

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON  
MAY 1999 SESSION

**FILED**  
June 17, 1999  
Cecil Crowson, Jr.  
Appellate Court Clerk

STATE OF TENNESSEE, )  
 )  
 Appellee, )  
 )  
 VS. )  
 )  
 KENNETH JERMAINE SMITH, )  
 a/k/a KENNY )  
 )  
 Appellant. )

C.C.A. NO. 02C01-9808-CC-00256

FAYETTE COUNTY

HON. JON KERRY BLACKWOOD,  
JUDGE

(Possession of Marijuana with Intent to  
Deliver; Possession of Paraphernalia)

FOR THE APPELLANT:

FOR THE APPELLEE:

**RICHARD G. ROSSER**  
102 East Court Square  
Somerville, TN 38068  
(On Appeal)  
  
**JAMES F. GOODWIN**  
7452 Harding Cove, #203  
Germantown, TN 38068  
(At Trial)

**PAUL G. SUMMERS**  
Attorney General & Reporter  
  
**J. ROSS DYER**  
Asst. Attorney General  
John Sevier Bldg.  
425 Fifth Ave., North  
Nashville, TN 37243-0493  
  
**ELIZABETH T. RICE**  
District Attorney General  
302 Market St.  
Somerville, TN 38068

OPINION FILED: \_\_\_\_\_

**AFFIRMED**

**JOHN H. PEAY,**  
Judge

## OPINION

The defendant was convicted by a jury of possession of marijuana with the intent to deliver and possession of paraphernalia, sentenced to an effective four year term in prison, and fined a total of seven thousand five hundred dollars (\$7500). He now challenges the sufficiency of the convicting evidence. Finding no error, we affirm.

The manager of the Country Oaks apartment complex testified that she watched three unfamiliar men use a key to enter the apartment of a female tenant she knew was not at home. Because this piqued her suspicion, she called the police. She testified that when they arrived a few minutes later, she and the officers knocked on the door of the apartment the three men had entered. According to the apartment manager, a few minutes passed before one of the men, later identified as codefendant Monty Antwine Chearis,<sup>1</sup> answered the door. The apartment smelled of incense.

Officer Kevin Crawford testified he asked Chearis whether he was alone in the apartment, and Chearis replied a friend was sleeping in the bedroom. Officer Crawford testified that as he approached the bedroom, the door to the bathroom, which was not lit, cracked open, revealing codefendant Madaron Humphrey<sup>2</sup> and the defendant. Captain Arthur Williamson, Jr., testified he entered the bathroom, turned on the lights, and noticed a towel on the vanity. He testified that another officer, Officer Pierce, picked up the towel, uncovering two clear plastic bags of marijuana. A box of cigars, with one missing, was also found in the bathroom. Officer Crawford testified that in his experience working drug cases, he has learned that individuals remove a portion of the tobacco in a cigar and replace it with marijuana so that when they smoke it, it appears they are

---

<sup>1</sup>Chearis was tried jointly with the defendant and convicted, but is not a party to this appeal.

<sup>2</sup>Humphrey was also charged, but pled guilty prior to trial.

smoking a regular cigar. Officer Crawford testified that when they found the defendant and Humphrey in the bathroom, nothing indicated that the facilities had been recently used.

The defendant was searched, and found on his person was a clear plastic bag containing additional plastic bags. According to Officer Crawford, these bags were of the type commonly used to hold marijuana and cocaine. During a subsequent search of the bedroom, Officer Crawford discovered in the top drawer of the dresser two clear plastic bags containing marijuana, one of which contained nine smaller bags of marijuana. As Officer Crawford testified, smaller individually wrapped packages of marijuana contained in a larger bag resembles packaging for individual sale. Also found in the top dresser drawer were two sets of scales, a health card belonging to Chearis, Chearis's driver's license, and a set of car keys.

The tenant of the apartment testified that she was at her mother's house doing laundry when Chearis, who was the father of her child and her ex-boyfriend, visited her apartment. She testified she had given him a key to her apartment the previous day so he could take a shower and leave her child some money and diapers. When she gave him the key, she did not give him permission to bring the defendant and Humphrey to her apartment. She denied keeping any marijuana, paraphernalia, cigars, or incense at her apartment.

Humphrey, who had pled guilty to possession charges prior to trial, testified for the defense. According to Humphrey's testimony, all of the marijuana and the paraphernalia belonged to him. Humphrey testified he concealed the drugs and paraphernalia on his person with the aid of a large, heavy coat so that the defendant and codefendant Chearis were not even aware of it. He testified that after they had parked

at the complex and were walking towards the apartment, he asked the defendant to retrieve some plastic bags from the car, which explains, according to Humphrey, why the police discovered plastic bags on the defendant's person. He also claims that upon entering the apartment, he immediately went to the bedroom dresser and stashed the marijuana and paraphernalia without the knowledge of the defendant or Chearis.

On cross-examination, Humphrey stated that he, the defendant, and Chearis had left a local hotel together and traveled in Chearis's car to the apartment, even though they all had different destinations and plans for the day. Humphrey indicated that Chearis intended to change clothes at the apartment. When asked why he and the defendant were at the apartment, Humphrey stated that his girlfriend was supposed to pick him up there, even though he admitted they had passed his girlfriend's house while traveling to the apartment. Humphrey also testified that the defendant was on his way to visit his uncle at his house, even though he then inexplicably stated that the defendant's uncle was not at home. He ultimately admitted he did not know why the defendant was present at the apartment if he had no business being there. Humphrey also admitted that he and the defendant ran into the bathroom when the police knocked at the apartment door.

The State questioned Humphrey regarding his insistence that Chearis and the defendant knew nothing about the marijuana or paraphernalia. In an apparent explanation of how Humphrey managed to covertly conceal the marijuana and paraphernalia in the top dresser drawer immediately upon arriving at the apartment--- even though Chearis's car keys were found in the top drawer next to the contraband--- Humphrey stated that Chearis drove his car without any keys. Upon further questioning, Humphrey stated that Chearis's car was not stolen and that he had bought the car without any keys. He also indicated that if Chearis's driver's license was in the top dresser

drawer next to the car keys and contraband, then Chearis must have been driving without his driver's license as well.

The State impeached Humphrey with a prior statement he had given to his probation officer, which stated that on the day in question, he, the defendant, and Chearis were at the apartment cooking and eating when the police arrived and that he did not know anything about the marijuana. Humphrey denied making a different statement the day before trial, but a rebuttal witness, an investigator with the D.A.'s office, testified Humphrey told him that he was bagging the marijuana in the apartment before the police arrived.

The defendant now argues that the evidence is insufficient to support his convictions because the State did not prove he ever possessed marijuana or paraphernalia. He maintains that the only evidence is circumstantial, in that the defendant was merely present in an apartment where drugs and paraphernalia were found.

Although the evidence of the defendant's guilt is circumstantial in nature, circumstantial evidence alone may be sufficient to support a conviction. State v. Buttrey, 756 S.W.2d 718, 721 (Tenn. Crim. App. 1988). In order for this to occur, however, the circumstantial evidence "must be not only consistent with the guilt of the accused but it must also be inconsistent with his innocence and must exclude every other reasonable theory or hypothesis except that of guilt." State v. Tharpe, 726 S.W.2d 896, 900 (Tenn. 1987). In addition, "it must establish such a certainty of guilt of the accused as to convince the mind beyond a reasonable doubt that [the defendant] is the one who committed the crime." Tharpe, 726 S.W.2d at 896. Moral certainty as to each element of the offense is required, but absolute certainty is not. Tharpe, 726 S.W.2d at 896.

While following these guidelines, this Court must remember that the jury decides the weight to be given to circumstantial evidence and that “[t]he inferences to be drawn from such evidence, and the extent to which the circumstances are consistent with guilt and inconsistent with innocence are questions primarily for the jury.” Marable v. State, 313 S.W.2d 451, 457 (Tenn. 1958); State v. Coury, 697 S.W.2d 373, 377 (Tenn. Crim. App. 1985); Pruitt v. State, 460 S.W.2d 385, 391 (Tenn. Crim. App. 1970).

Here, the defendant was charged with possession of marijuana with the intent to deliver and possession of drug paraphernalia. Mere presence in an area where drugs or paraphernalia are discovered does not show possession, State v. Cooper, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987), but possession can be based on either actual or constructive possession. State v. Brown, 823 S.W.2d 576, 579 (Tenn. Crim. App. 1991). Constructive possession occurs when a person has “the power and intention at a given time to exercise dominion and control over the drugs either directly or through others.” Cooper, 736 S.W.2d at 129 (quoting State v. Williams, 623 S.W.2d 121, 125 (Tenn. Crim. App. 1981)). Moreover, possession may occur either alone or jointly with others. State v. Copeland, 677 S.W.2d 471, 476 (Tenn. Crim. App. 1984).

The evidence in this case showed that the defendant had no business at the apartment where he was found. Marijuana and paraphernalia were found throughout the apartment, and none of it belonged to the tenant, who was not present at the time. When the police officers knocked at the door, a few minutes passed before Chearis answered, and the apartment smelled of incense. Although Humphrey insisted the defendant knew nothing of the marijuana, he also admitted, without explanation, that when the police arrived, he and the defendant hid in an unlit bathroom with two bags of marijuana and several empty plastic bags. Humphrey’s testimony was riddled with inconsistencies and it was impeached by prior inconsistent statements. As such, the jury

was entitled to give Humphrey's testimony very little weight. The jury could infer from all the circumstances---especially the presence of scales and marijuana that was already packaged for individual sale hidden in another room, the defendant's close proximity to larger bags of marijuana, and the presence of several empty plastic bags on the defendant's person---that the defendant had already exercised dominion and control over the confiscated drugs and paraphernalia or had intended to do so before the police arrived. Given this, the defendant's challenge to his convictions must fail.

We note that the defendant also appears to complain that the marijuana and paraphernalia were discovered pursuant to an illegal search. The defendant claims that even though no motion to suppress the evidence was filed or heard, the trial court "should have excluded the evidence of its own volition." Such a contention is wholly preposterous and will not afford the defendant relief on direct appeal from his convictions.

---

JOHN H. PEAY, Judge

CONCUR:

---

JOE G. RILEY, Judge

---

THOMAS T. WOODALL, Judge