

SUPREME COURT OF ARKANSAS

Thomas Edmond Bradley v. State of Arkansas, 347 Ark. 518

65 S.W.3d 874 (2002) · No. CR 01-681 · Decided February 7, 2002

SUMMARY

The Supreme Court of Arkansas affirmed the revocation of Thomas Bradley's suspended sentences based on a finding that he constructively possessed anhydrous ammonia in an unlawful container. The court held that the State need prove a violation of the conditions of a suspended sentence only by a preponderance of the evidence, and that the evidence was sufficient under that standard despite potentially being insufficient for a criminal conviction.

CASE DETAILS

COURT	Supreme Court of Arkansas
WRITING FOR THE COURT	W.H. "Dub" Arnold, Chief Justice
JURISDICTION	Arkansas
DECIDED	February 7, 2002
DOCKET	CR 01-681
DISPOSITION	affirmed
PROCEDURAL POSTURE	Bradley appealed the revocation of his suspended sentences after the trial court found by a preponderance of the evidence that he constructively possessed anhydrous ammonia in a nonconforming container, thereby violating the conditions of his suspended sentences.
STANDARD OF REVIEW	The State must prove a violation of a probation or suspended-sentence condition by a preponderance of the evidence. On appeal, the trial court's findings are upheld unless clearly against the preponderance of the evidence, with deference given to the trial court's credibility and evidentiary-weight determinations.
PRECEDENTIAL VALUE	Published Arkansas Supreme Court opinion; precedential.
PARTIES	Thomas Edmond Bradley v. State of Arkansas

TOPICS

- probation
- criminal procedure
- evidence
- standard of review
- appellate procedure

PRACTICE AREAS

Criminal law

Probation and suspended-sentence revocation

Evidence

Appellate procedure

QUESTIONS PRESENTED

1. Whether the State presented sufficient evidence to establish by a preponderance of the evidence that Bradley constructively possessed anhydrous ammonia in an unlawful container.
2. Whether evidence insufficient to support a criminal conviction may nevertheless support revocation of a suspended sentence.

HOLDINGS

1. The State must prove a violation of a condition of probation or a suspended sentence by a preponderance of the evidence, and the trial court's findings are affirmed unless clearly against the preponderance of the evidence.
2. The evidence was sufficient to establish by a preponderance of the evidence that Bradley constructively possessed anhydrous ammonia in an unlawful container and therefore violated the conditions of his suspended sentences.
3. Evidence that is insufficient to sustain a criminal conviction may nevertheless be sufficient to support revocation of a suspended sentence because the burdens of proof are different.

KEY QUOTATIONS

“Because this was a revocation proceeding, and the burden of proof was by a preponderance of the evidence, we hold that even if there was not enough evidence to sustain a conviction for violation of the anhydrous ammonia statute, the trial court's finding by a preponderance that appellant was in constructive possession of anhydrous ammonia being transported in an unlawful container is clearly sufficient to revoke his suspended sentences.” (878)

FACTUAL BACKGROUND

Bradley was a passenger in a vehicle stopped for speeding. Officers detected a powerful ammonia odor, and a search revealed anhydrous ammonia leaking from a red plastic container in the trunk; the container did not comply with Arkansas regulations. The trunk key was found beneath the passenger seat where Bradley had been sitting, and the occupants appeared unusually nervous. Based on these circumstances, the trial court found that Bradley constructively possessed the ammonia and revoked his suspended sentences.

PROCEDURAL HISTORY

Bradley pleaded guilty in 1997 to breaking or entering, two counts of burglary, and three counts of theft of property, and imposition of sentence was suspended subject to conditions including living a law-abiding life and not violating any law. The State filed a revocation petition in 2001 based on alleged possession of anhydrous ammonia in violation of Arkansas Code section 5-64-1301. The trial court revoked the suspended sentences, and the Arkansas Supreme Court affirmed.

DISPOSITION

affirmed

CASES CITED

- Lemons v. State, 310 Ark. 381, 836 S.W.2d 861 (1992)
- Hoffman v. State, 289 Ark. 184, 711 S.W.2d 151 (1986)
- Pearson v. State, 262 Ark. 513, 558 S.W.2d 149 (1977)
- Gordon v. State, 269 Ark. 946, 601 S.W.2d 598 (1980)
- Darrough v. State, 330 Ark. 808, 957 S.W.2d 707 (1997)
- Dodson v. State, 341 Ark. 41, 14 S.W.3d 489 (2000)
- Wade v. State, 267 Ark. 1101, 594 S.W.2d 43 (1980)
- Crossley v. State, 304 Ark. 378, 802 S.W.2d 459 (1991)

OPINION

Bradley v. State 65 S.W.3d 874

ARNOLD, J.

65 S.W.3d 874 (2002)

347 Ark. 518

Thomas Edmond BRADLEY v. STATE of Arkansas. No. CR 01-681. Supreme Court of Arkansas. February 7, 2002.

*875 Phillip A. McGough, P.A., North Little Rock, for appellant.

Mark Pryor, Att'y Gen., by: Misty Wilson Borkowski, Ass't Att'y Gen., Little Rock, for appellee.

*876 W.H. "DUB" ARNOLD, Chief Justice.

This case involves the revocation of a suspended sentence. Appellant Thomas Bradley pled guilty to breaking or entering, two counts of burglary, and three counts of theft of property in 1997. Imposition of appellant's sentences were suspended on several conditions, one of which was that appellant live a law-abiding life, be of good behavior, and not violate any state, federal, or municipal law. On February 20, 2001, the State filed a revocation petition based on alleged violations of the conditions of appellant's suspended sentences, particularly the alleged violation of Ark.Code Ann. § 5-64-1301 (Supp.2001), which states: Any person who knowingly possesses anhydrous ammonia in a container which does not comply with the regulations of the Boiler Inspection Division of the Department of Labor for the containment of anhydrous ammonia is guilty of a Class B felony. The trial court revoked appellant's suspended sentences, and the appellant now appeals that revocation. We affirm. Appellant was a passenger in a vehicle driven by a friend. The vehicle was stopped for speeding, and the odor of ammonia coming from the trunk was so strong that two police officers and a police dog were overcome. The officers obtained permission to search the vehicle, and found hypodermic needles in the door pocket of the driver's

door. The trunk key initially could not be found; however, access to the trunk was gained through the back seat, and the anhydrous ammonia was found there, leaking from a red nonconforming container. The trunk key was later found under the appellant's passenger seat, and the trial court found that, from all of the circumstances, appellant was in constructive possession of the anhydrous ammonia found in the trunk in the nonconforming container. The court found that while there might not be enough evidence to convict the appellant of violating the statute, there was sufficient evidence to revoke his suspended sentences. On appeal, appellant challenges the court's denial of his motions for directed verdict, alleging that the State did not sufficiently prove that appellant constructively possessed the contraband found in the trunk of the automobile.

I. Standard of Review We have held that to revoke probation or a suspended sentence, the burden is on the State to prove the violation of a condition of probation or suspended sentence by a preponderance of the evidence. See Ark.Code Ann. 5-4-309(d) (Supp.1999); *Lemons v. State*, 310 Ark. 381, 836 S.W.2d 861 (1992); *Hoffman v. State*, 289 Ark. 184, 711 S.W.2d 151 (1986); *Pearson v. State*, 262 Ark. 513, 558 S.W.2d 149 (1977). On appellate review, the trial court's findings will be upheld unless they are clearly against a preponderance of the evidence. *Hoffman*, supra. Because the burdens are different, evidence that is insufficient for a criminal conviction may be sufficient for a probation revocation. Thus, the burden on the State is not as great in a revocation hearing. *Lemons*, supra.; *Gordon v. State*, 269 Ark. 946, 601 S.W.2d 598 (1980). Since determination of a preponderance of the evidence turns on questions of credibility and weight to be given testimony, we defer to the trial judge's superior position. *Id.*

II. Merits At trial, West Memphis Police Officer Joseph Applegate testified that on October *877 12, 2000, at 2:39 a.m., he stopped a white Ford Thunderbird on Interstate 40 for speeding. He testified that upon approaching the vehicle, he smelled a strong odor of ammonia coming from inside the car. The driver gave Officer Applegate permission to search the vehicle. Both the driver and appellant, who was a passenger in the car, were placed in Officer Applegate's patrol car while he performed the search. Officer Applegate first attempted to use a drug dog to search the car; however, the dog had an abnormal alert and ran away from the car and the smell of ammonia. Officer Applegate then began conducting the search by accessing the trunk through the upper part of the back seat because the trunk key was "missing," although it was later found underneath the passenger seat in which appellant had been sitting. Officer Applegate testified that the parties acted very nervous more nervous than is normal during a traffic stop for speeding. When Officer Applegate opened the trunk, the strong ammonia odor caused him to vomit on the side of the road. West Memphis Detective Vance Plumhoff testified that he arrived to assist Officer Applegate. Detective Plumhoff is certified to recognize dismantled clandestine methamphetamine laboratories. Located inside the trunk was a red plastic gas tank, which contained anhydrous ammonia. Detective Plumhoff testified that the tank was leaking, causing the ammonia to evaporate, which would indicate that the trunk had recently been opened in order to place the ammonia inside it. The red plastic container is not the approved type for transportation of anhydrous ammonia in Arkansas. Detective Plumhoff further testified that

antifreeze and windshield washer fluid containers were also located in the trunk and that although carrying these items in one's automobile trunk is in no way illegal, given the circumstances and other findings in the trunk, these items were suspicious, as antifreeze may be used to manufacture methamphetamine or transport other chemicals and the methanol in certain brands of windshield washer fluid can be used in certain forms of manufacturing methamphetamine. Additionally, an empty silver pressurized tank and sixty-six Dilantin capsules were found in the trunk, although Detective Plumhoff testified that the pills would not have been used in the manufacture of methamphetamine. Appellant's objections to Detective Plumhoff's testimony relating how they were used were sustained by the court. Based on the evidence presented at the revocation hearing, we cannot say that the trial court erred in finding that the State had proved by a preponderance of the evidence that appellant had constructively possessed anhydrous ammonia in an unlawful container and, therefore, violated the conditions of his suspended sentences. We have held that the State need not prove that the accused physically possessed the contraband in order to sustain a conviction for possession of a controlled substance if the location of the contraband was such that it could be said to be under the dominion and control of the accused, that is, constructively possessed. *Darrough v. State*, 330 Ark. 808, 957 S.W.2d 707 (1997). We have further held that while constructive possession can be implied when the contraband is in the joint control of the accused and another, joint occupancy of a vehicle, standing alone, is not sufficient to establish possession or joint possession. *Dodson v. State*, 341 Ark. 41, 14 S.W.3d 489 (2000). Other factors to be considered in cases involving automobiles occupied by more than one person are: (1) whether the contraband is in plain view; (2) whether the contraband is found with the accused's personal effects; (3) whether it is found on the same side of the car seat as the accused was sitting or in near proximity to it; (4) whether the accused is the owner of the automobile, or exercises dominion or control over it; and (5) whether the accused acted suspiciously before or during the arrest. *Id.* Possession may be imputed when the contraband is found in a place which is immediately and exclusively accessible to the accused and subject to his dominion and control. See *Wade v. State*, 267 Ark. 1101, 594 S.W.2d 43 (1980); see also *Crossley v. State*, 304 Ark. 378, 802 S.W.2d 459 (1991). In this case, the trial court placed substantial emphasis on the fact that the trunk key was found underneath the seat where appellant was sitting. Since the ammonia was evaporating, the trunk would have recently been opened in order to place the ammonia inside it. As such, the fact that the key was found underneath appellant's seat led the trial court to believe that appellant placed it there in order to delay the officer's access to the trunk, and thus, that appellant had knowledgeable possession of anhydrous ammonia in an unlawful container. Moreover, other factors considered are the plain smell of ammonia, which was obviously so powerful that it was basically in "plain view," and the testimony of the officers that the driver and the appellant acted "very nervous more than is normal during a traffic stop for speeding." Because this was a revocation proceeding, and the burden of proof was by a preponderance of the evidence, we hold that even if there was not enough evidence to sustain a conviction for violation of the

anhydrous ammonia statute, the trial court's finding by a preponderance that appellant was in constructive possession of anhydrous ammonia being transported in an unlawful container is clearly sufficient to revoke his suspended sentences. Affirmed.

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