

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002457-MR

AURELIUS FLYNN, III

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE REBECCA M. OVERSTREET, JUDGE
ACTION NO. 02-CR-00605

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION

AFFIRMING

** ** * * * * *

BEFORE: DYCHE, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE. Aurelius Flynn III (hereinafter appellant) appeals his conviction in the Fayette Circuit Court for possession of a controlled substance in the first degree and possession of marijuana. A jury acquitted appellant of trafficking in a controlled substance in the first degree and possession of drug paraphernalia. On appeal, appellant alleges that there was not sufficient evidence to support his conviction for possession of a controlled substance in the first degree.

The Commonwealth responds that this claim of error is unpreserved. However, we have reviewed the bench conferences in this case, and appellant requested a directed verdict on all of the charges, not just the trafficking charge. Furthermore, under the circumstances of this case, we believe that appellant's motion for directed verdict on the possession count was sufficient for preservation without also requiring that appellant have objected to the giving of an instruction on this count at trial. See Barth v. Commonwealth, Ky., 80 S.W.3d 390 (2001). Additionally, we do not believe appellant conceded any argument against his conviction for possession of a controlled substance by acknowledging during the bench conference that he lived in the house in which drugs were found. Therefore, we review the merits of appellant's claim.

Appellant alleges that there was insufficient evidence to convict him of possession of a controlled substance by constructive possession. The controlled substance in this case was crumbs of cocaine which were found on the floor beneath the kitchen table. The crumbs of cocaine weighed 20 mg, which is an amount equivalent to mere thousandths of an ounce. Appellant disclaimed knowledge of how the cocaine got there. He asserts that the concept of constructive possession could not be applied to him because of the number of other people who also lived in the house with him. He maintains that the minute amount of

cocaine should preclude a reasonable belief that he knew of the presence of the drug. At trial, he identified two persons who had once brought cocaine into his home months earlier at which time he told them he did not want it in his house. He now argues that had he known about the presence of the drug, he would not have left this small amount of the drug beneath the table subject to his dominion and control.

The appellate standard of review of a directed verdict is, if under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, the defendant is not entitled to a directed verdict of acquittal. Commonwealth v. Sawhill, Ky., 660 S.W.2d 3, 5 (1983). We do not find the verdict to have been clearly unreasonable, notwithstanding appellant's attempts to establish reasonable doubt.

First, as to the amount of cocaine found, the evidence was sufficient. The statute proscribes possession of a controlled substance in "any quantity," and the quantity of the illegal substance is "immaterial to the criminality of the act" of possession. Bolen v. Commonwealth, Ky., 31 S.W.3d 907, 909-910 (2000). We believe an argument that the amount of cocaine was so small that it could have gone undetected by appellant was an argument for the jury. This contention does not nullify the legal sufficiency of the evidence to convict of possession.

We are not persuaded either by appellant's arguments that the Commonwealth did not establish that he had dominion and control over the cocaine. To prove constructive possession, the Commonwealth must present evidence which establishes that the contraband was subject to the defendant's dominion and control. Hargrave v. Commonwealth, Ky., 724 S.W.2d 202, 203 (1986). The general rule for possession of illicit drugs is that possession need not be exclusive, so that two or more persons may be in possession of the same drug at the same time, and this possession does not necessarily have to be actual physical possession. Franklin v. Commonwealth, Ky., 490 S.W.2d 148 (1972).

The evidence in this case showed that appellant lived at the house on Corral Street, and it was owned by his parents. Mail and other paperwork seized by police at the house listed it as appellant's residence. Appellant was not the only person to have lived in the house. Appellant's cousin, Brandon White, lived there until about three weeks prior to the search and still had his mail delivered there. Another cousin, Samuel Thompson, Jr., lived at the house until about two weeks prior to the search, and still received mail and had clothing at the house. Thompson testified that when he moved out, appellant, White and a man named Demetrius Jones were still living there. Both White and Thompson testified that they did not possess the

cocaine or have any knowledge that it was there. Appellant testified that his cousin and a friend from the community college had stayed at the house, but had moved out a week or two before the search. Appellant admitted possession of the marijuana, but denied possession of the crack cocaine, or the drug paraphernalia found at various places in the house.

Appellant directs us to several cases which deal with constructive possession in the context of a vehicle, but we do not find them instructive due to the considerable differences in the use of a house as opposed to a vehicle. Instead, we have reviewed another case involving discovery of drugs in a house, and we are unable to distinguish it factually from the case at bar. In Clay v. Commonwealth, Ky. App., 867 S.W.2d 200 (1993), the defendant was found guilty of constructive possession of cocaine in a house she owned and in which she lived and used the rooms where the cocaine was found. The defendant in Clay was found to be in constructive possession despite evidence at trial that another person present in the house at the time of the search claimed the cocaine was his and that the defendant knew nothing about it. Id. at 202.

Appellant's testimony and that of his witnesses showed that appellant was the primary resident of the house on Corral Street. Appellant was the only person to admit that he lived there at the time of the search. Appellant's account of two

other people bringing in the cocaine and being asked to leave occurred months before the search of the residence. Furthermore, under the law more than one person could have been in possession of the illegal drugs. All of the facts taken together provide sufficient evidence that appellant was in constructive possession of the cocaine found in his residence. Thus, we consider the verdict of the jury that appellant was in constructive possession of the cocaine in this case to have been reasonable.

For the foregoing reasons, we affirm appellant's conviction in the Fayette Circuit Court.

ALL CONCUR.

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