STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(Filed: December 6, 2012)

STATE OF RHODE ISLAND	:	
	:	
v.	:	**P2-2011-3491A**
	:	
PRISCILLA ANDRADE	:	
	:	

DECISION

McBURNEY, M., Before this Court, pursuant to Rule 9.1 of the Superior Court Rules of Criminal Procedure[1] and Rhode Island General Laws 1956 § 12-12-1.7,[2] is the Motion of Priscilla Andrade ("Andrade" or "Defendant") to Dismiss the five counts charged in the instant Criminal Information. Specifically, Defendant alleges that Counts One, Two, and Four—charging, respectively, possession of cocaine in violation of Rhode Island General Laws 1956 § 21-28-4.01.1(A)(1), possession of cocaine with intent to deliver in violation of

[1] Rule 9.1 of the Rules of Criminal Procedure for the Superior Court states:

> "A defendant who has been charged by information may, within thirty (30) days after he or she has been served with a copy of the information, or at such later time as the court may permit, move to dismiss on the ground that the information and exhibits appended thereto do not demonstrate the existence of probable cause to believe that the offense charged has been committed or that the defendant committed it. The motion shall be scheduled to be heard within a reasonable time."

[2] Rhode Island General Laws 1956 § 12-12-1.7 states:

> "Within thirty (30) days after a defendant is served with a copy of an information charging him or her with an offense, he or she may move in the superior court to dismiss the information on the ground that the information and exhibits appended to it do not demonstrate the existence of probable cause to believe that the offense charged has been committed or that the defendant committed it. Upon the filing of the motion to dismiss the court shall schedule a hearing to be held within a reasonable time."

§ 21-28-4.01(a)(4)(i), and possession of marijuana with intent to deliver in violation of § 21-28-4.01(a)(4)(i)—should be dismissed because the State did not demonstrate Defendant's actual or constructive possession over the marijuana or cocaine. Additionally, Defendant alleges that Count Three, conspiracy to commit an unlawful act in violation of Rhode Island General Laws 1956 § 11-1-6, should be dismissed because the Information Package does not contain evidence establishing an agreement between Defendant and the alleged co-conspirators. Defendant further argues that Count Five, maintenance of a narcotics nuisance in violation of § 21-28-4.06(2)(a), should be dismissed because the Information Package does not conclusively demonstrate that the premises that are the subject of the charge were owned or occupied by Defendant. For the reasons set forth below, this Court denies Defendant's Motion to Dismiss.

I. Facts and Travel

In February 2011, members of the Johnston Police Department met with a Confidential Informant ("CI," or "Informant"). The CI reported to the police that two individuals—Carmelo Figueroa and Nelson Amaral—were renting a residence at 2 ½ Earl Drive ("2 ½ Earl," or "Earl Residence") in Johnston, Rhode Island. The CI further stated that he had personally witnessed, on multiple occasions, Figueroa and Amaral "cooking" cocaine at the Earl Drive residence and that he had, on different occasions, observed large quantities of marijuana and two handguns in the residence. In addition, the CI informed the police that there was a stolen vehicle from Florida at the residence and that several other motor vehicles with altered V.I.N. numbers were also stored on the property.

In response to the information provided by the Informant, the police began surveillance of the Earl Drive residence. On February 9, 2011, during their surveillance,

police observed a vehicle leave the residence, drive to a nearby pharmacy, purchase baking soda—commonly used in production of crack cocaine—and then return to 2 ½ Earl. In addition, the police observed felons visiting the property on various dates and confirmed that the stolen vehicle from Florida was being stored at the premises.

Based on the information provided by the Informant, corroboration of that information through independent investigation and the officers' own observations from their surveillance, the police sought a search warrant for the Earl Drive residence. Three days later, on February 24, 2011, the police executed the warrant.

While conducting their search of 2 ½ Earl Drive, police detained co-defendants Nelson Amaral, Scott Silva, and Jason Cabral, and a minor female, Jane,[3] Amaral's girlfriend. Defendant was not present at the house at the time of the search.

Throughout the search, police found drugs, instruments used in the production of crack cocaine, and paraphernalia used in the packaging and delivery of illegal narcotics. Crack cocaine and marijuana were plainly visible on the kitchen countertop. In a K-9 search of the residence, additional illegal narcotics and incidents of the delivery of illegal narcotics were found: specifically, individually bagged crack cocaine and $540 cash were found in Amaral's bedroom; cocaine, individually packaged marijuana, and individually packaged crack cocaine were found inside kitchen cabinets; and crack cocaine in a plastic bag was found in a vehicle parked at the residence. Police also seized four cell phones from Amaral's bedroom and three cell phones from a kitchen drawer; the "Big Book of Buds, High Times Magazine" from the kitchen; a scale and narcotics grinder from the kitchen; and a Foodsaver shrink wrap machine from the living room.

[3] To protect the privacy of the juvenile female in this case, the Court has given her a fictitious name.

The following morning, Johnston Police provided constitutional rights forms to the three detained co-defendants. All three read and signed the forms. After reading and signing that form, Cabral provided a formal statement to the police. Cabral stated that he had personally observed both Amaral and Figueroa take illegal narcotics from the Earl residence and sell them on multiple occasions. When asked whether any other individuals lived at the Earl residence, Cabral provided that Priscilla Andrade, Figueroa's girlfriend, also lived there.

Police then spoke to Donald and Ruth Parrillo, the owners of the rental property at 2 ½ Earl. The Parrillos provided police with the lease agreement for the property, on which Andrade is listed as the applicant. Although Figueroa's name is also on the form, along with his birth date and his phone number, Andrade is the primary applicant; she provides her full name, social security number, current address, birth date, and employment information. In addition, the Parrillos made handwritten witness statements and stated to police that they were very familiar with Andrade and Figueroa, who were paying $1200 a month to rent the Earl residence and that they observed them daily.

The Johnston Police requested an arrest warrant for Andrade, and a warrant issued for her arrest. Andrade turned herself in on the active warrant. She was advised of her constitutional rights, processed, held, and arraigned. Subsequently, she filed a Rule 9.1 Motion to Dismiss for lack of probable cause.

II. Standard of Review

It is well settled that "[w]hen addressing a motion to dismiss a criminal information, a [Superior Court] justice is required to examine the information and any attached exhibits to determine whether the State has satisfied its burden to establish probable cause to believe that the offense charged was committed and that the Defendant committed it." State v. Martini,

860 A.2d 689, 691 (R.I. 2004) (quoting State v. Fritz, 801 A.2d 679, 682 (R.I. 2002)); see also State v. Aponte, 649 A.2d 219, 222 (R.I. 1994); State v. Reed, 764 A.2d 144, 146 (R.I. 2001). Further, when ruling on a motion to dismiss, "the trial justice should grant the state 'the benefit of every reasonable inference' in favor of a finding of probable cause." State v. Young, 941 A.2d 124, 128 (R.I. 2008) (quoting State v. Jenison, 442 A.2d 866, 875-76 (R.I. 1982)).

"The probable-cause standard applied to a motion to dismiss is the same as that for an arrest." Aponte, 649 A.2d at 222. "Probable cause to arrest 'consist[s] of those facts and circumstances within the police officer's knowledge at the moment of arrest and of which he had reasonably trustworthy information that would warrant a reasonably prudent person's believing that a crime has been committed and that the prospective arrestee had committed it.'" Id. (quoting State v. Usenia, 599 A.2d 1026, 1029 (R.I. 1991)). Thus, probable cause sufficient to support an information is established when, after taking into account relevant facts and circumstances, a reasonable person would believe that the charged crime occurred and was committed by Defendant. Furthermore, a trial justice's finding of probable cause "may be based in whole or in part upon hearsay evidence or on evidence which may ultimately be ruled to be inadmissible at the trial." Sec. 12-12-1.9; State v. Reed, 764 A.2d 144, 146-47 (R.I. 2001).

III. Analysis

A. Count One: Possession of Cocaine

In this case, Defendant argues that the possession charge should be dismissed because the State has not established that Defendant had constructive possession of the illegal narcotics found in the residence or that she exercised dominion or control over

them. In response, the State contends that it has put forth sufficient evidence that a reasonable person would be justified in believing that Defendant possessed a controlled substance.

To prove a defendant possessed illegal narcotics in violation of the General Laws, the State must establish that the defendant had "intentional control of [the] designated [substance] with knowledge of its nature." State v. Jenison, 442 A.2d 866, 875 (R.I. 1982) (quoting State v. Gilman, 110 R.I. 207, 215, 291 A.2d 425, 430 (1972)) (alterations in original). That control over the substance can be either actual or constructive. Jenison, 442 A.2d at 875. Constructive possession occurs "when an individual exercises dominion and control over such object even though it is not within his [or her] immediate physical possession." Id.; In re Caldarone, 115 R.I. 316, 326, 345 A.2d 871, 876 (1975); State v. Motyka, 111 R.I. 38, 40-41, 298 A.2d 793, 794 (1973). "'Constructive possession may be exclusive or joint,' and the fact that another person may have equal access to the item is not sufficient to negate constructive possession." In re Vannarith D., 731 A.2d 685, 689 (R.I. 1999) (quoting State v. Hernandez, 641 A.2d 62, 70 (R.I. 1994)). Rather, a court will determine, based on the totality of the circumstances, whether the defendant knew of the presence of the narcotic and intended to exercise control over it. Jenison, 442 A.2d at 875.

Evidence that a defendant owns or inhabits the premises in which the illegal narcotics are found, although not conclusive proof, provides a strong inference of constructive possession. In State v. Williams, for example, our Supreme Court concluded that although the defendant in that case was not at home when the police executed the search warrant, the fact that the narcotics were found at his home "clearly support[ed] a

finding that defendant possessed and had control over the marijuana." State v. Williams, 656 A.2d 975, 978 (R.I. 1995). Likewise, in Hernandez, our Supreme Court affirmed a conviction for possession of heroin with intent to deliver by reasoning that based on the totality of circumstances, a reasonable person could infer that the defendant had knowledge of the nature of the substance, had constructive possession of that substance, and had the intent to sell it. Hernandez, 641 A.2d at 62. In that case, the police discovered a large amount of heroin, cash, and drug paraphernalia throughout the premises. Although the defendant lived with several other individuals, the court still concluded that there was sufficient evidence of constructive possession to support the conviction because the defendant lived in the home, owned the home, and because drugs were present throughout the premises, including common areas. Id.

Accordingly, here, the Court will not dismiss Count One for possession of cocaine for lack of probable cause because the facts and circumstances would warrant a reasonably prudent person's believing that the crime—possession of cocaine—has been committed and that Defendant committed it. There is evidence that Defendant rents and inhabits the premises in which the cocaine was found. See Williams, 656 A.2d at 978. The rental agreement for the residence, provided by Donald and Ruth Parrillo, the owners of the property, was made out to Defendant. Furthermore, the Parrillos stated to the police that they were very familiar with Defendant, and that they observed her daily at 2 ½ Earl. Co-defendant Cabral, when making his formal statement to the police, also provided that Defendant lived at 2 ½ Earl, and that her then-boyfriend, Figueroa, also lived at the Earl residence. The majority of the items seized—cash, narcotics, and drug paraphernalia—were found in the common areas of the residence. See Hernandez, 641 A.2d at 62. Taking into

consideration all the facts and circumstances, this Court finds that there is probable cause to support the conclusions that Defendant had constructive possession over the illegal narcotics in her home with knowledge of their nature.

B. Counts Two and Four: Possession of Cocaine and Marijuana with Intent to Deliver

The Defendant further contends that Counts Two and Four, charging her with possession with intent to deliver, should be dismissed because the State has not established that Defendant had constructive possession or that she exercised dominion or control over them. The State argues, in contrast, that it has presented sufficient evidence that a reasonable person would be justified in believing that Defendant possessed a controlled substance with intent to deliver.

Section 21-28-4.01(a)(4)(i) makes it unlawful to possess a controlled substance with the intent to deliver.[4] To prove possession with intent to deliver, "the state must show that a defendant was in possession of drugs, had the requisite control over them, and intended to deliver the drugs to others." State v. Rodriguez, 10 A.3d 431, 434-35 (R.I. 2010) (quoting Williams, 656 A.2d at 978). Intent to deliver can be inferred "solely on the basis of the amount of the drugs found." Id. at 435 (quoting Williams, 656 A.2d at 978). Nonetheless, other paraphernalia, such as instruments typically used in the manufacture or delivery of narcotics, will also provide evidence permitting the inference of an intent to sell. Testimonial evidence of specific instances in which that individual did deliver narcotics will also provide evidence regarding that individual's intent. See State v. Reis, 815 A.2d 57, 62 (R.I. 2003); State v. Bracero, 434 A.2d 286, 290 (R.I. 1981).

[4] Because the element of possession is the same for a charge alleging possession or possession with intent to deliver, and because this Court has already concluded that there is probable cause to support a charge for possession of controlled substances, this Court will not engage in a lengthy analysis of that element in this section.

For example, in Rodriguez, our Supreme Court affirmed the Superior Court's denial of the defendant's motion for acquittal for possession with intent to deliver based primarily on the amount of drugs seized from the defendant and the manner in which those drugs were packaged. Rodriguez, 10 A.3d at 435. In that case, the Court concluded that the State had produced sufficient evidence to support the conviction when the defendant was in possession of more than eight ounces of cocaine, including approximately thirteen small baggies of cocaine, packaged for distribution, and there was evidence that the defendant had attempted to deliver cocaine to at least one individual. Id.; see also State v. Reed, 764 A.2d 144, 146-47 (R.I. 2001) (reversing the granting of motion to dismiss for lack of probable cause in possession with intent to deliver charge when state produced evidence that there was an unusual amount of foot traffic to the defendant's residence, and in executing the warrant to the defendant's apartment, the police seized a number of individually wrapped cocaine packets).

This Court finds that there is probable cause to support Defendant's intent to sell cocaine and marijuana. The search of Defendant's residence produced a seizure of 48.1 grams of cocaine (1.7 oz) and 69.9 grams of marijuana (2.5 oz). See Rodriguez, 10 A.3d at 435. More than half of the cocaine seized was in plain view on the kitchen table. Furthermore, much of the cocaine and marijuana was individually packaged. See State v. Reed, 764 A.2d at 146-47. In addition to the drugs, officers seized material typically used in the packaging and delivery of narcotics—a digital scale, bagging material, a shrink wrapping machine, cellular phones, pots and pans in the vicinity of cocaine residue, and baking soda.

The State also produced evidence that individuals of the household had previously delivered narcotics on multiple occasions. See Reis, 815 A.2d at 62; Bracero, 434 A.2d at 290. In his official statement to the police, co-defendant Cabral provided that he had personally witnessed members of Defendant's household sell drugs a number of times. See Reis, 815 A.2d at 62; Bracero, 434 A.2d at 290. Taking into consideration all the facts and circumstances, this Court finds that there is probable cause to support Defendant's intent to deliver controlled substances.

C. Count Three: Conspiracy

Additionally, Defendant argues that Count Three, charging Defendant with conspiracy to possess with intent to deliver, should be dismissed as the State has not provided evidence sufficient to establish an agreement between Defendant and the alleged co-conspirators. The State responds by contending that it has provided facts from which a reasonably prudent person would be justified in believing that Defendant entered into an agreement with the alleged co-conspirators to possess narcotics with the intent to deliver.

"Conspiracy is defined as a combination of two or more persons to commit an unlawful act or to perform a lawful act for an unlawful purpose." State v. Cipriano, 21 A.3d 408, 422 (R.I. 2011) (quoting State v. Mastracchio, 612 A.2d 698, 706 (R.I. 1992)). Once the agreement is made, the offense is complete, and no other action is required. State v. Brown, 486 A.2d 595, 601 (R.I. 1985); State v. Barton, 427 A.2d 1311, 1312-13 (R.I. 1981). Since the details or terms of that agreement are difficult to prove, a court may infer the goals of the alleged conspirators through proof of the "relations, conduct, circumstances, and actions of the parties." Cipriano, 21 A.3d at 422; Mastracchio, 612

A.2d at 706. To survive a motion to dismiss for lack of probable cause, the State must merely produce sufficient evidence that a reasonably prudent person would be justified in believing that Defendant entered into an agreement with another person to commit an unlawful act.

The evidence in this case is sufficient that a reasonably prudent person would be justified in believing that Defendant entered into an agreement with another person to deliver a controlled substance. The Defendant rents and inhabits the premises in which the narcotics and paraphernalia incident to narcotics delivery were found. She pays rent for the residence and the owners of the rental property stated to police that they are familiar with Defendant and observed her at the property on a daily basis. In addition, the majority of the drugs, packaging material, and other incidents of narcotics delivery were found in the common areas of the residence, a common area to which multiple people had access. Cabral also provided, in his official statement to the police, that he sometimes accompanied other co-defendants while they were delivering drugs. More importantly, however, Cabral observed other co-defendants performing illegal activities together; he stated "they both cook the crack cocaine in the house, and then they take it to Providence and sell it." Taking into consideration all the facts and circumstances, this Court finds that there is probable cause to support a conclusion that Defendant entered into an agreement to deliver illegal narcotics.

D. Count Five: Narcotics Nuisance

Finally, Defendant argues that Count Five, charging the maintenance of a narcotics nuisance, should be dismissed because the State has not established that Defendant controlled the residence or the drugs within it. The State, however, contends that it has provided sufficient evidence that a reasonably prudent person would be

justified in believing that Defendant maintained a narcotics nuisance. Specifically, the State produced evidence that Defendant had ownership or control over the property, that drugs were kept or manufactured on the property, and that Defendant was present at the property on a daily basis.

Section 21-28-4.06 of the Rhode Island General Laws makes it unlawful to maintain—that is, own or control—a place that is used for unlawful sale, use, or keeping of controlled substances. To demonstrate that the maintained place is a narcotics nuisance, courts have required proof of more than a single instance of sale, use, or keeping narcotics at the property. Nonetheless, whether the property qualifies as a "nuisance" is a highly specific factual determination based on all the facts and circumstances.

For example, in State v. Welch, our Supreme Court concluded that the facts and circumstances were sufficient to establish probable cause for the defendant's arrest when the record demonstrated that, at the time of arrest, the officers knew of at least one sale at the premises, knew that defendant was the owner of record of the house, and knew that defendant had sent another individual to receive several individually wrapped bags of marijuana from his closet. 441 A.2d 539, 541 (R.I. 1982). Nevertheless, evidence of a single sale is legally insufficient to sustain the charge of maintaining a narcotics nuisance. State v. Bulhoes, 430 A.2d 1274, 1276 (R.I. 1981).

This Court finds that there is probable cause to support Defendant's maintenance of a narcotics nuisance. As noted above, there is sufficient evidence in the record to support the conclusion that Defendant had control and possession over the property: Cabral, in his statement to the police, provided that Defendant lived at the residence; the

lease agreement listed Defendant as the primary applicant; and the owners of the residence identified Defendant as a tenant, and stated that they observed her daily at the residence. See Welch, 441 A.2d at 541. Furthermore, in his statement, Cabral provided that he had personally witnessed members of Defendant's household sell drugs on multiple occasions and that he had witnessed the keeping of drugs there on multiple occasions. See Bulhoes, 430 A.2d at 1276. The amount of narcotics seized at the property, in addition to the presence of narcotics paraphernalia typically associated with the delivery of narcotics, further supports the conclusion that Defendant's residence was being used to keep or sell controlled substances. Taking into consideration all the facts and circumstances, this Court finds that there is probable cause to support Defendant's intent to deliver controlled substances.

IV. Conclusion

For the reasons set forth above, the Court finds the existence of probable cause to believe that Count One, possession of cocaine in violation of § 21-28-4.01.1(A)(1), Count Two, possession of cocaine with intent to deliver in violation of § 21-28-4.01(a)(4)(i), and Count Four, possession of marijuana with intent to deliver in violation of § 21-28-4.01(a)(4)(i) have been committed and that Defendant committed them. Further, this Court finds that there is probable cause to believe Count Three, conspiracy to commit an unlawful act in violation of § 11-1-6 has been committed, and was committed by Defendant. Finally, there is probable cause to believe that Count Five, knowingly keeping a place used for the unlawful sale, use, or keeping of a controlled substance in violation of § 21-28-4.06(2)(a), was committed and that Defendant committed it. Thus, the Motion to Dismiss is denied on all Counts.