ARKANSAS COURT OF APPEALS

DIVISION II
No. CACR 08-1442

	Opinion Delivered June 17, 2009
WILLIAM FORD APPELLANT	APPEAL FROM THE POPE COUNTY CIRCUIT COURT, [NO. CR-08-115]
V.	HONORABLE JAMES D. KENNEDY, JUDGE
STATE OF ARKANSAS APPELLEE	AFFIRMED

JOHN B. ROBBINS, Judge

Appellant William Ford was tried before the bench in Pope County Circuit Court and found guilty of possession of methamphetamine. Appellant argues on appeal that there is insufficient evidence to prove that he possessed the drugs found in a small plastic bag on the ground where he was being questioned by police. The State contends that this argument is not preserved for appellate review, and alternatively that there is sufficient evidence that appellant was the person who dropped the bag of drugs on the ground. We hold that there is sufficient evidence to support the conviction. Thus, we affirm.

When an appellant challenges the sufficiency of the evidence to support a conviction on appeal, this court's test is whether there is substantial evidence to support the verdict. *Britt v. State*, 83 Ark. App. 117, 118 S.W.3d 140 (2003). Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a

conclusion one way or another. *Id*. In determining whether the evidence is substantial, evidence is viewed in the light most favorable to the State, considering only the evidence that supports the verdict. *Id*. The fact-finder was the sole determiner of credibility. *See Spencer v. State*, 255 Ark. 258, 499 S.W.2d 856 (1973).

At the conclusion of the State's case, appellant's attorney stated, "I'm going to go ahead and move at this time to dismiss on the insufficiency of the evidence with regard to possession." This motion was denied, the defense presented its case, and after the State's rebuttal, defense counsel stated that he renewed the motion "on the same basis" adding "there is not direct evidence of the Defendant's possession and so it's circumstantial evidence only and circumstantial evidence to be sufficient to convict for a felony must be – must rule out every other reasonable hypothesis." Defense counsel argued that the plastic bag of drugs could have been on the ground before appellant was in the area. The judge found that the State had proved its case beyond a reasonable doubt, and this appeal followed.

We hold that there is sufficient circumstantial proof here. To show constructive possession, one must show that the accused exercised care, control, and management over what he knew was contraband. *See Walker v. State*, 77 Ark. App. 122, 72 S.W.3d 517 (2002). Control and knowledge can be inferred from the circumstances, such as proximity of the contraband to the accused; the fact that it is in plain view; and the ownership of the property where the contraband is found. *Abshure v. State*, 79 Ark. App. 317, 87 S.W.3d 822

(2002). An accused's suspicious behavior coupled with proximity to the contraband is clearly indicative of possession. *See Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994).

Although argued as such, this is not a joint-possession case because the drugs were not found in the car occupied by two persons, or in a residence occupied by more than one person. Rather, the drugs were found on the ground where appellant was standing. Viewing only the evidence that tends to support the finding of guilt, the judgment must be affirmed.

We explain by setting forth the evidence presented to the trial judge, viewing it in the light most favorable to the State. A Honda Civic was pulled over in February 2008 on a street in Russellville, Arkansas. A female was driving; appellant was the passenger. They were both removed from the vehicle. She was taken for questioning to the driver's side of the patrol car. Appellant was taken to the back of the patrol car. Right after the driver gave her verbal consent to search the car, appellant wanted to go back to the car to retrieve his jacket. Appellant was *Terry*-frisked for obvious weapons.

The officer with appellant testified that he constantly visually scanned the ground about appellant, as he was trained to do. The officer stated that "when you are dealing with a suspect, you are constantly watching them and you're constantly watching the ground because you have knowledge that people will drop things on you; and I had checked the area throughout while I was standing there talking with him while I was doing a – what we call a body scan. . . . Then once they walk away you always check the ground, too."

Appellant placed his hands into the jacket pockets. The observing officer asked appellant to remove them. Appellant complied and then stretched his arms overhead as if to yawn or stretch. The officer did not see the small clear plastic bag (approximately two inches by three-quarter inch) until appellant walked away, going back toward the Honda. At that point, the officer picked up the bag, where appellant had been standing on "driveway surface."

The officer did not believe it was possible that the plastic bag was already there when appellant walked to the back of the patrol car, based upon his observation of appellant and the area. As soon as the officer looked closely at the bag, he told appellant to "hold on," whereupon appellant said immediately that "you planted that there."

Although appellant attempted to make a case for "planting" of drugs by the police, such testimony did not have to be believed. There is sufficient circumstantial evidence to support the possession-of-methamphetamine conviction. *Compare Morgan v. State*, __ Ark. __, __ S.W.3d __ (May 7, 2009).

Affirmed.

BAKER, J., agrees.

HART, J., concurs.

JOSEPHINE LINKER HART, Judge, concurring. I agree that this case must be affirmed, however, I write separately to honor the custom of addressing the argument that was actually raised by the appellant. On appeal, Mr. Ford argues, as he did to the trial court in his

directed-verdict motion, that the evidence was insufficient to sustain his conviction because there was no direct evidence that he possessed the narcotics, and the circumstantial evidence did not rule out every other reasonable hypothesis concerning how the drugs came to be found in the vicinity of where he had been standing. He notes further that the drugs were not found on him, he never acted nervously or suspiciously,[1] and he consented to multiple searches of his person, which all proved to be fruitless. He notes further that the drugs were found in the driveway of another person where other items of trash were strewn.

My decision to reject Mr. Ford's argument is guided by the supreme court's very recent decision, *Morgan v. State*, — Ark. —, — S.W.3d — (May 7, 2009). There, the supreme court reversed the court of appeals and affirmed a constructive possession case made entirely upon circumstantial evidence. Significantly, Morgan was not even present at the residence he shared with his wife when police executed a search warrant and discovered components of a meth lab in a storage building located in a junk yard thirty to forty feet from

[1] The majority cites *Heard v. State*, 316 Ark. 731, 876 S.W.2d 231 (1994), for the proposition that "suspicious behavior" coupled with proximity to the contraband is indicative of possession." In that case, when the police arrived on the porch to execute a search warrant, Heard "fled" to a bedroom where he was observed with his hand under the bed "making a slinging motion." A bottle containing crack cocaine was found under the bed. In contrast, Mr. Ford did not attempt to flee, but rather was completely cooperative with police as they repeatedly searched him. While it was true that Bonds testified that Mr. Ford "stretched his arms overhead as if to yawn or stretch," this motion occurred after Bonds ordered Mr. Ford to take his hands out of his jacket and keep them where he could see them for "officer safety." If this is the time that the majority believes that Mr. Ford dropped the alleged contraband, they do not explain why Bonds did not see it even though he claimed he was "constantly watching."

his residence. The evidence that linked Morgan to the contraband was ten inactive HCL generators strewn about an area outside his purported residence and traces of methamphetamine on a pipe, light bulb, and straw found inside the house. The warrant was obtained based on the police's assertion that two controlled buys were made by a confidential informant from a woman at Morgan's home. The supreme court did not find anything significant in the fact that Morgan is a male and the sales of the narcotics were by a female. Accordingly, although the supreme court recited that when a case relies on circumstantial evidence, "it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion," it also stated that "whether the evidence excludes every other hypothesis is left to the jury to decide." The supreme court did not consider the possibility that Morgan himself was not involved in the manufacture of methamphetamine or that he did not actually possess drug paraphernalia with intent to manufacture. This review procedure is of crucial importance to the case at bar and is, of course, binding on this court.

In effect, the decision in *Morgan* overrules, sub silentio, two cases that would otherwise control our analysis of the case before us. Those cases are *Hodge v. State*, 303 Ark. 375, 797 S.W.2d 432 (1990), and *Garner v. State*, 355 Ark. 82, 131 S.W.3d 734 (2003). In *Hodge*, the supreme court stated:

> Where contraband is discovered in jointly occupied premises, and there is no direct evidence that it belongs to a particular occupant, some additional factors must be present linking the accused to the contraband. The State must prove that the accused exercised care, control and management over the contraband.

303 Ark. at 377-78, 797 S.W.2d at 434. Further, the *Hodge* court held that where narcotics are found in an area entirely outside the control of the defendant and exposed to the public at large, the State must provide definite factors that link the defendant to the contraband. *Id*. This holding was cited with approval in *Garner*, *supra*.

In *Hodge* and *Garner*, the supreme court reviewed the circumstantial evidence and concluded that it did not exclude every other reasonable hypothesis supporting the defendant's innocence. In both cases, the drugs were found in public areas that were not exclusively accessible to the appellant. Likewise, the police did not observe the appellants directly possess the contraband or throw or drop it from their person or vehicle. There was suspicious activity on the part of the defendant in both *Hodge* and *Garner*, as both defendants attempted to flee from the police. Further, in *Hodge*, there was also evidence, including taped conversations with known drug dealers, that the appellant was conducting a drug deal, and in *Garner*, the narcotics were found in a Bushnell extra-wide binoculars case, and Garner had a set of Bushnell extra-wide binoculars in his truck. Additionally, a letter between two of Garner's brothers, which contained a passing reference to their brother, the appellant John Garner, was also found with the contraband.

However, under the standards employed by our supreme court in *Morgan*, the reviewing court is required to forego the type of analysis set forth by the supreme court in both *Hodge* and *Garner* that required reversal. I submit that I might have concluded that because Ford was searched twice; constantly kept under surveillance, first by Bonds, then by

Hubbard, and that Hubbard claimed that he carefully observed Ford's feet through repeated "body scans" to detect any effort by Ford to drop contraband and never observed Ford drop anything; while at the same time, Roper, who was only three to four feet away from where Ford was standing, received far less scrutiny and therefore could have dropped the narcotics, was one reasonable hypothesis that was inconsistent with Ford's guilt. However, because that procedure is no longer mandated after *Morgan*, I believe I am bound to vote to affirm.