IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

MARCH 1994 SESSION

FILED

October 24, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellant,	)	No. 01C01-9312-CR-00439
	)	
	)	Davidson County
v.	)	
	)	Hon. Walter C. Kurtz, Judge
	)	
HAROLD WAYNE SHAW,	)	(Possession with intent to deliver cocaine)
	)	
Appellee.	)	

For the Appellant:

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OPINION FILED:_____

REVERSED AND REMANDED

Joseph M. Tipton
Judge

O P I N I O N

The state has appealed as of right from the Davidson County Circuit Court's granting the defendant, Harold Wayne Shaw, a post-verdict judgment of acquittal. The defendant was convicted by a jury of possession with intent to deliver cocaine, a Class B felony, for which the trial court initially imposed an eight-year sentence and fined the defendant five thousand dollars. However, it ultimately concluded that the evidence was insufficient to prove beyond a reasonable doubt that the defendant had the intent to deliver the cocaine he possessed and it acquitted him of felony possession. The trial court sentenced the defendant for misdemeanor possession to eleven months, twenty-nine days and fined the defendant five hundred dollars. The state contends that the trial court erred in that the evidence was sufficient to support the jury's finding of felonious possession. We agree.

Metro Police Officer Marlene Pardue testified that she and her partner, who is now her husband, were on patrol around 1:00 a.m. on June 13, 1991, when they saw a car with no taillights. They turned on their blue lights and the car turned sharply into a Krispy Kreme parking lot. She determined that the defendant was the only person in the car and he said he did not have a driver's license. The defendant was asked to exit the car and was placed under arrest.

Officer Pardue testified that a search of the defendant revealed two bags of white powder in a pants pocket and two hundred three dollars cash in a pocket of shorts which he wore under his pants. She stated that the defendant had no identification on him and told them his name was Eric Lewis Smith. She said they determined that the car was registered to Harold Shaw, but the defendant maintained he was Smith. She indicated that after the defendant was taken into the jail, he acknowledged at some point that he

was Shaw. The car was impounded and searched, but nothing else of significance was discovered.

Metro Police Sergeant Douglas Pardue testified that he was Officer Pardue's partner on the night in question and he essentially corroborated her testimony. The state sought to elicit from him the street value of cocaine, but the trial court sustained the defendant's objection because of lack of a proper foundation.

The parties stipulated that the substance was analyzed by Donna White, a forensic scientist with the Tennessee Bureau of Investigation Crime Laboratory. She found that one packet held 13.9 grams and the other packet held 6.9 grams of substances containing cocaine.

The defendant testified and denied possessing the cocaine. He said that he had consistently told the police his true name after he was stopped. He said that he parked directly in front of the Krispy Kreme and that Officer Pardue accused him of being a drug dealer named Eric Benford or the like. He stated that she walked two parking spaces from his car, found something on the ground, and told him that it was his.

The defendant testified that Officer Pardue found money on him, but that he was employed at B.F. Goodrich at the time. He identified photographs which he stated showed his car's taillights to be working while it was impounded. He said his lights were on when he was stopped. The defendant acknowledged that he had not known the arresting officers before the arrest and that there were people in the Krispy Kreme shop during the incident. He admitted that he had been previously convicted of a felony.

In rebuttal, Officer Pardue testified about her filling out an information form after the arrest. She noted that she had asked the defendant if he was working and that he said no.

The trial court concluded at the end of the state's case-in-chief that the evidence was insufficient to prove that the defendant possessed cocaine with the intent to sell it. However, it submitted the issue of the defendant's possession with intent to deliver to the jury. The jury returned a verdict of guilt and assessed a five thousand dollar fine.

In granting an acquittal after the verdict, the trial court stated that it was relying upon State v. Cooper, 736 S.W.2d 125 (Tenn. Crim. App. 1987), and that there was "absolutely no proof that he possessed this cocaine with the intent to deliver." The state contends that there was sufficient evidence to allow the jury to find the intent to deliver. We agree and believe that the trial court misapprehended the import of Cooper relative to circumstantial evidence.

In Tennessee, whether the issue of the sufficiency of the evidence for acquittal purposes is being considered by the trial court upon motion or by an appellate court upon review, the standard to apply is the same. State v. Adams, 916 S.W.2d 471, 473 (Tenn. Crim. App. 1995). That standard is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Only when the evidence of guilt is wholly circumstantial do we instruct the jury that guilt can only result from facts "so closely interwoven and connected that the finger of guilt is pointed unerringly at the defendant and the defendant alone." State v. Crawford, 470 S.W.2d 610, 613 (Tenn. 1971). That is, the evidence must be both consistent with the defendant's guilt and inconsistent with the defendant's innocence, and it must exclude all other reasonable theories except that of guilt. Patterson v. State, 475 S.W.2d 201, 203 (Tenn. Crim. App. 1971).

In Cooper, the case upon which the trial court relied in granting the acquittal, this court was confronted with a woman who was present when police found over 24 pounds of marijuana and 5.8 grams of cocaine in various parts of another person's trailer. About a quarter of an ounce of marijuana was found in her purse and carryall bag. The court viewed the evidence to show that she was only a temporary guest in the trailer. She was convicted of felonious possession with intent to deliver or sell marijuana and cocaine. The court's primary focus, and the reason the case is most often cited, dealt with the concept of possession in terms of including both actual and constructive possession. It noted that constructive possession is the ability to reduce an object to actual possession, but that mere presence in an area where drugs are discovered or mere association with a person who, in fact controls or possesses drugs is insufficient to support a finding that a person is guilty of possession. 736 S.W.2d at 129.

In concluding that the woman was not guilty of felonious possession, the court considered the evidence of her possession of the large quantity of marijuana and cocaine to be wholly circumstantial in nature. Thus, its analysis proceeded under the long-standing standard to which a wholly circumstantial evidence case must be subjected, i.e., "the facts and circumstances 'must be so strong and cogent as to exclude every other reasonable hypotheses save the guilt of the defendant.'" Id., quoting State v. Crawford, 470 S.W.2d at 612. Concluding that the facts and circumstances did not exclude all

reasonable hypotheses other than guilt of felonious possession beyond a reasonable doubt, the court reduced the conviction to misdemeanor possession of the quarter of an ounce of marijuana found in the defendant's purse and carryall bag.[1]

Unlike Cooper, this case consists of both direct and circumstantial evidence. Direct evidence is "evidence which, if believed, proves the existence of the fact in issue without inference or presumption". State v. Thompson, 519 S.W.2d 789, 792 (Tenn. 1975). Officer Pardue testified that she confiscated two bags of cocaine from the defendant's pocket, and the two bags of cocaine were introduced at trial. This proof is direct evidence of the defendant's possession of cocaine. In Cooper, both the defendant's possession and intent were proved solely through circumstantial evidence. In this case, only the defendant's intent was proven solely through circumstantial evidence.

The one element present in almost all criminal offenses which is most often proven by circumstantial evidence is that relating to the culpable mental state. See State v. Hall, 490 S.W.2d 495, 496 (Tenn. 1973). Other than an accused stating what his or her purpose, intent, or thinking was at the relevant times, the trier of fact is left to determine the mental state by making inferences drawn from the surrounding circumstances found by it to exist. See, e.g., Poag v. State, 567 S.W.2d 775 (Tenn. Crim. App. 1978). In fact, T.C.A. § 39-17-419 states that "[i]t may be inferred from the amount of a controlled substance or substances possessed by an offender, along with other relevant facts surrounding the arrest, that the controlled substance or substances were possessed with the purpose of selling or otherwise dispensing." With respect to this permissive inference, our review is only to consider whether "under the facts of the case, there is no rational way the trier [of fact] could make the connection permitted by the inference" beyond a reasonable doubt. County Court of Ulster County v. Allen, 442 U.S. 140, 157, 99 S. Ct.

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[1]At the time of the offense, distribution of less than one-half ounce of marijuana was a misdemeanor. See T.C.A. § 39-6-417(a)(1)(F)(iii) and (b)(1) (Supp. 1985) [repealed, 1989]. Thus, possession of less than one-half ounce would be a misdemeanor regardless of what the accused intended to do with the substance.

2213, 2225 (1979). In other words, even though circumstantial evidence is needed for one element, the standard for evidence sufficiency remains the same.

We do not necessarily reject out of hand the trial court's statement that, standing alone, the fact that the defendant possessed 20.8 grams of a substance containing cocaine is insufficient to support an inference of an intent to deliver. See Turner v. United States, 396 U.S. 398, 423, 90 S. Ct. 642, 656 (1970). (Mere possession of 14.68 grams of mixture containing cocaine and sugar is "consistent with . . . possessing the cocaine not for sale but exclusively for his personal use."). Nevertheless, the jury was entitled to consider the quantity of cocaine as circumstantial evidence of the defendant's intent along with the other circumstances proven to exist at the time of the arrest.

In the light most favorable to the state, the proof showed that the defendant was traveling in a car while he physically possessed 20.8 grams of a substance containing cocaine divided into two packets. He had over two hundred dollars in his shorts pocket and was unemployed. He gave a false name to the arresting officers and had no identification on him. In addition, no drug paraphernalia was found in the car, and no proof at trial indicated that the defendant intended to consume the cocaine. See State v. Brown, 915 S.W.2d 3, 8 (Tenn. Crim. App. 1995) (recognizing that lack of drug paraphernalia was indicative of an intent to sell, as opposed to an intent for personal use).

Given the above evidence, we conclude that sufficient evidence was presented for the jury, as a rational trier of fact, to conclude beyond a reasonable doubt that the defendant possessed cocaine with the intent to deliver it. Therefore, the judgment of acquittal is reversed and the defendant's conviction for misdemeanor possession is vacated. The case is remanded to the trial court for it to reinstate the eight-year sentence

and five thousand dollar fine and to enter a judgment of conviction for possession of cocaine with the intent to deliver, a Class B felony.

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_____Joseph M. Tipton, Judge

CONCUR:

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Paul G. Summers, Judge

_____
Jerry Scott, Special Judge