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STATE OF CONNECTICUT *v.* HECTOR FERMAINT
(AC 25192)

Flynn, Bishop and Dupont, Js.

Argued May 24—officially released September 27, 2005

(Appeal from Superior Court, judicial district of New Britain, geographical area number fifteen, Espinosa, J.)

Erika L. Amarante, special public defender, with whom was *Aaron S. Bayer*, special public defender, for the appellant (defendant).

Julia K. Conlin, deputy assistant state's attorney, with whom, on the brief, were *Scott J. Murphy*, state's attorney, and *Brian Preleski*, senior assistant state's attorney, for the appellee (state).

Opinion

DUPONT, J. The defendant, Hector Fermaint, appeals from the judgment of the trial court finding him in violation of the conditions of his probation, revoking his probation and committing him to the custody of the commissioner of correction for eight years, execution suspended after five years, and five years of probation. The defendant raises two issues on appeal. The defendant claims that (1) there was insufficient evidence for

the court to find, by a fair preponderance of the evidence, that he was in possession of narcotics[1] and (2) the delay in holding his probation revocation hearing violated General Statutes § 53a-32 (a) and his constitutional rights to due process and a speedy trial. Because we conclude that there was insufficient evidence for the trial court to find that the defendant was in possession of narcotics, we reverse the judgment of the trial court and remand the case with direction to render judgment in favor of the defendant.[2]

On the basis of the evidence presented by the state at the probation revocation hearing, the trial court found the following facts. The defendant began his probation on February 23, 2001, and he signed the conditions of probation on March 1, 2001, certifying that he was advised of the conditions and that he understood them. One of the conditions was that he not commit any new crimes. On June 25, 2001, the defendant was arrested on a charge of violation of probation because he had been arrested and charged with possession of narcotics on May 1, 2001.

On May 1, 2001, Officer Jerry Chrostowski of the New Britain police department received a telephone call from a confidential informant with whom Chrostowski had worked for five years. The informant told Chrostowski that Kara Laliberte was in the Pinnacle Heights housing project and was in possession of cocaine. The informant also told Chrostowski that Laliberte was in her Honda Accord, accompanied by two males. The informant identified one of the males as ''Hector,'' Laliberte's boyfriend. After locating Laliberte and her Honda and surveilling the automobile for five to fifteen minutes, Chrostowski observed the car leave the area. Chrostowski called over the police radio for a marked police vehicle to stop the Honda.

Officer Raymond Grzegorzek, who was in a marked cruiser, stopped the Honda. Immediately in back of the marked cruiser was Chrostowski's car. Grzegorzek informed Chrostowski that he had observed the occupants of the car engaging in furtive movements. As Chrostowski approached the vehicle, he observed a lot of furtive movements between the backseat passenger and Laliberte. When the headlights of the cruiser were on the Honda, Chrostowski saw the defendant make a bending movement from the backseat, where he was seated, toward Laliberte, who was seated in the front passenger seat. As Officer Christopher Brody, who was working with Chrostowski, approached the Honda, he observed Laliberte putting something down her pants. Chrostowski approached the defendant and noticed, with the aid of his flashlight, several crumbs[3] of a rock like substance on the seat next to the defendant. Believing the crumbs to be crack cocaine, Chrostowski asked the other officers to escort the driver and passengers out of the car. Chrostowski collected the crumbs

found on the seat and field tested them. They tested positive for the presence of cocaine. The Honda was searched, and a small amount of green leafy substance was found in the front carpet area of the car. That substance tested positive for marijuana. A plastic bag with a large rock like substance was found in Laliberte's pants. It tested positive for crack cocaine. Laliberte also had $120 in cash concealed in her bra. An address book was recovered from the defendant, containing names of people that were familiar to the arresting officers. The book also contained other names and personal information of the defendant. No drugs were found on the person of the defendant. He was carrying $2 at the time. On the basis of its findings, the court found that the defendant ''possessed narcotics . . . and thereby violated a condition of his probation.''[4]

The defendant claims that the court's finding of a violation of probation was not sufficiently supported by a fair preponderance of the evidence. One of the general conditions of the defendant's probation was that he not violate any criminal law of the United States, this state or any other state or territory. The probation violation was premised on his arrest on a charge of possession of narcotics in violation of General Statutes § 21a-279 (a).[5] The defendant argues that there was insufficient evidence to find that he possessed the seized contraband. We agree.

''A revocation of probation hearing has two distinct components and two purposes. A factual determination by a trial court as to whether a probationer has violated a condition of probation must first be made.'' (Internal quotation marks omitted.) *State* v. *Davis*, 84 Conn. App. 505, 509, 854 A.2d 67, cert. denied, 271 Conn. 922, 859 A.2d 581 (2004). ''The state must establish a violation of probation by a fair preponderance of the evidence. That is to say, the evidence must induce a reasonable belief that it is more probable than not that the defendant has violated a condition of his or her probation. (Citation omitted; internal quotation marks omitted.) *State* v. *Reilly*, 60 Conn. App. 716, 725, 760 A.2d 1001 (2000). ''If a violation is found, a court must next determine whether probation should be revoked because the beneficial aspects of probation are no longer being served. . . . Since there are two distinct components of the revocation hearing, our standard of review differs depending on which part of the hearing we are reviewing.'' (Internal quotation marks omitted.) *State* v. *Davis*, supra, 509. The court's factual finding that a condition of probation was violated is the determination from which the defendant in this case appeals.

''In making its factual determination, the trial court is entitled to draw reasonable and logical inferences from the evidence. . . . Our review is limited to whether such a finding was clearly erroneous. . . . A finding of fact is clearly erroneous when there is no

evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . In making this determination, every reasonable presumption must be given in favor of the trial court's ruling.

"[T]o prove illegal possession of a narcotic substance, it is necessary to establish that the defendant knew the character of the substance, knew of its presence and exercised dominion and control over it. . . . Where, as here, the [narcotics were] not found on the defendant's person, the state must proceed on the theory of constructive possession, that is, possession without direct physical contact. . . . One factor that may be considered in determining whether a defendant is in constructive possession of narcotics is whether he is in possession of the premises where the narcotics are found. . . . Where the defendant is not in exclusive possession of the premises where the narcotics are found, it may not be inferred that [the defendant] knew of the presence of the narcotics and had control of them, unless there are other incriminating statements or circumstances tending to buttress such an inference. . . . To mitigate the possibility that innocent persons might be prosecuted for . . . possessory offenses . . . it is essential that the state's evidence include more than just a temporal and spatial nexus between the defendant and the contraband. . . . While mere presence is not enough to support an inference of dominion or control, where there are other pieces of evidence tying the defendant to dominion and control, the [finder of fact is] entitled to consider the fact of [the defendant's] presence and to draw inferences from that presence and the other circumstances linking [the defendant] to the crime." (Citations omitted; internal quotation marks omitted.) Id., 509–11.

Although *Davis* establishes the parameters of constructive possession, the facts in this case are different from the facts in *Davis*.[6] "Where the defendant is not in exclusive possession of the premises where the narcotics are found, it may not be inferred that [the defendant] knew of the presence of the narcotics and had control of them, unless there are other incriminating statements or circumstances tending to buttress such an inference." (Internal quotation marks omitted.) Id., 510. The crumbs of crack cocaine were not found on the defendant's person. Furthermore, he was not in control of the location where the crumbs were found. The record is devoid of any incriminating statements made by the defendant. In order to infer that the defendant in this case knew of the presence of the narcotics and had control of them, therefore, there must be circumstances tending to buttress such an inference.

The court relied on the following facts to support its

inference: (1) a confidential informant notified New Britain police that Laliberte was in possession of crack cocaine and that she was accompanied by the defendant; (2) after Laliberte's Honda was stopped by police, there were furtive movements inside the vehicle—the defendant turned to look back at the police and he leaned toward Laliberte; (3) crumbs of crack cocaine were found on the seat next to the defendant; (4) Laliberte was observed stuffing something down her pants that was later identified as crack cocaine; and (5) the defendant was carrying an address book containing names, addresses and telephone numbers of people familiar to the arresting officers.

The information provided by the confidential informant does not permit inferences that the defendant either knew of the substance's presence or exercised dominion and control over it. It also does not buttress such inferences. The informant did not tell Chrostowski that the defendant purchased, sold or used cocaine. The informant did not tell Chrostowski that the defendant possessed cocaine. To the contrary, the informant told Chrostowski that Laliberte possessed cocaine and that the defendant was in her presence. The subsequent searches of Laliberte and the defendant revealed that Laliberte had cocaine in her direct physical possession and that the defendant did not, corroborating the information provided to Chrostowski. Laliberte had $120; the defendant had $2. The information received by Chrostowski from the informant says nothing of the defendant's knowledge or control of narcotics.

The fact that crumbs of cocaine were found on the seat next to the defendant is no more than a temporal and spatial nexus between the defendant and the contraband, which is insufficient proof of possession. ''While mere presence is not enough to support an inference of dominion or control, where there are other pieces of evidence tying the defendant to dominion and control, the [finder of fact is] entitled to consider the fact of [the defendant's] presence and to draw inferences from that presence and the other circumstances linking [the defendant] to the crime.'' (Internal quotation marks omitted.) Id., 510–11. Therefore, we must look to the other evidence tying the defendant to the dominion and control of the cocaine before we can determine if the trial court was entitled to draw any inferences from the defendant's presence.

The court relied on the furtive movements[7] inside the vehicle as other evidence tying the defendant to dominion and control. Our case law indicates that mere furtive movements are not enough to establish an inference of possession. In *State* v. *Brunori*, 22 Conn. App. 431, 578 A.2d 139, cert. denied, 216 Conn. 814, 580 A.2d 61 (1990),[8] this court held that a defendant's bending over and attempting to walk away while in a public, high crime area were not ''*probative* in supporting an

inference of possession.'' (Emphasis added.) Id., 439. The court, again, articulated that principle in *In re Benjamin C.*, 22 Conn. App. 458, 577 A.2d 1117 (1990): ''Bending over as if to tie one's shoe is one of those innocent gestures that can be mistaken for a guilty movement. The motivation for such an action may run the whole spectrum from the most legitimate to the most heinous.'' Id., 462.

It logically follows that the nondescript furtive movement, namely, the leaning forward by the defendant toward Laliberte and the defendant's turning to look back at the police cruiser when the lights were turned on do not create or support an inference of possession. The defendant's turning to look back at the police cruiser when the lights were initiated was an innocuous act. Innocent drivers and their passengers turn to look in the direction of lights and sirens everyday. If they did not, it would be hard to imagine how drivers would be effectively alerted that police were conducting a traffic stop or that they needed to allow an ambulance, police vehicle or fire engine to pass. The defendant's leaning forward to the area that police ultimately uncovered the narcotics, namely, the person of Laliberte, is similar to the *Brunori* and *In re Benjamin C.* defendants' bending toward the proximity where narcotics ultimately were discovered.[9] That movement is consistent with innocent action. When a person is seated in a vehicle, the act of looking directly behind them without the aid of mirrors necessarily requires a leaning forward and turning of the upper body. The leaning forward action also is consistent with the innocent action of leaning forward to hear what the front occupants are saying or to speak to the front occupants. As a result, the nondescript furtive movement, the leaning forward by the defendant toward Laliberte and turning to look back at the police cruiser when the lights were initiated do not create or support an inference of possession without some other evidence that permits or buttresses the inference.

In its brief and at oral argument, the state attempted to distinguish *Brunori* and *In re Benjamin C.* because those cases required proof beyond a reasonable doubt, as opposed to proof by a preponderance of the evidence, the standard applicable in probation revocation hearings. The language employed by the court in *Brunori* and *In re Benjamin C.* in discussing the value of evidence of furtive movement to create or to support an inference of possession is not that of proof beyond a reasonable doubt. In *Brunori*, the court found that such evidence was not probative in supporting an inference of possession. *State* v. *Brunori*, supra, 22 Conn. App. 439. In *In re Benjamin C.*, the court also found that similar evidence did not rise to the level of probable cause for possession. *In re Benjamin C.*, supra, 22 Conn. App. 462. The probative value and probable cause thresholds are both below the threshold of proof

required by the preponderance of the evidence standard. As a result, the state's argument is unavailing.

The court also relied on the fact that after the furtive movements, Laliberte was observed stuffing something down her pants that was later identified as crack cocaine. Specifically, the court found that the defendant had bent forward and handed the larger piece of crack cocaine to Laliberte, which she concealed in her pants. The record is devoid of any evidence that would permit such an inference. There was no testimony at trial that the defendant's arms were ever extended or that the defendant handed anything to the other occupants. Chrostowski and Brody testified that they did not observe the defendant hand anything to the other occupants, and Grzegorzek did not testify that he observed the defendant hand anything to the other occupants. The information provided to Chrostowski by the confidential informant, to whose reliability Chrostowski attested, indicated only that Laliberte possessed cocaine. Furthermore, there was no fingerprint analysis of the bag of crack cocaine to establish that the defendant possessed it at any time, nor was there any chemical analysis of the larger piece of crack cocaine and the crumbs to establish a connection between the substances. The court's finding that the defendant handed Laliberte the larger piece of crack cocaine was clearly erroneous.

Finally, the court relied on the address book, recovered from the defendant, which contained names, addresses and telephone numbers of people familiar to the arresting officers. The address book also contained names and addresses of persons in Puerto Rico and the Dominican Republic, and a book seller in Enfield, Connecticut. The address book also contained $2, a social security number and banking information. Chrostowski, the officer who searched the defendant and seized the address book, admitted that the address book could be the defendant's personal address book. Although Chrostowski believed the address book might be related to drug trade, he did not ascertain whose social security number and bank information it contained and did not contact any of the people listed in the address book.

The state relies on several cases in support of its claim that the facts in this case are sufficient to prove possession by a preponderance of the evidence. We find those cases distinguishable from the present case.[10] Furthermore, the present case stands in stark contrast to cases in which this court has affirmed judgments finding a probation violation on the basis of possession. See *State* v. *Davis*, supra, 84 Conn. App. 505; *State* v. *Hooks*, 80 Conn. App. 75, 832 A.2d 690 (2001), cert. denied, 267 Conn. 908, 840 A.2d 1171 (2003); *State* v. *Shannon*, 61 Conn. App. 543, 764 A.2d 1281 (2001). Here, the narcotics were not on the defendant's person,

they were not found in a place under his exclusive or shared control, the police did not observe or videotape him engaging in any transaction, there were no controlled purchases from him, the police did not observe him pass anything to the other occupants in the car, he did not flee, he did not attempt to conceal the crumbs of crack cocaine and he did not make any incriminating statements. The only evidence offered to prove that the defendant was in possession of the crumbs of crack cocaine was his proximity to the crumbs and that he engaged in ''furtive'' movements. Under the preponderance of the evidence standard, that evidence is insufficient to prove possession of narcotics. Reviewing the record before us, we conclude that the court could not, by a preponderance of the evidence, find that the defendant possessed either the crumbs of crack cocaine on the seat next to him or the larger piece of cocaine recovered from Laliberte.

The judgment is reversed and the case is remanded with direction to render judgment in favor of the defendant.

In this opinion FLYNN, J., concurred.

[1] During the probationary period of the defendant's original sentence of ten years imprisonment, execution suspended after eighteen months, with ten years probation, the defendant was arrested on charges of possession of narcotics and possession of marijuana, in violation of General Statutes §§ 21a-279 (a) and 21a-279 (c), respectively. That arrest caused a warrant to be issued, charging the defendant with a violation of a condition of probation.

[2] In view of our disposition of the first issue, we need not resolve the second issue.

[3] At the probation revocation hearing, Chrostowski testified that the crumbs were approximately one-tenth of one gram. Chrostowski further testified that it was possible that the defendant could have been sitting in the backseat without noticing the crumbs.

[4] The defendant was arrested on charges of possession of narcotics and possession of marijuana. See footnote 1. The court, however, did not find that he possessed marijuana. The court based its finding that the defendant violated his probation on the allegation that the defendant was found in possession of narcotics. The defendant was never prosecuted by the state for either crime.

[5] General Statutes § 21a-279, entitled ''Penalty for illegal possession. Alternative sentences,'' provides in relevant part: ''(a) Any person who possesses or has under his control any quantity of any narcotic substance, except as authorized in this chapter, for a first offense, may be imprisoned not more than seven years or be fined not more than fifty thousand dollars, or be both fined and imprisoned; and for a second offense, may be imprisoned not more than fifteen years or be fined not more than one hundred thousand dollars, or be both fined and imprisoned; and for any subsequent offense, may be imprisoned not more than twenty-five years or be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned.''

[6] In *Davis*, the police, on the basis of a tip, set up two controlled purchases at the residence of the defendant. The informant purchased drugs from an African-American male named Doug at the defendant's residence. The defendant was the only African-American male named Doug living at the residence. The defendant's car was parked in the driveway at the time of the controlled purchases. While the police were executing a search warrant at the defendant's residence, the defendant arrived at the premises as a passenger in his vehicle. When beckoned by an officer, the car was driven away. The facts in the present case are clearly distinguishable. Significantly, there were no controlled purchases from the defendant or observed sales by the defendant, and the narcotics were not recovered in an area over which the defendant exercised any control.

[7] Although the officers testified that they had observed furtive movements inside the vehicle, there was no mention of the furtive movements in the

police report that Chrostowski had prepared almost two years and eight months earlier. Chrostowski testified that he prepared reports with as much detail as possible to aid his ability to give accurate testimony if called to testify years after an arrest, however, he failed to provide an explanation why information about the furtive movements was omitted from the police report.

[8] In *Brunori*, police officers observed the defendant walk around the corner of a building after he saw the police approaching, bend over with his arm outstretched, come back up and move back a few feet. *State* v. *Brunori*, supra, 22 Conn. App. 433. Cocaine and a hypodermic needle were later recovered in the proximate area that the officers had observed the defendant bend and reach. Id. The court explained: ''Surely, the innocuous act of bending over on a public sidewalk cannot be given any weight. Possession cannot be established by evidence of a movement that may have been performed for a multitude of reasons. The possibility that the defendant here may have discarded narcotics is not enough. In addition, the fact that the defendant started walking as the patrol car was arriving was no more suspicious than if he had instead elected to 'freeze.' No matter what the defendant did at this point, the state, no doubt, could have argued that some inculpatory inference could be drawn from his movements.'' Id., 439.

[9] Here, however, the relationship between the furtive movement and the contraband of which the state seeks to prove possession is significantly more attenuated than the facts indicated in *Brunori* and *In re Benjamin C.*, in which the court found furtive movement in close proximity to contraband not probative of possession. *In re Benjamin C.*, supra, 22 Conn. App. 462; *State* v. *Brunori*, supra, 22 Conn. App. 439. Unlike those cases, there was no testimony in the trial court that the defendant's arms were ever extended or that the defendant handed anything to the other occupants. Chrostowski and Brody testified that they did not observe the defendant hand anything to the other occupants, and Grzegorzek did not testify that he observed the defendant hand anything to the other occupants.

[10] In *State* v. *Leon-Zazueta*, 80 Conn. App. 678, 836 A.2d 1273 (2003), cert. denied, 268 Conn. 901, 845 A.2d 405 (2004), although there was no evidence placing the defendant in his apartment at the time narcotics were delivered by mail, the court found sufficient evidence to support inferences of knowledge of presence and control over the narcotics. The evidence demonstrated that two packages containing cocaine arrived at the defendant's residence on the day he expected them. One package was addressed to him by name. The defendant's roommate testified that the defendant had asked her to sign for two packages on his behalf on that day. During a warrant search of the residence, the police recovered other empty packages sent from the same address, an open box of sandwich bags, a digital scale, a large pan and an open box of baking soda. In the present case, there are no statements from which possession may be inferred, the defendant didn't have any control over the location where the narcotics were recovered, and the ''drug related items'' are not of a similar nature.

In *State* v. *Delarosa*, 16 Conn. App. 18, 547 A.2d 47 (1988), the defendant was a passenger in a car in which a large quantity of cocaine was found. Some of the cocaine was discovered in plain view on the vehicle floor in close proximity to the defendant. The vehicle in which the defendant was riding was actively being employed in a drug trafficking venture from New York to Boston. The defendant appeared fidgety and nervous through the traffic stop and was continually wiping his nose. The present case does not involve a large quantity of narcotics, there are no allegations that the vehicle was actively being employed in a drug trafficking venture and the defendant's gestures do not link him to the narcotics in a similar way that persistently wiping one's nose does when there is a large amount of cocaine in close proximity.