[Cite as *State v. Riley*, 2015-Ohio-94.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	
	)	
PLAINTIFF-APPELLEE,	)	
	)	CASE NO. 13 MA 180
V.	)	
	)	OPINION
TIMOTHY RILEY,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 13CR723
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellee	Paul Gains Prosecutor Ralph M. Rivera Assistant Prosecutor 21 West Boardman St., 6th Floor Youngstown, Ohio 44503-1426 (No Brief Filed)
For Defendant-Appellant	Attorney John A. Ams 134 Westchester Drive Youngstown, Ohio 44515

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: January 2, 2015

[Cite as *State v. Riley*, 2015-Ohio-94.]
DONOFRIO, J.

{¶1} Defendant-appellant Timothy Riley appeals his conviction and sentence entered in the Mahoning County Common Pleas Court to one count of having a weapon while under disability, following a jury trial. Appointed appellate counsel has filed a no-merit brief presenting one potential assignment of error, and asking to withdraw.

{¶2} On July 9, 2013, Youngstown Police Officers responded to a 911 hang up from the residence of 501 1/2 Glenhaven Avenue, Youngstown, Ohio. (Tr. 144.) Officer Russell Davis testified that when he responded, Riley's mother stated that she had made the 911 call. (Tr. 144.) Officer Davis testified that Riley's mother stated that she had seen her son, Freeman, pull a silver-colored handgun out from underneath his sweatshirt, had it at his side, and then he left the house. (Tr. 144-145.) Further, officers testified that Riley's mother told them she wanted her son out of her residence because she had heard he had been robbing people for firearms. (Tr. 181-182.)

{¶3} When Riley's mother, Elane Riley, testified, she acknowledged that she had placed the call to 911. (Tr. 119-120.) She testified that she called 911 because she and Riley had argued about him not helping with bills and she wanted him removed from her home. (Tr. 120, 134.) Two days prior to the incident they had got into a fight where she feared Riley would strike her. (Tr. 120.)

{¶4} Riley's mother gave the officers consent to search her residence. (Tr. 124.) Police encountered Riley and Marquise Lewis coming out of the side door of the residence. The police stopped both men and discovered that Marquise had a warrant out of Campbell, Ohio. (Tr. 184.) Marquise was arrested and turned over to the Campbell police. (Tr. 184.) When police searched Riley, no weapons or drugs were found on his person. (Tr. 171.)

{¶5} Upon conducting a search of what was believed to be Riley's bedroom in the residence, officers found a black cloth holster lying on the floor and a half full box of .22 caliber ammunition in the closet. (Tr. 152.) Officers also found a black electronic scale. (Tr. 187.) Officer Davis searched a crawl space off the bedroom and

found an area where the insulation was pulled back a couple of inches. (Tr. 188-189.) When he pulled the insulation back further, he recovered a loaded Llama handgun. (Tr. 189.) Officer Davis also searched the freezer of the residence, where he recovered a loaded Keltec and loaded .22 revolver. (Tr. 171.) Also within the freezer, Davis located a pill bottle containing four rocks of crack-cocaine. (Tr. 171.)

{¶6} Based on this investigation, officers charged Riley with possession of the firearms and possession of crack-cocaine. Because Riley had previously been convicted of a violent offense, namely robbery, Riley was charged with having a weapon while under a disability.

{¶7} On September 19, 2013, Riley was indicted for three counts of having a weapon while under disability in violation of R.C. 2923.13(A)(2)(B), third-degree felonies, and possession of cocaine in violation of R.C. 2925.11(A)(C)(4)(a), a fifth-degree felony. Riley pleaded not guilty.

{¶8} The case proceeded to a jury trial on November 12, 2013. Of the three counts of having a weapon under disability, the jury found Riley guilty of only one count and not guilty on the other two counts. The possession of cocaine count was dismissed pursuant to Crim.R. 29 (Tr. 249-252.)

{¶9} The trial court conducted the sentencing hearing on November 15, 2013. The state requested the maximum sentence of 36 months in prison for the conviction on one count of having a weapon while under disability. Also, the state requested additional prison time pursuant to R.C. 2929.141 (Commission of offense by person under post-release control or transitional control). Under R.C. 2929.141, if an offender commits a new felony while on post-release control, they can receive a prison term for the violation of post-release control up to a maximum of the greater of twelve months or the period of post-release control for the earlier felony minus any time spent on post-release control, in addition to any prison term for the new felony. Because Riley was on post-release control for a robbery conviction at the time of the offense, the state also requested that the trial court sentence Riley to a term of imprisonment equal to the period of post-control remaining on his robbery conviction

(798 days) and order that term of imprisonment to be served consecutively to the maximum term its was seeking for his current conviction. Finally, defense counsel spoke on behalf of Riley, as did Riley himself. The trial court sentenced appellant to the maximum sentence of 36 months in prison, noting that Riley had just very recently to this case previously served a prison term for an offense, was on post-release control for that offense when he committed the present offense, and that the offense involved a firearm. The court chose not to sentence Riley to any time in prison pursuant to R.C. 2929.141 and stemming from the violation of his post-release control sanctions from his previous conviction for robbery. Thus, Riley's aggregate sentence was 36 months in prison. This appeal followed.

{¶10} Appointed appellate counsel filed a no-merit brief on May 13, 2014. On May 21, 2014, this court issued a judgment entry informing appellant of counsel's no-merit brief and granting appellant 30 days to file his own written brief. Appellant has not filed an appellate brief on his own behalf.

{¶11} In *Toney*, this court recognized an indigent defendant's constitutional right to court-appointed counsel for direct appeal of their conviction. *State v. Toney*, 23 Ohio App.2d 203, 262 N.E.2d 419 (7th Dist.1970), paragraph one of the syllabus. After a conscientious examination of the record, counsel should present any assignments of error which could arguably support the appeal. *Id*., at paragraph two of the syllabus. If instead counsel determines that the defendant's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, then counsel should inform the appellate court and the defendant of that by brief and ask to withdraw as counsel of record. *Id*., at paragraph three and four of the syllabus. The defendant is then given the opportunity to raise, pro se, any assignments of error he chooses. *Id*., at paragraph four of the syllabus. The appellate court is then duty bound to examine the record, counsel's brief, and any pro se arguments, and determine if the appeal is wholly frivolous. *Id*., paragraph five of the syllabus. If after determining that the appeal is wholly frivolous, then the appellate

court should permit counsel to withdraw and affirm the judgment of conviction and sentence. *State v. Toney*, 23 Ohio App.2d 203, 262 N.E.2d 419 (7th Dist.1970).

{¶12} Appellant's appointed appellate counsel has identified one potential issue for appeal: whether there had been ineffective assistance of trial counsel. Because this case involved a jury trial, an independent review of the case reveals other potential issues that could be raised in this appeal. Appointed appellate counsel's potential issue will be addressed first, followed by this court's independent review.

Effectiveness of Trial Counsel

{¶13} The sole potential assignment of error identified by appellant's appointed counsel is whether there had been ineffective assistance of trial counsel. In order to prove ineffective assistance of counsel, an appellant must satisfy a two-prong test. First, the appellant must establish that counsel's performance was deficient, and second, the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph two of the syllabus. Even if counsel's performance is considered deficient, a conviction cannot be reversed absent a determination that appellant was prejudiced. *State v. Dickinson*, 7th Dist. No. 03 CO 52, 2004-Ohio-6373, at ¶ 13, citing *Bradley*, 42 Ohio St.3d at 142, 538 N.E.2d 373. To show that he has been prejudiced by trial counsel's deficient performance, appellant must prove that there is a reasonable probability that but for counsel's serious error, the result of the trial would have been different. *Id.*, citing *State v. Baker*, 7th Dist. No. 03 CO 24, 2003-Ohio-7008, at ¶ 13; *State v. Keith*, 79 Ohio St.3d 514, 534, 684 N.E.2d 47 (1997).

{¶14} A court deciding an ineffective assistance claim does not need to "approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052, 80 L.Ed.2d 674. Further, the appellant must affirmatively

prove the alleged prejudice occurred. *Id*. at 693, 104 S.Ct. 2052, 80 L.Ed.2d 674. Otherwise, any act or omission of counsel would satisfy the test. *Id*.

{¶15} The appellant bears the burden of proof on the issue of counsel's effectiveness, and in Ohio, a licensed attorney is presumed competent. *State v. Carter*, 7th Dist. No. 2000-CO-32, 2001 WL 741571 (June 29, 2001) citing *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999). Furthermore, "strategic or tactical decisions will not form a basis for a claim of ineffective assistance of counsel." *Dickinson* at ¶ 11, citing *State v. Clayton*, 62 Ohio St.2d 45, 48-49, 402 N.E.2d 1189 (1980).

{¶16} In *Dickinson*, this court stated "[e]ffectiveness is, 'not defined in terms of the best available practice, but rather should be viewed in terms of the choices made by counsel.'" *Id*. at ¶ 12, quoting *State v. Wilkins*, 64 Ohio St.2d 382, 390, 415 N.E.2d 303 (1980). This court urged that the reasonableness of the attorney's decisions must be assessed at the time the decisions are made, and not at the time of assessment. *Id*., citing *Wilkins*, 64 Ohio St.2d at 390, 415 N.E.2d 303.

{¶17} In the present case, there is nothing to suggest that trial counsel's performance was deficient. In reviewing the pretrial proceedings, we observe that Riley's trial counsel did not file a motion to suppress the evidence seized during the search of the residence. However, trial counsel's failure to file a motion to suppress does not necessarily constitute ineffective assistance of counsel. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 721 N.E.2d 52 (2000). Rather, the failure to file a motion to suppress may constitute ineffective assistance of counsel when the record demonstrates that the motion would have been granted. *State v. Barnett*, 7th Dist. No. 06-JE-23, 2008-Ohio-1546, ¶ 31.

{¶18} Here, the record does not demonstrate that had counsel filed a motion to suppress evidence obtained pursuant to the warrantless search of the residence, the trial court would have granted it. The search and seizure was proper due to voluntary consent to search given by Riley's mother. Consent is a well-recognized exception to the warrant requirement. *State v. Fasline*, 7th Dist. No. 12 MA 221,

2014-Ohio-1470 ¶ 24, citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041 (1973). A parent who owns or controls the premises in which a child resides has the right to consent to a search thereof even though such search may produce incriminating evidence against the child. *See State v. Reynolds*, 80 Ohio St.3d 670, 687 N.E.2d 1358 (1998).

{¶19} "Whether consent to search was voluntary or was the product of duress or coercion, either express or implied, is a question of fact to be determined from the totality of the circumstances." *Id*., citing *Schneckloth* at 248–249. Thus, this is a determination best left to the trier of fact, and will not be reversed unless it is not supported by competent credible evidence. *Id*., *State v. Dabney*, 7th Dist. No. 02BE31, 2003-Ohio-514, at ¶ 9; *State v. Lett*, 11th Dist. No. 2008-T-0116, 2009-Ohio-2796, ¶ 32 (consent is a question of fact).

{¶20} Here, Riley's mother testified that she voluntarily gave police consent to search her residence at which Riley often resided. (Tr. 124.) Further, Officer Davis testified that Riley's mother requested that officers search her residence to make sure there were no guns inside. (Tr. 148.) As such, had Riley's trial counsel filed a motion to suppress, the trial court would have found that the consent was voluntary and the motion would not have been granted.

{¶21} As highlighted by Riley's appointed appellate counsel, his trial counsel demonstrated effectiveness throughout the remainder of the proceedings. Riley's trial counsel successfully defended him on three of the four felony counts he faced. Further, the record indicates that trial counsel cross-examined the state's witnesses and attacked the credibility of the police officers. Additionally, at the sentencing hearing, counsel spoke on behalf of Riley, emphasized his young age and his difficult upbringing and environment. (Sentencing Tr. 5-6.) Further, the record is devoid of any indication that Riley was not satisfied with his representation. Thus, the record does not reveal any deficiency in trial counsel's performance.

{¶22} Accordingly, appointed appellant counsel's sole potential assignment of error lacks merit.

Sufficiency of the Evidence

{¶23} The remaining potential issues that could possibly be raised on appeal concern sufficiency and weight of the evidence, and sentencing. Since Riley's conviction is the result of a jury trial, we proceed to examine the sufficiency and weight of the evidence. "The test of sufficiency is whether after reviewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt." *State v. Bulin*, 7th Dist. 09 BE 27, 2011-Ohio-3398, ¶ 57 citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). The court does not examine the credibility of the witnesses, nor does it weigh the evidence in this process. *State v. Goff*, 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). A reviewing court should not disturb the decision below unless it finds that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991). "Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. In a review of sufficiency of the evidence, this court must "assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *Thompkins* at 390.

{¶24} Riley was convicted of having a weapon while under disability in violation of R.C. 2923.13(A)(2)(B), which provides in pertinent part:

> (A) Unless relieved from disability as provided in section 2923.14 of the Revised Code, no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:
>
> * * *
>
> (2) The person is under indictment for or has been convicted of any felony offense of violence or has been adjudicated a delinquent child for the commission of an offense that, if committed by an adult, would have been a felony offense of violence

(B) Whoever violates this section is guilty of having weapons while under disability, a felony of the third degree.

{¶25} Riley had a prior felony conviction for robbery for which he served a four-year prison sentence. Thus, the state was required to prove beyond a reasonable doubt that Riley knowingly possessed a firearm. To "have" a firearm within the meaning of R.C. 2923.13, a defendant must actually or constructively possess the weapon. *State v. Simpson*, 7th Dist. No. 01 CO 13, 2002-Ohio-1565, ¶ 52. Actual possession merely requires physical control or ownership of the weapon at some point. *Id*; *State v. Messer*, 107 Ohio App.3d 51, 56, 667 N.E.2d 1022 (9th Dist.1995); *State v. Hardy*, 60 Ohio App.2d 325, 397 N.E.2d 773 (8th Dist.1978), paragraph one of the syllabus.

{¶26} In the present case, Riley's mother testified that she had called 911 that day because she and her son had got into an argument two days before and she wanted him out of her house. (Tr. 120.) Contrary to this statement, both Officer Davis and Officer Moran testified that Riley's mother called and stated that she saw her son with a handgun and that he was on parole. (Tr. 144, 181.) The state presented Officer Davis who testified that he recovered a loaded handgun within the crawlspace. (Tr. 189.) Further, Officer Davis recovered two loaded handguns located inside the freezer. (Tr. 171). Riley's mother testified that her son did not stay at the residence often because they fought a lot. (Tr. 122). Further, she stated that her nephew Marquise stayed in the bedroom of the residence where the contraband was found. However, the state attacked the credibility of Riley's mother by highlighting the fact that she did not show up when she was supposed to testify and requiring the issuance of a warrant for her appearance.

{¶27} Here, the record contains evidence from which the jury could have found that appellant knowingly, either actually or constructively, possessed a firearm. Thus, considering the evidence in a light most favorable to the state, it appears the testimony presented at trial established beyond a reasonable doubt that Riley possessed a firearm while under disability.

Manifest Weight of the Evidence

{¶28} Upon reviewing the transcript and the evidence, a manifest weight of the evidence argument would also fail. A claim that a verdict is against the manifest weight of the evidence requires a reviewing court to review the entire record and weigh the evidence, including witness credibility, and determine whether, "the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A reversal on weight of the evidence is ordered only in exceptional circumstances. *Id*. This is because the trier of fact is in the best position to determine the credibility of the witness and the weight due to the evidence. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967).

{¶29} In this case, the testimony at trial reveals that there were two different versions of what happened after police arrived at the residence. Appellant's mother testified that the reason she called 911 was because she wanted her son out of the house because they fought about money. Both Officer Davis and Officer Moran testified that appellant's mother told them she called 911 because she saw her son leaving her residence with a gun by his side. Further, appellant's mother testified that the firearms found in the house did not belong to her son but rather her nephew Marquise. She went on to state that appellant did not reside there often, he just came and went. In opposition, both Officer Davis and Officer Moran testified that appellant's mother indicated that the bedroom was appellant's.

{¶30} These two versions cannot be reconciled. Clearly someone is not telling the truth. There are no compelling indicators in the text of the transcript that overwhelmingly support appellant's theory, and there is no indication that the jury clearly lost its way.

{¶31} Thus, with two plausible versions, it becomes a credibility question. Credibility of the witnesses is best left to the trier of fact as it is "best able to view the witnesses and observe their demeanor, gestures and voice inflections." *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). An

appellate court will not substitute its judgment for that of the trier of fact if there is competent and credible evidence to support the conviction. *State v. Trembly*, 137 Ohio App.3d 134, 141-142, 738 N.E.2d 93 (8th Dist.2000). Reversal based upon the manifest weight of the evidence should occur "only in the exceptional case in which the evidence weighs heavily against conviction." *Thompkins*, 78 Ohio St.3d at 387, citing *Martin*, 20 Ohio App.3d at 175. As such, this court must respect the deference due to the jury's conclusion.

{¶32} In reviewing this record as a whole, the evidence did not weigh heavily against a conviction, the trial court did not lose its way, nor was there a manifest miscarriage of justice. Therefore, Riley's conviction was not against the manifest weight of the evidence.

Sentencing

{¶33} The last thing to examine in this court's independent review is sentencing. Our review of felony sentences is now a limited, two-fold approach, as outlined in the plurality opinion in *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶ 26. First, we must examine the sentence to determine if it is "clearly and convincingly contrary to law." *Id*. (O'Conner, J., plurality opinion). In examining "all applicable rules and statutes," the sentencing court must consider R.C. 2929.11 and R.C. 2929.12. *Id*. at ¶ 13-14 (O'Conner, J., plurality opinion). If the sentence is clearly and convincingly not contrary to law, the court's discretion in selecting a sentence within the permissible statutory range is subject to review for abuse of discretion. *Id*. at ¶ 17 (O'Conner, J., plurality opinion). Thus, we apply an abuse of discretion standard to determine whether the sentence satisfies R.C. 2929.11 and R.C. 2929.12. *Id*. at ¶ 17 (O'Connor, J., plurality opinion).

{¶34} Here, Riley was convicted of having a weapon while under disability in violation of R.C. 2923.13(A)(2)(B), a third-degree felony. The possible sentences for a third-degree felony are 9, 12, 18, 24, 30, or 36 months. R.C. 2929.14(A)(3)(b). The trial court sentenced Riley to 36 months. Since his sentence fell within that range, there is no error with it. *See State v. Koffel*, 7th Dist. No. 06 CO 36, 2007-Ohio-3177,

¶ 31. While the General Assembly has reenacted the judicial fact-finding requirement for consecutive sentences, it has not revived the requirement for maximum and more than minimum sentences.

{¶35} Furthermore, the trial court stated in its sentencing judgment entry that it "considered the record, oral statements as well as the principles and purposes of sentencing under O.R.C. 2929.11, and has balanced the seriousness and recidivism factors under O.R.C. 2929.12."

{¶36} Thus, Riley's sentence fell within the statutory range and was not clearly and convincingly contrary to law. Nor did the trial court's application of R.C. 2929.11 and R.C. 2929.12 to appellant's sentence constitute an abuse of discretion.

{¶37} In sum, for all of the foregoing reasons, the potential assignment of error identified by Riley's appointed appellate counsel is without merit and our own independent review of the case file and appellate filings reveals that there are no appealable issues. The conviction and sentence are affirmed and counsel's motion to withdraw is granted.

Vukovich, J., concurs.

DeGenaro, P.J., concurs.