Cite as 2009 Ark. App. 873

# ARKANSAS COURT OF APPEALS

DIVISION IV
**No.** CACR09-591

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| GREGORY BERNARD BROWN<br>APPELLANT | **Opinion Delivered** DECEMBER 16, 2009 |
| V. | APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT<br>[NO. CR2008-2476] |
| STATE OF ARKANSAS<br>APPELLEE | HONORABLE CHRISTOPHER CHARLES PIAZZA, JUDGE |
| | AFFIRMED |

**KAREN R. BAKER, Judge**

In a bench trial in the Pulaski County Circuit Court, appellant, Gregory Bernard Brown, was convicted of possession of cocaine with intent to deliver in violation of Arkansas Code Annotated section 5-64-401(a)(1)(A) (Supp. 2007). He was sentenced to ten years' imprisonment, with five of those years suspended. As his sole point on appeal, appellant asserts that the court erred in denying his motion to dismiss the charge of possession of cocaine with intent to deliver because the State failed to introduce substantial evidence that he committed the offense. We affirm.

At approximately 4:30 p.m. on January 18, 2008, Officer Dennis Hutchins, a Little Rock police officer, initiated a stop of the vehicle appellant was driving because of a broken brake light. Officer Hutchins described the vehicle as a two-door, 1974 Cadillac DeVille. The

passengers included Arthur Patterson, who was sitting in the front passenger seat, and appellant's five-year-old-son, who was sitting in the middle of the front bench seat. Officer Hutchins testified that appellant provided him with a driver's license but was unable to provide any registration, bill of sale, or any other proof of ownership. Therefore, Officer Hutchins testified that, pursuant to policy, he would conduct an inventory search, and the vehicle would be towed. Officer Hutchins asked appellant and Patterson to step out of the vehicle. Because of cold temperatures, the child was allowed to remain inside the vehicle. An inventory search revealed a white "to-go box" in the front passenger seat, which, at the time of the stop, was in Patterson's lap. Patterson and the child were eating fish from the container at the time of the stop. The search also revealed another white "to-go box" in the floorboard. The child made the statement, "That's my daddy's fish." Officer Hutchins testified that he opened the second "to-go box," and it contained a "clear bag containing off-white, rock-like items and some powder that [he] suspected at the time to be crack cocaine." The items were marked and prepared for storage as evidence. At that point, Officer Hutchins did a search of appellant's person. On appellant, Officer Hutchins found five $100 bills, fourteen $20 bills, and $1.43. The total amount of cash on appellant's person was $781.43.

Patterson testified that on January 18, 2008, he and appellant went to Peter's Fish Market to get some fish. Patterson testified that after they had been were stopped by Officer Hutchins, he saw appellant "[throw] some drugs in the car." He stated that the drugs fell into a container that was in appellant's son's lap. When Patterson saw the drugs land in the container in the

child's lap, Patterson "pushed the container off the little boy" and it landed in the floor. Until he saw appellant toss the drugs into the container, he claimed that he did not know that appellant had drugs in the vehicle. Patterson testified that there was no second container of food in the passenger floorboard of the vehicle; he also stated that there was a "bag" in the floorboard and that he did not know if there was another container of food in the bag or not. After he was asked to exit the vehicle, Patterson underwent a search of his person. Although nothing was found on his person, he was arrested for possession of a controlled substance. Later, appellant approached him and asked him if he would "take a charge." Patterson declined, stating that he "wouldn't just mess up [his] life like that."

Beth Bakalekos of the Little Rock Police Department submitted the evidence to the crime lab. She testified that the lab analysis revealed that the substance tested positive for cocaine; cocaine base, 3.07 grams, and cocaine hydrochloride, 0.8 grams. She testified that the value of the cocaine base would be approximately $250, and the value of the cocaine hydrochloride would be $75 to $80. She testified that "having numerous twenty-dollar bills is typically indicative of someone who's selling." As to Patterson's statements, she testified that his testimony at trial about appellant tossing the dope into the child's food container was consistent with his statement to her during the investigation.

At this point in the trial, appellant's counsel made a motion for dismissal, alleging that the State failed to prove beyond a reasonable doubt that appellant was actually the one who was in possession of cocaine before it was thrown. The trial court denied the motion.

Appellant testified on his own behalf. He testified that on January 18, 2008, he and Patterson got take-out from Peter's Fish Market. As they drove, Patterson fed appellant's son fish from Patterson's "to-go box." Appellant testified that his styrofoam "to-go container" was in the floorboard. Once Officer Hutchins pulled him over and he was unable to provide proof of ownership orregistration, Officer Hutchins had him step out of the vehicle, patted him down, put him in handcuffs, and put him in the back of the police car. Appellant denied Patterson's statement that he threw the drugs into the vehicle as he exited. He stated that he "did not do anything else at any time when [he] was asked to step out of the vehicle"; he did not reach into his pocket and pass anything to Patterson or throw anything across the vehicle. Appellant testified that he had "no knowledge at all of how cocaine could have been found in [his] car." When asked about his prior convictions, appellant admitted that he had been convicted of possession of a controlled substance with intent to deliver, second-degree murder, and a number of counts of residential burglary and theft of property.

At the close of the evidence, appellant's counsel renewed his motion for dismissal, which was again denied by the court. This appeal followed.

Appellant's argument on appeal challenges the sufficiency of the evidence. A motion to dismiss in a bench trial is identical to a motion for a directed verdict in a jury trial in that it is a challenge to the sufficiency of the evidence. *Springs v. State*, 368 Ark. 256, 244 S.W.3d 683 (2006). In reviewing a challenge to the sufficiency of the evidence, we will not second-guess credibility determinations made by the fact-finder. *Stone v. State*, 348 Ark. 661, 74 S.W.3d 591

(2002). Instead, we view the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Id.* We affirm the conviction if there is substantial evidence to support it. *Wilson v. State*, 88 Ark. App. 158, 196 S.W.3d 511 (2004). Substantial evidence is evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty, without resorting to speculation or conjecture. *Crutchfield v. State*, 306 Ark. 97, 812 S.W.2d 459 (1991). Circumstantial evidence provides the basis to support a conviction if it is consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *McKenzie v. State*, 362 Ark. 257, 208 S.W.3d 173 (2005). A fact-finder may accept or reject any part of a witness's testimony, and its conclusion on credibility is binding on this court. *E.g.*, *White v. State*, 47 Ark. App. 127, 886 S.W.2d 876 (1994). The fact-finder is not required to believe any witness's testimony, especially the testimony of the accused, because he is the person most interested in the outcome of the trial. *Winbush v. State*, 82 Ark. App. 365, 107 S.W.3d 882 (2003).

Appellant was convicted of possession of cocaine with intent to deliver in violation of Arkansas Code Annotated section 5-64-401(a)(1)(A). That section states as follows:

> (a) Controlled Substance–Manufacturing, Delivering, or Possessing with Intent to Manufacture or Deliver. Except as authorized by subchapters 1-6 of this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance. Any person who violates this subsection with respect to:
>
> (1) Schedule I or II Narcotic Drug or Methamphetamine.
>
> (A)(i) A controlled substance classified in Schedule I or Schedule II that is a narcotic drug or methamphetamine, and by aggregate weight, including an

> adulterant or diluent, is less than twenty-eight grams (28 g), is guilty of a felony and shall be imprisoned for not less than ten (10) years nor more than forty (40) years, or life, and shall be fined an amount not exceeding twenty-five thousand dollars ($25,000).
>
> (ii) For any purpose other than disposition, this offense is a Class Y felony.

Appellant argues that the trial court erred in denying his motion to dismiss because the State's proof of appellant's guilt "was so contradictory that the fact-finder had to guess whether [appellant] possessed the bag of cocaine at issue." Both Patterson and Officer Hutchins testified as to a bag of cocaine that was found inside appellant's vehicle. Appellant contends, however, that Patterson's testimony about there being a carry-out "bag" in the floorboard of the vehicle that may have contained a "to-go box" and Officer Hutchins's testimony about another box (or container) in the floorboard of the vehicle was "irreconcilable" and resulted in the court having to "guess" or "speculate" that appellant was in possession of cocaine. This argument is unavailing. This court will not second-guess credibility determinations made by the fact-finder. *Epps v. State*, 100 Ark. App. 344, 268 S.W.3d 362 (2007). The credibility of witnesses is an issue for the jury and not the court. *Bell v. State*, 371 Ark. 375, 266 S.W.3d 696 (2007). The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Id.*

In the present case, appellant was the driver of the 1974 Cadillac DeVille that was pulled over for a broken brake light. While appellant could not produce any registration or proof of ownership of the vehicle, he told officers that he had recently purchased the vehicle and was in the process of completing the paperwork. Appellant was asked to step back to the patrol car,

and the vehicle was searched. The search revealed two to-go containers of food, one of which contained a clear bag of off-white, rock-like items and some powder that later tested positive for cocaine base and cocaine hydrochloride. In reference to the "to-go box" that contained the cocaine, appellant's son made the statement, "That's my daddy's fish." On appellant's person, officers found five $100 bills, fourteen $20 bills, and $1.43, totaling $781.43 in cash. While there was conflicting evidence as to whether the cocaine was found in a to-go container or in a bag, the fact-finder has the sole authority to evaluate the credibility of witnesses and to apportion the weight to be given to the evidence. *See Bell v. State*, 334 Ark. 285, 973 S.W.2d 806 (1998). We hold that under these facts, the evidence is sufficient to support appellant's conviction.

Affirmed.

HENRY and BROWN, JJ., agree.

*William R. Simpson, Jr.*, Chief Public Defender; *Elizabeth Borders*, Deputy Public Defender; by: *Clint Miller*, Deputy Public Defender, for appellant.

*Dustin McDaniel*, Att'y Gen., by: *Brad Newman*, Ass't Att'y Gen., *Robert Siddall*, Admitted to Practice Pursuant to Rule XV of the Rules Governing Admission to the Bar of the Supreme Court under the Supervision of *Darnisa Johnson*, Deputy Att'y Gen., for appellee.