

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 11AP-592 (C.P.C. No. 10CR-11-6524)
Marlon B. Banks,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 30, 2012

Ron O'Brien, Prosecuting Attorney, and *Seth L. Gilbert*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶ 1} Defendant-appellant, Marlon B. Banks, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to jury verdict, of one count of carrying a concealed weapon, in violation of R.C. 2923.12, and one count of improperly handling a firearm in a motor vehicle, in violation of R.C. 2923.16, both felonies of the fourth degree. Defendant assigns a single error:

There was insufficient competent, credible evidence to support the jury's verdict, thereby, denying Appellant due process under the state and federal Constitutions. (Passim)

Because the state presented sufficient competent, credible evidence to support the jury's verdict, we affirm.

I. Facts and Procedural History

{¶ 2} An indictment filed on November 5, 2010 charged defendant with one count each of carrying a concealed weapon and improperly handling a firearm in a motor vehicle. In a jury trial beginning May 9, 2011, the state presented evidence that defendant was a rear seat passenger in a car stopped for a traffic violation. Pursuant to a consensual search, police found a weapon protruding from the back of the front passenger seat, resulting in the two charges against defendant. The jury returned a verdict of guilty on both counts. In a sentencing hearing conducted June 7, 2011, the trial court merged the two counts under R.C. 2941.25 and sentenced defendant accordingly.

II. Assignment of Error—Sufficiency of the Evidence

{¶ 3} In his single assignment of error, defendant asserts the state failed to present sufficient evidence that he possessed the gun found in the motor vehicle stopped for the traffic violation.

{¶ 4} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Sufficiency is a test of adequacy. *Id.* We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus; *State v. Conley*, 10th Dist. No. 93AP-387 (Dec. 16, 1993).

{¶ 5} Defendant was indicted pursuant to R.C. 2923.12(A)(2), which proscribes carrying a concealed weapon and provides that "[n]o person shall knowingly carry or have concealed on the person's person or concealed ready at hand * * * [a] handgun other than a dangerous ordnance." R.C. 2923.16(B), the basis for the other charge against defendant, addresses a firearm in a motor vehicle and provides that "[n]o 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." To "have" a gun,

"one must either actually or constructively possess" it. *State v. Dorsey*, 10th Dist. No. 04AP-737, 2005-Ohio-2334, ¶ 32. The sole issue in defendant's assigned error asserts the state failed to present the requisite evidence of possession.

{¶ 6} Possession may be actual or constructive. *State v. Saunders*, 10th Dist. No. 06AP-1234, 2007-Ohio-4450, ¶ 10, citing *State v. Burnett*, 10th Dist. No. 02AP-863, 2003-Ohio-1787, ¶ 19, citing *State v. Mann*, 93 Ohio App.3d 301, 308 (8th Dist.1993). A person has actual possession of an item when it is within his immediate physical control. *Id.*; *State v. Norman*, 10th Dist. No. 03AP-298, 2003-Ohio-7038, ¶ 29; *State v. Messer*, 107 Ohio App.3d 51, 56 (9th Dist.1995). Constructive possession exists when a person knowingly exercises dominion or control over an object, even though the object may not be within the person's immediate physical possession. *State v. Hankerson*, 70 Ohio St.2d 87 (1982), syllabus; *Saunders* at ¶ 11, citing *State v. Wyche*, 10th Dist. No. 05AP-649, 2006-Ohio-1531, ¶ 18, and *State v. Chandler*, 10th Dist. No. 94APA02-172 (Aug. 9, 1994). "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). "'[P]ossession' 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." R.C. 2925.01(K). Because the firearm here was not found on defendant's person, the state was required to prove defendant constructively possessed it.

{¶ 7} Circumstantial evidence alone may be sufficient to support the element of constructive possession. *Jenks* at 272-273. Absent a defendant's admission, the surrounding facts and circumstances, including defendant's actions, constitute evidence from which the trier of fact can infer whether the defendant constructively possessed the subject weapon. *State v. Stanley*, 10th Dist. No. 06AP-323, 2007-Ohio-2786, ¶ 31; *Norman* at ¶ 31; *State v. Baker*, 10th Dist. No. 02AP-627, 2003-Ohio-633, ¶ 23.

{¶ 8} "Although inferences cannot be built upon inferences, several conclusions may be drawn from the same set of facts." *State v. Grant*, 67 Ohio St.3d 465 (1993), citing *Hurt v. Charles J. Rogers Transp. Co.*, 164 Ohio St. 329 (1955), paragraph three of the syllabus. "And it is equally proper that a series of facts or circumstances may be used as

the basis for ultimate findings or inferences." *Hurt* at 334. "Because reasonable inferences drawn from the evidence are an essential element of the deductive reasoning process by which most successful claims are proven, the rule against stacking inferences must be strictly limited to inferences drawn exclusively from other inferences." *State v. Evans*, 10th Dist. No. 01AP-594 (Dec. 27, 2001), quoting *Donaldson v. N. Trading Co.*, 82 Ohio App.3d 476, 481 (10th Dist.1992). See also *Motorists Mut. Ins. Co. v. Hamilton Twp. Trustees*, 28 Ohio St.3d 13, 17 (1986) (remarking on the rule's "dangerous potential for subverting the fact-finding process and invading the sacred province of the jury").

A. *The Evidence*

{¶ 9} The state presented evidence that Officer Patrick Daugherty, a patrol officer with the Columbus Division of Police, was on patrol on the city's northeast side on October 26, 2010 beginning at 11:00 p.m. Working alone that night, he stopped a vehicle on Norwood, south of Oakland Park, at 2:26 a.m. for failure to light the rear license plate as required under law. Apart from the driver, the vehicle carried two people: one in the front passenger seat and defendant in the left rear passenger seat.

{¶ 10} Daugherty testified that, "as the vehicle was pulling over, the rear passenger on the driver's side leaned over towards the passenger seat, the front passenger's seat, to the point where I lost sight of him, so I knew he was leaning fairly far." (Tr. 51.) Daugherty stated "it was just a quick—it only took him just a second. He leaned over and then back to the upright seated position." (Tr. 51.) The officer, though observing all passengers, saw only defendant move.

{¶ 11} On reaching the vehicle, Daugherty asked the driver for his license, but the driver did not have one. Instead, he gave the officer an identification card. As Daugherty was speaking to the driver, he noted defendant "was starting to sweat." (Tr. 53.) Neither of the other occupants was moving or sweating, and the night was not hot.

{¶ 12} Standing close to the vehicle, the officer was unable to see the firearm that eventually was discovered. Daugherty asked the driver to step out of the vehicle so Daugherty could issue him a citation for the traffic offenses, including his lack of a driver's license. Daugherty then asked the driver if anything illegal was in the car. The driver responded negatively and consented to a search of the vehicle.

{¶ 13} By that time, other officers had arrived, one of them being Kareem Kashmiry of the Columbus Division of Police. Kashmiry searched the vehicle and noticed a firearm handle partially sticking out from the back of the front passenger seat; on extracting the weapon from the vehicle, he saw a .22 caliber revolver loaded with six live rounds and two spent rounds. Kashmiry testified the gun could not have been placed there from the front seat and was accessible only to the back seat passenger.

{¶ 14} At the close of the state's case, defendant moved for acquittal, and the trial court denied the motion. Defendant presented no evidence, and the trial court submitted the matter to the jury, along with the parties' stipulation that the gun was operable.

B. Sufficiency of Evidence

{¶ 15} The state presented sufficient evidence that defendant possessed the gun. The evidence, construed in the state's favor, supports four factors that, in turn, support such a conclusion: the gun was found under the front passenger seat, it was positioned so that the handle of the gun protruded from the back of the seat while the muzzle pointed toward the front passenger door, only someone in the back seat could have so placed it, and defendant was the only passenger in the back seat of the vehicle.

{¶ 16} Defendant argued at trial that the evidence did not reflect how long the gun had been under the seat, so someone else may have placed the gun under the seat before defendant entered the vehicle. Two additional factors, construed in the state's favor, undermine defendant's argument and support the state's contention that defendant placed the gun under the seat.

{¶ 17} Initially, Daugherty testified defendant moved quickly toward the front passenger seat for a brief moment, suggesting he placed something there. *See State v. Campbell*, 5th Dist. No. 2004CA00176, 2005-Ohio-795, ¶ 29 (noting the defendant's furtive movement supported the conclusion that the defendant constructively possessed the firearm discovered in the vehicle). In addition to defendant's quick movement toward the front passenger seat as if to hide something there, defendant alone among the three passengers began to sweat on the officer's approach to the vehicle. *See State v. Gibson*, 9th Dist. No. 18540 (May 6, 1998) (noting as part of a sufficiency analysis the defendant's obvious sweating).

{¶ 18} Defendant suggests that, despite the evidence and the inferences drawn from them, two separate cases require reversal. Defendant cites *State v. Haynes*, 25 Ohio St.2d 264 (1971), where police found marijuana in the general living area of a house defendant rented but which his girlfriend and three nephews also occupied. Pointing out that defendant had not occupied the house for a week before the police discovered narcotics there, the court decided the evidence was insufficient to demonstrate that defendant possessed the narcotics found in the house. Here, unlike *Haynes*, the evidence implicates defendant more than the other occupants in the vehicle. Defendant alone moved in a fashion suggesting he was hiding something under the front passenger seat in a manner that the front seat passenger could not have placed it, and he alone was sweating as the officer spoke to the driver.

{¶ 19} Similarly, *State v. Duganitz*, 76 Ohio App.3d 363 (8th Dist.1991), fails to support defendant's argument. In that case, the Eighth District reversed the defendant's convictions where police stopped the vehicle he was driving for expired license plates. The defendant and a passenger were removed from the vehicle and placed in a cruiser. When the officer looked under a blanket in the front seat, the officer found a gun. Even though the gun was slightly closer to where the defendant had been sitting, the court concluded the gun was as accessible to the passenger as to the defendant, making the evidence insufficient to convict the defendant of possessing the gun. The facts here are considerably different from *Duganitz*, as the evidence indicated neither the driver nor the front seat passenger could have placed the gun where police found it, and the gun was accessible only to defendant.

{¶ 20} In the final analysis, the state presented sufficient evidence that defendant possessed the firearm found in the motor vehicle stopped for a traffic violation where the officer observed defendant, sitting in the back seat, lean down toward the front passenger seat and return to an upright position. As the officer spoke with the driver, defendant began to sweat noticeably, and the gun, placed under the passenger seat so that neither the driver nor the front seat passenger could have placed it there, was accessible only to defendant.

{¶ 21} Defendant's single assignment of error is overruled.

III. Disposition

{¶ 22} Having overruled defendant's single assignment of error, we affirm the judgment of the trial court.

Judgment affirmed.

BROWN, P.J., and CONNOR, J., concur.
