

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1020

September Term, 2017

LAVAR DEMOND SMITH

v.

STATE OF MARYLAND

Nazarian,
Shaw Geter,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: March 22, 2018

* This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

Appellant, Lavar Demond Smith, was tried and convicted by a jury in the Circuit Court for Washington County (Dwyer, J.) of possession of heroin and possession with intent to distribute heroin. On July 1, 2017, Judge Dwyer sentenced Appellant to twenty years' imprisonment, all but the mandatory minimum ten years to be suspended.

Appellant filed the instant appeal, in which he posits the following question for our review:

Was the evidence legally insufficient to establish guilt in this case?

FACTS AND LEGAL PROCEEDINGS

Shelley Mohamed, an employee of the Comfort Suites hotel located on Dual Highway in Washington County, testified that, on September 3, 2016, she was working the third shift from 11:00 p.m. to 7:00 a.m. and that Appellant was registered in Room No. 205.

According to Mohamed, she received “a few calls” from a person “with a man’s voice” in Room 205 who “called down” to complain that he could hear someone “stepping in the ceiling,” to which she responded that someone was in the room above. Mohamed testified that she placed a call to the room above and awakened somebody. When the person called a third time, she told him “I assure you there’s no one in the ceiling,” and the individual asked her to call the police. Mohamed called the police, who arrived and went upstairs. Mohamed testified that, sometime later, the two officers came back down and a gentleman and a girl checked out at 3:41 a.m. Mohamed described the girl as Caucasian

with blonde hair in a ponytail. Mohamed said the girl later returned to the hotel at 7:00 a.m. and requested the key to the room and Mohamed offered to open the room door and stand there while the girl looked for her phone. Mohamed said that the girl, who was accompanied by another girl with purple hair, then entered the room and “looked at a couple of spots in the room and then went straight to the safe and was trying to open it.” According to Mohamed, she told the girl that she could not open the safe because the room wasn’t in her name and the girl became angry and left.

Mohamed testified that the other clerk, Shaena Miller, went to the room and opened the safe and called her from the room and stated, “There was drugs and money in the safe.” Mohamed told Miller to “bring it down. We’ll call the police that was here earlier.” Mohamed testified that she then called the police and that Miller came downstairs with “a big bag . . . and a wad of cash.” Mohamed left the hotel at 7:30 a.m. and Miller replaced her as the clerk on the next shift. According to Mohamed, housekeeping staff arrived at 8:30 a.m. and had not yet entered or cleaned the room.

Scott St. Clair of the Hagerstown City Police Department testified that he was working the midnight shift on September 3, 2016, when he responded to a call for a disturbance at the Comfort Suites at approximately 4:00 a.m. According to Officer St. Clair, he encountered a male in the room, whom he identified in court as Appellant, who complained that people were trying to come through the ceiling. Officer St. Clair stated that Appellant and a white female then “politely walked out and eventually left.” According to Officer St. Clair, they left the hotel quietly and peacefully and that Appellant then later

arrived at the police station, sweating and distraught that his female friend had been kidnapped on Interstate 81. The police located Appellant's friend who had arrived to pick up her car. Officer St. Clair testified that he observed Appellant on the East side of the police station parking lot on his cell phone making statements that he had left some items behind in the room.

Shaena Miller, Front Office Manager for Comfort Suites, testified that, on September 3, 2016, she was working the first shift from 7:00 a.m. to 3:00 p.m. and that, at approximately 10:40 a.m., she rented a room to Appellant, whom she identified in court. Miller testified that, on September 4, 2016, Mohamed advised her of what had transpired on the previous night and that a woman later came to the hotel looking for her cell phone. Mohamed accompanied the woman to Appellant's room. According to Miller, at approximately 7:30 a.m., she "put the drugs and the money in a bag, and then brought it down, and we called the police, and they came and took it."

Officer Zane Rowe of the Hagerstown City Police Department testified that he was working the dayshift on September 4, 2016, when he responded to the Comfort Suites for "found CDS [controlled dangerous substance]." He encountered Miller and Mohamed, who advised that they had found two bags of suspected CDS and money inside a safe in Room 205. Officer Rowe seized the evidence and deposited it into the evidence locker at the station house.

Hagerstown City Police Officer, Kylie Bricker, testified that, on September 4, 2016, while working the dayshift, she saw Appellant outside the station house pacing back and

forth and was eventually asked to leave the area. However, at the time the CDS was found in the hotel room, Appellant was in police custody.

Jeffrey Kercheval, forensic scientist at Western Maryland Regional Crime Lab, testified that the suspected CDS tested positive as 34.8 grams of heroin. He further testified that there were no latent finger prints identified on either of the plastic bags of CDS in question.

Hagerstown City Police Officer Frank Toston testified as an expert in the identification, packaging, sale and distribution of narcotics that the condition of the suspected CDS was indicative of an intent to distribute.

Appellant, testifying in his own defense, denied that he had been in possession of the CDS. According to Appellant, he never went into the safe in Room 205 and he did not know that there was any CDS in the safe. Appellant argued that his room, No. 205, adjoined Room 207, which was also occupied, and that he had complained to the front desk that the occupants were making noise and that they had opened the connecting door when he had gone to lunch. Ultimately, he asked the Front Desk clerk to call the police, after which he left the hotel and later went to the Hagerstown Police Department to file a complaint about the Hotel.

At trial, the circuit court denied Appellant's Motion for Judgment of Acquittal as it pertained to the charges for possession and distribution. The court explained as follows:

Clearly it's not anything more than constructive possession of that. The evidence is that a large amount, over an ounce of heroin along with some other stuff . . . was in a . . . in a safe in Room 205 in the Comfort Suites in Washington County, Maryland.

Mr. Smith has been identified, ah, by multiple witnesses as the person who was the proprietor of that room and present in that room, ah, around that one day between like ten thirty in the morning and about three or four in the morning when he checked out. And, ah, around that one day between like thirty in the morning and about three or four in the morning when he checked out. And, ah, but he wasn't an exclusive possession. There was also a woman described as a white woman with blond hair, who was maybe a companion or at least someone who was in the room as well, ah, with Mr. Smith.

One . . . one person having constructive possession doesn't rule out another . . . other people having constructive possession. More than one person can constructively possess the same item.

In a light most favorable to the State, we have Mr. Smith [coming] in close proximity to the area where the heroin was found, that at least in the room with it, if not in the safe or fingerprints on the safe or on the baggies. That's granted. Ah, the one officer I believe it was Officer Rowe, ah . . . no . . . Officer St. Clair, I apologize, testified that the ah, defendant. Mr. Smith was on his cellular telephone apparently, ah, verbally complaining that he left something in the room. Didn't say what. And I think the inference can be drawn in a light most favorable to the State that Mr. Smith left the heroin in the room. Ah, he left something in the room according to Officer. St. Clair. It was his room. It was checked in . . . it was in his name.

One of the clerks, Miss Mohamed, didn't remember the defendant. But the other clerk, ah, Miss Miller did and identified him, as well as Officer St. Clair, who was there that night. So, regarding Counts One and Two, the motion for judgment of acquittal is respectfully denied.

The instant appeal followed.

DISCUSSION

I.

Appellant's sole contention on appeal is that the evidence was legally insufficient to sustain his convictions. Specifically, Appellant argues that the evidence was insufficient to establish constructive possession of the CDS. Appellant maintains that "no CDS or

paraphernalia was found on [his] person or in his personal belongings and, of course, there was no direct evidence of [him] consuming any CDS.” Appellant asserts that “[h]e was merely present in a room in which he did not have exclusive possession and in which CDS was later found inside a locked safe and hidden from view.”

The State responds that the evidence is sufficient to support Appellant’s convictions. The State maintains that “[t]he record shows that Smith had a possessory interest in the place where the contraband was found—the hotel room safe—and that he was in close proximity because he had been in that hotel room.” Furthermore, the State notes that “[a] hotel employee testified about Smith checking out of the hotel and said that the room was registered to Smith.” According to the State’s Attorney, a jury could reasonably infer that “Smith had knowledge that the drugs were in the safe in his hotel room.”

As a preliminary matter, we note that Appellant’s argument, on appeal, solely focuses upon whether the evidence supported his possession, constructive or otherwise, of the CDS. Although Appellant asserts that the evidence was insufficient to support both his convictions, he fails to provide an argument regarding his possession with intent to distribute CDS conviction. Therefore, we will limit our review of Appellant’s claim to those for which he provided argument, *i.e.*, the possession of CDS conviction. *See Thompson v. State*, 229 Md. App. 385, 400 (2016) (citation omitted) (“[A]rguments not presented in a brief or not presented with particularity will not be considered on appeal.”).

“The standard for appellate review of evidentiary sufficiency 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.” *State v. Smith*, 374 Md. 527, 533 (2003) (citing *Jackson v. Virginia*, 443 U.S. 307, 313 (1979)). “We give ‘due regard to the [fact finder's] findings of facts, its resolution of conflicting evidence, and, significantly, its opportunity to observe and assess the credibility of witnesses.’ *Id.* at 534 (quoting *Moye v. State*, 369 Md. 2, 12 (2002)). “We do not re-weigh the evidence, but ‘we do determine whether the verdict was supported by sufficient evidence, direct or circumstantial, which could convince a rational trier of fact of the defendant’s guilt of the offenses charged beyond a reasonable doubt.’” *Id.* (quoting *White v. State*, 363 Md. 150, 162 (2001)).

“The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the State to prove every element of an offense charged beyond a reasonable doubt.” *Savoy v. State*, 420 Md. 232, 246 (2011) (citing *In re Winship*, 397 U.S. 358, 364 (1970)). Accordingly, we will examine each element of the criminal conviction at issue.

Md. Code Ann., Crim. Law (C.L.) § 5–601(a)(1) prohibits an individual from possession or administration of a CDS, outside a few delineated exceptions, *e.g.*, a valid prescription from a licensed physician. C.L. § 5–101(v) defines “possession” as a “means to exercise actual or constructive dominion or control over a thing by one or more persons.” “[P]ossession may be . . . exclusive, or joint.” *Kamara v. State*, 205 Md. App. 607, 633 (2012) (quoting *Belote v. State*, 199 Md. App. 46, 55 (2011)).

To establish constructive possession, the following factors may be utilized:

(1) the defendant’s proximity to the drugs, (2) whether the drugs were in plain view of and/or accessible to the defendant, (3) whether there was indicia of mutual use and enjoyment of the drugs, and (4) whether the defendant has an ownership or possessory interest in the location where the police discovered the drugs. None of these factors are, in and of themselves, conclusive evidence of possession.

Id. (quoting *Smith v. State*, 415 Md. 174, 198 (2010)).

“To prove dominion and control, ‘the evidence must show directly or support a rational inference’ that the accused ‘exercised some restraining or directing influence’ over the drugs.” *Kamara*, 205 Md. App. at 632 (quoting *Jefferson v. State*, 194 Md. App. 190, 214 (2010)). “Knowledge of the presence of drugs is required to exercise dominion and control. Such knowledge may be proven by circumstantial evidence and by inferences drawn therefrom.” *Id.* at 632–33 (citations omitted).

In the instant case, we are persuaded that constructive possession was established sufficiently to support Appellant’s conviction for possession of a CDS. The hotel room where the CDS was found was registered to Appellant, who was witnessed to be in use of the room. As a member of the hotel staff observed, Appellant’s associate attempted to access the safe where the drugs were being stored in the room. Appellant was also observed by a police officer at the police station pacing with a cell phone, complaining that he left something in the hotel room. Accordingly, in the light most favorable to the State, a rational jury could infer that Appellant was in constructive possession, *i.e.*, dominion and control, of the CDS left in the hotel room. Therefore, the evidence is sufficient to support Appellant’s conviction.

**JUDGMENTS OF THE CIRCUIT
COURT FOR WASHINGTON COUNTY
AFFIRMED. COSTS TO BE PAID BY
APPELLANT.**