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IN THE COURT OF APPEALS OF INDIANA

Nathan Sutton,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 7, 2021

Court of Appeals Case No. 20A-CR-2213

Appeal from the Marion Superior Court

The Honorable David M. Hooper, Judge

Trial Court Cause No. 49G25-1612-F6-47541

Bradford, Chief Judge.

Case Summary

[1] Nathan Sutton was arrested on December 12, 2016, after a police officer observed him walking along active train tracks in Marion County. At the time of his arrest, Sutton, who was carrying a backpack, displayed signs of intoxication. The officer searched Sutton's backpack finding four pills which were later determined to contain the controlled substance Lisdexamfetamine. Sutton was subsequently charged with and found guilty of Level 6 felony possession of a narcotic drug.

[2] On appeal, Sutton contends that the evidence is insufficient to sustain his conviction because the State failed to prove that Lisdexamfetamine qualifies as a narcotic drug. The State concedes, and we agree, that the evidence is insufficient to prove that Sutton possessed a narcotic drug. As such, we reverse the judgment of the trial court and vacate Sutton's conviction for Level 6 felony possession of a narcotic drug.

Facts and Procedural History

[3] On December 12, 2016, Southport Police Officer William Roberson observed Sutton walking on active railroad tracks. Officer Robertson inquired into what Sutton, who was carrying a backpack, was doing. Sutton informed Officer Robertson that he was "just walking around." Tr. Vol. II p. 26. Observing that Sutton had bloodshot, watery eyes, smelled of alcohol, and was somewhat unsteady on his feet, Officer Robertson placed Sutton under arrest for public

intoxication and transported him to the police station. Upon arrival at the police station, Officer Robertson searched Sutton's backpack, finding four pills "in a little bag." Tr. Vol. II p. 30. Initial tests identified the pills as Vyvanse. Further tests confirmed that the pills contained Lisdexamfetamine. Vyvanse is the generic name for Lisdexamfetamine.

[4] The State charged Sutton with Level 6 felony possession of a narcotic drug and Class B misdemeanor public intoxication. On November 24, 2020, the trial court dismissed the public intoxication charge but found Sutton guilty of Level 6 felony possession of a narcotic drug. The trial court sentenced Sutton to 364 days of incarceration, with credit for time served.

Discussion and Decision

[5] Sutton contends that the evidence is insufficient to sustain his conviction for Level 6 felony possession of a narcotic drug.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The

> evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146–47 (Ind. 2007) (citations, emphasis, and quotations omitted). Stated differently, "'[w]e affirm the judgment unless no reasonable factfinder could find the defendant guilty.'" *Mardis v. State*, 72 N.E.3d 936, 938 (Ind. Ct. App. 2017) (quoting *Griffith v. State*, 59 N.E.3d 947, 958 (Ind. 2016)).

[6] Indiana Code section 35-48-4-6(a) provides that a person who, without a valid prescription, "knowingly or intentionally possesses … a narcotic drug (pure or adulterated) classified in schedule I or II," commits Level 6 felony possession of a narcotic drug.

> "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:
>
> (1) Opium, opiates, derivatives of opium and opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation. The term does not include the isoquinoline alkaloids of opium.
> (2) Opium poppy and poppy straw.
> (3) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this section.

Ind. Code § 35-48-1-20. Indiana Code section 35-48-2-6(b) provides a list of the narcotic drugs that qualify as schedule II controlled substances. Importantly,

Lisdexamfetamine is not listed in subsection (b) as a narcotic drug. Instead, it is listed under Indiana Code section 35-48-2-6(d), which separately lists the *stimulants* that qualify as schedule II controlled substances.

[7] Sutton argues, and the State concedes, that Lisdexamfetamine is a stimulant, not a narcotic. As such, they agree that the evidence is insufficient to prove that Sutton knowingly or intentionally possessed a narcotic drug.[1] The State further concedes that "under these circumstances, the State agrees that Sutton's conviction should be vacated." Appellee's Br. p. 8. We agree and therefore reverse the judgment of the trial court and vacate Sutton's conviction for Level 6 felony possession of a narcotic drug.

[8] The judgment of the trial court is reversed and the conviction vacated.

Vaidik, J., and Brown, J., concur.

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[1] The State acknowledges that "Sutton raised this as a defense at trial, thereby alerting the State and the trial court to the problem; however, neither the trial court nor the State moved to amend the charging information at that time or enter judgment of conviction for the lesser offense of possession of a controlled substance, which was the crime actually committed by Sutton." Appellee's Br. pp. 7–8.