IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT JACKSON
Assigned on Briefs March 3, 2020

STATE OF TENNESSEE v. JASON COLLINS

Appeal from the Circuit Court for Henderson County
No. 18117-2C Donald Allen, Judge

No. W2019-01415-CCA-R3-CD

The defendant, Jason Collins, appeals his Henderson County Circuit Court jury convictions of possession with intent to sell .5 grams or more of methamphetamine and possession of drug paraphernalia, arguing that the trial court erred by permitting the State to present a rebuttal witness, that the evidence was insufficient to support his convictions, and that the trial court erred by aligning the sentence imposed in this case consecutively to the sentence imposed in an unrelated case. Discerning no error, we affirm.

Tenn. R. App. P. 3; Judgments of the Circuit Court Affirmed

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which TIMOTHY L. EASTER, and J. ROSS DYER, JJ., joined.

Samuel W. Hinson, Lexington, Tennessee, for the appellant, Jason Collins.

Herbert H. Slatery III, Attorney General and Reporter; Daniel P. Whitaker III, Assistant Attorney General; Jody Pickens, District Attorney General; and Angela R. Scott, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

The Henderson County Grand Jury charged the defendant with alternative counts of possession with intent to sell or deliver .5 grams or more of methamphetamine and possession of drug paraphernalia.

At the June 2019 trial, former City of Lexington Police Department ("LPD") Officer James Robert McCready testified that on October 9, 2017, he knocked on the door of 480 Franklin Avenue, a home that he knew to be the defendant's residence, and the defendant answered. Upon seeing Officer McCready, the defendant "yelled, 'Police,' and turned back towards the residence." At that point, Officer

McCready "ran past him, and I went into the house." Officer McCready encountered a man and a woman, later identified as Dawn Michlitsch and Chad Scott, in a back bedroom of the residence; the woman "was half-way in between the bed and like a dresser-type area reaching for . . . the illegal narcotics and the bags and scales and . . . other paraphernalia." Officer McCready collected a bag containing what appeared to be methamphetamine along with "[t]wo sets of digital scales, a couple of spoons, some batteries," and some "small cotton balls." Forensic testing established that the substance collected by Officer McCready was 8.35 grams of methamphetamine.

During cross-examination, Officer McCready acknowledged that the defendant shouted "Police" after Officer McCready had asked if anyone else was inside the residence. He believed the defendant to be warning the other occupants. Officer McCready conceded that the drugs and drug paraphernalia were all found in the back bedroom the man and the woman occupied when the police arrived. Officers searched the house and the defendant's person but found no other contraband.

LPD Narcotics Investigator Ricky Montgomery testified that over the course of his career, the source of methamphetamine in the community had switched from local manufacture in clandestine labs to methamphetamine "shipped in over the border and just coming in from Mexico." He said, "It's been quite some time since we received an actual meth lab here in Lexington." Investigator Montgomery testified that "homemade dope is not very pure" and "more of a powdery form" while the methamphetamine obtained from Mexico was "a higher quality" and "a crystal-like substance."

Investigator Montgomery testified that, as part of his duties, he often employed the services of confidential informants to participate in controlled buys of methamphetamine. He said that "[g]enerally, we purchase grams at a time" because that was the amount typically purchased by drug users for personal use and that the price of a gram of methamphetamine was $80 to $100 at the time of trial. He said that the scales and spoons collected by Officer McCready as well as the baggies located on the dresser were items used by drug dealers to package drugs for resale. Investigator Montgomery said that he prepared arrest warrants for the defendant, Ms. Michlitsch, and Mr. Scott. Mr. Scott absconded from the jurisdiction, and Ms. Michlitsch pleaded guilty.

During cross-examination, Investigator Montgomery agreed that the defendant did not have actual possession of either the drugs or drug paraphernalia in this case. He said that he had elected to charge the defendant because those items were located inside the defendant's residence.

The State rested, and Dawn Michlitsch testified on behalf of the defendant.

Ms. Michlitsch testified that she and the defendant were friends and that he had been her roommate when they lived in Oregon. On October 9, 2017, she and her boyfriend, Chad Scott, spent the night at the defendant's house in the guest bedroom. She said that she "had been there for a little bit" and that she "had stayed in my own room, my own area." She recalled that on October 9, she and Mr. Scott were in the guest bedroom "with the door closed" when she heard the defendant say, "'Police are here.'" At that point, Ms. Michlitsch "stood up, and someone answered the door." She added, "I thought it was a joke, you know, because it was a guy in normal clothes, you know, and so, I relaxed and then they said, 'Step out,' you know, and I realized people were serious." She said that the officer found methamphetamine, "some scales and some paraphernalia" inside the bedroom she and Mr. Scott occupied.

Ms. Michlitsch testified that she had pleaded guilty to possession with intent to sell methamphetamine. She said that she had purchased the methamphetamine that officers recovered from the bedroom "that very same morning" from another woman inside the defendant's living room while the defendant slept in his own bedroom. Ms. Michlitsch said that she pleaded guilty to possessing the methamphetamine because it belonged to her. She recalled that the State actually "offered probation if I was to say it was Jason Collins," but she elected instead to enter a blind plea to the charged offenses. She explained, "Well, honestly, I really wanted to say it was someone else's because I have young children, but I spent a night praying because I was going to come say it was, and I spent the night praying, and I just can't lie. I can't do that." Ms. Michlitsch said that the defendant had not approached her to testify on his behalf and that she had approached defense counsel because she "needed to tell the truth."

During cross-examination, Ms. Michlitsch said that she and Mr. Scott had begun staying with the defendant on September 12, 2017. None of the three were working on October 9, 2017. Ms. Michlitsch maintained that she paid only $350 for the 8.35 grams of methamphetamine that she purchased. She said that she woke up in the middle of the night to find a woman she knew only as "Chris" sitting on the sofa in the defendant's living room crying and "talking about her electric getting shutting off because she didn't have the money to pay for it and stuff." Ms. Michlitsch said that she "just started talking to her and . . . it came about that she needed about that much money and had about that much drugs, and I was okay with that."

Ms. Michlitsch acknowledged having told Investigator Montgomery that she had also purchased "a little amount" of methamphetamine from a person named Tasha Wheeler. She said that she used money she took from Mr. Scott's wallet, some of which was her "birthday money" and some of which was the proceeds from Mr. Scott's disability check, to purchase the drugs. She said that she used the defendant's cellular

telephone to make the arrangement to purchase drugs from Ms. Wheeler. She denied that Ms. Wheeler was actually arranging to purchase drugs from her on the day of the offenses.

Ms. Michlitsch acknowledged that she had used methamphetamine with the defendant and Mr. Scott on the day of the offenses but insisted that, although the defendant knew there were drugs in the house, he did not know the amount. She said that the scales, spoons, and baggies had been in the guest bedroom when she began staying at the defendant's house. She denied that she was getting up to get rid of the drugs when Officer McCready entered the room, saying, "I just came up to see what was going on." Ms. Michlitsch conceded that plea documents in her case indicated that she had entered a best interests plea but said that she had assumed that her plea of guilty meant that she was admitting that the drugs belonged to her.

Following Ms. Michlitsch's testimony, the defendant elected not to testify and chose to present no further proof.

In rebuttal, Ms. Wheeler testified that she knew of Ms. Michlitsch and that she had "met her like probably two or three times." Ms. Wheeler recalled having seen Ms. Michlitsch on the day that Ms. Michlitsch was arrested when she took a fishing pole to the defendant's residence. Ms. Wheeler denied having sold drugs to Ms. Michlitsch that day.

Based upon this proof, the jury convicted the defendant as charged. The trial court merged the defendant's conviction of possession with intent to deliver .5 grams or more of methamphetamine into the defendant's conviction of possession with intent to sell .5 grams or more of methamphetamine and imposed a Range II sentence of 20 years' incarceration for the drug possession conviction and a sentence of 11 months and 29 days for the conviction of possession of drug paraphernalia. The court aligned the sentences consecutively to each other and to the defendant's eight-year sentence in an unrelated case.

In this appeal, the defendant challenges the trial court's decision permitting Ms. Wheeler to testify, the sufficiency of the convicting evidence, and the propriety of the sentence. We consider each claim in turn.

I. Rebuttal Witness

The defendant first asserts that the trial court erred by permitting the State to present Ms. Wheeler as a rebuttal witness because the State failed to provide notice that Ms. Wheeler might testify at trial. The State asserts that the defendant waived

plenary review of this issue by failing to file a motion for new trial. Alternatively, the State contends that the trial court did not err.

After the defense rested, the State indicated an intent to call Ms. Wheeler as a rebuttal witness. The defendant objected on grounds that he had not been given pretrial notice that Ms. Wheeler was a potential witness in the case. The State argued that it was not required to provide notice to the defendant that Ms. Wheeler might be a rebuttal witness because it did not decide to call Ms. Wheeler as a witness until Ms. Michlitsch testified that she bought the drugs from Ms. Wheeler. The prosecutor candidly admitted that "we suspected that [Ms. Michlitsch] was going to use Ms. Tasha Wheeler because of the fact that she had told the officers that she thought that Ms. Wheeler was the one that told on them about the drugs." Because the State "suspected that" Ms. Michlitsch would implicate Ms. Wheeler based upon Ms. Michlitsch's conversation with Investigator Montgomery two days before the defendant's trial, they made "arrangements to have her here today."

The trial court ruled that Ms. Wheeler could testify to "rebut or contradict any testimony that Dawn Michlitsch has offered" but that she could not offer any testimony that the State could or should have offered in its case-in-chief regarding the defendant's guilt of the charged offenses.

As the State correctly points out, the defendant did not file a motion for new trial in this case. Consequently, he has waived appellate review of all claims the remedy for which is a new trial, including the trial court's decision to admit Ms. Wheeler's testimony. *See* Tenn. R. App. P. 3(e) ("[I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in . . . [any] ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived."); *see also State v. Martin*, 940 S.W.2d 567, 569 (Tenn. 1997) (holding that a defendant relinquishes the right to argue on appeal any issues that should have been presented in a motion for new trial but were not raised in the motion); *State v. Dodson*, 780 S.W.2d 778, 780 (Tenn. Crim. App. 1989).

"When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial . . . ." Tenn. R. App. P. 36(b). This court will grant relief for plain error pursuant to Rule 36(b) only when:

> (1) the record clearly establishes what occurred in the trial court; (2) the error breached a clear and unequivocal rule of law; (3) the error adversely affected a substantial right of the

> complaining party; (4) the error was not waived for tactical purposes; and (5) substantial justice is at stake.

State v. Cooper, 321 S.W.3d 501, 506 (Tenn. 2010) (quoting *State v. Hatcher*, 310 S.W.3d 788, 808 (Tenn. 2010)).

The "State's duty to disclose the names of its witnesses is merely directory, not mandatory," and "a defendant will be entitled to relief for nondisclosure only if he or she can demonstrate prejudice, bad faith, or undue advantage." *State v. Dellinger*, 79 S.W.3d 458, 489 (Tenn. 2002) (citing *State v. Harris*, 839 S.W.2d 54, 69 (Tenn. 1992)). That being said, "[t]he [S]tate has an obligation to proceed within the context of the applicable norms of a level-handed prosecution." *State v. West*, 825 S.W.2d 695, 698 (Tenn. Crim. App. 1992). Pursuant to this obligation, the State should not call a witness as a rebuttal witness when "[t]he evidence given by the witness [is] proof-in-chief." *Id.* In this case, the trial court strictly limited Ms. Wheeler's testimony to only that which directly contradicted the testimony offered by Ms. Michlitsch. Accordingly, no clear and unequivocal rule of law was breached, and, thus, this claim does not satisfy the criteria for plain error review.

II. Sufficiency

Sufficient evidence exists to support a conviction if, after considering the evidence—both direct and circumstantial—in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011). This court will neither re-weigh the evidence nor substitute its inferences for those drawn by the trier of fact. *Dorantes*, 331 S.W.3d at 379. The verdict of the jury resolves any questions concerning the credibility of the witnesses, the weight and value of the evidence, and the factual issues raised by the evidence. *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). Significantly, this court must afford the State the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. *Id.*

Code section 39-17-417(a)(4) provides that "[i]t is an offense for a defendant to knowingly . . . [p]ossess a controlled substance with intent to . . . deliver or sell the controlled substance." T.C.A. § 39-17-417(a)(4). Tennessee courts recognize that possession may be either actual or constructive. *State v. Shaw*, 37 S.W.3d 900, 903 (Tenn. 2001). A person constructively possesses a controlled substance when he or she has "the power and intention at a given time to exercise dominion and control over [the contraband] either directly or through others." *Id.* at 903 (quoting *State v. Patterson*, 966

S.W.2d 435, 445 (Tenn. Crim. App. 1997)). Said differently, constructive possession is the "ability to reduce an object to actual possession." *State v. Cooper*, 736 S.W.2d 125, 129 (Tenn. Crim. App. 1987). However, "[t]he mere presence of a person in an area where drugs are discovered is not, alone, sufficient." *State v. Bigsby*, 40 S.W.3d 87, 90 (Tenn. Crim. App. 2000) (citing *Cooper*, 736 S.W.2d at 129). "Likewise, mere association with a person who does in fact control the drugs or property where the drugs are discovered is insufficient to support a finding that the person possessed the drugs." *Cooper*, 736 S.W.2d at 129.

"Possession need not be exclusive and may be exercised jointly with more than one person." *State v. Richards*, 286 S.W.3d 873, 885 (Tenn. 2009) (citations omitted). When, as here, an "accused is not in exclusive possession of the place where the controlled substance is found, additional incriminating facts and circumstances must be presented" that "affirmatively link the accused to the controlled substance." *Id.* Such facts and circumstances include:

> (1) whether the drugs were in plain view[;] (2) whether contraband was in close proximity to the defendant[;] (3) conduct on the part of the defendant indicative of guilt, including furtive gestures and flight; (4) the quantity of drugs present; (5) the proximity of the defendant's effects to the contraband; (6) the presence of drug paraphernalia; (7) whether the defendant was under the influence of or possessed additional narcotics; (8) the defendant's relationship to the premises; and (9) incriminating statements made by the defendant.

Id. at 885-86 (footnotes omitted).

Applying the inferences from the evidence most favorable to the State, we conclude that the evidence was sufficient to establish that the defendant constructively possessed the drugs and paraphernalia. The drugs and drug paraphernalia were located inside the defendant's home, and the defendant shouted a warning when he saw Officer McCready at the door, suggesting that he knew there were drugs in the house. The 8.35 grams of methamphetamine was far in excess of the amount typically possessed by drug users. Ms. Michlitsch testified that the drug paraphernalia was present in the home before she and Mr. Scott came to stay with the defendant. She also testified that she had used drugs with the defendant and Mr. Scott earlier that day. Although Ms. Michlitsch claimed exclusive ownership of the drugs, the jury was entitled to disregard that testimony.

III. Sentencing

Finally, the defendant challenges the sentencing decision of the trial court, arguing that the court erred by ordering that he serve the sentences imposed for his convictions in this case consecutively to each other and to a previously-imposed sentence. The State asserts that the trial court did not err.

Neither party presented live testimony at the sentencing hearing, but the defendant made a sworn statement to the court wherein he admitted that he had "transgressed against" the "peace and dignity" of the state, noted that he had "never done well in this area," and said that he planned to leave the state after sentencing.

The presentence report, which was exhibited to the hearing, indicates that the 44-year-old defendant refused to provide any current or historic information regarding his family or employment history or a written statement for inclusion in the report. The defendant had five prior drug-related convictions dating back to 1994, including four convictions for the possession of methamphetamine for offenses committed in 2016 and 2017. In addition, he had five convictions for forgery, two convictions of aggravated burglary, and one conviction of theft.

The State asked the trial court to impose a Range II maximum sentence of 20 years for the defendant's conviction and to order that he serve that sentence consecutively to an eight-year effective sentence imposed for the defendant's convictions of possession of methamphetamine in an unrelated case. The defendant asked the trial court for leniency in the sentence to be imposed in this case and to align any sentence imposed concurrently with the eight-year sentence.

The trial court observed that the defendant was charged with selling methamphetamine on four occasions between December 6, 2016, and February 16, 2017, "and then by October" officers "find the defendant and other individuals inside the defendant's residence with a large amount of methamphetamine, along with drug paraphernalia, which all indicates that he was still selling methamphetamine." The court determined that the defendant qualified as a Range II offender. The court applied enhancement factor (1), that the defendant had a history of criminal convictions or criminal behavior in addition to that necessary to establish the appropriate range, noting that the defendant had an extensive criminal history that dated back more than 20 years and included 10 felony convictions. The court also applied enhancement factor (8), that the defendant had previously failed to comply with sentences involving release into the community, observing that "every time he's ever been given probation or parole, he's violated those by either committing new offenses or by not following the conditions of our rules of probation." The court concluded that the defendant's refusal to provide

information for the presentence report and his refusal "to complete the questionnaire, which he was ordered by the Court to do," reflected poorly on the defendant's amenability to correction "or a willingness to participate in any type of alternative sentencing." Based upon these findings, the court imposed a Range II sentence of 20 years, the maximum within the range, for the defendant's convictions of the possession with intent to sell and the possession with intent to deliver methamphetamine. The court then merged the convictions into a single conviction. The court also ordered the defendant to serve the maximum sentence of 11 months and 29 days for his conviction of possession of drug paraphernalia.

As to sentence alignment, the trial court ordered the defendant to serve the sentences imposed in this case consecutively to each other and to the previously-imposed eight-year sentence based upon "his extensive history of criminal activity." Finally, the court determined that the defendant was not an appropriate candidate for alternative sentencing based upon his extensive criminal history.

Our supreme court has adopted an abuse-of-discretion standard of review for sentencing and has prescribed "a presumption of reasonableness to within-range sentencing decisions that reflect a proper application of the purposes and principles of our Sentencing Act." *State v. Bise*, 380 S.W.3d 682, 707 (Tenn. 2012). The application of the purposes and principles of sentencing involves a consideration of "[t]he potential or lack of potential for the rehabilitation or treatment of the defendant . . . in determining the sentence alternative or length of a term to be imposed." T.C.A. § 40-35-103(5). Trial courts are "required under the 2005 amendments to 'place on the record, either orally or in writing, what enhancement or mitigating factors were considered, if any, as well as the reasons for the sentence, in order to ensure fair and consistent sentencing.'" *Bise* 380 S.W.3d at 698-99 (quoting T.C.A. § 40-35-210(e)). The abuse-of-discretion standard of review and the presumption of reasonableness also applies to "questions related to probation or any other alternative sentence." *State v. Caudle*, 388 S.W.3d 273, 278-79 (Tenn. 2012). The standard of review adopted in *Bise* "applies similarly" to the imposition of consecutive sentences, "giving deference to the trial court's exercise of its discretionary authority to impose consecutive sentences if it has provided reasons on the record establishing at least one of the seven grounds listed in Tennessee Code Annotated section 40-35-115(b)." *State v. Pollard*, 432 S.W.3d 851, 861 (Tenn. 2013).

In our view, the record supports the sentencing decision of the trial court. As the court observed, the defendant's history of criminal activity is extensive, spans more than 20 years, and includes some 10 felony convictions, half of which relate to the possession or sale of drugs.

Accordingly, we affirm the judgments of the trial court.

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JAMES CURWOOD WITT, JR., JUDGE