IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2019-KA-01007-COA

LAVAR WILLIAMS A/K/A LAVAR D. WILLIAMS A/K/A LAVAR DAUNTE WILLIAMS A/K/A BOO LOVE — **APPELLANT**

v.

STATE OF MISSISSIPPI — **APPELLEE**

DATE OF JUDGMENT:	06/18/2019
TRIAL JUDGE:	HON. DEWEY KEY ARTHUR
COURT FROM WHICH APPEALED:	MADISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT:	OFFICE OF STATE PUBLIC DEFENDER BY: ERIN ELIZABETH BRIGGS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: ABBIE EASON KOONCE
DISTRICT ATTORNEY:	JOHN K. BRAMLETT JR.
NATURE OF THE CASE:	CRIMINAL - FELONY
DISPOSITION:	AFFIRMED - 12/15/2020
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE BARNES, C.J., GREENLEE AND WESTBROOKS, JJ.

GREENLEE, J., FOR THE COURT:

¶1. Lavar Williams was convicted in the Madison County Circuit Court of Count I, possession of one kilogram or more of marijuana with the intent to sell, distribute, or transfer; Count II, conspiracy to sell, distribute, or transfer one kilogram or more of marijuana; Count III, possession of more than thirty grams of cocaine with the intent to sell, distribute, or transfer; and Count IV, conspiracy to sell, distribute, or transfer more than thirty grams of cocaine. The court found that Williams was a non-violent habitual offender and subsequent drug offender and sentenced him to serve forty years for Count I; five years for

Count II; eighty years for Count III; and twenty years for Count IV in the custody of the Mississippi Department of Corrections. The court ordered Williams's sentences to be served consecutively to each other and to any and all other sentences.

¶2. Trial counsel filed a notice of appeal on Williams's behalf and a motion to withdraw as counsel of record. The court granted the motion to withdraw and appointed the Office of Indigent Appeals to represent Williams on appeal.

¶3. On appeal, Williams claims that his convictions for possession with intent were not supported by sufficient evidence and that his trial counsel's assistance was ineffective for failing to file post-trial motions challenging the sufficiency and weight of the evidence. Finding no reversible error, we affirm.

FACTS

¶4. At trial, Lieutenant Trey Curtis with the Narcotics Division of the Madison County Sheriff's Department testified that in December 2017 he began monitoring Williams's phone calls while Williams was in the Madison County Detention Center. Lieutenant Curtis testified that Williams made several calls to Jeremiah Kelly and used code words to discuss narcotics. As a result, Lieutenant Curtis obtained search warrants for Williams's residence on Kings Crossing in Madison County and Kelly's mother's residence on North Jackson Street in Madison County.

¶5. On January 27, 2018, law enforcement executed the warrants. Lieutenant Curtis testified that law enforcement found marijuana and cocaine at Williams's residence. They also found currency, scales, sandwich bags, priority-mail postal stickers, and drug ledgers.

According to Lieutenant Curtis, the currency was divided into stacks, and on top of each stack were ledgers with names and amounts. Lieutenant Curtis testified that the ledgers corroborated information that he had overheard on Williams's phone calls with Kelly. On cross-examination, Lieutenant Curtis admitted that Williams had been in jail for approximately two months and therefore had not had access to his residence.

¶6. The State played portions of several of Williams's phone calls to Kelly for the jury. During the calls, Williams and Kelly discussed "T-shirts," "presents," and "shoes." Lieutenant Curtis explained that "T-shirts" was code for crack cocaine, and "presents" and "shoes" were codes for marijuana. Kelly assured Williams that he had written everything down and that everything was "copesetic."

¶7. During the calls, Williams and Kelly discussed someone named "Young." Lieutenant Curtis testified that a box found in the trash can suggested that Young lived in California. Then Williams referenced "Mark in the truck." Kelly asked, "Mark in the truck?" Williams clarified, "In the brown truck." Lieutenant Curtis testified he determined that Mark was a UPS driver. Later, Kelly told Williams that everything was "straight" with certain mail. According to Lieutenant Curtis, Williams told Kelly to send Young "750 times ten," which meant $750 per pound for marijuana. Lieutenant Curtis testified that "7,500 Young" was written on one of the ledgers.

¶8. Tommy Jones, Captain of the Narcotics Division of the Madison County Sheriff's Department, testified that he participated in the execution of the search warrant at Williams's house. Captain Jones testified that law enforcement found a safe inside a bedroom closet,

containing what they suspected was marijuana and cocaine, $93,259, and a stolen fully automatic machine gun MP5.[1] Additionally, Captain Jones testified that the ledgers mostly corroborated the phone calls between Williams and Kelly. On cross-examination, Captain Jones admitted that Williams had not had access to his house for approximately two months and that other people had access to the house.

¶9. Archie Nichols, with the Mississippi Forensics Laboratory, testified that the safe at Williams's residence contained 167.66 grams of cocaine, a Schedule II controlled substance, and 5,556.71 grams of marijuana, a Schedule I controlled substance. Additionally, 10.58 grams of cocaine and another .48 gram of cocaine were found in Williams's kitchen.

¶10. Finally, the State called Lenaris Milton to testify at trial. Milton had pleaded guilty to conspiracy to deliver marijuana in this case and was sentenced to serve five years. As part of his plea, he agreed to testify at Williams's trial. According to Milton, he grew up with Williams, and he, Williams, and Kelly were involved in the same drug business. According to Milton, he sold drugs for Williams even while Williams was in jail in January 2018. Milton specifically testified that Williams had called him from jail and directed him to distribute drugs. Milton also testified that they used code words for drugs such as "presents" and "T-shirts." According to Milton, he helped his wife run a clothing store in 2018, but Williams did not have anything to do with it.

¶11. After the State rested its case, the defense moved for a directed verdict, which was denied. Then Williams testified. Williams's defense was that he had been incarcerated since

[1] $32,561 was found in the safe at Kelly's mother's house.

December 4, 2017, and that other people had access to his residence while he was incarcerated. He admitted to calling Kelly from jail; however, he testified that they only discussed Christmas presents for his kids, not drugs. He also testified that when they discussed T-shirts, they were referring to T-shirts at Milton's clothing store that he helped run. Later, Williams testified that he never mentioned presents or T-shirts. According to Williams, he instructed Kelly to manage his appliance business. Williams testified that he received scratch-and-dent appliances from a man named Derek Young at Lowe's in Madison. Then he sold the appliances to individual buyers. Williams testified that when he said "$750," he was referring to refrigerators. According to Williams, he had never been around any drugs and did not know of any drug activity at his house.

¶12. After the defense rested its case, the State called Lieutenant Curtis as a rebuttal witness. Lieutenant Curtis testified that although they seized some appliances from Williams's house, they did not find any ledgers that referred to appliances.

¶13. After the State finally rested, the defense renewed its motion for a directed verdict, which was denied. Williams also requested a peremptory jury instruction, which was refused.

¶14. Ultimately, the jury found Williams guilty. At sentencing, Williams suggested that his trial counsel's assistance had been ineffective; however, the court disagreed. Now Williams appeals, claiming his convictions for possession with intent were not supported by sufficient evidence, and his trial counsel was ineffective for failing to file post-trial motions.

DISCUSSION

I. Whether sufficient evidence supported Williams's convictions for possession with intent.

¶15. Williams claims that his convictions for possession with intent were not supported by sufficient evidence. He does not challenge the "intent to sell, transfer, or distribute" element of his convictions, nor does he challenge his conspiracy convictions.

¶16. When reviewing a challenge to the sufficiency of the evidence, "the relevant question is whether, after viewing the evidence 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." *Reynolds v. State*, 227 So. 3d 428, 436 (¶32) (Miss. Ct. App. 2017) (quoting *Bush v. State*, 895 So. 2d 836, 843 (¶16) (Miss. 2005), *overruled on other grounds by Little v. State*, 233 So. 3d 288, 292 (¶¶19-20) (Miss. 2017)).

¶17. "Possession of a controlled substance may be actual or constructive." *O'Donnell v. State*, 173 So. 3d 907, 917 (¶22) (Miss. Ct. App. 2015) (quoting *Johnson v. State*, 81 So. 3d 1020, 1023 (¶7) (Miss. 2011)). "Constructive possession allows the prosecution to establish possession of contraband when evidence of actual possession is absent." *Adams v. State*, 228 So. 3d 832, 835 (¶8) (Miss. Ct. App. 2017). This Court and our supreme court have held that "[c]onstructive possession is established by evidence showing that the contraband was under the dominion and control of the defendant." *Id*. (quoting *Roberson v. State*, 595 So. 2d 1310, 1319 (Miss. 1992)). "There must be sufficient facts to warrant a finding that the defendant was aware of the presence and character of the particular contraband and was intentionally and consciously in possession of it." *Id*. (quoting *Glidden v. State*, 74 So. 3d 342, 345-46 (¶12) (Miss. 2011)). Because Williams was charged with possession with intent, the State

also had to prove that he intended to sell, transfer, or distribute the controlled substances. However, as stated, Williams does not challenge the "intent to sell, distribute, or transfer" element of his convictions.

¶18. At trial, the State presented evidence that the safe at Williams's residence contained 167.66 grams of cocaine and 5,556.71 grams of marijuana. Additionally, 10.58 grams of cocaine and another .48 gram of cocaine were found in Williams's kitchen. Williams points out that he did not have exclusive control over his house. He argues that Kelly and others had access to his residence while he was in jail. However, the phone calls between Williams and Kelly suggest that Kelly was selling drugs on Williams's behalf. Williams and Kelly used code words to discuss drugs, Kelly wrote down what they discussed, and information on ledgers reflected their conversations. Williams gave instructions to Kelly, and Kelly seemingly reported to Williams. Additionally, Milton testified that he, Williams, and Kelly were in the same drug business. And he further testified that Williams called him while he (Williams) was in jail and directed him to distribute drugs.

¶19. Williams contends that proximity is an essential element of constructive possession and that because he was incarcerated, he could not have possessed the drugs. A similar argument was raised in *Adams*. On appeal, Williams cites to *Curry v. State*, 249 So. 2d 414, 416 (Miss. 1971), where our supreme court observed that "[p]roximity is usually an essential element [of constructive possession] but by itself is not adequate in the absence of other incriminating circumstances." This Court later noted that "[t]he observation that proximity is necessary in 'usual' cases is dicta about the practical reality of proving constructive

possession." *Adams*, 228 So. 3d at 836 (¶11). "Proximity is not literally an element of constructive possession." *Id*.

¶20. We find that there was sufficient evidence to sustain Williams's convictions under the theory of constructive possession. Therefore, this issue is without merit.

II. Whether trial counsel was ineffective for failing to file post-trial motions.

¶21. Williams claims that his trial counsel was ineffective for failing to file a motion for judgment notwithstanding the verdict and a motion for a new trial.

¶22. A criminal defendant has a state and federal constitutional right to the effective assistance of counsel. U.S. Const. amend. VI; U.S. Const. amend. XIV; Miss. Const. art. 3, § 26; *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). To prove ineffective assistance of counsel, the defendant must show (1) counsel's performance was deficient, and (2) the deficiency prejudiced the defense. *Strickland*, 466 U.S. at 687.

¶23. "Ordinarily, claims of ineffective assistance of counsel are not addressed on direct appeal." *Pace v. State*, 242 So. 3d 107, 118 (¶28) (Miss. 2018) (citing *Wilcher v. State*, 863 So. 2d 776, 825 (Miss. 2003)). "Where the record cannot support an ineffective assistance of counsel claim on direct appeal, the appropriate conclusion is to deny relief, preserving the defendant's right to argue the same issue through a petition for post-conviction relief." *Id*. However, "if the defendant is represented by counsel who did not represent him at trial, and the facts supporting the claim are fully apparent from the appellate record, the Court may address the issue." *Id*. (citing M.R.A.P. 22(b)). Because Williams is represented by new counsel and because his ineffective-assistance claim is based on facts fully apparent from the

record, we proceed to review the issue.

¶24. Our supreme court has found that "a defense attorney's failure to file post-trial motions challenging the weight and sufficiency of the evidence constituted deficient performance." *Id*. at (¶30) (citing *Holland v. State*, 656 So. 2d 1192, 1197-98 (Miss. 1995)). Even if the failure of Williams's counsel to file post-trial motions challenging the sufficiency and weight of the evidence constituted deficient performance, Williams has not shown that any prejudice resulted from the failure because as discussed below, there is no reasonable probability that either motion would have been granted.

¶25. Although trial counsel did not file a motion for judgment notwithstanding the verdict challenging the sufficiency of the evidence, counsel preserved the claim for appeal when he requested a directed verdict, renewed the motion for a directed verdict, and requested a peremptory instruction. The court held three times that the State presented sufficient evidence for a jury to find that Williams committed the crimes beyond a reasonable doubt. And after reviewing the record, this Court has determined that sufficient evidence supported the jury's verdicts.[2]

¶26. In addition, although trial counsel did not file a motion for a new trial, Williams does not make any persuasive argument that had trial counsel made the appropriate post-trial motion, there would have been a substantial likelihood of a different outcome. *See Johnson v. State*, 876 So. 2d 387, 391 (¶10) (Miss. Ct. App. 2003). Accordingly, we find that Williams has not shown that trial counsel's failure to file post-trial motions violated his

[2] As discussed, Williams only challenges the sufficiency of the evidence with respect to his convictions for possession with intent.

constitutional right to the effective assistance of counsel.

¶27. **AFFIRMED.**

BARNES, C.J., CARLTON AND WILSON, P.JJ., WESTBROOKS AND LAWRENCE, JJ., CONCUR. McDONALD, J., DISSENTS WITHOUT SEPARATE WRITTEN OPINION. McCARTY, J., DISSENTS WITH SEPARATE WRITTEN OPINION, JOINED BY McDONALD, J.

McCARTY, J., DISSENTING:

¶28. Because he was locked up, the evidence was insufficient to find beyond a reasonable doubt the cocaine and marijuana were in Williams' possession. The lack of proof means the conviction for constructive possession should be reversed and rendered.

¶29. This appeal reminds me of *Smoots v. State*, No. 2018-KA-01611-COA, 2020 WL 3248939 (Miss. Ct. App. June 16, 2020) (petition for writ of certiori filed). Having heard someone was selling crack cocaine, officers obtained a warrant to search a pool hall. *Id*. at *1 (¶3). When the officers entered the pool hall, they found three men sitting around a table—and a running toilet. *Id*. at (¶4). After busting open the sewer line, law enforcement found ten rocks of cocaine. *Id*. Only one of the trio was arrested and later convicted of possession with intent to distribute. *Id*. at *3 (¶14).

¶30. On appeal, we reversed. *Id*. at *5 (¶21). "The evidence permitted only an inference that one of the three men was guilty, and the jury could only guess as to the guilty party." *Id*. "A criminal conviction cannot rest on such substantial guesswork, speculation, and conjecture." *Id*. (internal quotation mark omitted) (quoting *Edwards v. State*, 469 So. 2d 68, 69 (Miss. 1985)). In other words, we should not guess when it comes to guilt or innocence.

¶31. But we are guessing in this case. The required element of "dominion and control"

cannot be established. The drugs were found in Williams' home, which he had not had access to for approximately *two months* due to his incarceration. Williams was arrested on other charges in early December 2017, and the drugs were not found until January 27, 2018. At the time the drugs were found, Williams was over six miles away behind the walls of the Madison County Detention Center. To find that Williams had "possession" of the drugs while he was incarcerated strains the boundaries of that word beyond any manageable definition.

¶32. Further, multiple other people did have access to the house during that time. Just as in *Smoots*, there is evidence to suggest that one of the individuals who had access to the house was guilty of possession with intent to distribute, but the evidence was insufficient to determine with certainty which individual.

¶33. For these reasons, I respectfully dissent.

McDONALD, J., JOINS THIS OPINION.