Circuit Court for Howard County
Case No. 013-K-17-057711

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1903

September Term, 2017

JARON L. RHODES

v.

STATE OF MARYLAND

Berger,
Leahy,
Adkins, Sally D.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Adkins, Sally D., J.

Filed: April 18, 2019

After a bench trial, Appellant Jaron L. Rhodes was convicted of various crimes, including possession of heroin with intent to distribute (Count 4), possession of more than 28 grams of heroin (Count 8), possession of a regulated firearm (Count 2), and possession of a firearm by a prohibited person (Count 3). He was sentenced to ten years' incarceration, the first five without parole, for possession of 28 grams or more of heroin, and a concurrent ten-year term for possession of heroin with intent to distribute.

Rhodes presents the following questions for our review:

1. Did the Circuit Court err in not merging his convictions and sentence for possession of heroin with intent to distribute into his conviction of possession of that same heroin in an amount greater than 28 grams?

2. Was the evidence sufficient to support the lower court's finding that Mr. Rhodes had constructive possession of the heroin found on the windowsill and the gun found in the safe so as to support its finding of possession thereof beyond a reasonable doubt?

STATEMENT OF FACTS

The Howard County SWAT team, armed with a search warrant, entered the door to Unit C at 11990 Little Patuxent Parkway in Howard County, Maryland. On the first floor of the two-story apartment was a living room with a television on the wall and an "L"-shaped couch to the left of the stairs leading to the second floor. Beyond the couch was a dining area with a counter-height bar, the kitchen was behind the bar partition, and a bedroom and bath followed. On the second floor, there was a loft area and an additional bedroom and bath.

When Corporal John Jacobs entered the living room, he found three individuals, already detained by the team, plus two more persons being ushered past the living room from the back of the apartment. Jacobs asked for, and obtained, identification of each of the individuals, including Rhodes.

Detective Andrew Brown, an officer who helped to execute the search warrant after entry was made, identified Rhodes and the two individuals who were seated on the couch when the apartment was breached, as well as the two other individuals who were found in the first-floor bedroom. Brown testified that he did not know how long Rhodes had been in the apartment before the raid. Brown and his fellow officers searched the apartment for evidence. Under the couch they found a handgun magazine, as well as a loaded .40 caliber Kahr Arms handgun. When the weapon was found, all five men were arrested and searched.

The search of Rhodes revealed $570 in his pants pocket, eight blue pills, and a ninth partial pill rolled up in a one-dollar bill. Upon analysis, the pills were determined to be oxycodone. No phone was found on Rhodes, but three other individuals had phones on their person. As Brown walked Rhodes to the police cruiser, he heard Rhodes say, "I'm a dead man." All five individuals were driven to the police station.

Police found five additional cell phones near the living room couch where the five men had been seated. They also found a small amount of marijuana on the coffee table in the living room. On top of the dining room table was a digital scale covered in white powder residue, and two other digital scales were found on the premises. Also recovered in the first-floor bedroom was a plastic bag with cocaine and heroin.

In the second-floor bedroom, police found a substance described as looking like "brownie batter" lying on a paper towel drying on the windowsill. When the substance was later submitted for analysis, it was determined to be in excess of 28 grams of heroin. At trial, an expert in narcotics distribution and trafficking opined that possessing this amount of heroin, with a street value of $120 per gram, constituted possession with intent to distribute. Officers also discovered a second handgun locked in a safe in the second-floor room.

Police found no mail in the house connected to Rhodes and no key to the apartment was in his possession. Nonetheless, recordings of three telephone calls between Rhodes and unidentified individuals, in which Rhodes stated that he had possessions at 11990 Little Patuxent Parkway, were played for the court. In one call he said that "somebody told on us, somebody hit my crib, yo, they hit my crib." Also, records made during booking at the police station reflect that Rhodes told officers his address was 11990 Little Patuxent Parkway.

DISCUSSION

I. Merger

After acquitting Rhodes of possession of the cocaine and heroin found in the first-floor bedroom, the court determined that he possessed only the heroin drying on the windowsill and the oxycodone found in his pocket. Rhodes was convicted of possession of 28 grams or more of heroin, in violation of Maryland Code (2005, 2012 Repl. Vol.), § 5-612(a)(5) of the Criminal Law Article ("CR"), and possession of heroin with intent to distribute, in violation of CR § 5-602(2). He was also convicted of possession of a firearm

as a prohibited person—for the gun in the safe of the second-floor bedroom—in violation of CR § 4-203. At sentencing, the court imposed two sentences related to Rhodes' possession of heroin: the first, ten years for possession of 28 grams or more of heroin, with no possibility of parole for five years; and the second, a concurrent sentence of ten years for possession of heroin with intent to distribute. Rhodes contends that the trial court erred in not merging these two convictions.

The question of whether a sentence is illegal and requires correction under Maryland Rule 4-245 is one of law and, therefore, is reviewed without deference to the trial court. We generally apply the test formulated in *Blockburger v. United States*, 284 U.S. 299 (1932), which "focuses upon the elements of each offense; if all the elements of one offense are included in the other offense, so that only the latter offense contains a distinct element or distinct elements, the former merges into the latter." *Snowden v. State*, 321 Md. 612, 617 (1991) (citation omitted). "If the offenses merge and are thus deemed to be one crime, separate sentences for each offense are prohibited." *Id.*

Appellant relies on *Simpson v. State*, 121 Md. App. 263 (1998), which applied a similar, but not identical, statute to the version of CR § 5-612 at issue here. There this Court determined that "[t]he elements of possession with intent to distribute over 28 grams of heroin are the same as that of possession with intent to distribute heroin, with the added element that the amount to be distributed is 28 or more grams." *Id.* at 291. Therefore, the Court reasoned, a "sentence for possession with intent to distribute heroin must be merged with that for possession with intent to distribute the greater amount." *Id.* Rhodes contends that *Simpson* governs here, and these two convictions should be merged, because his

conviction for possession of heroin with intent to distribute shared all of the elements of his conviction for possession of that same heroin with the mere additional element that the amount of heroin that was possessed was 28 grams or greater.

The State offers a contrary analysis of merger in this context, arguing against merger because each offense contains an element that the other does not, and relying upon our recent decision in *Carter v. State*, 236 Md. App. 456 (2018), as well as earlier decisions. In its view, possession with intent to distribute requires an intent to distribute but does not require the possession of any particular quantity of drugs. In contrast, possession of 28 grams or more of heroin requires possession above a threshold quantity but does not require an intent to distribute. The State distinguishes *Simpson,* pointing out that *Simpson* involved a since-repealed statutory scheme under which possession in excess of the threshold quantities in former-CR § 5-612 was not an independent crime, but instead provided for enhanced penalties when the amount of drugs possessed by a person convicted of possession with intent to distribute exceeded the statutory threshold. *See Kyler v. State,* 218 Md. App. 196, 223–25 (2014).

The State's argument against merger is bolstered by our recent decision in *Carter,* in which we applied current-CR § 5-612. There we clarified that "what was initially a mere penalty enhancement," was ultimately made a stand-alone crime. *Carter,* 236 Md. App. at 480. Examining the text of 2005 Md. Laws ch. 482, we found determinative language indicating that the changes were made "FOR the purpose of altering certain provisions of law to establish new offenses in place of factual determinations that enhance penalties . . . ." *Id.* at 479. Despite retention of the old title and headings, including the

"enhanced penalty" heading, included by the publishers of the Maryland Code, we held that the offense was the "possession of a specified quantity of controlled dangerous substances, and the penalty provided in subsection (c) is simply the penalty for that crime, not an enhancement of any other penalty." *Id.* at 482. In *Carter*, we also addressed *Kyler*'s reliance on the "enhanced penalty" language, emphasizing that the term was not part of the statute; rather it was only a heading included by the publishers. *Id.* at 480 n.13. We are persuaded by the *Carter* holding and concur with the State's argument that, applying the required elements test, the crimes of possession with intent to distribute heroin and possession of 28 grams of heroin do not merge.

We should also address the rule of lenity, even though Rhodes does not make a rule of lenity argument. The State, anticipating we might do so, acknowledges that in *Kyler*, although the two offenses did not merge under the required evidence test, they nonetheless merged under the rule of lenity. The rule of lenity applies when a court is "unsure of the legislative intent in punishing offenses as a single merged crime or as distinct offenses . . . ." *Kyler*, 218 Md. at 228 (citation omitted). In such situations, the court resolves the ambiguity in the defendant's favor by merging the crimes for sentencing. *Id.* at 229. The *Kyler* Court applied the rule of lenity because it considered CR § 5-612 ambiguous because it lacked an anti-merger provision, and the statute continued to refer to the penalty as an "enhanced penalty." *Id*. The State distinguishes *Kyler*'s rule of lenity holding for similar reasons assigned in its required elements analysis—that the "enhanced penalty" language, as explained in *Carter*, was not part of the statute enacted by the General Assembly. As the State contends, the rule of lenity "serves only as an aid for resolving an

ambiguity and it may not be used to create an ambiguity where none exists." *Jones v. State*, 336 Md. 255, 261 (1994). We agree that the rule of lenity does not apply here because the 2005 legislative enactment made clear that it intended that CR § 5-612 would create a new offense, not an enhanced penalty.

In sum, the sentences imposed upon Rhodes for the crimes of possession of heroin with intent to distribute, and possession of 28 grams or more of heroin, need not be merged either under the required elements tests, or the rule of lenity.

II. Sufficiency of the Evidence

Appellant challenges the sufficiency of the evidence to support his conviction for possession of the heroin found on the windowsill and the handgun found in the upstairs safe. The test for evidentiary sufficiency is whether the evidence shows directly, or supports an inference, that "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Suddith*, 379 Md. 425, 429 (2004) (citations omitted). In our review of a sufficiency challenge, we give deference to all reasonable inferences the fact finder draws, regardless of whether we would have chosen a different reasonable inference. *See id.* at 430. We do not weigh the credibility of the evidence. *See State v. Stanley*, 351 Md. 733, 750 (1998). No greater degree of certainty is required when the evidence is circumstantial, rather than direct. *See Ross v. State*, 232 Md. App. 72, 99 (2017) (citation omitted). In making a determination of sufficiency, we must give due regard to the fact finder's factual conclusions, resolution of conflicting evidence, and opportunity to observe and assess the credibility of witnesses. *See McDonald v. State*, 347 Md. 452, 474 (1997). Yet, a conviction may not be sustained only

on proof amounting to "strong suspicion or mere probability." *Taylor v. State*, 346 Md. 452, 458 (1997) (citation omitted).

Rhodes argues that he was not found in possession of either the heroin or the handgun. "Possess" in this context means "to exercise actual or constructive dominion or control over a thing by one or more persons." CR § 5-101. "Control" over a controlled dangerous substance ("CDS") has been defined as exercising a "restraining or directing influence over" the item allegedly possessed. *Garrison v. State*, 272 Md. 123, 142 (1974). Recognizing that possession need not be sole or exclusive, Rhodes, quoting *Garrison*, argues that for him to have possessed the heroin, the "evidence must show directly or support a rational inference that [Rhodes] did in fact exercise some dominion or control over the prohibited . . . drug in the sense contemplated by the statute, i.e., that [he] exercised some restraining or directing influence over it." *Id.* Appellant points to the factors considered relevant in determining constructive possession of a CDS: proximity of the drugs to the individual; whether the drugs were in plain view or accessible to the accused; any indicia of mutual use and enjoyment; and whether the accused had an ownership or possessory interest in the house. *See e.g.*, *Smith v. State*, 415 Md. 174, 198–99 (2010); *Moye v. State*, 369 Md. 2, 18–20 (2002). He explains that none of these factors, standing alone, is dispositive, citing, *inter alia*, *Smith*, 415 Md. at 198.

Appellant focuses on *Moye*, in which the Court of Appeals reversed a defendant's conviction for possession of a CDS and paraphernalia found in the basement of the house in which he lived. *See Moye*, 369 Md. at 24. There, the police located illicit items in three open and partially open drawers in the basement, with additional marijuana and cocaine in

an open portion of the basement ceiling from which a ceiling tile had been removed. *See id.* at 6–7. Moye, who was living at the house as a guest of the couple who were renting the residence and who rented the basement to a fourth individual, had been seen in the basement before the search. *See id.* at 6. Yet, there was no testimony offered that put him in any proximity to the area in which the drugs were found and no evidence about how long he had been in the basement—which might have demonstrated a likelihood of becoming aware of the drugs present there. *See id.* at 18. Rhodes quotes the Court of Appeals' assessment of the evidence in *Moye*: "a person has been convicted of possessing controlled dangerous substances and yet [it could not] gauge whether he even knew the contraband was in the basement and controlled or exercised dominion over the CDS." *Id.* at 20. Rhodes reads *Moye* as "rejecting any conclusion that an accused's presence in a home in which drugs are found in plain view was sufficient standing alone to establish possession of that contraband."

Rhodes sees himself as fitting within the *Moye* rubric. Although acknowledging that the heroin was in plain view on a second-story windowsill, he argues that his presence in the living room did not connect him to the second-floor heroin. He disclaims any evidence that he was ever on the second-floor. Nor, Rhodes maintains, did the evidence connect him to the gun inside the locked safe. He points to the absence of any proof that he lived on the premises, other than his father's rental of the apartment, and that he had shown an interest in being named in the lease until he learned that such would require a records check. Rhodes minimizes conversations in which he acknowledged having possessions in the house and paying rent, and points to the absence of any proof that he

had clothing or other possessions there, or of any cell phone or other bills listing the domicile as his residence.

In response, the State agrees that knowledge of an object's presence is generally a prerequisite to the exercise of dominion and control and generally agrees with the factors utilized for determining constructive possession. It points to the trial judge's explicit citation to evidence that: (1) Rhodes' father leased the premises and Rhodes wanted to be on the lease until he learned a background check was required; (2) Rhodes' made calls from the detention center in which he indicated he had paid rent for the apartment and that all of the personal property in the apartment belonged to him except the clothes in the first-floor bedroom; and (3) there was documentary evidence showing that, when booked, Rhodes listed his address as the subject premises. The State maintains that this evidence, along with his presence at the time of the arrest, was sufficient to support the trial court's rational finding that he "had substantial control of the second floor bedroom," including "full knowledge and control" of the safe and heroin found there.

The State also points to other evidence that Rhodes was involved in distribution of drugs in the apartment, including: three digital scales, two in common areas (dining room table and kitchen cabinet), and that the one on the dining room table was covered in white powder residue; eight cell phones, including five on the couch; significant amounts of cash, including $572 on Rhodes; a second handgun under the couch where Rhodes sat; and lastly Rhodes comment that he was "a dead man." An expert also testified that scales, guns, and cash are items associated with drug trafficking.

We agree with the State that the totality of the evidence was sufficient to show that Rhodes was in constructive possession of the heroin on the second-floor windowsill and the gun in the safe. *See State v. Gutierrez*, 446 Md. 221, 238–42 (2016) (evidence of occupancy plus evidence of drug distribution sufficient to show constructive possession of guns and drugs in apartment). *Moye* is readily distinguishable. As the State points out, Moye made no phone calls complaining that "somebody told on us" and "somebody hit my crib," or acknowledging having possessions in the subject premises. Further, at the time of the arrest, Moye was not carrying drugs and $572 in cash in his pocket or sitting on a couch that had a loaded handgun underneath it. The trial court did not err in concluding that Rhodes was in constructive possession of the windowsill heroin and the gun in the safe.

CONCLUSION

For these reasons, we affirm the judgment of the Circuit Court for Howard County, both as to the convictions and sentencing.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.