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

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BARBARA J. WILSON
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff	:	CASE NO. 2018 CR 00838
vs.	:	Judge McBride
MICHAEL LEON THOMASON	:	<u>DECISION/ENTRY</u>
Defendant	:	

Dorothy Smith, assistant prosecuting attorney for the state of Ohio, 76 South Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

William J. Rapp, counsel for the defendant Michael Leon Thomason, One East Main Street, Amelia, Ohio 45102.

This case came before the court for a bench trial on January 30, 2019. At the conclusion of the trial, the court took the issues raised in the case under advisement.

The defendant Michael Leon Thomason was indicted on September 20, 2018, on two counts- (1) aggravated possession of drugs involving methamphetamine in violation of R.C. 2925.11(A), a felony of the fifth degree and (2) aggravated possession of drugs involving fentanyl in violation of R.C. 2925.11(A), a felony of the fifth degree.

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.

PROCEDURAL BACKGROUND

On September 20, 2018, the defendant Michael Leon Thomason was indicted on two counts: (1) aggravated possession of drugs involving methamphetamine in violation of R.C. 2925.11(A), a felony of the fifth degree and (2) aggravated possession of drugs involving fentanyl in violation of R.C. 2925.11(A), a felony of the fifth degree.

On November 8, 2018, the defendant submitted a waiver of his right to a jury trial. On that same date, during a hearing, the court found the defendant to have knowingly, intelligently, and voluntarily waived his right to a jury trial. The court journalized this finding on December 14th.

The court held a bench trial on January 30, 2019. At the conclusion of the trial, the court took the issues raised in the trial under advisement.

FINDINGS OF FACT

The above charges stem from an incident that occurred on May 26, 2018. Sometime around 2:00 a.m. to 2:30 a.m. on that date, Officer Chris Davidson, a police officer with the Goshen Township Police Department, noticed a vehicle driving without working license plate lights.

Officer Davidson stopped the vehicle along State Route 132, Goshen Township, and Clermont County, Ohio. Officer Davidson made contact with the driver, who was the defendant Michael Leon Thomason.

The defendant did not appear to be under the influence of drugs. Officer Davidson also made contact with the passenger, Jesse Doyle. Doyle was sweating and had

constricted pupils, consistent with the use of drugs. He was also holding a can of Mountain Dew.

Officer Davidson collected both men's identification and went to his police cruiser to run a LEADS report. Doyle had not given him his correct social security number, so Officer Davidson had to ask him for it again. With the correct number, he learned that there was a warrant for Doyle's arrest.

Officer Davidson asked Doyle to step out of the vehicle. As he did so, Officer Davidson spotted a black, pan-type object on the floor, with white residue on it. Doyle placed the can of Mountain Dew on the floorboard and was detained in the police cruiser. He stated that the items on the floorboard were his. Officer Davidson searched the passenger floorboard and discovered several pieces of drug paraphernalia. He found a black sunglass case on the passenger floorboard that had a glass pipe and a small spoon inside, which are items often used for drug use.

When Officer Davidson picked the Mountain Dew can up off the floorboard, he heard a rattling noise inside. The can was cold to the touch and had condensation on it. The can was halfway full so he poured the contents out. Officer Davidson found, inside the can, a razor and cut straw, also consistent with drug use.

Officer Davidson asked the defendant if he could search the rest of the vehicle, to which the defendant readily agreed. Officer Davidson found a marijuana scale inside of a bag in the center console. He also looked into a second, larger Mountain Dew can, located in a cup holder. The cup holder was positioned below the radio and dash area, and there was only one cup holder. This larger can was also cold and had condensation. Officer Davidson needed to use his flashlight to see into the can, and in doing so he

observed that that there were objects inside the can. He poured the liquid out, and two plastic baggies fell out as well. One baggy contained had a white, crystal substance. The second plastic baggy contained a piece of wrapped paper.

Officer Davidson told the defendant what he had found in the vehicle. The defendant denied that he possessed these items and instead said the items belonged to the passenger Doyle, whom he was driving home from another person's house. He also stated that the vehicle belonged to his sister, and he believed that the scale belonged to a friend of his sister who was involved with marijuana. The passenger Doyle then changed his story and said that the smaller Mountain Dew can on the floorboard, which Officer Davidson had seen him holding, did not belong to him.

Officer Davidson sent the two baggies to be tested for drugs at the BCI Crime Lab. Testing revealed that the paper wrapped inside one plastic baggy contained white powder, which was determined to be less than .10 grams of fentanyl.¹ The other plastic baggy, containing the crystals, was tested and found to be .50 grams of methamphetamine.²

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 [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.

¹ State's Ex. 4.

² State's Ex. 4.

³ R.C. 2901.05(A).

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."

Further, "[i]t is axiomatic that the state must prove each and every element of an offense * * *."⁴

As the trier of fact, the court " * * * makes the determinations of credibility and the weight to be given to the evidence."⁵ 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.⁶

LEGAL ANALYSIS

In Count 1, the defendant is charged with aggravated possession of drugs involving methamphetamine in violation of R.C. 2925.11(A). In Count 2, the defendant is charged with aggravated possession of drugs involving fentanyl in violation of R.C. 2925.11(A). Under R.C. 2925.11(C)(1)(a), whenever the controlled substance which is

⁴ *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.")

⁵ *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.")

⁶ *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.

possessed is, with limited exceptions, a Schedule II drug or a compound, mixture, or preparation of a Schedule II drug, the violation of R.C. 2925.11(A) constitutes aggravated possession of drugs, which is a fifth degree felony. Methamphetamine and fentanyl are both Schedule II drugs.⁷

The Ohio Revised Code criminalizes the possession of drugs in R.C. 2925.11(A): "No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog."⁸ 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. * * *"⁹ "To act knowingly, a defendant merely has to be aware that the result may occur."¹⁰ "Knowledge can be ascertained from the surrounding facts and circumstances of the case."¹¹ Further, the knowledge requirement for a possession charge can be satisfied regardless of the amount.¹²

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."¹³ A person can either have actual or constructive possession of a drug.¹⁴

⁷ R.C. 3719.41.

⁸ R.C. 2925.11(A).

⁹ R.C. 2901.22(B).

¹⁰ *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.

¹¹ *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).

¹² *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).

¹³ R.C. 2925.01(K).

¹⁴ *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.

“Actual possession occurs when the defendant ‘had the items within his immediate physical control.’”¹⁵ 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.”¹⁶

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 was not directly in his possession.¹⁷ 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 * * *.”¹⁸

The state may prove constructive possession using only circumstantial evidence.¹⁹ 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.”²⁰ “The discovery of readily accessible drugs in close proximity to the accused constitutes circumstantial

¹⁵ *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.

¹⁶ *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.”).

¹⁷ *State v. Mayer*, 8th Dist. Cuyahoga No. 80168, 2003-Ohio-1, ¶ 8.

¹⁸ (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).

¹⁹ *State v. Fletcher*, 86 N.E.3d 591, 2017-Ohio-1006, ¶ 58 (12th Dist.), quoting *State v. Fultz*, 12th Dist. Butler No. CA2015-06-103, 2016-Ohio-1486, ¶ 12.

²⁰ *Peyton*, 2017-Ohio-243 at ¶ 45, citing *Williams*, 2015-Ohio-2010 at ¶ 15.

evidence that the accused was in constructive possession of the drugs.”²¹ Notably, a “person may knowingly possess or control property belonging to another; the state need not establish ownership to prove constructive possession.”²²

In turning to the case at bar, the court finds that the defendant is not guilty of aggravated possession of drugs in violation of R.C. 2925.11(A), as to either Count 1 for methamphetamine or Count 2 for fentanyl, because the court is not convinced beyond a reasonable doubt that defendant had knowledge or consciousness that he was in possession of the drugs, nor does it believe that he possessed the drugs. As explained above, to be found guilty of possession of drugs, under R.C. 2925.11(A) the defendant must have “knowingly” possessed the drugs.²³ The surrounding facts and circumstances of the case do not convince the court beyond a reasonable doubt that the defendant had such knowledge.²⁴

In looking at the surrounding facts and circumstances, the court finds that they more likely support the defense’s theory that the passenger brought the drugs into the vehicle without the defendant’s knowledge. The passenger admitted that the items on the floorboard were his, which included several items for using drugs that were concealed in other containers, including a glass pipe, small spoon, razor, and cut straw. All of these items are meant for drug use and indicate that the passenger was also likely the person who brought the methamphetamine and fentanyl into the vehicle, which were likewise concealed from open view. Indeed, Officer Davidson only thought to check the large Mountain Dew can because he had previously found drug paraphernalia in the smaller

²¹ *Fletcher*, 2017-Ohio-1006 at ¶ 58, quoting *Fultz*, 2016-Ohio-1486 at ¶ 13.

²² *Peyton*, 2017-Ohio-243 at ¶ 44, citing *Williams*, 2015-Ohio-2010 at ¶ 14.

²³ R.C. 2925.11(A).

²⁴ *Anderson*, 2009-Ohio-2521 at ¶ 28, citing *Lott*, 51 Ohio St.3d at 168.

one held by the passenger. He had to use his flashlight to see if there were any items in the can, and then he had to pour out the liquid to discover what they were. There is no evidence that the defendant ever handled the large Mountain Dew or drank from it.

Moreover, it was the passenger, not the defendant, who appeared to be under the influence of drugs at the time of the stop. In this regard, Officer Davidson described the defendant's demeanor as normal and cooperative during the ordeal, which further supports the defense's theory that the defendant was unaware that there were drugs in the tall Mountain Dew can.²⁵ On the whole, it seems more likely to the court that the defendant was oblivious to the presence of the methamphetamine and fentanyl.

Here, as the trier of fact, the court finds that the state has not proven beyond a reasonable doubt that the defendant had the requisite mental state to find him guilty of aggravated possession of methamphetamine or fentanyl. The court finds that the defendant was not aware that there was "probably" methamphetamine or fentanyl in the tall Mountain Dew can.²⁶

Likewise, to show that the defendant had "constructive possession" of either drug, the state must prove that the defendant was "conscious" of the fentanyl and methamphetamine's presence.²⁷ For the same reasons described above, the court finds the facts and circumstances surrounding the drugs' discovery do not convince the court beyond a reasonable doubt that he was conscious that he was in the presence of, and

²⁵ *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).

²⁶ R.C. 2901.22(B).

²⁷ *Peyton*, 2017-Ohio-243 at ¶ 44, quoting *Jester*, 2012-Ohio-544 at ¶ 25.

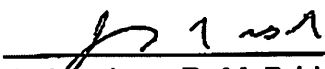
therefore could exercise dominion and control over, either drug. As such, the court concludes that the state has not proven beyond a reasonable doubt that the defendant is guilty of aggravated possession of methamphetamine or fentanyl under R.C. 2925.11(A) as charged in Counts 1 and 2.

CONCLUSION

For the foregoing reasons, the court finds that the state has not proven beyond a reasonable doubt the defendant's guilt of the two charges of aggravated possession of drugs, in violation of R.C. 2925.11(A), felonies of the fifth degree. As such, the defendant Michael Leon Thomason is hereby acquitted as to the charges contained in Counts 1 and 2 of the indictment.

IT IS SO ORDERED.

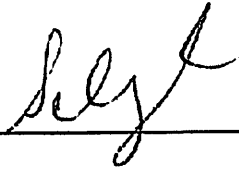
DATED: 4-19-19



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I certify that copies of the within Decision/Entry have been provided on this 22nd day of April 2019 by e-mail to Dorothy Branson-Smith, Assistant Prosecuting Attorney, at dksmith@clermontcountyohio.gov, and to William J. Rapp, Attorney for the Defendant, at lawoffice@williamjrapp.com. A printed copy has been provided to the Prosecuting Attorney's Office, and a printed copy has been mailed by regular U.S. Mail to William J. Rapp, One E. Main Street, Amelia, Ohio 45102.



Judicial Assistant to Judge McBride