IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 081577

RICKY C. WILLIAMS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF FOR THE COMMONWEALTH

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STATEMENT OF THE CASE

At a bench trial in the City of Portsmouth on September 20, 2006, Ricky C. Williams was convicted of possession of cocaine with intent to distribute, third or subsequent offense, possession of heroin with intent to distribute, third or subsequent offense, and possession of methadone with intent to distribute, third or subsequent offense. (App. 1-2, 72-73, 80). The

court sentenced him to a total of 15 years' imprisonment but suspended six years of that sentence, leaving Williams with a total active sentence of nine years. (App. 80-82).

Williams' petition for appeal was granted by the Virginia Court of Appeals. That court affirmed Williams' convictions by published opinion on June 24, 2008. Williams v. Commonwealth, 52 Va. App. 194, 662 S.E.2d 627 (2008).

Williams' subsequent petition for appeal to this Court was granted on December 12, 2008. The only issue before this Court is whether the evidence was sufficient to sustain Williams' methadone conviction.

WILLIAMS' ASSIGNMENT OF ERROR

THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S RULING THAT THE DEFENDANT POSSESSED METHADONE WITH THE INTENT TO DISTRIBUTE.

QUESTION PRESENTED

WAS THE EVIDENCE SUFFICIENT TO FIND WILLIAMS GUILTY OF POSSESSION OF METHADONE WITH INTENT TO DISTRIBUTE?

STATEMENT OF FACTS

On August 17, 2005, at about 6:45 p.m., Detectives T. McAndrew and K. Johnakin, of the Portsmouth Police Department, initiated a traffic stop of a black Honda station wagon. (App. 12-14, 23, 41).

Two men were seated in the Honda; the driver, Mr. Clark, and the defendant, Ricky Williams, who was seated in the front passenger seat. (App. 14, 61). As the officers approached the vehicle, Williams tossed three bags over his left shoulder onto the back seat of the Honda. (App. 33-34, 41). Johnakin recognized the items in one of the bags as heroin capsules. (App. 34-35). Detective Johnakin opened Williams' door and removed him from the car. He then put handcuffs on Williams, who attempted to resist arrest. (App. 34-35). Detective McAndrew removed the bags from the back seat. (App. 14-15, 34-35).

One of the bags recovered from the Honda contained 38 heroin capsules, with a total weight of 3.321 grams. The second bag contained powder cocaine, with a total weight of 1.240 grams. The third bag contained 10 methadone tablets. (App. 15-19, 79). Williams was unable to produce a prescription for the methadone. (App. 36). The street value of Williams' drugs was approximately six-hundred dollars. (App. 49). Williams told Detective Johnakin that he was not employed. (App. 37-38).

Detective R. M. Holley testified for the Commonwealth at trial. The parties stipulated that Holley was an expert in the packaging, sale, use and distribution of narcotics in the City of Portsmouth and the trial court accepted him as such. (App. 45-46). Holley testified that, in his opinion,

the heroin, cocaine, and methadone recovered from Williams were inconsistent with personal use. (App. 47-54). Holley based his opinion on the quantity of heroin, the quantity and packaging of methadone, the cost of the drugs, Williams' unemployment, the combination of the three drugs, and Williams' carrying all of them at once on his person. (App. 47-49, 51).

Holley noted that it was unusual for a methadone user to possess ten tablets at a time. Holley also testified a methadone user who received the drug through a program, instead of by prescription, would only receive one tablet at a time. (App. 50). Holley further noted someone with a prescription for methadone would carry the tablets in a prescription bottle, as required by law, and that the methadone tablets here were not in a prescription bottle but in a plastic bag corner. Holley testified this was inconsistent with personal use. (App. 50).

Holley testified, and Williams conceded, that Williams' possession of 38 capsules of heroin, weighing 3.321 grams, was inconsistent with personal use, especially given it would take even a heavy user about seven days to ingest that quantity of heroin. (App. 48). Holley noted it would be ***very unusual*** for a user to have such quantities of heroin, methadone, and cocaine on his person simultaneously. Indeed, he testified he had ***never*** in his experience observed a user to be in possession of quantities of ***any*** three

drugs simultaneously. (App. 49-51, 53). Further, he noted heroin and methadone had substantially the same effect and that it would thus be unusual for a user to possess both. (App. 48, 53).

Holley further testified Williams' lack of a job supported his conclusion that the drugs were not possessed for personal use, noting the cost of the drugs was higher for a user than one purchasing wholesale for re-distribution and that an individual without a job would be unable to pay for such quantities of drugs for personal use. (App. 51). However, Holley also testified that even if Williams did have a job, his opinion would not change, due not only to the substantial quantities of heroin and methadone but the unusual combination of drugs. (App. 51).

Williams testified on own behalf, claiming he had a full-time job as an iron worker and that he made 14 dollars an hour. (App. 60-61, 64-65). Williams admitted he was a convicted felon but could not recall the number of his prior felonies. (App. 62). Williams claimed the officers had not asked him any question regarding his name, address, or date of birth but could not recall if the officers questioned him about his employment. (App. 63-64). Williams claimed Clark was the owner of the vehicle and suggested the officers could not have seen him attempt to dispose of the drugs, claiming the windows were tinted. (App. 61). Williams did not admit

possession of the drugs or claim he was a addict or that any of the drugs were for personal use. (App. 60-65).

ARGUMENT

THE EVIDENCE WAS SUFFICIENT TO FIND WILLIAMS GUILTY OF POSSESSION OF METHADONE WITH INTENT TO DISTRIBUTE.

Standard of Review

When considering the sufficiency of the evidence, an appellate court views the evidence in the light most favorable to the Commonwealth, the prevailing party at trial. Commonwealth v. Hudson, 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003) (citation omitted). On review, an appellate court should not substitute its judgment for that of the trier of fact. Cable v. Commonwealth, 243 Va. 236, 239, 415 S.E.2d 218, 220 (1992).

The credibility of witnesses and the weight accorded their testimony are matters solely within the province of the trial court. Yarbrough v. Commonwealth, 258 Va. 347, 364, 519 S.E.2d 602, 610 (1999) (citations omitted). An appellate court disregards all evidence in conflict with the Commonwealth's and accepts as true all of the Commonwealth's credible evidence. Parks v. Commonwealth, 221 Va. 492, 498, 270 S.E.2d 755, 759 (1980). The judgment of the trial court, sitting without a jury, is entitled to the same weight as a jury verdict and will not be disturbed on appeal

unless plainly wrong or without evidence to support it. Va. Code § 8.01-680; Britt v. Commonwealth, 276 Va. 569, 573, 667 S.E.2d 763, 765 (2008) (citations omitted).

A court considering a challenge to the sufficiency of the evidence does not "ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 318-19 (1979) (citation omitted). Rather, the relevant question is whether "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. at 319.

The Evidence Was Sufficient

On appeal, Williams does not contend he was not in possession of the methadone or the other drugs. Instead, he argues the evidence adduced at trial did not prove he possessed the methadone with the intent to distribute it. This claim is without merit.

Intent to distribute "necessarily must be proved by circumstances." Hunter v. Commonwealth, 213 Va. 569, 570, 193 S.E.2d 779, 780 (1973). Several factors may constitute probative evidence of intent to distribute a controlled substance. McCain v. Commonwealth, 261 Va. 483, 493, 545 S.E.2d 541, 547 (2001).

Such evidence may include the quantity of the drugs seized, the manner in which they are packaged, and the presence of an unusual amount of cash, equipment related to drug distribution, or firearms. McCain, 261 Va. at 493, 545 S.E.2d at 547 (citations omitted). Other relevant factors include the absence of drug paraphernalia or other evidence related to personal drug use by an accused, Colbert v. Commonwealth, 219 Va. 1, 4, 244 S.E.2d 748, 749 (1978), evidence the cost of the quantity of drugs involved exceeded the defendant's financial means, see Walker v. Commonwealth, 42 Va. App. 782, 793-94, 595 S.E.2d 30, 36 (2004), and simultaneous possession of a combination of drugs. See Harper v. Commonwealth, 49 Va. App. 517, 522, 642 S.E.2d 779, 781 (2007).

Possession of a controlled substance in a quantity "greater than the supply ordinarily possessed for personal use" may be sufficient to establish an intent to distribute it. Dukes v. Commonwealth, 227 Va. 119, 122, 313 S.E.2d 382, 383 (1984). Finally, expert opinion testimony may be considered by the fact finder in determining "the significance of the weight and packaging of drugs regarding whether it is for personal use," Shackleford v. Commonwealth, 32 Va. App. 307, 327, 528 S.E.2d 123 (2000), aff'd, 262 Va. 196, 547 S.E.2d 899 (2001), provided such testimony

does not invade the province of the jury on an ultimate issue of fact. Llamera v. Commonwealth, 243 Va. 262, 414 S.E.2d 597 (1992).

Here, Williams had $600 worth of cocaine, heroin, and methadone on his person. As Detective Holley testified, given Williams' unemployment, his possession of hundreds of dollars worth of drugs was clearly inconsistent with personal use. See Walker, 42 Va. App. at 793-94, 595 S.E.2d at 36 (finding evidence sufficient to prove intent to distribute where Commonwealth's expert testified amount of heroin, absence of physical evidence of personal use, and "appellant's unemployment made possession of forty-nine capsules [of heroin], worth approximately $500, inconsistent with personal use.").[1]

Moreover, as Holley opined, the packaging of the methadone and the amount possessed were inconsistent with personal use. (App. at 49-50). Williams possessed ten methadone tablets, which had a street value of

[1] Williams testified at trial – without corroborative evidence - that he was employed full-time, earning $14 per hour. (App. 60, 64). However, Detective Johnakin testified Williams told him he was not employed. (App. 37-38). The trial court was entitled to reject Williams' testimony, see Covil v. Commonwealth, 268 Va. 692, 696, 604 S.E.2d 79, 82 (2004), and the proper standard of review requires this Court to do the same. See Hudson, 265 Va. at 514, 578 S.E.2d at 786. Moreover, even if the court had accepted Williams' testimony in this regard, his earning capacity was still insufficient to afford him the means to possess the drugs for personal use as their street value significantly exceeded his gross weekly income. (App. 49, 64).

approximately $100. (App. 49). This quantity was greater than that even a prescription user of methadone would normally carry and far more than the single tablet a methadone user would be given by a recovery program. (App. 50). The methadone was packaged, just like the cocaine and heroin, in a plastic bag corner, not in a prescription bottle as it should have been if he had been a prescription user. See McCain, 261 Va. at 493, 545 S.E.2d at 547 (individual packaging in plastic bags indicative of intent to distribute).

Additionally, Detective Holley's testimony established that a user would not ordinarily possess methadone and heroin simultaneously, as they had substantially the same effect. Indeed, Holley explained the combination of all three drugs possessed was rare, and that he had never seen a user possess such a combination. See Harper, 49 Va. App. at 522, 642 S.E.2d at 781 (noting significance of "the unique, simultaneous possession of a combination of two disparate drugs.").

Finally, there was no evidence any of the drugs were for Williams' personal use. Williams was unable to produce a prescription for the methadone. Moreover, although he testified at trial, Williams never admitted using any of the drugs or claimed he possessed them for personal use. See McCain, 261 Va. at 493, 545 S.E.2d at 547 (finding significant lack of evidence defendant used cocaine in determining evidence sufficient

to find intent to distribute); Colbert, 219 Va. at 4, 244 S.E.2d at 749 (noting lack of evidence of personal use in finding evidence of intent to distribute sufficient); see also Raffel v. United States, 271 U.S. 494, 497 (1926) (stating a testifying defendant's "failure to deny or explain evidence of incriminating circumstances of which he may have knowledge, may be the basis of adverse inference"). Under all these circumstances, the trial court reasonably determined Williams possessed the drugs with the intent to distribute.

Williams, in support of his claim that that evidence was insufficient, suggests the trial court erred by considering Detective Holley's testimony. Williams notes Holley repeatedly referred to his "experience" and contends "Detective Holley's experience was not evidence in this trial." (Appellant's Br. at 6). However, Williams did not object to Holley's testimony at trial. Thus, the Court of Appeals found this argument was not properly before it. Williams, 52 Va. App. at 201, n.4, 662 S.E.2d at 631, n.4 (citing Rule 5A:18). Williams has not assigned error to that ruling. Because the issue of Holley's experience was neither presented to the trial court, see Rule

5:25, nor raised as an assignment of error in this Court, see Rule 5:17(c), it is not properly before the Court and should not be considered.[2]

Williams next contends the trial court erred in denying his motion to strike because Holley's opinion testimony did not take into account Clark's presence in the car. Williams suggests Clark possessed the drugs in tandem with him and that the amount of drugs, when divided by two, was consistent with personal use. Williams, however, never presented this argument to the trial court. Thus, the Court of Appeals found this argument was not properly before it. Williams, 52 Va. App. at 201, n.4, 662 S.E.2d at 631, n.4 (citing Rule 5A:18). Williams has not assigned error to that ruling. Because this argument was neither presented to the trial court, see Rule 5:25, nor raised as an assignment of error in this Court, see Rule 5:17(c), it is not properly before the Court and should not be considered.

Moreover, this claim is without merit. There is simply no evidence Clark possessed the drugs. See Drew v. Commonwealth, 230 Va. 471,

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[2] Indeed, at trial, Williams not only failed to object to the content of Holley's testimony, he stipulated to his expertise in the packaging, sale, use and distribution of narcotics. (App. 46). Moreover, as this Court has held, expert testimony is admissible where the fact finder "is confronted with ***issues which require scientific or specialized knowledge or experience*** in order to be properly understood." Compton v. Commonwealth, 219 Va. 716, 726, 250 S.E.2d 749, 755-56 (1979) (emphasis added). Thus, the expert's experience is, in fact, relevant evidence.

473, 338 S.E.2d 844, 845 (1986) (to obtain conviction for possession, Commonwealth must show actual or constructive possession; constructive possession established by showing "acts, statements, or conduct of the accused or other facts or circumstances which tend to show [he] was aware of both the presence and character of the substance and that it was subject to his dominion and control."). Indeed, the record is devoid of any evidence Clark even knew the drugs were in the car. That Clark was present in the car with the drugs gives rise to no presumption of possession. See Code § 18.2-250. Rather, the evidence showed Williams was in possession of the drugs, Williams attempted to discard the drugs when confronted by the officers, and Williams resisted when the officer attempted to remove him from the car and to arrest him. Thus, the evidence showed Williams, and Williams alone, possessed the drugs. Because there was no evidence of joint possession, the expert's failure to take joint possession into account in rendering an opinion was irrelevant.

Finally, Williams contends the evidence adduced at trial was insufficient to support his conviction for possession of methadone with intent to distribute because only one of the tablets was tested. The Court of Appeals held, and Williams does not dispute, that random sampling of an unknown substance may support an inference as to the entire substance

possessed, provided the totality of the circumstances supports that inference. Williams, 52 Va. App. at 201, 662 S.E.2d at 631. Indeed, Williams acknowledges that "[a] chemist need not analyze every particle of a substance admitted into evidence to give an opinion as to the whole." (Appellant's Br. at 8 (citing People v. Kline, 41 Ill. App. 3d 261 (1976))).

Instead, Williams challenges the totality of the circumstances to support the inference. He contends the chemist who conducted the tests did not "give an opinion as to the whole." (Appellant's Br. at 8). He further notes Detective Holley did not offer an expert opinion on the matter. (Appellant's Br. at 8). Williams argues in the absence of such testimony no "inference can be drawn as to the composition of the [other nine] tablets." (Appellant's Br. at 8). Thus, he contends, the evidence only proved he

possessed one methadone tablet and that possession of one such tablet is consistent with personal use.[3] This claim is without merit.

First, Williams is factually incorrect – the forensic scientist did provide evidence "as to the whole." The forensic scientist's analysis, presented without objection by certificate in lieu of live testimony, as provided for by Virginia Code § 19.2-187, included the observation that "visual examination [of the suspected methadone tablets] determined that the physical characteristics [were] consistent with a pharmaceutical preparation containing Methadone." (App. 79). The forensic scientist further noted that the pills did not appear to have been altered. The

[3] Accepting, for the sake of argument, Williams' claim that only one methadone tablet was proved, this claim is still without merit. The methadone was not in a prescription bottle, Williams could not produce a prescription for it, and Williams never claimed he used methadone, either as part of a program or illegally. Further, Williams simultaneously possessed methadone, a large quantity of heroin — although the drugs have the same effect — and cocaine. These factors are independent of the quantity of methadone and supported the conclusion that the possession of methadone was inconsistent with personal use. Under these circumstances a reasonable fact finder could have found Williams possessed even a single methadone tablet with intent to distribute. See Colbert, 219 Va. at 4, 244 S.E.2d at 749 (quantity only one factor relevant to intent; even where quantity relatively small, other circumstances may prove intent to distribute). Finally, given the method of packaging and the identical appearance of the pills, the fact finder could infer even Williams could not tell the tablets apart. Thus, the possibility that some of the tablets were not real methadone does nothing to detract from the other factors supporting the conclusion the possession of those tablets was with intent to distribute.

scientist thereafter analyzed one of the identical pills and determined it was, in fact, methadone. (App. 79). Thus, a forensic scientist with knowledge of controlled substances inspected the pills and identified them from their markings as identical to manufactured pharmaceutical methadone. This observation was supported by his test, which proved the tested tablet was exactly what it appeared to be – methadone.

Moreover, it was not necessary for the forensic scientist or Detective Holley to express an opinion that all of the pills were methadone for the trial court, as fact finder, to conclude they were all methadone and that Williams possessed them with intent to distribute.

As the Court of Appeals stated, intent may be proven by circumstantial evidence and such evidence is entitled to the same weight as direct evidence. Williams, 52 Va. App. at 204, 662 S.E.2d at 632 (quoting Muhammad v. Commonwealth, 269 Va. 451, 480, 619 S.E.2d 16, 32 (2005). When faced with circumstantial evidence, it is the job of the fact-finder "to determine what inferences are to be drawn from proved facts, provided the inferences are reasonably related to those facts." Williams, 52 Va. App. at 204, 662 S.E.2d at 632 (quoting Inge v. Commonwealth, 217 Va. 360, 366, 228 S.E.2d 563, 567-68 (1976)). As the Court of Appeals correctly stated, "[a] logical extension of this rule is that when a portion of

an unknown substance is tested and confirmed to be a controlled substance, it is not unreasonable for the fact finder to infer that the entire amount is the same controlled substance if the totality of the circumstances supports that inference. Williams, 52 Va. App. at 204, 662 S.E.2d at 632 (citing United States v. Fitzgerald, 89 F.3d 218, 223 n.5 (5th Cir. 1996) (holding "Random sampling is generally accepted as a method of identifying the entire substance whose quantity has been measured.")); see also Harlan v. State, 120 S.W.3d 339, 343 (Tx. App. 2003) (random sampling of seemingly identical items contained in one container sufficient to prove all items are contraband — fact finder entitled to determine uniformity of such items); State v. Tucker, 837 A.2d 1078, 1079 (N.H. 2003) (random sampling of five out of many packets, all similar in appearance and packaging, sufficient for fact finder to reasonably infer all packets contained heroin); Means v. State, 372 S.E.2d 484, 485-86 (Ga. Ct. App. 1998) (where cocaine found in random sampling of 20 out of 121 bags, all of which looked alike and had been contained in single larger bag, fact finder could reasonably infer all 121 bags contained cocaine); Taylor v. Commonwealth, 984 S.W.2d 482, 485 (Ky. Ct. App. 1998) (same, random sampling of plants that all appeared to be marijuana); State. Givens, 917 S.W.2d 215, 217 (Mo. App. 1996) (same, random sampling of apparent

cocaine base); Ross v. State, 528 So.2d 1237 (Fl. App. 1988) (holding it is a "fair inference" "similar-looking, commingled material is the same as the random positive sample taken therefrom").

Here, as the Court of Appeals found, the evidence supports the reasonable inference that all ten pills were methadone. Williams possessed the ten pills simultaneously and they were packaged together in a plastic bag corner. The certificate of analysis prepared by the forensic scientist proved all ten pills looked alike and all ten pills looked like the pharmaceutical preparation of methadone. Further, the Commonwealth introduced the tablets themselves into evidence, and the trial court closely examined them. In doing so, the trial court noted that the tablets were indistinguishable, bearing identical markings.[4] (App. 73-74).

Based on this evidence, the trial court reasonably inferred all ten tablets contained the same substance, methadone, as the tested tablet. As the Court of Appeals held, these "circumstances support the inference reached by the trial court that all ten tablets contained the same substance

[4] Indeed, because the trial court was able to examine the pills and, based on that examination, the evidence in the certificate of analysis, and the packaging of the pills, make its own determination as to all ten pills, expert opinion testimony "as to the whole" was not only unnecessary, it was inadmissible. See Compton, 219 Va. at 726, 250 S.E.2d at 755 (expert testimony inadmissible where ordinary person able to comprehend and form opinions about matter) (citations omitted).

as the tablet that was tested. There is nothing in the record to indicate that such an inference is plainly wrong and, under the totality of the circumstances" it was clearly reasonable. Williams, 52 Va. App. at 205, 662 S.E.2d at 632-33.

CONCLUSION

For the foregoing reasons the Commonwealth asks this Court to affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

On February 17, 2009, the required copies of this brief were hand-delivered to the Clerk of this Court, and three copies were mailed to Anthony J. Nicolo, Ferrell, Sayer & Nicolo, P.C., 355 Crawford Street, Suite 704, Portsmouth, Virginia 23704, counsel for the appellant.

An electronic copy of this brief has been provided to the Court.

_____
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