In the Missouri Court of Appeals
Eastern District

DIVISION ONE

STATE OF MISSOURI,	)	No. ED98478
	)	
Plaintiff/Respondent,	)	Appeal from the Circuit Court
	)	of the City of St. Louis
v.	)	
	)	
BRUCE PIERCE,	)	Honorable Thomas C. Grady
	)	
Defendant/Appellant.	)	Filed: February 26, 2013

Introduction

Bruce Pierce (Appellant) appeals from the trial court's judgment entered upon a jury verdict convicting him of second-degree trafficking and resisting a felony arrest. We affirm.

Factual and Procedural Background

On May 5, 2010, the State charged Appellant with second-degree trafficking (Court I), alleging he possessed more than two grams of substance containing cocaine base, and resisting arrest for a felony (Count II), alleging Appellant resisted being arrested for second-degree trafficking by fleeing from the law enforcement officer making the arrest.

On November 9, 2010, the cause went to trial but ended when the jury became deadlocked and the court declared a mistrial. On November 30, 2011, the cause was

retried. The evidence adduced at trial, viewed in the light most favorable to the verdicts, is as follows.

On May 5, 2010, at approximately 7:00 p.m., officers Patrick Daut (Daut) and Nate Burkemper (Burkemper) were on patrol as part of an undercover unit. Daut was driving the unmarked vehicle. The officers were wearing plain clothes and vests which said "Police" on the front and back. The officers were parked at a curb in the 2900 block of James "Cool Papa" Bell Avenue when they saw Appellant walking across a vacant field toward a large group of vacant buildings. Appellant sat down on the steps in front of one of the vacant buildings. The officers decided to approach Appellant and conduct a field interview. Daut pulled the car up to Appellant at the curb and called out, "Hey, it's the police. How you doing?" Appellant got up and ran eastward along the sidewalk and then northbound through the gangway. The officers pursued Appellant in their vehicle in an attempt to cut him off. As they neared Appellant in the alley, Burkemper exited the vehicle and initiated a foot pursuit. Daut continued to follow them in the car.

Burkemper was initially 30 to 40 feet away from Appellant but closed the gap to 20 to 25 feet within a few seconds. While running through a vacant lot, Burkemper observed Appellant throw an object on the ground. Burkemper stooped down and grabbed the object, a clear plastic baggie containing an off-white substance which Burkemper believed to be narcotics. Burkemper secured the object in his pocket and continued running after Appellant. Burkemper identified himself as a police officer, advised Appellant that he was under arrest and ordered Appellant to stop. Appellant continued to run, eventually running into the rear yard of 1350 Garrison. Appellant ran up onto the deck, shoved a woman standing in the back doorway out of the way, and ran

inside the house. Burkemper followed Appellant into the residence where he saw Appellant removing his polo, revealing another shirt underneath. Burkemper again ordered Appellant to stop. Appellant complied and Burkemper arrested Appellant and escorted him outside.

Daut, having secured the front of the residence, met Burkemper outside and took custody of Appellant and the baggie. Daut advised Appellant of his Miranda[1] rights which Appellant waived. Appellant stated, "I am on parole. I cannot afford to take this hit. I shouldn't have gone in that lady's house, but I didn't think she would mind."

The following day, lab tests performed on the substance inside the bag revealed the substance was 2.51 grams of cocaine base. The substance was reweighed in November 2010 at 2.20 grams. The substance was tested again before trial in November 2011 and was found to be 2.14 grams of cocaine base. Two criminalists with the St. Louis City Police Department testified that the successive drops in weight can be attributed primarily to moisture loss but also to small losses during sampling and testing.

The jury convicted Appellant on both counts. The court sentenced Appellant, as a prior and persistent drug offender, to concurrent terms of 10 years and 7 years. This appeal follows.

Points Relied On

In his first point on appeal, Appellant argues the trial court erred in denying his pretrial motion to dismiss and in retrying his case four terms after the first trial resulted in a mistrial due to a hung jury, because Article I, Section 19 of the Missouri Constitution limits the circuit court's authority and jurisdiction to retry such cases to within the next term of court.

[1] Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

In his second point on appeal, Appellant argues the trial court erred in denying his motion for judgment of acquittal on the resisting arrest count and in accepting the jury's guilty verdict because the State did not present sufficient evidence upon which a reasonable jury could have found Appellant guilty beyond a reasonable doubt, in that the State failed to prove that he fled for the purpose of preventing the arrest.

In his third point on appeal, Appellant agues the trial court erred in failing to submit his proffered instruction on the lesser-included offense of possession of a controlled substance because he was entitled to the instruction in that the jury could have accepted the lab technicians' testimony that Appellant possessed a substance containing cocaine base while rejecting the inconsistent testimony as to the substance's weight.

Discussion

Point I – Motion to Dismiss

Typically, this Court reviews the trial court's ruling on a motion to dismiss for an abuse of discretion. State v. Ferdinand, 371 S.W.3d 844, 850 (Mo. App. W.D. 2012). However, constitutional interpretation is an issue of law that this Court reviews *de novo.* Farmer v. Kinder, 89 S.W.3d 447, 449 (Mo. banc 2002). Here, the question is whether the trial court drew the proper legal conclusion from the uncontested facts and, therefore, because the decision below was based upon an interpretation of the Missouri Constitution, this Court's review is *de novo*. Missouri Prosecuting Attorneys v. Barton County, 311 S.W.3d 737, 740 (Mo. banc 2010).

"[The] [r]ules applicable to constitutional construction are the same as those applied to statutory construction, except that the former are given a broader construction, due to their more permanent character." Id. at 741. Non-technical words "must be given

their plain or ordinary meaning unless such construction will defeat the manifest intent of the constitutional provision." Id. at 742. Every word is presumed to have meaning. Id.

Article I, Section 19 of the Missouri Constitution provides:

> That no person shall be compelled to testify against himself in a criminal cause, nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury; *but if the jury fail to render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court*; and if judgment be arrested after a verdict of guilty on a defective indictment or information, or if judgment on a verdict of guilty be reversed for error in law, the prisoner may be tried anew on a proper indictment or information, or according to the law.

(Emphasis added.)

No local rule governs the terms of court in the City of St. Louis so the terms are governed by Section 478.205.[2] See 22nd Judicial Circuit, Local Rule 2.2. Section 478.205 provides that, to the extent a term of court is required or specified by law, terms of each circuit court are considered to commence on the second Mondays in February, May, August and November of each year. Applying Section 478.205, the last term of court in the 22nd judicial circuit for 2010 commenced on November 8 and the terms of said court for 2011 would have commenced on February 14, May 9, August 8, and November 14.

Appellant's first trial ended in a mistrial on November 10, 2010. A trial setting was scheduled for January 10, 2011, the same term of court. On January 14, 2011, the case was continued due to attorney conflict until March 7, 2011, the next term or February term. On March 10, 2011, the case was continued due to attorney conflict until April 4, 2011, still in the February term of court. On April 6, 2011, the case was continued by the court's motion until May 23, 2011, now in the May term of court. On

[2] All statutory references are to RSMo. 2006, unless otherwise indicated.

May 24, 2011, the case was continued until July 25, 2011, at the request of the prosecution due to a witness being unavailable. On July 27, 2011, the case was rescheduled due to illness of defense counsel until September 6, 2011, now in the August term of court. On August 24, 2011, the case was continued due to attorney conflict until October 24, 2011. On October 27, 2011, the case was continued due to attorney conflict until November 28, 2011, now in the November term of court.

On November 30, 2011, Appellant's case went to trial. That day, Appellant filed a Motion to Dismiss for Violation of State Constitutional Time Limit requesting the court dismiss the case with prejudice for failing to try Appellant within the same or next term of court as specified in Article I, Section 19 of the Missouri Constitution. The trial court denied the motion.

On appeal, Appellant argues the trial court erred in overruling his motion to dismiss because the court lacked either the jurisdiction or the authority to retry him because he was not retried within the same or the next term of court as provided by Article I, Section 19.

It cannot be said that the trial court lacked the jurisdiction to retry Appellant's case. The trial court had both personal jurisdiction, *i.e.*, power over Appellant's person, and subject matter jurisdiction, *i.e*., the power to hear criminal cases. State v. Fassero, 256 S.W.3d 109, 117 (Mo. banc 2008); St. Louis County v. Berck, 322 S.W.3d 610, 615 (Mo. App. E.D. 2010).

Appellant argues the trial court lacked the authority to proceed and erred in overruling his motion to dismiss based upon the court's failure to abide by the

constitutional time limitation set forth in Section I, Article 19 for retrial following a mistrial. This is an issue of first impression.

Article I, Section 19 of the Missouri Constitution provides in pertinent part that a person shall not twice be put in jeopardy of his life or liberty for the same offense after being acquitted by a jury "but if the jury fail to render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court[.]"

"[T]he constitutional protection to be free from double jeopardy is a personal right or privilege which is waived if not timely and properly asserted at trial or when entering a guilty plea." State v. Elliott, 987 S.W.2d 418, 420-21 (Mo. App. W.D. 1999).

The time restriction, although part of the double jeopardy provision, is analogous to some of the speedy trial provisions. The constitutional right to a speedy trial, found in the Sixth Amendment to the U.S. Constitution and Article I, Section 18(a) of the Missouri Constitution, guarantees a criminal defendant that the State will move fast enough to assure the early and proper disposition of the charges. State v. Newman, 256 S.W.3d 210, 213-14 (Mo. App. W.D. 2008). The speedy trial right is intended to protect an individual's liberty interest, and to minimize the possibility of lengthy pretrial incarceration and the disruption caused by arrest and the presence of unresolved criminal charges. State ex rel. McKee v. Riley, 240 S.W.3d 720, 728 (Mo. banc 2007).

Furthermore, the language of the Article I, Section 19 provision is similar to that found in statutory time limitations for trials, in particular Section 545.890 which provides that an imprisoned defendant who is not brought to trial before the end of the second term of the court shall be entitled to discharge unless the delay shall happen upon the

application of the prisoner or occasioned by the want of time to try the cause. See also Sections 545.900, 545.910 and 545.920.

"The purpose of the statute against continuances while a defendant is in custody is not only to secure a speedy trial but to prevent laches on the part of the state[.]" State v. Barrett, 406 S.W.2d 602, 604 (Mo. 1966). "[T]he right to a discharge if the statute is not observed is not jurisdictional, it is a privilege and may be waived if not invoked at the proper time in an appropriate manner before trial." Id.

In State v. Harper, 473 S.W.2d 419 (Mo. 1971), the Missouri Supreme Court considered whether the failure to bring the defendant to trial within the statutorily prescribed time period required the defendant's discharge. In reviewing the precedent of other states, the court noted, "'It has been well said that the rights given the accused by the constitution and our statutes are shields, not weapons, and being so intended by the legislature, we must give meaning to that intent.'" Harper, 473 S.W.2d at 423, quoting McCandless v. Dist. Ct. of Polk County, 61 N.W.2d 674, 678 (Iowa 1953).

In looking to the intent of the statute, the Harper court found:

> (S)tatutory enactments of this nature may be waived by a defendant, being enacted for the benefit of an accused and implementing his constitutional right to a speedy trial. They, as their language indicates and as has been held, are to prevent unreasonable delays in prosecutions, forestalling the protracted imprisonment or harassment of one accused of crime. Their purpose is not to furnish a technical escape from trial and punishment or to forfeit any rights of the public, when the public's representatives are not at fault, to safeguard that law and order necessary for the preservation of society and made effective through the punishment of criminals for their wrongs.
> …
> It was never intended, in our judgment, to place such an arbitrary duty on the state that a defendant who does not desire a prompt trial can sit idly by without objecting to the delay or requesting a trial and, at the appropriate time, successfully assert a motion for release claiming that his right to a speedy trial had been violated and that he should go "scot free."

Harper, 473 S.W.2d at 424 (internal quotations omitted).

The Harper court held a defendant was not entitled to be released under the statute simply because the required number of terms had elapsed. Id. at 424. The court held a defendant must show that he demanded a trial and that such request was unsuccessful for a reasonable length of time before his right to release was asserted. Id. The court based its ruling on the theory that a defendant's failure to affirmatively seek a speedy trial constitutes a wavier of that right. Id.

Here, Appellant's retrial was initially scheduled for the same term. It was then twice rescheduled to occur during the next term of court. The trial was then rescheduled five additional times until finally commencing in November 2011. Out of the seven continuances, four were attributed to attorney conflict and the remaining for illness of defense counsel, unavailability of a State witness and on the court's motion for failing to reach the cause. Appellant never objected to any of the continuances nor demanded a trial. Instead, Appellant acquiesced to the passage of time and then sought release due to such passage and his previously unasserted privilege.

In light of the precedent holding that a defendant may waive his constitutional protection from double jeopardy and his statutory speedy trial rights, this Court finds the time constraint set forth in Article I, Section 19 for the retrial of a defendant following a hung jury is a right or privilege which the defendant may waive by failing to assert through the timely demand of a trial.

Because Appellant did not affirmatively seek an earlier trial date the trial court did not err in overruling Appellant's motion to dismiss. Appellant's Point I is denied.

Point II – Sufficiency of the Evidence

On review, this Court is limited to determining whether the evidence was sufficient for a reasonable person to find Appellant guilty beyond a reasonable doubt. State v. Beam, 334 S.W.3d 699, 707 (Mo. App. E.D. 2011). We view the evidence, and all reasonable inferences drawn therefrom, in the light most favorable to the verdict and disregard any evidence and inference contrary to the verdict. Id. It is the jury's duty to assess the reliability, credibility, and weight of the witness's testimony. State v. Giles, 949 S.W.2d 163, 166 (Mo. App. W.D. 1997). This court does not reweigh the evidence. State v. Johnson, 316 S.W.3d 491, 495 (Mo. App. W.D. 2010).

The State charged Appellant with resisting a felony arrest, alleging Burkemper, a law enforcement officer, was making an arrest of Appellant for second-degree trafficking, and Appellant knew or reasonably should have known that Burkemper was making an arrest, and, for the purpose of preventing Burkemper from effecting the arrest, resisted the arrest by fleeing from Burkemper.

"'The gravamen of the offense is resisting an arrest, not flight from an officer. Accordingly, the offense of resisting arrest cannot occur unless a law enforcement officer actually contemplates an arrest.'" State v. Christian, 184 S.W.3d 597, 603 (Mo. App. E.D. 2006), quoting State v. Brooks, 158 S.W.3d 841, 850–51 (Mo. App. E.D. 2005). Resistance must occur when the person knows that an officer is making an arrest. Id. "The arrest must be *in progress* when the resistance occurs." Id. (internal quotations omitted). An arrest is said to be in progress once the officer is attempting to restrain or control the defendant. Id.

On appeal, Appellant argues the State failed to prove beyond a reasonable doubt that he fled from Burkemper for the purpose of preventing Burkemper from completing the arrest. Appellant's point is without merit.

The evidence indicates that Burkemper did not initially pursue Appellant with the intent to make an arrest. However, during the pursuit, Burkemper observed Appellant throw an object to the ground. Burkemper retrieved the object and, believing the item to be narcotics, Burkemper continued to give chase. While trailing Appellant by only 20 feet, Burkemper identified himself as a police officer, advised Appellant that he was under arrest and ordered Appellant to stop. Appellant continued to run, eventually seeking refuge in a nearby residence where he was apprehended.

The fact that Appellant was already running when Burkemper attempted to arrest him does not preclude a finding that Appellant's decision to continue running was done with the purpose of preventing Burkemper from completing the arrest. "'During a suspect's flight from a law enforcement officer, the actions of the suspect may constitute a separate crime, giving rise to a reason to arrest the suspect.'" State v. St. George, 215 S.W.3d 341, 346 (Mo. App. S.D. 2007), quoting State v. Chamberlin, 872 S.W.2d 615, 618 (Mo. App. S.D. 1994). Here, Appellant's actions while running, *i.e.*, discarding suspected narcotics, gave rise to a reason for Burkemper to arrest Appellant.

Based on the evidence, a reasonable jury could find that after Appellant dropped the baggie containing cocaine and Burkemper ordered Appellant to stop because he was under arrest, that Appellant knew or reasonably should have known that Burkemper was making an arrest and that Appellant continued to flee from Burkemper for the purpose of preventing Burkemper from effecting the arrest. Appellant's Point II is denied.

Point III – Lesser-Included Instruction

On review of the trial court's refusal to instruct the jury on a lesser-included offense, we review the evidence in the light most favorable to the defendant. State v. Taylor, 373 S.W.3d 513, 524 (Mo. App. E.D. 2012).

The court need not instruct on a lesser-included offense "unless there is a basis for a verdict acquitting the defendant of the offense charged and convicting him of the included offense." Section 556.046.2; Taylor, 373 S.W.3d at 524. "To acquit of the greater offense, there must be 'some evidence that an essential element of the greater offense is lacking and the element that is lacking must be the basis for acquittal of the greater offense and the conviction of the lesser.'" Taylor, 373 S.W.3d at 524, quoting State v. Greer, 348 S.W.3d 149, 154 (Mo. App. E.D. 2011). "[A] lesser[-]included[-] offense instruction is not required where there is strong and substantial proof of the offense charged, and the evidence does not suggest a questionable essential element of the more serious offense charged." Taylor, 373 S.W.3d at 524. The test is whether "a reasonable juror could draw inferences from the evidence presented that an essential element of the greater offense has not been established." Id.

A person commits the crime of second-degree drug trafficking if he possesses or has under his control more than two grams of a mixture or substance containing cocaine base. Section 195.223.3, RSMo. Supp. 2011. At trial, Appellant offered an instruction on the lesser-included offense of possession of a controlled substance, which makes it unlawful for any person to possess or have under his control a controlled substance. Section 195.202.1. The trial court denied Appellant's request.

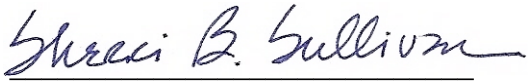
On appeal, Appellant argues the trial court erred in refusing to instruct the jury on the lesser-included offense of possession of a controlled substance on Count I because there was inconsistent evidence as to the weight of the substance, supporting a theory that Appellant possessed a controlled substance but not the requisite two grams required for second-degree trafficking. Appellant contends the jury could have accepted the evidence that he possessed a substance containing cocaine base while disregarding the evidence about the weight of the evidence. We disagree.

The uncontested evidence at trial was that the substance containing cocaine base weighed 2.51 grams the day after Appellant was arrested. Although there were minute decreases in the weight over the course of 18 months, one retesting and two reweighs, the weight never dropped below the two grams required to support the second-degree trafficking conviction.

Based upon the substantial evidence presented that the cocaine base weighed more than two grams, no reasonable juror could infer that the substance weighed less than two grams and that this element of second-degree trafficking was not established. Appellant was not entitled to the lesser-included offense instruction because there was no reasonable basis to conclude that Appellant did not possess more than two grams of cocaine base. Appellant's Point III is denied.

Conclusion

The judgment of the trial court is affirmed.



Sherri B. Sullivan, J.

Clifford H. Ahrens, P.J., and
Glenn A. Norton, J., concur.