[Cite as *State v. Cowan*, 2019-Ohio-2691.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

TREMAINE D. COWAN,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 CO 0010

Criminal Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2014-CR-00513

BEFORE:
Gene Donofrio, Carol Ann Robb, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed

Atty. Robert Herron, Prosecutor, Atty. Tammie Jones, Assistant Prosecutor, Columbiana County Prosecutor's Office, 105 South Market Street, Lisbon, Ohio 44432, for Plaintiff-Appellee and

Atty. Joseph Medici, Chief Counsel, Legal Division, and Atty. Christina Madriguera, Assistant Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, for Defendant-Appellant.

Dated:
June 25, 2019

Donofrio, J.

{¶1} Defendant-appellant, Tremaine Cowan, appeals from a Columbiana County Common Pleas Court judgment convicting him of tampering with evidence, following a jury trial.

{¶2} On December 14, 2014, appellant went with a friend to a party at Richard Dennison's apartment in Salem, Ohio. The party-goers used several different types of drugs at the party.

{¶3} The next day, Dennison complained to Salem Police Officers that there were unwanted people in his apartment. At the time, the Salem Police Department had been investigating Dennison's residence for drug activity. Dennison granted the Columbiana County Drug Task Force consent to search his home. Consequently, a group of officers went to Dennison's apartment.

{¶4} When the officers arrived at Dennison's apartment, they knocked and announced their presence. During this time, Detective John Scheets noticed people moving inside the apartment. When no one answered, the officers attempted to unlock the door with a credit card. The officers then repeatedly banged on the door and announced their presence. This time, someone opened the door.

{¶5} Appellant and one other person were in the apartment. As part of their standard procedure, the officers asked them for identification and ran them through their computer. The computer search revealed that appellant had an outstanding warrant for his arrest. At that point, Sergeant Brent Slider took appellant into custody and transported him to the Salem Police Department.

{¶6} While Sgt. Slider was booking appellant, appellant became ill. Sgt. Slider placed a garbage can in front of appellant. Appellant vomited into the garbage can. Sgt. Slider then noticed a plastic baggie containing a white powder in the garbage can. The

white powder tested positive for cocaine. Appellant was subsequently transported by ambulance to the hospital where he was treated for a drug overdose.

{¶7} A Columbiana County Grand Jury indicted appellant on one count of possession of cocaine, a fifth-degree felony in violation of R.C. 2925.11(A), and one count of tampering with evidence, a third-degree felony in violation of R.C. 2921.12(A)(1).

{¶8} The matter proceeded to a jury trial. The jury found appellant guilty of both counts. The trial court subsequently sentenced appellant to 12 months in prison for possession of cocaine and 30 months for tampering with evidence. The court ordered appellant to serve his sentences consecutive to each other and consecutive to the federal prison term he was already serving. The court also taxed the costs of the proceedings to appellant, but stayed the collection of the costs until appellant is released from incarceration.

{¶9} Appellant filed a timely notice of appeal on April 5, 2018. He now raises three assignments of error.

{¶10} Appellant's first assignment of error states:

> MR. COWAN'S CONVICTION FOR TAMPERING WITH EVIDENCE UNDER R.C. 2921.12(A)(1) IS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

{¶11} Appellant argues the evidence was insufficient to support his conviction for tampering with evidence. He points out that the sole reason for his arrest was his outstanding warrant. Had he not had an outstanding warrant, appellant contends, he would have been free to leave Dennison's apartment. Appellant notes there was no evidence that the police were investigating him for a drug possession offense prior to when he became ill in the booking room. Because he was not under investigation for drug possession when he allegedly swallowed the cocaine, he asserts the evidence was insufficient to convict him of tampering with evidence.

{¶12} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the verdict. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In essence, sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio

St.3d 380, 386, 678 N.E.2d 541 (1997). Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.* In reviewing the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *Smith*, 80 Ohio St.3d at 113.

{¶13} Appellant was convicted of tampering with evidence and possession of cocaine. He does not challenge his possession conviction. Thus, we will only address appellant's tampering with evidence conviction.

{¶14} The jury convicted appellant of tampering with evidence in violation of R.C. 2921.12(A)(1), which provides:

> (A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:
>
> (1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation[.]

{¶15} We must examine the state's evidence to determine whether it presented evidence going to each element of this offense.

{¶16} Det. Scheets was the state's first witness. On the day in question, Det. Scheets was working as a member of the Columbiana County Drug Task Force. Salem officers alerted him that Dennison had made a complaint that there were unwanted people in his residence. (Tr. 203). Det. Scheets was familiar with Dennison's residence due to a pending drug investigation. (Tr. 203). Det. Scheets then obtained Dennison's consent to search his apartment. (Tr. 204).

{¶17} Det. Scheets, accompanied by several other officers, went to Dennison's apartment. (Tr. 207-208). When they arrived, the detective knocked on the door and announced the police presence. (Tr. 208). No one responded. (Tr. 208). But the detective was able to observe people moving inside the apartment through the blinds on the door. (Tr. 208-209). He continued to knock and announce police presence to no

avail. (Tr. 209). Det. Scheets tried to unlock the door with a credit card but was unsuccessful. (Tr. 209). He then beat on the door again announcing, "police." (Tr. 210). Eventually, one of the men inside opened the door. (Tr. 210). Appellant and another man were present inside the apartment. (Tr. 210).

{¶18} Upon entering the apartment, Det. Scheets first saw a table in the living room with drug paraphernalia on it. (Tr. 212, 219). Throughout the apartment he found needles, spoons, "blunts," "tear offs," and a marijuana pipe. (Tr. 219-222). He also located a "tear off" inside the toilet. (Tr. 222). Det. Scheets explained that a "tear off" was a small baggie containing drugs. (Tr. 220). He testified that it was significant that the "tear off" was in the toilet because it indicated that someone was possibly trying to destroy evidence by flushing it down the toilet. (Tr. 222).

{¶19} Det. Scheets asked the two men for identification and ran them through the police computer system. (Tr. 214). He found that appellant had an outstanding warrant for his arrest. (Tr. 214-215). Det. Scheets and Sgt. Slider then placed appellant under arrest and Sgt. Slider transported him to the police station. (Tr. 215-216).

{¶20} Sgt. Slider also testified about the day in question. Sgt. Slider was part of the team of officers sent to Dennison's apartment. He testified that he understood that Dennison had reported there were two uninvited men at his apartment who had supplied him with drugs. (Tr. 309). Sgt. Slider stated that from the time Det. Scheets began to pound on the door and announce the police presence, it took between a minute-and-a-half to two minutes before one of the men opened the door. (Tr. 310).

{¶21} Sgt. Slider testified that once they confirmed that appellant had an outstanding warrant, he transported appellant to the Salem Police Department. (Tr. 320). At the station, Sgt. Slider brought appellant into the booking room. (Tr. 321). While Sgt. Slider was processing appellant, appellant became ill. (Tr. 322-323). Sgt. Slider grabbed a waste basket from underneath his desk and placed it in front of appellant. (Tr. 323). Appellant vomited into the waste basket. (Tr. 323-324). Because appellant was heaving violently, Sgt. Slider called an ambulance for him. (Tr. 324). Sgt. Slider noticed that appellant vomited a white substance in a baggie. (Tr. 324-325). While they were waiting for the ambulance, Sgt. Slider asked appellant if he ingested anything to make him sick. (Tr. 326). Appellant told Sgt. Slider that he had ingested "a large bag" of cocaine. (Tr.

326). Appellant told the sergeant he ingested it when the police arrived at Dennison's apartment. (Tr. 327). Sgt. Slider stated that appellant relayed the same information to the EMTs when they arrived. (Tr. 327-328). Sgt. Slider then accompanied the EMTs who took appellant to the hospital. (Tr. 328).

{¶22} Sgt. Slider testified that the public does not have access to the waste basket that appellant vomited into. (Tr. 323). He further testified that when he gave the waste basket to appellant it was "essentially empty," containing only one or two pieces of paper. (Tr. 323).

{¶23} Whitney Voss is a forensic scientist at the Bureau of Criminal Identification and Investigation. She tests evidence for the presence of drugs. Voss tested the white substance in the baggie that was retrieved from the waste basket. (Tr. 288-289). Her test revealed that the substance contained cocaine. (Tr. 292).

{¶24} Det. Scheets later went to check on appellant at the hospital. He asked appellant, "Was it only cocaine?" that he swallowed and appellant nodded his head in the affirmative. (Tr. 236).

{¶25} This evidence, when viewed in the light most favorable to the prosecution, was sufficient to convict appellant of tampering with evidence.

{¶26} Appellant claims that at the time he allegedly swallowed the cocaine, he was not under investigation for a drug offense. He urges this court to apply the Ohio Supreme Court's decision in *State v. Barry*, 145 Ohio St.3d 354, 49 N.E.2d 1248, 2015-Ohio-5449, to find the evidence here was insufficient to support his conviction.

{¶27} In *Barry*, Barry travelled to Middletown, Ohio where her friends convinced her to conceal a package of heroin in her vagina. She did so. She and the others then drove to Scioto County where they were stopped by police for a defective muffler and erratic driving. The officer who approached the car smelled marijuana and an investigation ensued. Barry eventually admitted she had concealed heroin inside her body. Barry was subsequently charged with and convicted of tampering with evidence in addition to other crimes.

{¶28} The Fourth District Court of Appeals affirmed Barry's conviction but certified its decision to the Ohio Supreme Court after finding it to be in conflict with a Second District case. The Court was charged with determining "whether knowledge that

an official proceeding or investigation is pending or likely to be instituted can be imputed to one who commits a crime, regardless of whether that crime is likely to be reported to law enforcement." *Id*. at ¶ 17.

{¶29} The Court found that in order to convict Barry of tampering with evidence, the state had to prove that at the time she concealed the heroin, Barry knew that an investigation into her drug trafficking and possession was likely to be instituted. *Id*. at ¶ 22. The Court went on to find:

> [T]here is no evidence that at the time she concealed the heroin in her body in Middletown, Ohio, Barry knew or could have known that a state trooper would stop her car in Scioto County and begin an investigation of her for drug trafficking and drug possession. Thus, the trial court erred in instructing the jury that by committing an unmistakable crime, Barry had constructive knowledge of an impending investigation of that crime, and her tampering conviction is not supported by sufficient evidence.

Id. at ¶ 3.

{¶30} In the case at bar, however, appellant overlooks several key pieces of evidence that distinguish this case from *Barry*.

{¶31} First, appellant had been at the apartment participating in an all-night drug party. And drug paraphernalia was in plain view in the apartment.

{¶32} Second, when Det. Scheets first knocked on the apartment door and announced that the police were there, instead of answering the door appellant and the other man moved around inside the apartment for one-and-a-half to two minutes. And a "tear off" baggie of drugs was found in the toilet. This evidence suggests that the two were concealing drugs or other evidence.

{¶33} Third, appellant told Sgt. Slider he ingested the baggie of cocaine when the police arrived at the apartment. Thus, it was not until he knew the police were outside the apartment door that appellant made the decision to swallow the baggie of cocaine.

{¶34} Construing this evidence in the light most favorable to the prosecution reasonably leads to the conclusion that when appellant heard the police knocking at the door, he knew that a drug investigation was about to be instituted. He was in the

apartment after attending a drug party there. Drug paraphernalia was strewn about. And the police were knocking on the door. Upon realizing that a drug investigation was likely to commence, appellant swallowed the baggie of cocaine in order to conceal it from police. Appellant admitted to Sgt. Slider that he swallowed the baggie of cocaine when he heard the police outside of the apartment. This evidence, taken as a whole, demonstrated that appellant knew an official investigation was likely to be instituted and he concealed the baggie of cocaine in order to impair its availability as evidence in that investigation. Thus, the state presented sufficient evidence to support appellant's tampering with evidence conviction.

{¶35} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶36} Appellant's second assignment of error states:

> MR. COWAN'S CONVICTION FOR TAMPERING WITH EVIDENCE UNDER R.C. 2921.12(A)(1) IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶37} Here appellant asserts his conviction was against the manifest weight of the evidence. He re-asserts his argument from his first assignment of error that because there was no evidence that he was under investigation for drug possession at the time he allegedly swallowed the cocaine, he cannot be convicted of tampering with evidence.

{¶38} In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine whether, in resolving conflicts in the evidence, 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. *Thompkins*, 78 Ohio St.3d at 387. "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other.'" *Id*. (Emphasis sic.) In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may consider and weigh all of the evidence produced at trial. *Id.* at 390.

{¶39} Yet granting a new trial is only appropriate in extraordinary cases where the evidence weighs heavily against the conviction. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). This is because determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of the facts who sits in the best position to judge the weight of the evidence and the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *State v. Rouse*, 7th Dist. Belmont No. 04-BE-53, 2005-Ohio-6328, ¶ 49, citing *State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Thus, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. Mahoning No. 99-CA-149, 2002-Ohio-1152.

{¶40} Reversing a conviction based on weight of the evidence after a jury trial is so extreme that it requires the unanimous vote of all three appellate judges rather than a mere majority vote. *Thompkins*, 78 Ohio St.3d at 389, citing Section 3(B)(3), Article IV of the Ohio Constitution (noting that the power of the court of appeals is limited in order to preserve the jury's role with respect to issues surrounding the credibility of witnesses).

{¶41} In addition to the evidence set out above, in reviewing a manifest weight challenge we must also consider the evidence put forth by the defense.

{¶42} Appellant testified in his own defense. Appellant stated that during the evening of December 14, 2014, two women drove him and his friend to a party at Dennison's apartment. (Tr. 345-346). Appellant stated that he had never been to Dennison's apartment before that night. (Tr. 346). Appellant stated that the party goers were using drugs including heroin, benzokonopin, and marijuana. (Tr. 346). He stated the party went on until they all passed out. (Tr. 347). Appellant stated he passed out on a mattress on the living room floor. (Tr. 347-348). He stated he did not wake up the next day until the police were inside the apartment. (Tr. 348).

{¶43} Appellant stated that the police arrested him because he had an outstanding warrant. (Tr. 349). He stated that he got sick at the police department. (Tr. 349).

{¶44} Appellant denied possessing any cocaine on the day in question. (Tr. 350). He also denied destroying any evidence. (Tr. 350).

{¶45} On cross examination, appellant admitted to being in Dennison's bathroom to take some pills but stated that he was only in the bathroom before he went to sleep. (Tr. 352). Appellant denied swallowing a baggie of cocaine. (Tr. 353). He also claimed he never told police officers that he swallowed cocaine. (Tr. 353-354).

{¶46} Considering appellant's testimony along with the rest of the evidence set out above does not suggest that the jury clearly lost its way in finding appellant guilty of tampering with evidence. As set out in appellant's first assignment of error, the evidence indicated that appellant attended a drug party, passed out at the party, and awoke to police knocking at the door. When he realized the police were about to enter the apartment, in which drugs were present and drug paraphernalia was in plain view, appellant swallowed a baggy of cocaine in order to conceal it from the police.

{¶47} Although appellant testified that he did not swallow the cocaine and did not try to conceal any cocaine, appellant's credibility was a matter for the jury to determine. The jurors were in the best position to observe appellant's gestures, voice inflections, and demeanor. *DeHass*, 10 Ohio St.2d 230. The jury clearly found appellant's testimony to be not credible. Thus, appellant's conviction is not against the manifest weight of the evidence.

{¶48} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶49} Appellant's third assignment of error states:

> MR. COWAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN TRIAL COUNSEL FAILED TO FILE A MOTION TO WAIVE COURT COSTS AT SENTENCING.

{¶50} In his final assignment of error, appellant claims his trial counsel was ineffective. He asserts his counsel should have, and failed to, file a motion to waive his court costs. Because he was previously found to be indigent, appellant claims his counsel was ineffective for failing to file a motion to waive his court costs.

{¶51} To prove an allegation of ineffective assistance of counsel, the appellant must satisfy a two-prong test. First, appellant must establish that counsel's performance has fallen below an objective standard of reasonable representation. *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. Second, appellant must demonstrate that he was prejudiced by counsel's performance. *Id.* To show that he has been prejudiced by counsel's deficient performance, appellant must prove that, but for counsel's errors, the result of the trial would have been different. *Bradley*, at paragraph three of the syllabus.

{¶52} Appellant bears the burden of proof on the issue of counsel's ineffectiveness. *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999). In Ohio, a licensed attorney is presumed competent. *Id.*

{¶53} Pursuant to R.C. 2947.23(A)(1)(a), in all criminal cases, the court shall include court costs in the sentence and render a judgment against the defendant for such costs. The court retains jurisdiction to waive, suspend, or modify the payment of the court costs at the time of sentencing *or at any time thereafter*. (Emphasis added); R.C. 2947.23(C).

{¶54} Thus, trial courts are required to impose court costs on criminal defendants. But the court retains continuing jurisdiction to waive those costs even after sentencing.

{¶55} In this case, the trial court ordered appellant to pay court costs. But it stayed the collection of the court costs until appellant is released from incarceration. Appellant is indigent and was represented by court-appointed counsel. Appellant's counsel did not file a motion to waive those costs.

{¶56} At least two other districts have addressed this issue.

{¶57} In *State v. Springer*, 8th Dist. Cuyahoga No. 104649, 2017-Ohio-8861, the appellant argued in part that his attorney was ineffective for failing to move for the waiver of court costs. The Eighth District noted "that 'it is nearly impossible to establish prejudice as a result of counsel's failure to move for a waiver of costs at sentencing' because under R.C. 2947.23(C), as amended in 2013, trial courts now retain jurisdiction to waive, suspend or modify the payment of court costs at any time." *Id*. at ¶ 45, citing *State v. Mihalis*, 8th Dist. Cuyahoga No. 104308, 2016-Ohio-8056, ¶ 33; *State v. Brown*, 8th Dist.

Cuyahoga No. 103427, 2016-Ohio-1546, ¶ 15. But the court stated that there was one exception to that rule. It found that in a case where the trial court had previously found the defendant to be indigent, it was reasonably likely that the court would have waived the costs had counsel filed a motion to waive. *Id*. at ¶ 46, citing *State v. Gibson*, 8th Dist. No. 104363, 2017-Ohio-102. The Eighth District found that under these circumstances, counsel's failure to move for waiver of costs is deficient and prejudices the defendant. *Id*. Consequently, it vacated the imposition of court costs and remanded the matter for a hearing regarding the imposition of costs. *Id*. at ¶ 52.

{¶58} In *State v. Davis*, 5th Dist. Lickins No. 17-CA-55, 2017-Ohio-9445, however, the Fifth District declined to adopt the Eighth District's holding. Instead, the Fifth District reasoned that *Davis* had relied on an older case that predated the amendment of R.C. 2947.23. *Id.* at ¶ 31. It noted that effective March 22, 2013, the legislature amended R.C. 2947.23 to add the following language in a new subsection (C): "The court retains jurisdiction to waive, suspend, or modify the payment of the costs of prosecution, including any costs under R.C. 2947.231, at the time of sentencing or at any time thereafter." *Id*. Therefore, the court concluded:

> Consequently, Appellant is not prejudiced by trial counsel's failure to request waiver of costs at sentencing because he is not foreclosed from filing a request at a later time. Therefore, we find the basis for a finding of ineffective assistance of counsel for failure to request that waiver no longer exists. For that reason, we are unwilling to adopt the rationale of the court in *Springer*, and we find that the failure to request a waiver of costs at sentencing is not ineffective assistance of counsel.

Id.

{¶59} In this case, because the trial court has not yet required appellant to pay the court costs, appellant has not suffered any prejudice as is required to succeed on an ineffective assistance of counsel claim. And because R.C. 2947.23(C) permits the trial court to "waive, suspend, or modify the payment of the court costs" even after sentencing, appellant can still file a motion to waive those costs. Thus, appellant's ineffective assistance of counsel claim fails.

{¶60} Accordingly, appellant's third assignment of error is without merit and is overruled.

{¶61} For the reasons stated above, the trial court's judgment is hereby affirmed.

Robb, J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.