a felony of the third degree,
- Count 2 in Case No. 2018 CR 000407, aggravated possession of drugs in violation of R.C. 2925.11(A), a felony of the third degree, and
- Count 3 in Case No. 2018 CR 000407, possession of cocaine in violation of R.C. 2925.11(A), a felony of the fifth degree.

Counsel shall conference within three business days of the date of this Decision and call the Assignment Commissioner (513-732-7108) in order to schedule the sentencing hearing, which shall be held within 3-5 weeks of the date of this Decision.

No later than March 1, 2019, each counsel shall submit a brief setting forth the defendant's position on the issue of merger as applied to the offenses in this case. The motion shall be supported by a memorandum setting forth the facts and the law in support of the position taken by counsel and supported by appropriate citations of authority. Any reply memorandum shall be served and filed no later than March 8, 2019.

IT IS SO ORDERED.

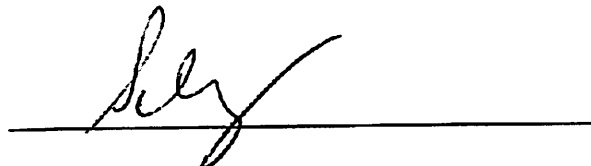
DATED: 2-19-19



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I certify that copies of the within Entry have been sent on this 19th day of February 2019 by e-mail to Carol Rowe, Assistant Prosecuting Attorney for the State of Ohio, at crowe@clermontcountyohio.gov, and to Hal Arenstein, Attorney for the Defendant, at halalawyer@aol.com.



Judicial Assistant to Judge McBride