

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

FILED
2021 JUN 17 AM 10:02
BARBARA A. WIEDENBEIN
CLERK OF COMMON PLEAS
CLERMONT COUNTY, OH

STATE OF OHIO :
Plaintiff : CASE NO. 2020 CR 000107
vs. : Judge McBride
BRIAN P. RYAN : DECISION/ENTRY OF ACQUITTAL
Defendant :

Zachary A. Zipperer, assistant prosecuting attorney for the state of Ohio, 76 S. Riverside Drive, 2nd Floor, Batavia, Ohio 45103.

Richard R. Campbell, assistant public defender and counsel for the defendant Brian P. Ryan, 302 East Main Street, Batavia, Ohio 45103.

This cause is before the court for a bench trial, which was held on February 8, 2021. Following written closing arguments from counsel, this matter was taken under advisement on March 25, 2021.

On January 28, 2020, the defendant Brian P. Ryan was indicted on one count of aggravated possession of drugs in violation of R.C. 2925.11(A), a felony of the fifth degree. He waived his right to a jury trial on December 28, 2020, which the court found was made knowingly, intelligently, and voluntarily.

Upon consideration of the trial, the record of the proceedings, the evidence presented at the trial, the written arguments of counsel, and the applicable law, the court now renders this written decision.

STANDARD OF REVIEW

COPY

In a criminal case, it is the state's burden to prove the defendant's guilt beyond a reasonable doubt.¹ 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 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 * * *.”² “[T]he state solely carries the burden of proof and the defense has no duty to disprove the state’s case.”³

As the trier of fact, the court “* * * makes the determinations of credibility and the weight to be given to the evidence.”⁴ 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.⁵ Moreover, in bench trials “[i]t is well-established that a trial court is presumed to know the applicable law and apply it accordingly.”⁶

¹ R.C. 2901.05(A).

² *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.”)

³ *State v. Petit*, 12th Dist. Madison No. CA2016-01-005, 2017-Ohio-633, ¶ 27, quoting *State v. Richardson*, 8th Dist. Cuyahoga No. 100115, 2014-Ohio-2055, ¶ 24.

⁴ *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.”).

⁵ *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.

⁶ *In re D.L.B.*, 12th Dist. Fayette No. CA2011-09-019, 2012-Ohio-3045, ¶ 22, citing *State v. Lloyd*, 12th Dist. Nos. CA2007-04-052 and CA2007-04-053, 2008-Ohio-3383, ¶ 28.

FINDINGS OF FACT

The court makes the following findings of fact based upon the testimony of the witnesses, joint stipulations, and the exhibits it found to be admissible, credible, and reliable as presented at trial:

Officer Jake Dold is a police officer who serves as part of the road patrol for Miami Township Police Department. Officer Dold has been a law enforcement officer for over eight years. His role on road patrol includes drug interdiction, and he has received training on drug interdiction.

Officer Dold was on road patrol on June 19, 2020 working a shift that lasted from 6:00 am until 6:00 pm. Just before 10:00 am on June 19, 2020, Officer Dold began following a blue Honda Accord, which the defendant was driving, because it was following too closely to the vehicle in front of it. He also recognized the vehicle as belonging to Mark Miller, a known drug trafficker. Officer Dold stopped the vehicle and made contact with the defendant in the parking lot of a Frisch's restaurant off of State Route 28 in Clermont County, Ohio.

Upon making contact, Officer Dold observed that the defendant was upset, agitated, argumentative, and nervous. Officer Dold believed that the defendant's hands were in front of him as he approached the vehicle, as opposed to making furtive movements. Officer Dold asked the defendant for his driver's license. The defendant did not have one and provided a state identification card. During their interaction, the defendant had phone conversations with Miller, the Honda's owner, at intermittent points. The defendant intimated to Officer Dold that he was driving to Goshen to visit a woman. Officer Dold verified that the defendant did not have a valid driver's license through LEADS and that his license was suspended. Officer Dold requested a canine unit, but none was available.

Officer Dold determined that the vehicle needed to be towed because the defendant did not have a valid driver's license to drive it, and there was no other licensed driver on the scene. Officer Dold inventoried the vehicle, per Miami Township Police Department policy. Prior to doing so, Officer Dold asked the defendant if he had anything illegal in the vehicle. He responded to the effect of "there should not be" or there would not be "anything that's his."⁷

Officer Dold described the vehicle as being "messy" and containing trash, which the video footage from his body camera confirms.⁸ Officer Dold found methamphetamine in a "tied off" plastic bag located between the center console and passenger's seat. It was wedged between the seat buckle receptacle and a cup-holder. Officer Dold testified that the bag was visible from the driver's side when he leaned into the vehicle, and it was within arm's length of the driver's seat. Officer Dold asked the defendant if the bag contained methamphetamine, and he responded, "I guess." The substance in the bag was tested and was found to be 2.552 grams of methamphetamine.

Officer John Gratsch is a police officer with the Miami Township Police Department, and he was serving on road patrol on June 19, 2020 as well. He was also present at the scene of the defendant's stop. Officer Gratsch observed that the defendant was polite and conversational with him until he learned that Miller's vehicle was going to be searched and was asked if he had any illegal items inside. At that point, Officer Gratsch observed that the defendant's demeanor changed, and he became evasive. When answering the question about whether the car contained illegal items, the defendant paused and scratched his head before answering. He also discontinued eye contact with Officer Gratsch at that point.

Per Officer Gratsch, during the vehicle search the defendant had a phone conversation with Miller. The defendant immediately stated on the phone call that "they're searching the car." After the call, the defendant appeared somewhat agitated to Officer Gratsch. Officer Gratsch asked the

⁷ It is unclear from the video footage of this conversation what the defendant precisely said, and the court is therefore relying on Officer Dold's testimony as to the defendant's statements.

⁸ State's Ex. 4.

defendant if there was “anything in the vehicle.” The defendant responded: “When you find something, you guys are going to pin it on me.” Later, when the officers were asking the defendant about Miller, the defendant was asked if there was “something” in the car. The defendant responded: “probably, maybe.” And then during the same conversation the defendant was asked how Miller responded to learning the car was being searched, to which the defendant reported that Miller swore.

LEGAL ANALYSIS

The defendant is charged with a single count of aggravated possession of drugs, methamphetamine, in violation of R.C. 2925.11(A), a felony of the fifth degree. Under R.C. 2925.11(C)(1)(a), whenever the controlled substance is, with limited exceptions, a Schedule II drug or a compound, mixture, or preparation of a Schedule II drug, a violation of R.C. 2925.11(A) constitutes aggravated possession of drugs, which is a fifth degree felony. Methamphetamine is a Schedule II drug.⁹

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.”¹⁰ 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. * * *”¹¹ “To act knowingly, a defendant merely has to be aware that the result may occur.”¹² “Knowledge can be

⁹ R.C. 3719.41.

¹⁰ R.C. 2925.11(A).

¹¹ R.C. 2901.22(B).

¹² *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.

ascertained from the surrounding facts and circumstances of the case.”¹³ Further, the knowledge requirement for a possession charge can be satisfied regardless of the amount.¹⁴

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.”¹⁵ A person can either have actual or constructive possession of a drug.¹⁶

“Actual possession occurs when the defendant ‘had the items within his immediate physical control.’”¹⁷ 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.”¹⁸

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.¹⁹ 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

¹³ *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).

¹⁴ *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).

¹⁵ R.C. 2925.01(K).

¹⁶ *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. See *State v. Sexton*, 12th Dist. Warren No. CA2018-08-100, 2020-Ohio-153, ¶ 10, quoting *State v. Cobb*, 12th Dist. Butler No. CA2007-06-153, 2008-Ohio-5210, ¶ 100 (providing the same definition for constructive possession).

¹⁷ *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.

¹⁸ *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.”).

¹⁹ *State v. Mayer*, 8th Dist. Cuyahoga No. 80168, 2003-Ohio-1, ¶ 8.

the most natural inference from the facts proved * * *.”²⁰ The state may prove constructive possession using only circumstantial evidence.²¹ 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.”²² “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.”²³ Notably, a “person may knowingly possess or control property belonging to another; the state need not establish ownership to prove constructive possession.”²⁴

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) 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.²⁵ The surrounding facts and circumstances of the case do not convince the court beyond a reasonable doubt that the defendant had such knowledge.²⁶

In looking at the surrounding facts and circumstances, including the defendant’s demeanor, the court believes it is *possible* that the defendant knew of the bag of methamphetamine wedged between the passenger seat and center console as he drove Miller’s vehicle. The court also believes

²⁰ (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).

²¹ *State v. Fester*, 12th Dist. No. CA2019-05-043, 2021-Ohio-410, 167 N.E.3d 1021, ¶ 58, quoting *State v. Fultz*, 12th Dist. Butler No. CA2015-06-103, 2016-Ohio-1486, ¶ 12. See *State v. Fletcher*, 86 N.E.3d 591, 2017-Ohio-1006, ¶ 58 (12th Dist.), quoting *Fultz*, 2016-Ohio-1486 at ¶ 12.

²² *Peyton*, 2017-Ohio-243 at ¶ 45, citing *Williams*, 2015-Ohio-2010 at ¶ 15.

²³ *State v. Mickey*, 12th Dist. Clermont No. CA2019-07-055, 2020-Ohio-1432, ¶ 27, quoting *Fultz*, 2016-Ohio-1486 at ¶ 13. See *Fletcher*, 2017-Ohio-1006 at ¶ 58, quoting *Fultz*, 2016-Ohio-1486 at ¶ 13 (quoting same).

²⁴ *Peyton*, 2017-Ohio-243 at ¶ 44, citing *Williams*, 2015-Ohio-2010 at ¶ 14.

²⁵ R.C. 2925.11(A).

²⁶ *Anderson*, 2009-Ohio-2521 at ¶ 28, citing *Lott*, 51 Ohio St.3d at 168.

it is just as possible that he was unaware of the bag of methamphetamine until Miller informed him of its presence during a phone call or once Officer Dold showed him the bag of methamphetamine. Indeed, the defendant was driving another person's vehicle, and given the state of disarray in the vehicle, a plastic bag may not have drawn his notice. Possible is not tantamount to probable. Ultimately the court, as the trier of fact, 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. The court cannot find that the defendant was aware that there was "probably" methamphetamine between the middle console and passenger seat.²⁷

Likewise, to show that the defendant had "constructive possession" of the drug, the state must prove that the defendant was "conscious" of the methamphetamine's presence.²⁸ 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 therefore could exercise dominion and control over, the 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 under R.C. 2925.11(A) as charged in the indictment.

CONCLUSION

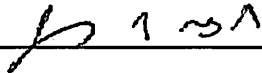
For the foregoing reasons, the court finds that the state has not proven beyond a reasonable doubt the defendant's guilt of the charge of aggravated possession of drugs, in violation of R.C. 2925.11(A), a felony of the fifth degree. As such, the defendant Brian P. Ryan is hereby acquitted of that charge.

²⁷ R.C. 2901.22(B).

²⁸ *Peyton*, 2017-Ohio-243 at ¶ 44, quoting *Jester*, 2012-Ohio-544 at ¶ 25.

IT IS SO ORDERED.

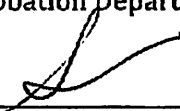
DATED: 3-17-21



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

I certify that copies of the within Entry have been provided on this 17th day of June 2021 by e-mail to Zachary Zipperer, Assistant Prosecuting Attorney, at zzipperer@clermontcountyohio.gov, and to Richard R. Campbell, Attorney for the Defendant, at rcampbell@clermontcountyohio.gov. Printed copies have been provided to the Prosecuting Attorney's Office, the Public Defender's Office, and the Probation Department.



Judicial Assistant to Judge McBride