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DISTRICT IV

June 11, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2019AP992-CR State of Wisconsin v. Jarvis James Alphonse
(L.C. # 2017CF2011)

Before Blanchard, Kloppenburg, and Nashold, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Jarvis Alphonse appeals a judgment convicting him of possession with intent to deliver cocaine. On appeal, Alphonse challenges the sufficiency of the evidence to support the conviction. Based upon our review of the briefs and record, we conclude at conference that this case is

appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We summarily affirm.

Police responded to an abandoned 911 call. At the scene, one of the responding police officers searched the trunk of a vehicle near which Alphonse had been standing.[2] The vehicle belonged to Alphonse's girlfriend. The officer discovered a handgun inside the trunk, as well as substances that were later confirmed by the state crime laboratory to be marijuana and approximately 62.8 grams of cocaine.

After a one-day bench trial, Alphonse was convicted of possession of a firearm by a felon, possession of THC as a second or subsequent offense, and possession of greater than 40 grams of cocaine with intent to deliver as a second or subsequent offense. *See* WIS. STAT. §§ 941.29(1m)(a); 961.41(3g)(e) and (1m)(cm)4. On appeal, Alphonse challenges only the conviction for possession of cocaine with intent to deliver, specifically arguing that there was insufficient evidence of his intent to deliver the cocaine to one or more other persons.[3]

When reviewing the sufficiency of the evidence, we will uphold a conviction "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis. 2d 493, 501, 451 N.W.2d 752 (1990). If there is a possibility that the fact finder, here the circuit court, "could have

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] In his appellate briefs, Alphonse does not challenge the search of the vehicle by law enforcement.

[3] Alphonse, through his defense counsel, stipulated at trial that the cocaine charge was a second or subsequent offense.

drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt," we must uphold the verdict even if we believe that the trier of fact "should not have found guilt based on the evidence before it." ***Id.*** at 507.

Alphonse argues that possession of approximately 63 grams of cocaine is not, without further evidence of intent to deliver, sufficient to support his conviction under WIS. STAT. § 961.41(1m)(cm). Alphonse points out that, in his own trial testimony, he denied having an intent to sell the cocaine. Rather, he testified that he intended all 62.8 grams to be for his personal use, through his habit of ingesting between three and five grams of cocaine per day. Alphonse also draws our attention to trial testimony from law enforcement that, as with most goods, it is cheaper to buy cocaine in bulk than it is to buy it in smaller amounts. Alphonse testified that he had paid approximately $1,800 for the cocaine that was found in the trunk of the vehicle.

Putting aside a statutory argument that we conclude we need not address, the State argues that Alphonse's contention fails because it rests on the false premise that the only evidence of intent to deliver presented at trial was the relatively large quantity of cocaine.[4] The State argues that the record contains sufficient evidence, including but not limited to quantity, to support a finding of intent to deliver under WIS. STAT. § 961.41(1m)(cm). We agree.

Evidence that Alphonse possessed 62.8 grams is only one of a number of relevant facts that the circuit court could rely on to determine that the State met its burden of showing that Alphonse

[4] The State also argues that possession of 62.8 grams of cocaine is, in itself, sufficient in all cases for a finding of intent to deliver under WIS. STAT. § 961.41(1m). Because we conclude that a combination of reasonable inferences based on all of the evidence, including credibility determinations by the circuit court, was sufficient to support Alphonse's conviction under § 961.41(1m)(cm), we need not reach this argument. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (stating that if a decision on one point disposes of the appeal, we need not address other issues raised).

possessed the cocaine with an intent to deliver it. WISCONSIN STAT. § 961.41(1m) provides that intent "may be demonstrated by, without limitation because of enumeration, evidence of the quantity and monetary value of the substances possessed, the possession of manufacturing implements or paraphernalia, and the activities or statements of the person in possession of the controlled substance …."

Officer John McMahon testified at trial that, in 21 years of investigating narcotics crimes, he had never seen a situation in which someone possessing 62.8 grams of cocaine did so only to consume it personally and not distribute it to one or more other persons. McMahon testified that the "sheer amount" of cocaine Alphonse possessed "is significant in itself." McMahon testified that the largest amount of cocaine he had ever been aware of someone possessing that was for the person's exclusive use, to the best of McMahon's knowledge, was 14 grams. In addition, Officer McMahon testified that in this case there had been no "use paraphernalia," such as pipes or straws, found with the cocaine. McMahon also testified that the fact that the cocaine was found in the trunk of a vehicle indicated that Alphonse was probably trying to conceal it and move it around, rather than storing it in a single location.

In addition, a handgun was recovered next to the cocaine in the trunk of the vehicle. The gun was loaded with five rounds in the magazine and one round in the chamber. Although weapons are not expressly mentioned in WIS. STAT. § 961.41(1m), the Wisconsin Supreme Court has recognized that firearms are "'tools of the trade' for drug dealers." ***State v. Guy***, 172 Wis. 2d 86, 96, 492 N.W.2d 311 (1992) (quoting ***United States v. Oates***, 560 F.2d 45, 62 (2d Cir. 1977)). A reasonable inference could be drawn that the loaded gun was present to help Alphonse protect the large, highly valuable quantity of cocaine in the course of one or more sales transactions.

McMahon opined that the value of the 62.8 grams, if broken down and sold by the gram, would be approximately $6,200, just under $100 per gram.

The circuit court also could properly take into consideration Alphonse's own activities and statements as evidence of intent under WIS. STAT. § 961.41(1m). Alphonse admitted in testifying at trial that he had travelled to Chicago and purchased the cocaine. His arrest occurred only about four to five hours after he returned to Rock County from Chicago. Alphonse argues that the lack of typical drug dealer tools, such as scales or baggies, supports an inference that he purchased the cocaine for personal use and not for distribution. However, another reasonable inference is that Alphonse had simply not had enough time, between returning to Rock County and his arrest, to begin to divide up or otherwise prepare the cocaine for distribution. When reviewing the sufficiency of the evidence, if more than one inference can be drawn from the evidence, this court will follow the inference that supports the trial court's finding "unless the evidence on which that inference is based is incredible as a matter of law." ***Poellinger***, 153 Wis. 2d at 506-07.

Finally, the circuit court made express credibility findings that support its decision. "When required to make a finding of fact, the trial court determines the credibility of the witnesses and the weight to be given to their testimony and its determination will not be disturbed by this court on appeal where more than one inference may be drawn from the evidence." ***State v. Turner***, 114 Wis. 2d 544, 550, 339 N.W.2d 134 (Ct. App. 1983). The court found the testimony of the law enforcement officers to be credible and found Alphonse to have "some serious credibility issues." The court's finding that Alphonse's testimony was not entirely credible is supported by the record. For example, Alphonse admitted in his trial testimony that, when he was arrested, he lied to police officers and told them he did not know anything about the gun and drugs in the trunk. Alphonse also told his probation agent that he had not used any drugs for a month before his arrest. Then,

at trial, Alphonse admitted that the cocaine was his and testified that he had consumed some of it between the time he purchased it in Chicago and the time he was arrested. The court was certainly not required to credit Alphonse's testimony about his plans for the 62.8 grams.

IT IS ORDERED that the judgment is summarily affirmed under WIS. STAT. RULE 809.21(1).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals