IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT JACKSON

JULY 1996 SESSION

FILED

October 31, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	**C.C.A. NO. 02C01-9601-CC-00030**
Appellee,	)	
	)	**FAYETTE COUNTY**
VS.	)	
	)	**HON. JON KERRY BLACKWOOD, JUDGE**
JOHNNY JONES and GLADYS CATRON	)	
	)	(Possession of cocaine and marijuana with intent to deliver; possession of handgun; resisting arrest)
Appellants.	)	
	)	

FOR THE APPELLANT JONES:

HAROLD D. ARCHIBALD
Falls Bldg., Ste. 790
22 N. Front St.
Memphis, TN 38103

FOR THE APPELLANT CATRON:

WILLIAM L. JOHNSON
50 N. Front St., Ste. 1150
Memphis, TN 38103

FOR THE APPELLEE:

CHARLES W. BURSON
Attorney General & Reporter

ELLEN H. POLLACK
Asst. Attorney General
450 James Robertson Pkwy.
Nashville, TN 37243-0493

ELIZABETH RICE
District Attorney General

CHRISTOPHER MARSHBURN
Asst. District Attorney General
302 Market St.
Somerville, TN 38068

OPINION FILED:_____

AFFIRMED IN PART, MODIFIED AND REMANDED IN PART AND REVERSED IN PART

JOHN H. PEAY,
Judge

O P I N I O N

The defendant, Johnny Jones, was indicted for possessing cocaine with the intent to deliver; possessing marijuana with the intent to deliver; possession of a handgun after conviction of a felony; and resisting arrest. After a jury trial, he was convicted on all charges. The defendant, Gladys Catron, was indicted for possessing cocaine with the intent to deliver; possessing marijuana with the intent to deliver; and contributing to the delinquency of a minor. The trial court dismissed the last charge, and she was convicted of the other two charges after a jury trial. The defendants were tried together.

Jones appeals as of right, challenging the sufficiency of the evidence. He also alleges that the trial court erred when it allowed the State to reopen its proof, and erred in denying his motion for a bifurcated trial on the issue of establishing his felon status on the weapon possession charge. Catron appeals as of right, challenging the sufficiency of the evidence on her conviction for possession of cocaine with the intent to deliver. She does not challenge her other conviction. Because we find the evidence of Jones' marijuana and weapon convictions to be insufficient, we reverse that portion of the judgment below and dismiss those charges. We also modify his conviction of possession of cocaine with intent to deliver by reducing it to simple possession of cocaine. We affirm his conviction for resisting arrest. As to Catron, we find the evidence insufficient to support her conviction for possession of cocaine with the intent to deliver and therefore modify her conviction to simple possession of cocaine. The modified convictions are remanded for new sentencing hearings.

On February 24, 1995, Dennis Cheairs, the director of the twenty-fifth judicial district drug task force, obtained a search warrant for Catron's apartment. Later

that day, Cheairs and several other police officers executed the warrant. Captain Arthur Williamson, Jr., was the first of the officers to enter the apartment after Catron opened the door for him. As he entered, he saw Jones standing near the bedroom door. Jones asked the police officer what he wanted, and Captain Williamson explained that he had a search warrant for the house and vehicles. At that point, Williamson testified, "I saw Mr. Jones, fumbling with his left hand, go towards his mouth." Jones also walked away and Williamson ran after and grabbed him. Two other officers then joined Williamson and they struggled with the defendant Jones, trying to get him to spit out what he had placed in his mouth. This struggle occurred in the bedroom and lasted ten to fifteen minutes. Eventually, Jones spit out a white powder substance and a chewed plastic bag. The powder substance was later determined to be cocaine. The officers also located five hundred eighty-nine dollars ($589) in cash in Jones' pocket.

As the officers took Jones out of the bedroom, Officer Leslie D. Jones continued the search. He found a pistol between the mattress and box springs of the bed. An officer with a dog also searched the room, and the dog indicated the presence of drugs in the top drawer of a dresser in the bedroom. Upon opening the drawer, the officers found thirty-two bags of marijuana totaling approximately 2.8 ounces. The officers also took the cellular phone which was sitting in its charger on top of the dresser, a pager sitting on the dresser, a large knife, some rolling papers and some food stamps. The phone and pager were in Jones' name.

Jones did not testify. On cross-examination, however, Director Cheairs admitted that Jones had an address separate from Catron's. Officer Crawford also admitted on cross-examination that Jones had told him that he was employed by Troxel. Catron testified that Jones had come over shortly before the officers arrived, that they

had been having an argument and she was trying to get him to leave. She had told her daughter to call the police because Jones wouldn't leave. She testified that all of the drugs were hers and that Jones had grabbed her cocaine away from her before the officer knocked on the door. She testified that she had opened the door to the police because she thought they were there to remove Jones. She said that Jones did not live there, that the gun was hers, and she had had it for longer than she had known Jones. She further testified that Jones was unaware of the gun. She testified that the phone and pager were hers, but that they had been a gift from Jones and that was the reason they were in his name. She further testified that the drawer in which the marijuana was found was her lingerie drawer and that Jones did not go into that drawer, nor had she ever shown the marijuana to him. She testified that Jones had a key to her apartment, and that they had both just been paid.

When an accused challenges the sufficiency of the convicting evidence, we must review the evidence in the light most favorable to the prosecution in determining whether "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, 61 L.Ed.2d 560 (1979). We do not reweigh or re-evaluate the evidence and are required to afford the State the strongest legitimate view of the proof contained in the record as well as all reasonable and legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978).

Questions concerning the credibility of witnesses, the weight and value to be given to the evidence, as well as factual issues raised by the evidence are resolved by the trier of fact, not this Court. Cabbage, 571 S.W.2d 832, 835. A guilty verdict rendered by the jury and approved by the trial judge accredits the testimony of the

witnesses for the State, and a presumption of guilt replaces the presumption of innocence. State v. Grace, 493 S.W.2d 474, 476 (Tenn. 1973).

Our Code provides that "[i]t is an offense for a defendant to knowingly . . . [p]ossess a controlled substance with intent to . . . deliver [it.]" T.C.A. § 39-17-417(a)(4). Marijuana and cocaine are both controlled substances. T.C.A. §§ 39-17-415 and 39-17-408. Possession may be actual or constructive. State v. Cooper, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987). Here, there is no doubt that the defendant Jones actually possessed the cocaine: it was in his mouth. However, he did not actually possess the marijuana. The first issue, then, is whether there was sufficient evidence that the defendant Jones constructively possessed the marijuana.

There was not. As was stated in the Cooper case,

> Before a person can be found to constructively posses a drug, it must appear that the person has 'the power and intention at a given time to exercise dominion and control over . . . [the drugs] either directly or through others.' In other words, 'constructive possession is the ability to reduce an object to actual possession.' The mere presence of a person in an area where drugs are discovered is not, alone, sufficient to support a finding that the person possessed the drugs. Likewise, mere association with a person who does in fact control the drugs or property where the drugs are discovered is insufficient to support a finding that the person possessed the drugs.

736 S.W.2d at 129 (citations omitted) (changes in original). In this case, the only evidence of defendant Jones' "constructive possession" was his proximity to the chest of drawers while the police struggled to make him spit out the cocaine, and his association with the defendant Catron. These facts are simply not enough. The defendant Jones' conviction of possession of marijuana with intent to deliver is reversed and dismissed.

As we stated above, there is no question about Jones' possession of the cocaine. The issue in this conviction, then, is whether there was sufficient evidence of his intent to deliver that cocaine. Our Code provides 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." T.C.A. § 39-17-419 (emphasis added). The amount of cocaine retrieved from the defendant Jones' mouth was 1.9 grams. There was no testimony adduced at trial as to the significance of that amount of cocaine, that is, whether it would be an "appropriate" amount for purely personal use, or whether such an amount would normally be kept only for resale. Similarly, there was no testimony about the number of "uses" which could be had from this amount of cocaine. Nor was there any testimony about its worth. Jones' possession of this cocaine, without more, is simply not enough from which to infer his intent to deliver it.

The State argues further that the jury could rightfully infer Jones' intent to deliver the cocaine from the evidence that Jones possessed a beeper. In fact, the evidence proved only that the beeper was in Jones' name, not that he actually possessed it. The beeper was found on Catron's dresser, not on Jones' person or in his actual possession. In State of Tennessee v. Reginald T. Smith, No. 02-C-01-9204-CR-00097, Shelby County (filed February 17, 1993, at Jackson), relied on by the State, the defendant was wearing his beeper. Moreover, the prosecution put on evidence in that case that beepers were common in drug trafficking. No such testimony was adduced in this trial. We do not think that this item of circumstantial evidence was sufficient to prove the defendant Jones' intent to deliver the cocaine beyond a reasonable doubt.[1]

[1]Although not argued by the State, Jones' possession of five hundred eighty nine dollars ($589) in cash, without more, is also insufficient to support an inference that he intended to deliver the cocaine.

Accordingly, we reverse Jones' conviction for possession of cocaine with intent to deliver. However, Jones' mere possession of the cocaine was also a criminal offense. "It is an offense for a person to knowingly possess . . . a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of professional practice." T.C.A. § 39-17-418 (a). That Jones tried so desperately to hide and/or swallow the cocaine upon learning of the search is sufficient circumstantial evidence that his possession was "knowing" and that it was without the benefit of a valid prescription.

Simple possession of cocaine is a lesser included offense of possession of cocaine with the intent to deliver. The evidence at trial was sufficient to convict Jones of simple possession. Where the proof at trial is not sufficient to support the greater offense, but is sufficient to support the lesser included offense, we have the authority to order a reduction in the degree of the offense for which the defendant was convicted. State v. Tutton, 875 S.W.2d 295, 297 (Tenn. Crim. App. 1993). Therefore, we hereby reduce Jones' conviction for possession of cocaine with intent to deliver to simple possession, and remand this matter for a new sentencing hearing in accord with this lesser degree offense.

With respect to the handgun charge, under our Code "[a] person commits an offense who possesses a handgun and: . . . [h]as been convicted of a felony drug offense." T.C.A. § 39-17-1307(b)(1)(B). In this case there was absolutely no proof adduced at trial connecting the defendant Jones to the pistol other than that he was in the same room with it at the time the police were struggling with him. There was no proof that he tried to retrieve the pistol or that he was even aware of its existence. The evidence was therefore clearly inadequate to support his conviction. Moreover, there was

no adequate proof that he had a prior felony conviction as required by the statute. At trial, the prosecuting attorney stated "we would like to submit into evidence as an exhibit a certified copy of the conviction from Shelby County Criminal Court, dated February 13th -- Well, actually dated June 25th, 1990, Docket Number 90-05774, a felony conviction from that Court." With that, the State rested its case. However, the trial court had earlier ruled that this exhibit would not be passed to the jury. Thus, all the jury learned about this prior felony conviction was what it heard from the prosecuting attorney. However, the prosecuting attorney did not identify whose conviction he was speaking of. The jury is not permitted simply to assume the prosecutor was referring to a conviction of Jones', particularly where there are two defendants on trial. The defendant's conviction for possessing a handgun after having been convicted of a felony drug offense is reversed and dismissed.

The offense of resisting arrest is committed where "a person . . . intentionally prevent[s] or obstruct[s] anyone known to the person to be a law enforcement officer . . . from effecting a stop, frisk, halt, arrest or search of any person, including the defendant, by using force against the law enforcement officer or another." T.C.A. § 39-16-602(a). The term "force" is defined as "compulsion by the use of physical power or violence and shall be broadly construed to accomplish the purposes of this title[.]" T.C.A. § 39-11-106(12).

Officer Kevin Crawford, who participated in executing the search warrant, testified that

> As we entered the residence, a male black that I knew as a Johnny Jones was standing at the bedroom door. As we came through the door, he put his hand up to his face area, and turned around in the bedroom door to go back into the bedroom.

> At that time Captain Williamson and I took off running toward him and caught him at the entrance to the bathroom, and got him to come back into the bedroom where we were standing. At that time we asked Mr. Jones to open his mouth, which he refused to do. And a type of a struggle at that time started between Mr. Jones and myself and Captain Williamson and a couple more of the officers. It lasted, probably 10, maybe 15 minutes. At that time Mr. Jones spit out a white substance, with a plastic bag included in it, into a black toboggan that we had picked up and was [sic] holding in front of him.

Director Cheairs described the incident as "tussling" and "a struggle." Officer Leslie D. Jones testified that "they were trying to handcuff him, and it took three of [sic] four officers to get him handcuffed. When I first entered the bedroom with them, they was [sic] still struggling with him on the bed and his hands were free." Officer Williamson testified that "He wasn't trying to fight us, or nothing [sic] like that. He was just trying to keep us from obtaining the item that he had in his mouth." However, giving the State the strongest legitimate view of the proof, we think the evidence was sufficient for the jury to find the defendant Jones guilty beyond a reasonable doubt of resisting arrest. The judgment of conviction for this offense is therefore affirmed.

Given our disposition on the merits of the defendant Jones' convictions, we decline to address his issues about the State being allowed to reopen its proof to introduce evidence of his prior felony conviction and the trial court's denial of his motion to bifurcate the trial.

With respect to the defendant Catron, she testified at trial that the marijuana and cocaine were hers. Accordingly, possession is not an issue in her convictions. However, she challenges the sufficiency of the evidence as to her possessing the cocaine with the intent to deliver.

As we stated above with respect to defendant Jones, the amount of cocaine

retrieved from the defendant Jones' mouth was 1.9 grams. There was no testimony adduced at trial as to the significance of that amount of cocaine, that is, whether it would be an "appropriate" amount for purely personal use, or whether such an amount would normally be kept only for resale. Again, there was no testimony about the number of "uses" which could be had from this amount of cocaine. Nor was there any testimony about its worth. No cutting agents, scales, or other paraphernalia associated with the sale of cocaine were seized at Catron's residence. Nor was any money or other assets seized from Catron during the search which might indicate that she sold drugs or that she lived a lifestyle in excess of her legitimate income. Her mere possession of this cocaine, without more, is simply not enough from which to infer her intent to deliver it.

As discussed above, simple possession of cocaine is a lesser included offense of possession of cocaine with intent to deliver. Here, there was sufficient evidence to support a conviction for this lesser offense and, as we did with Jones' conviction, we hereby reduce Catron's conviction to simple possession of cocaine and remand this matter for a new sentencing hearing in accord with this lesser degree offense.

For the reasons set forth in the discussion above, defendant Jones' convictions for possession of marijuana with intent to deliver and possession of a handgun after conviction of a felony are reversed and dismissed. Jones' and Catron's convictions for possession of cocaine with intent to deliver are reduced to simple possession of cocaine and remanded for sentencing. Jones' conviction for resisting arrest is affirmed.

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JOHN H. PEAY, Judge

CONCUR:

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DAVID H. WELLES, Judge

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CORNELIA A. CLARK, Special Judge