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ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-21-325

HARACIO COLEN APPELLEE V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** April 6, 2022 APPEAL FROM THE FAULKNER COUNTY CIRCUIT COURT [NO. 23CR-17-1178] HONORABLE CHARLES E. CLAWSON III, JUDGE AFFIRMED

RAYMOND R. ABRAMSON, Judge

Haracio Colen appeals his convictions of possession of a Schedule VI controlled substance with the purpose to deliver and possession of drug paraphernalia from the Faulkner County Circuit Court. On appeal, Colen argues that the circuit court erred by denying his motions to dismiss and to suppress. We affirm.

On August 2, 2018, the State filed an amended criminal information charging Colen with possession of a Schedule VI controlled substance and possession of drug paraphernalia.

On April 23, 2019, Colen moved to suppress physical evidence. He argued that the Conway Police Department illegally detained him and conducted a warrantless search and seizure of his person and property in violation of his Fourth and Fourteenth Amendment rights. He asked the court to suppress the evidence seized as result of the illegal search.

On December 13, the court held a suppression hearing. At the hearing, Officer Jeran Smith, an investigator with the Conway Police Department narcotics division, testified that

on October 3, 2017, he responded to a report that someone had been selling marijuana behind a barbershop. He explained that as he walked to the barbershop, he smelled marijuana coming from a black Land Cruiser[1] with the engine running; however, no one was in the vehicle. Officer Smith stated that he entered the barbershop and asked the patrons who owned the vehicle. He testified that Colen was in a barber chair and that he responded that the vehicle belonged to him. He asked to speak with Colen outside, and Colen agreed. Officer Smith testified that outside the barbershop, he explained to Colen that he had probable cause to search the vehicle due to the odor of marijuana. He stated that Colen became "very nervous and uncomfortable." Officer Smith stated that he located marijuana, a scale, and baggies inside the vehicle.

Marcus Fry testified that on October 3, 2017, he was cutting Colen's hair at the barbershop. He stated that during the haircut, officers entered the business and asked who owned the black vehicle outside, but no one responded. He explained that after no one responded, the officers started "looking towards me and Mr. Colen." He stated that Colen then stood up, and the officers again asked him if he owned the vehicle. Fry testified that Colen responded no, but the officers asked him to talk outside. Fry stated that he eventually followed Colen and the officers outside the barbershop, and he again heard Colen tell the officers that he did not own the vehicle. Colen introduced a document from the Arkansas Department of Motor Vehicles showing that Patricia Hopson owned the Land Rover.

[1]Officer Smith referred to the vehicle as a black Land Cruiser while other testimony and the vehicle registration indicate that the vehicle was a black Land Rover.

At the conclusion of the hearing, the court took the matter under advisement, and on January 29, 2020, the court entered an order denying the suppression motion.

Colen waived his right to a jury trial, and on February 2, 2021, the case proceeded to a bench trial. Officer Richard Shumate testified that on October 3, 2017, he assisted Officer Smith and the Conway Police Department narcotics division with the investigation of Colen. He explained that on that day, Officer Smith had received information that Colen would be at the barbershop and that he would be driving a black Land Rover. He testified that he saw a black Land Rover with its engine running outside the barbershop and that he smelled marijuana coming from the vehicle. Officer Shumate stated that he entered the barbershop with Officer Smith, and when Officer Smith asked who was driving the black Land Rover, Colen stood up and said the vehicle belonged to him. He further testified that when they spoke with Colen outside the barbershop, Colen consented to a search of his person, and he located the vehicle's key fob on Colen. Officer Shumate gave the key fob to Officer Smith.

In addition to his suppression-hearing testimony, Officer Smith testified at the bench trial that he had been investigating Colen prior to October 3, 2017, and that he had associated Colen with a black Land Cruiser. He acknowledged that when he entered the barbershop, he believed that Colen had been driving the black Land Cruiser.

Officer Smith again testified that when he asked who owned the vehicle, Colen responded that the vehicle belonged to him. Officer Smith further explained that Officer Shumate gave him the key fob located on Colen and that he (Officer Smith) used the key fob to unlock the vehicle. Officer Smith testified that he located the marijuana, baggies, and

a scale on the backseat floorboard of the car. Candice Foscue, a forensic chemist with the Arkansas State Crime Laboratory, testified that the marijuana found in the car weighed 116.8 grams.

After the State rested, Colen moved to dismiss the charges. He argued that the State failed to prove that he had physical or constructive possession of the contraband. He also argued that the officers were not credible. The court denied the motion.

The defense then called Fry, whose testimony was consistent with his suppression-hearing testimony. Fry additionally stated that Colen had been in the barbershop for "a few minutes" before the officers arrived. Following Fry's testimony, Colen rested his case, and he again argued that the State failed to prove that he had physical or constructive possession.

The court convicted Colen of both possession of a controlled substance with the purpose to deliver and possession of drug paraphernalia. The court found both Officer Smith and Officer Shumate credible.

On March 5, 2021, the court held a sentencing hearing, and it sentenced Colen to 120 months' imprisonment on each count to run concurrently.[2] This appeal followed.

On appeal, Colen first argues that the circuit court erred by denying his motion to dismiss the charges because the State presented insufficient evidence that he had possession of the vehicle and thus the contraband found in the back seat. He relies on Fry's testimony that he denied owning the vehicle as well as the vehicle's registration showing that another person owned the vehicle. He also points out that the officers did not see him driving the

[2]Colen was convicted as a habitual offender pursuant to Arkansas Code Annotated section 5-4-501(a) (Supp. 2021).

car and did not locate his personal items inside. He further cites *Boston v. State*, 69 Ark. App. 155, 12 S.W.3d 245 (2000), and argues that even if there was evidence that he had possession of the vehicle with the contraband, there was no evidence that he ever touched or used the contraband. He alternatively argues that the State presented insufficient evidence to establish that he had a purpose to deliver the marijuana.

A motion to dismiss at a bench trial is identical to a motion for directed verdict at a jury trial in that it is a challenge to the sufficiency of the evidence. Ark. R. Crim. P. 33.1 (2021); *Jordan v. State*, 2014 Ark. App. 325. In reviewing a sufficiency challenge, we assess the evidence in the light most favorable to the State and consider only the evidence that supports the verdict. *Id.* We will affirm a judgment of conviction if substantial evidence exists to support it. *Id.* Substantial evidence is evidence that is of sufficient force and character that it will, with reasonable certainty, compel a conclusion one way or the other without resorting to speculation or conjecture. *Id.* Circumstantial evidence may provide a basis to support a conviction, but it must be consistent with the defendant's guilt and inconsistent with any other reasonable conclusion. *Collins v. State*, 2021 Ark. 35, 617 S.W.3d 701. Whether the evidence excludes every other hypothesis is left to the jury to decide. *Id.* Further, 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. *Armstrong v. State*, 2020 Ark. 309, 607 S.W.3d 491.

A person commits possession of a Schedule VI substance with the purpose to deliver if he possesses a Schedule VI controlled substance and the State proves purpose to deliver by any of the following factors:

(1) The person possesses the means to weigh and separate a Schedule VI controlled substance;

(2) The person possesses a record indicating a drug-related transaction;

(3) The Schedule VI controlled substance is separated and packaged in a manner to facilitate delivery;

(4) The person possesses a firearm that is in the immediate physical control of the person at the time of the possession of the Schedule VI controlled substance;

(5) The person possesses at least two (2) other controlled substances in any amount; or

(6) Other relevant and admissible evidence that contributes to the proof that a person's purpose was to deliver a Schedule VI controlled substance.

Ark. Code Ann. § 5-64-436(a) (Repl. 2016). Marijuana is a Schedule VI controlled substance. Ark. Code Ann. § 5-64-215(a)(1) (Supp. 2021). As to possession of drug paraphernalia, "[d]rug paraphernalia" includes "[a] scale or balance used, intended for use, or designed for use in weighing or measuring a controlled substance." Ark. Code Ann. § 5-64-101(12)(B)(v) (Supp. 2021). *See Keys v. State*, 2021 Ark. App. 469, 636 S.W.3d 835.

It is not necessary for the State to prove literal physical possession to prove possession; rather, possession may be proved by constructive possession, which is the control or right to control the contraband. *Matlock v. State*, 2015 Ark. App. 65, 454 S.W.3d 776. To prove constructive possession, the State must establish that a defendant exercised care, control, and management over the contraband. *Id.* Constructive possession may be established by circumstantial evidence. *Id.*

In this case, we hold that substantial evidence supports Colen's convictions for possession of a Schedule VI controlled substance with the purpose to deliver and possession of drug paraphernalia. Officers Smith and Shumate testified that Colen said the car belonged

to him, and they also testified that the car's key fob was found on Colen's person. Even though Fry's testimony differed from the officers' testimony, we defer to the trier of fact for credibility determinations.

As to Colen's argument concerning the requirements set forth in *Boston*, *Boston* involved a joint-occupancy situation, and the supreme court has held that when a single occupant is in a borrowed car or a car owned by another, he is not afforded the benefit of the increased inquiry afforded in joint-occupancy situations. *Polk v. State*, 348 Ark. 446, 73 S.W.3d 609 (2002). Again, officers testified that Colen said that the car belonged to him, and there was no evidence that another individual occupied the car. Even so, we point out that the State's evidence further established that the car smelled of marijuana, the car's engine was running, and Colen had the car's key fob on his person.[3]

As to Colen's alternative argument concerning the insufficiency of the evidence establishing the purpose to deliver, he did not raise this argument to the circuit court. Accordingly, it is not preserved for our review. *See Warren v. State*, 2019 Ark. App. 33, 567 S.W.3d 105.

Colen also argues that the circuit court erred by denying his motion to suppress. He acknowledges that officers can conduct a warrantless search of a readily movable vehicle

[3]In cases involving joint occupancy of the premises where the contraband is found, some additional factors must be present linking the accused to the contraband. *Pokatilov v. State*, 2017 Ark. 264, 526 S.W.3d 849. Those factors include (1) that the accused exercised care, control, or management over the contraband; and (2) that the accused knew the matter possessed was contraband. *Id.* The control and knowledge can be inferred from the circumstances, such as the 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. *Id.* In addition, an accused's suspicious behavior coupled with proximity to the contraband is clearly indicative of possession. *Id.*

when probable cause exists, but he argues that the vehicle in this case was not readily movable because it was unoccupied at the time of the search. He also notes that the car was not located in a high-crime area and that there was no evidence of potential movement by friends or family.

In reviewing a circuit court's denial of a motion to suppress, we conduct a de novo review based on the totality of the circumstances, reviewing findings of historical fact for clear error and determining whether those facts give rise to reasonable suspicion or probable cause, giving due weight to inferences drawn by the circuit court and proper deference to the circuit court's findings. *Christopher v. State*, 2017 Ark. App. 237, 520 S.W.3d 291. Arkansas appellate courts defer to the superior position of the circuit court to evaluate the credibility of witnesses at a suppression hearing. *Id.* We will reverse the denial of a motion to suppress only if the ruling is clearly against the preponderance of the evidence. *Id.*

Arkansas Rule of Criminal Procedure 14.1(a)(i) (2021) allows for a warrantless search of a readily movable vehicle that an officer has reasonable cause to believe contains evidence subject to seizure where the vehicle is in an area open to the public. Because a vehicle is readily movable by any person, not just the suspect, exigent circumstances allow the vehicle to be searched at the scene. *McDaniel v. State*, 337 Ark. 431, 990 S.W.2d 515 (1999); *Christopher*, 2017 Ark. App. 237, 520 S.W.3d 291. This justification to conduct a warrantless search does not vanish if the vehicle is immobilized. *See Bohanan v. State*, 324 Ark. 158, 919 S.W.2d 198 (1996) (holding that a warrantless search under Rule 14.1 was proper even though the vehicle was unoccupied and had a flat tire). Further, we have held that the odor of marijuana coming from a vehicle is sufficient to arouse suspicion and

provide probable cause for the search of that vehicle. *Christopher*, 2017 Ark. App. 237, 520 S.W.3d 291; *Lopez v. State*, 2009 Ark. App. 750.

Here, officers testified that the car's engine was running and that it smelled of marijuana. Given these circumstances and our case law, we hold that the circuit court's denial of Colen's motion to suppress was not clearly against the preponderance of the evidence. We therefore affirm Colen's convictions.

Affirmed.

VIRDEN and MURPHY, JJ., agree.

Lassiter & Cassinelli, by: *Michael Kiel Kaiser*, for appellant.

Leslie Rutledge, Att'y Gen., by: *Rebecca Kane*, Ass't Att'y Gen., for appellee.