[Cite as *State v. Saffell*, 2020-Ohio-7022.]

# IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

JAMES J. SAFFELL,

Defendant-Appellant.

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**OPINION AND JUDGMENT ENTRY**
**Case No. 19 JE 0021**

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Criminal Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 18-CR-00169

**BEFORE:**
Cheryl L. Waite, Carol Ann Robb, David A. D'Apolito, Judges.

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**JUDGMENT:**
Affirmed.

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*Atty. Jane M. Hanlin,* Jefferson County Prosecutor and *Atty. Michael J. Calabria,* Assistant Prosecuting Attorney, Jefferson County Justice Center, 16001 State Route 7, Steubenville, Ohio 43952, for Plaintiff-Appellee.

*Atty. Adam M. Martello*, P.O. Box 1484, Steubenville, Ohio 43952, for Defendant-Appellant.

Dated: December 31, 2020

**WAITE, P.J.**

**{¶1}** Appellant James J. Saffell appeals from a judgment of the Jefferson County Court of Common Pleas sentencing him to prison after a jury convicted him on one count of trafficking in drugs, one count of possession of drugs, and one count of having weapons while under disability. For the following reasons, we affirm the judgment of the trial court.

Factual and Procedural History

**{¶2}** On September 19, 2018, Michael Hayman ("Hayman") was arrested by the Ohio State Highway Patrol ("OSHP") in Jefferson County and charged with driving under a suspended license and possession of drug paraphernalia. At the jail, Hayman informed patrolmen that he could make a buy of methamphetamine from Appellant. The OSHP contacted the Jefferson County Drug Task Force regarding the issue.

**{¶3}** Detective Thomas Ellis ("Ellis") of the task force met with Hayman at the jail and a buy was arranged for that day. Hayman was transported to the drug task force headquarters where he was searched and given $350.00 in prerecorded money, as well as an audio/video recording device to record the transaction. Hayman was dropped off a short distance from Appellant's residence, which was described as a garage apartment. The video recorded by Hayman apparently shows him approaching the residence, gaining entry and telling Appellant he wants to buy a "ball," which is one-eighth of an ounce of methamphetamine. The video records Appellant working behind a desk and then approaching Hayman. The two exchange money. Appellant returns to the desk and walks back to Hayman and gives Hayman a baggie. On the baggie is a preprinted label,

"Pill Pouch, Day, A.M. P.M." (9/19/19 Tr., p. 123.) When Hayman walked away from the residence he was picked up nearby by Ellis. Hayman gave Ellis the baggie and was again searched.

**{¶4}** The contents of the baggie field tested positive for methamphetamine. Using this information, a search warrant was obtained and executed the same day and resulted in seizure of numerous items associated with drug trafficking. Several digital scales were found at various locations in the apartment, including at the desk where Appellant was seen working. There were numerous baggies recovered from the desk where Appellant was seen in the video, with the same "Pill Pouch" labeling as the baggie given to Hayman. (9/19/19 Tr., p. 133.) Approximately $1700 was recovered from Appellant's wallet, including the $350.00 in prerecorded money. (9/19/19 Tr., p. 139.) A rifle was recovered from behind a speaker in the residence. (9/19/19 Tr., p. 141.) Ellis testified that a drug pipe containing a yellow liquid was found behind a couch. Appellant told the officers that the pipe contained "Mountain Dew." (9/19/19 Tr., p. 123.) Appellant also told the officers that the rifle they found was not his, but belonged to a neighbor. (9/19/19 Tr., p. 141.) Ellis testified that the rifle "was located behind a large speaker which made it hard for the plain eye to see it. So, when we looked behind the speaker that's when it was located." (9/19/19 Tr., p. 141.) Appellant also told officers they "hit him too early" because his drug supplier from Akron had not yet arrived. (9/19/19 Tr., p. 223.)

**{¶5}** The contents of the baggie and the liquid from the drug pipe were sent to BCI for testing and tested positive for methamphetamine. (9/19/19 Tr., p. 138.) The rifle was tested and found to be operable. (9/19/19 Tr., p. 141.)

**{¶6}** As a result of the search of the house, Appellant was indicted on one count of trafficking in drugs in violation of R.C. 2925.03(A)(1) and (C)(2)(a), a fifth-degree felony; one count of possession of drugs in violation of R.C. 2925.11(A) and (C)(1)(c), a second-degree felony; and one count of having weapons under disability in violation of R.C. 2923.13(A)(2), a third-degree felony.

**{¶7}** A jury trial was held on September 19, 2019. Prior to trial, a hearing was held regarding proposed testimony as to the level of methamphetamine found in the yellow liquid in the drug pipe. The state argued that it was merely required to prove, at trial, that the liquid did contain methamphetamine. Objecting to introduction of this testimony, defense counsel argued that the state was required to prove exactly how much methamphetamine was contained in the drug pipe liquid in order for any sentence enhancement to be valid. The trial court concluded that the actual amount of methamphetamine in the pipe liquid was irrelevant, because the state's burden was only to prove that the liquid did contain methamphetamine, regardless of the amount. Following trial, Appellant was found guilty on all charges. On September 20, 2019, Appellant was sentenced to 12 months of incarceration on count one, a mandatory two-year sentence on count two; and 24 months on count three. The sentences for all counts were ordered to run concurrently, for a total stated prison term of two years.

**{¶8}** Appellant filed this timely appeal.

ASSIGNMENT OF ERROR NO. 1

APPELLANT'S CONVICTION FOR HAVING A WEAPON UNDER DISABILITY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 2

APPELLANT'S CONVICTION FOR POSSESSION OF METHAMPHETAMINE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 6

APPELLANT'S CONVICTION FOR TRAFFICKING IN METHAMPHETAMINE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

**{¶9}** In his first, second and sixth assignments of error Appellant contends that his convictions on all three charges were against the manifest weight of the evidence. However, the arguments he raises under the first and second assignments of error actually contain an assertion that his convictions for having a weapon while under a disability and possession of methamphetamine were not supported by sufficient evidence.

**{¶10}** Sufficiency of the evidence is a question of law relating to the legal adequacy of the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). This standard is used to determine whether the case may go to the jury or whether the evidence is sufficient, as a matter of law, to support the jury verdict. *State v. Smith,* 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In determining whether a judgment is supported by sufficient evidence, our 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 were proven beyond a reasonable doubt. *State v. Treesh,* 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001).

**{¶11}** Regarding the charge of having a weapon under a disability, Appellant argues the state did not present evidence that Appellant was aware the rifle was present in his residence, and so, failed to prove that he "knowingly" possessed it as required under the statute.

**{¶12}** "Possession" is defined by statute as "having control over a thing or substance." R.C. 2925.01(K). Possession "may not be inferred solely from the mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." R.C. 2925.01(K). However, possession can be actual or constructive. *State v. Cope,* 7th Dist. Columbiana No. 17 CO 0005, 2018-Ohio-2479, ¶ 43. "Constructive possession" means having immediate access to the item. In order to establish constructive possession, "the state must prove that the defendant was conscious of the object, and able to exercise dominion and control over it even though that object may not be within his immediate physical possession." *State v. St. John,* 7th Dist. Belmont No. 09 BE 13, 2009-Ohio-6248, ¶ 19, citing *State v. Hankerson,* 70 Ohio St.2d 87, 90-91, 434 N.E.2d 1362 (1982). Further, ownership does not need to be proven and circumstantial evidence can be utilized to establish possession. *State v. Sykes,* 7th Dist. Mahoning No. 16 MA 0162, 2018-Ohio-983, ¶ 17.

Weapon Under A Disability

**{¶13}** R.C. 2923.13(A)(2), having weapons while under a disability, provides in pertinent part:

> (A) Unless relieved from disability under operation of law or legal process, 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.

**{¶14}** Conviction on this charge requires proof of either actual or constructive possession. *State v. Hardy,* 60 Ohio App.2d 325, 327, 397 N.E.2d 773 (8th Dist.1978). The weapon recovered in this matter, a rifle, was found in the one-room apartment, behind a speaker. There was no evidence anyone other than Appellant lived in the apartment. Appellant claimed the rifle belonged to a neighbor and Appellant was keeping it for him.

**{¶15}** Appellant was clearly conscious of the rifle and able to exercise control over it. The evidence when viewed in the light most favorable to the prosecution could lead a rational trier of fact to find Appellant was in possession of the rifle. Appellant knew the rifle was present in his apartment, and although it was not necessarily in plain view, it was located in an area where it was readily accessible to Appellant. *State v. English,* 1st Dist. Hamilton No. C-080872, 2010-Ohio-1759, ¶ 33. Sufficient evidence exists to support this conviction.

Possession of Drugs

**{¶16}** Appellant was convicted of possession of drugs in violation of R.C. 2925.11(A) and (C)(1)(c), with the second-degree felony enhancement. The statutes read, in pertinent part:

> (A) No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog.
>
> * * *
>
> (C) Whoever violates division (A) of this section is guilty of one of the following:
>
> (1) If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II * * * whoever violates division (A) of this section is guilty of aggravated possession of drugs. The penalty for the offense shall be determined as follows:
>
> * * *
>
> (c) If the amount of the drug involved equals or exceeds five times the bulk amount but is less than fifty times the bulk amount, aggravated possession of drugs is a felony of the second degree, and the court shall impose as a mandatory prison term a second degree felony mandatory prison term.

R.C. 2925.11(A) and (C)(1)(c).

**{¶17}** Again, constructive possession has been found where the accused is aware of the presence of the object. *State v. Hankerson,* 70 Ohio St.2d 87, 91, 434 N.E.2d 1362

(1982). Appellant relies on *U.S. v. Caseer,* 399 F.3d 828 (6th Cir.2004) in the instant matter. In *Caseer,* the defendant, a Somalian native, was charged with possession of a controlled substance, khat, an East African/Arabian Peninsular shrub from which the Schedule I controlled substance, cathinone, is derived. The *Caseer* court concluded that the government had failed to present sufficient evidence that *Caseer* knew that the khat plant contained cathinone. *Id.* at 844. Appellant contends that, like *Caseer*, he was unaware that the drug pipe liquid contained anything but Mountain Dew and that the record is devoid of any evidence that Appellant knew there was methamphetamine in the pipe.

**{¶18}** Appellant also argues that the Ohio Supreme Court's decision in *State v. Gonzalez,* 150 Ohio St.3d 276, 81 N.E.3d 419, 2017-Ohio-777 (*Gonzales II)* is not applicable in this instance. In *Gonzalez II,* the Court overruled its previous holding in *State v. Gonzales,* 150 Ohio St.3d 261, 2016-Ohio-8319 (*Gonzales I)*. In *Gonzales I* the Court had concluded that only the weight of the pure cocaine, and not any filler material, could be considered when determining the threshold drug amount for penalty enhancement. A short time later, in *Gonzales II*, the Court overturned its earlier decision, concluding the relevant amount of cocaine for penalty enhancement purposes included the amount of pure cocaine as well as any additives or fillers. *Id.* at ¶ 9. Appellant argues in this case that while the fillers in cocaine are part of the usable drug, the Mountain Dew in his drug pipe cannot be considered as part of the methamphetamine. Therefore, no amount of any substance beyond pure methamphetamine can be used for purposes of sentence enhancement, and *Gonzales II* is not controlling precedent in this case.

**{¶19}** Conversely, the state argues that *Gonzales II* does apply to this case. The state also cites *State v. Thomason,* 11th Dist. Ashtabula No. 2016-A-0027, 2017-Ohio-7447. In *Thomason,* officers seized jars of methamphetamine. At trial, a scientist from the Ohio Bureau of Criminal Investigation ("BCI") testified that she analyzed the liquid taken from the jars, approximately 96.53 grams, and that this liquid contained methamphetamine. The court concluded that R.C. 2925.01(I)(I) presupposes that the entire medium containing the methamphetamine is to be considered for penalty purposes. *Id.* at ¶ 33.

**{¶20}** In this case, a drug pipe full of yellow liquid was found behind Appellant's couch. Appellant was home when the search warrant was executed. The residence was a one-room garage that had been converted into an apartment. There is no evidence that Appellant shared the residence with anyone else. Once the drug pipe was found, Appellant did not deny that it was his and hastened to tell the officers that the liquid inside of it was Mountain Dew. (9/19/19 Tr., p. 123.) Appellant does not contend that he was unaware of the existence of the drug pipe or that it was not his, only that he believed the pipe solely contained Mountain Dew. In his brief, Appellant explains in great detail the common use of Mountain Dew as a "filter" and a "sweetener" for inhaling methamphetamine using a drug pipe. (Appellant Brief, p. 16.) Despite this lengthy explanation regarding the common practice of using Mountain Dew as a filter for methamphetamine use, Appellant maintains that he believed the only substance in the pipe was Mountain Dew.

**{¶21}** Given the evidence and the testimony, the state presented sufficient evidence that Appellant constructively possessed methamphetamine. Appellant was the

sole resident of the apartment where numerous items of drug paraphernalia related to methamphetamine were present, including the drug pipe found behind Appellant's couch. Appellant certainly knew the pipe was there, and knew its use, as evidenced by the drug trade in which he was involved and the other items of drug paraphernalia. While Appellant very quickly told the officers that the pipe contained only a sugary soft drink, this statement in no way appears exculpatory. The circumstantial evidence presented by the state was sufficient for a reasonable trier of fact to determine that Appellant was aware that the liquid in the drug pipe contained methamphetamine and thus, the sentencing enhancement based on this was appropriate.

Trafficking of Methamphetamine

**{¶22}** In his sixth assignment of error Appellant contends his conviction for trafficking in methamphetamine was against the manifest weight of the evidence. He challenges the direct evidence that he sold methamphetamine to the confidential informant.

**{¶23}** Weight of the evidence focuses on "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." (Emphasis deleted.) *Thompkins,* at 387. A review of the manifest weight of the evidence focuses on the state's burden of persuasion and the believability of the evidence presented. *State v. Merritt*, 7th Dist. Jefferson No. 09 JE 26, 2011-Ohio-1468, ¶ 34. A reviewing court "weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 484 N.E.2d 717 (1st Dist.1983).

**{¶24}** A reversal under a manifest weight review in a criminal matter should be granted only "in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Andric*, 7th Dist. Columbiana No. 06 CO 28, 2007-Ohio-6701, ¶ 19, citing *Martin* at 175. Determinations regarding witness credibility, conflicting testimony and the weight to give the evidence "are primarily for the trier of the facts." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 995, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact is in the best position to weigh all evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984). When presented with two fairly reasonable perspectives regarding the evidence or with two conflicting versions of events, neither of which can be ruled out as unbelievable, we will not choose which one is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

**{¶25}** Appellant was convicted of trafficking methamphetamine in violation of R.C. 2925.03(A)(1) and (C)(2)(a), which provide:

> (A) No person shall knowingly do any of the following:
>
> (1) Sell or offer to sell a controlled substance or a controlled substance analog[.]
>
> * * *

> (C) Whoever violates division (A) of this section is guilty of one of the following:
>
> * * *
>
> (2) If the drug involved in the violation is any compound, mixture, preparation, or substance included in schedule III, IV, or V, whoever violates division (A) of this section is guilty of trafficking in drugs. The penalty for the offense shall be determined as follows:
>
> (a) Except as otherwise provided in division (C)(2)(b), (c), (d), or (e) of this section, trafficking in drugs is a felony of the fifth degree, and division (B) of section 2929.13 of the Revised Code applies in determining whether to impose a prison term on the offender.

R.C. 2925.03(A)(1) and (C)(2)(a).

**{¶26}** At trial, the state offered Detective Ellis's testimony. He testified that he was contacted by OSHP after they arrested Hayman, and that Hayman offered to act as a confidential informant by purchasing methamphetamine from Appellant. (9/19/19 Tr., p. 117.) Ellis went to the jail and spoke with Hayman. (9/19/19 Tr., p. 117.) Hayman was transported to the drug task force headquarters and searched. (9/19/19 Tr., p. 118.) Hayman was dropped off near Appellant's residence. (9/19/19 Tr., p. 118.) At that point, Ellis gave Hayman prerecorded money as well as an audio/visual recording device. (9/19/19 Tr., p. 118.) Ellis activated the recorder when Hayman left the car. (9/19/19 Tr., p. 121.) Ellis testified that although he could not monitor the recording in real time,

Hayman had no ability to control the device in any way while it was recording. (9/19/19 Tr., p. 121.) The transaction took approximately ten to fifteen minutes, after which Hayman returned to the vehicle and handed Ellis the recording device and the baggie with the methamphetamine. (9/19/19 Tr., p. 122.) Ellis packaged the baggie in a sealed envelope to be shipped to BCI for analysis. (9/19/19 Tr., p. 124.) Ellis downloaded the recording to the drug task force computer. (9/19/19 Tr., p. 128.) The recording was played for the jury at trial. (9/19/19 Tr., p. 129.) Ellis testified regarding the video, including identifying Appellant as working behind a desk where the officers executing a search warrant later recovered numerous drug paraphernalia, including baggies identical to the one given to Hayman. (9/19/19 Tr., p. 129.) Ellis had obtained a search warrant for Appellant's residence using information from the buy. (9/19/19 Tr., p. 131.) The search recovered a rifle, a drug pipe containing the yellow liquid, the prerecorded money and numerous drug paraphernalia. (9/19/19 Tr., pp. 123, 133, 139, 141.)

**{¶27}** On cross-examination, defense counsel asked Ellis about the thoroughness of the search that was conducted of Hayman prior to the buy. (9/19/19 Tr., pp. 152-153.) Ellis described the standard search of an informant including a search of shoes, socks, belt, pockets and inside clothing. (9/19/19 Tr., pp. 152-153). Defense counsel asked whether the informant was disrobed and body cavities were searched and Ellis responded in the negative. (9/19/19 Tr., p. 153.)

**{¶28}** A copy of the recording was not made part of the record before this Court. The state offered still photos from the recording at trial, which were included in the record. According to Ellis' testimony, the recording of the buy showed Hayman asking Appellant for a "ball" of methamphetamine. (9/19/19 Tr., p. 120.) Appellant is seen going behind

the desk where the drug paraphernalia was later found. (9/19/19 Tr., p. 129.) He returned to Hayman and money was exchanged. (9/19/19 Tr., p. 129.) Appellant returned to the desk and minutes later handed Hayman a baggie containing a substance that later tested positive for methamphetamine. (9/19/19 Tr., p. 131.) The baggie presented by Hayman was identical to those found in the search and were unique because of the "Pill Pouch, Day, A.M. P.M." label. (9/19/19 Tr., p. 123.)

**{¶29}** After reviewing the record we cannot conclude that Appellant's conviction for trafficking methamphetamine was against the manifest weight of the evidence. Although Appellant urged the jury to conclude that Hayman was not thoroughly searched prior to the buy, calling into question whether Hayman may have planted the baggie containing the drug, the testimony of Ellis directly contradicts this assertion. This testimony, the still photos, and the BCI reports provide a basis on which a reasonable jury could have determined that Appellant sold Hayman methamphetamine. Therefore, when presented with plausible theories from both sides, the jury ultimately concluded that the state's theory was more credible. The evidence in this record does not lead us to believe that this is an exceptional circumstance in which we should interfere with the jury's decision on the evidence presented.

**{¶30}** Appellant's convictions for having a weapon under a disability and possession of methamphetamine were supported by evidence sufficient for both charges to go the jury. Moreover, Appellant's conviction for trafficking in methamphetamine was not against the manifest weight of the evidence. Therefore, Appellant's first, second and sixth assignments of error are without merit and are overruled.

ASSIGNMENT OF ERROR NO. 3

APPELLANT'S CONVICTION FOR AGGRAVATED POSSESSION OF METHAMPHETAMINE VIOLATED HIS CONSTITUTIONAL RIGHT TO DUE PROCESS.

**{¶31}** Appellant challenges his conviction for possession of methamphetamine arguing the statutory scheme is void for vagueness.

**{¶32}** The void for vagueness doctrine is premised on the due process provision of the Fourteenth Amendment, and bars enforcement of, "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *State v. Bennett*, 150 Ohio App.3d 450, 458, 2002-Ohio-6651, 782 N.E.2d 101 (1st Dist.2002), citing *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct.1219, 137 L.Ed.2d 432 (1997).

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

*Grayned v. Rockford*, 408 U.S. 104, 108-09, 92 S.Ct.2294, 33 L.Ed.2d 222 (1972).

**{¶33}** A tripartite analysis must be applied when examining under the void-for-vagueness doctrine. See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). First, the law must provide fair warning to the ordinary citizen so their behavior may comport with the dictates of the law. Second, it must preclude arbitrary, capricious and generally discriminatory enforcement by officials given too much authority and too few constraints. Third, we must ensure that fundamental constitutionally protected freedoms are not unreasonably impinged or inhibited. *State v. Tanner,* 15 Ohio St.3d 1, 472 N.E.2d 689 (1984).

**{¶34}** Appellant concedes that the language in R.C. 2925.11(A) "is not patently vague or ambiguous." He claims, instead, that the statutory scheme "promulgated by it is latently ambiguous." (Appellant's Brf., p. 22.) Appellant cites multiple statutory provisions in support of his void for vagueness argument. Appellant argues that R.C. 2925.11(A) refers to a "controlled substance," which requires reading the definition of "controlled substance" found in R.C. 3719.014. That section refers to "schedule I, II, III, IV, or V," but those schedules are not readily accessible in the definition. Even if the schedules are found in the code, the penalty provisions in R.C. 2925.11 (C)(1)(c) refer to "bulk amount," which is defined in R.C. 2925.01(D). Appellant argues that the definition for bulk amount, which is "an amount equal to or exceeding three grams of a compound, mixture, preparation, or substance that is or contains any amount of a schedule II stimulant" is itself vague. R.C. 2925.01(D)(1)(g). Appellant contends this definition alone deprives him of fair warning of the statute's penalties even if the statutory scheme was not so complex. Appellant also argues that interpreting the statutory provisions literally

would lead to an absurd result: that Appellant was subjected to a penalty enhancement because his drug pipe water tested positive for methamphetamine. Finally, Appellant argues the rule of lenity, that a statute defining a penalty must be strictly construed against the state in favor of more lenity for the accused. *Bifulco v. United States,* 447 U.S. 381, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980).

**{¶35}** "The Constitution requires only that the challenged statute or ordinance * * * conveys [a] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordan v. De George*, 341 U.S. 223, 231-232, 71 S.Ct. 703, 95 L.Ed. 886 (1951). Absolute or mathematical certainty is not required, only reasonable certainty of the nature and cause of the offense is required. *State v. Quinones,* 7th Dist. Mahoning No. 02 CA 243, 2003-Ohio-6727, ¶ 19 citing *State v. Schaeffer,* 96 Ohio St. 215, 236, 117 N.E. 220 (1917).

**{¶36}** In response, Appellee cites to *State v. Collier,* 62 Ohio St.3d 267, 581 N.E.2d 552 (1991) in which the Ohio Supreme Court has already addressed vagueness claims about this statutory scheme that are strikingly similar to Appellant's.

> R.C. 2925.11 begins with a general prohibition: "No person shall knowingly obtain, possess, or use a controlled substance. R.C. 2925.11(A). This language is clear and unambiguous. The average person reading this portion of the statute would have little doubt as to its meaning. Indeed, the conduct prohibited is set forth with notable lucidity. Likewise, the exception to the general prohibition is readily comprehensible and understandable. R.C. 2925.11(B) states that the prohibition against obtaining, possessing, or using a controlled substance "does not apply to any person who obtained

> the controlled substance pursuant to a prescription issued by a practitioner, where the drug is in the original container in which it was dispensed to such person." We see little room for speculation as to the meaning of this language. Nor would a person of ordinary intelligence need to guess as to its application.

*Collier* at 270.

**{¶37}** The *Collier* Court concluded that the first prong of the test for vagueness is not met because the statute sets forth the prohibited conduct: knowingly obtaining, possessing or using a controlled substance. *Id.* at 271. As to the second prong, regarding whether the statute improperly provides for arbitrary or discriminatory enforcement, the court noted that in order to be found unconstitutionally vague, a statute must be vague in all of its applications. *Id.* The court concluded that, although "numerous innocent scenarios may be presented regarding almost every criminal statute," speculation about potential arbitrary enforcement is not enough to give rise to a constitutional violation. *Id.* at 272. Regarding the final prong in the test for vagueness, the court concluded that no constitutionally protected freedom is present nor unreasonably impinged as there is no constitutional right to obtain, possess or use a controlled substance. *Id.*

**{¶38}** The Ohio Supreme Court has specifically held that R.C. 2925.11 is not unconstitutionally vague for voidness. In accordance with *Collier,* Appellant's third assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 4

APPELLANT'S CONVICTION FOR AGGRAVATED POSSESSION OF METHAMPHETAMINE AND THE RESULTING SENTENCE VIOLATED ART I, §10 OF THE CONSTITUTION OF THE UNITED STATES.

**{¶39}** In his fourth assignment of error Appellant again argues that the total weight of the drug pipe liquid cannot be utilized to enhance the sentencing penalty, and doing so allowed the trial court to, *ex post facto*, enlarge the penalty for his original criminal act.

**{¶40}** It is axiomatic that a statute is presumed to be constitutional. *State ex rel. Jackman v. Cuyahoga Cty. Court of Common Pleas,* 9 Ohio St.2d 159, 161, 224 N.E.2d 906 (1967). Appellant must establish beyond a reasonable doubt that R.C. 2925.11 is unconstitutional because it violates the prohibition against ex post facto laws. *Roosevelt Properties Co. v. Kinney,* 12 Ohio St.3d 7, 13, 465 N.E.2d 421 (1984). Section 10, Article I of the United States Constitution provides that "[n]o State shall * * * pass any * * * ex post facto Law." The Ohio Constitution contains a similar provision, Section 28, Article II. *State v. Elmore,* 122 Ohio St.3d 472, 2009-Ohio-3478, 912 N.E.2d 582, ¶ 14. The Ohio Supreme Court has stated that "[a]n ex post facto law ' "punishes as a crime an act previously committed, which was innocent when done, [or] which makes more burdensome the punishment for a crime, after its commission." ' " *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 30, citing *State v. Cook,* 83 Ohio St.3d 404, 414, 700 N.E.2d 570 (1998), quoting *Beazell v. Ohio*, 269 U.S. 167, 169-170, 46 S.Ct. 68, 70 L.Ed. 216 (1925).

**{¶41}** As earlier discussed, the Supreme Court noted in *Collier* that R.C. 2925.11 is not unconstitutionally vague, does not allow for arbitrary or discriminatory enforcement, and the prohibitions and penalties are not ambiguous. As such, Appellant's argument

that this statutory section allows for heavier penalties to be imposed after the crime has been committed through judicial enlargement is not well taken. Further, penalty enhancement provisions do not punish past conduct. Instead, they increase the severity of the penalty. *State v. Parker,* 186 Ohio App.3d 600, 2010-Ohio-1092, 929 N.E.2d 516 (7th.Dist.), ¶ 17.

**{¶42}** We have already determined that Appellant's convictions were supported by sufficient evidence and were not against the manifest weight of the evidence. We have also determined that the statutory framework at issue is not unconstitutionally void for vagueness. Appellant's arguments that essentially raise all of these identical arguments are equally without merit. Appellant has not shown that the penalty enhancement provision found within R.C. 2925.11 violates the constitutional prohibition against ex post facto laws. Appellant's fourth assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 5

IT WAS ERROR FOR THE TRIAL COURT TO EXCLUDE EVIDENCE RELATING TO THE AMOUNT OF METHAMPHETAMINE DEFENDANT WAS ACCUSED OF POSSESSING.

**{¶43}** In his fifth assignment of error Appellant again argues the trial court erred in allowing the state's testimony regarding the liquid in the drug pipe. The matter was determined prior to trial in a motion in limine. A motion in limine is a ruling to include or exclude evidence. *State v. Lundy,* 41 Ohio App.3d 163, 535 N.E.2d 664 (1st.Dist.1987). We review the trial court's decision on a motion in limine for an abuse of discretion. *Id.*

"The term 'abuse of discretion' connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Greenwood v. Quality Motor Cars by Butch Miller,* 7th Dist. Belmont No. 15 BE 003, 2016-Ohio-8172, ¶ 12, citing *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

**{¶44}** Prior to trial, the state sought to exclude Appellant's counsel from raising that the exact amount of methamphetamine in the liquid found in Appellant's drug pipe was at issue in this case in order to avoid confusing the jury and in accordance with *Gonzales (II), supra*.

> [PROSECUTOR]: Your Honor, I would anticipate that the evidence in this case is going to show that at the time of the arrest the Defendant was in possession of a smoking device, I'll call it for any other term, and at the bottom of this smoking device was a liquid and that liquid was tested, both field tested and then tested by BCI and it tested both presumptive positive for methamphetamine and BCI will be here today and they will testify that they used a chemical analysis and this solution contained methamphetamine. They have weighed that total solution. It's plus or minute [sic] I think it was 57 grams. I would have to check to be sure but that's approximately correct, Your Honor. Let me check the indictment. Yeah.
>
> THE COURT: 57.23 is what the indictment reflects.

[PROSECUTOR]: Right, 57.23 grams more or less and it was a substance that contained methamphetamine and that's the burden of proof of the State of Ohio, only that it is a substance that contains methamphetamine.

* * * [T]he limitation here is that they cannot be asking about threshold levels, how much meth is inside that 57.23 grams. That's not what the Ohio law is. * * * That's not what the burden is in the State of Ohio. It's going to confuse the jury and I think if we get anything like that, we need a direct instruction to the jury that the State is not required to show how much methamphetamine is in that substance. We only have to show that it is a substance--

THE COURT: In the compound or mixture.

* * *

[DEFENSE COUNSEL]: Just to be clear, for our recordkeeping, we've objected. We think we should be able to ask during the examination of a BCI agent -- BCI agent regarding how they -- the testing, what is the threshold level before it kicks into -- into controlled substances. I think that that is -- that goes into testing. That goes into relevance on what they do, how they do it, things of that nature.

* * *

> THE COURT: Okay. All right. And the Court has cautioned Defense Counsel regarding that issue and as the Court understands it, consistent with the law the statute reads the compound, substance, mixture. So, the compound is the weight that counts and that's what the law says. It is irrelevant the amount or the -- the ratio of whatever was in there, water, Mountain Dew, whatever was in there to the meth. As long as there was meth in there, it was detectable and it was detected by a lab, it is the weight of the compound and that's what the law says. It's the weight of the compound, not how much is in -- how much meth is in that compound; correct?
>
> [PROSECUTOR]: Correct, Your Honor.

(9/19/19 Tr., pp. 9-12.)

**{¶45}** Appellant notes that *Gonzales II*, relied on by the state in the motion in limine, discusses additives in only cocaine and determines they are part of the usable drug. *Gonzales II* does not discuss methamphetamine, at issue in this case. The state, in response, does not rely solely on *Gonzales II*. The state also relies on *Thomason,* in which the Eleventh District applied the holding in *Gonzales II* to a case involving a liquid containing methamphetamine. The appellant in *Thomason* made a similar argument to Appellant's, that the "filler" liquid in the drug pipe was not intended for consumption as a controlled substance, but was used to filter the controlled substance. The *Thomason* court recognized that methamphetamine is defined by statute as, "methamphetamine, any salt, isomer, or salt of an isomer of methamphetamine, or any compound, *mixture*,

preparation, or substance containing methamphetamine or any salt, isomer, or salt of an isomer of methamphetamine." R.C. 2925.01(I)(I). In affirming the appellant's conviction, the Eleventh District concluded:

> We acknowledge the ridiculousness of convicting an individual of aggravated possession of drugs even though the "drug," in its existing form, was not marketable or useable. We must, however, apply the unambiguous language of the law as written. And unless or until the legislature changes the definition of methamphetamine to exclude compounds, mixtures, preparations, or substances that are not useable, strange and arguably absurd results will be achieved. In light of the statutory definition of methamphetamine, the state presented sufficient evidence to establish the total weight of the liquid precursor was more than five times the bulk amount. (Emphasis deleted.)

*Id. at* ¶ 35.

**{¶46}** Based on the holding in *Gonzales II* as well as the statutory definition of methamphetamine set forth in R.C. 2925.01(I)(I), it is clear the legislature intended for "methamphetamine" to include a compound, mixture, or preparation containing methamphetamine. Therefore, the trial court did not abuse its discretion in precluding Appellant from attacking testimony of state's witnesses in this regard. The exact amount of methamphetamine contained within the pipe liquid is not relevant to the state's burden of proof. The entire compound, which tested positive for methamphetamine, is properly considered for statutory purposes, including penalty enhancement.

**{¶47}** Appellant's fifth assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 7

APPELLANT'S TRIAL COUNSEL FAILED TO OBJECT TO IRRELEVANT AND PREJUDICIAL EVIDENCE, RESULTING IN INEFFECTIVE ASSISTANCE OF COUNSEL.

**{¶48}** Appellant contends his trial counsel was ineffective for failing to object to the admission of photographs of drug paraphernalia, arguing that the photographs were not relevant to the charged offenses.

**{¶49}** The test for ineffective assistance of counsel is two-part: whether trial counsel's performance was deficient and, if so, whether the deficiency resulted in prejudice. *State v. White*, 7th Dist. Jefferson No. 13 JE 33, 2014-Ohio-4153, ¶ 18, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 107. In order to prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Lyons*, 7th Dist. Belmont No. 14 BE 28, 2015-Ohio-3325, ¶ 11, citing *Strickland* at 694. The appellant must affirmatively prove the alleged prejudice occurred. *Id.* at 693.

**{¶50}** As both are necessary, if one prong of the *Strickland* test is not met, an appellate court need not address the remaining prong. *Id.* at 697. 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. Columbiana 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).

**{¶51}** When a claim for ineffective assistance of counsel is made based on failure to file an objection or a motion, the appellant must demonstrate that the objection or motion had a reasonable probability of success. If the objection or motion would not have been successful, then the appellant cannot prevail on the ineffective assistance of counsel claim. *State v. Adkins,* 161 Ohio App.3d 114, 2005-Ohio-2577, ¶ 14 (4th Dist.).

**{¶52}** The trial court admitted 24 photographs of Appellant's apartment taken while the search warrant was being executed, which included pictures of drugs and numerous drug paraphernalia, including the drug pipe containing the yellow liquid. The state offered these photos to establish that Appellant possessed controlled substances and to demonstrate trafficking, as the baggies were identical to the one sold to Hayman and the multiple scales and baggies were photographed in multiple places throughout the apartment, including at the desk where Appellant was seen working during the buy. None of the photographs were repetitive or cumulative, as each was taken of different objects at different locations throughout the apartment. The photographs were relevant in order to demonstrate Appellant's possession and trafficking of drugs. In addition, the simple fact that they were numerous is not grounds for reversal. *State v. Monroe,* 105 Ohio St.3d 384, 2005-Ohio-2282, 827 N.E.2d 285, ¶ 26. This record reveals the probative value of the photographs was outweighed by any potential unfair prejudice. Appellant has not demonstrated that, but for trial counsel's objection to introduction of the photographs, the outcome of the trial would have been different. Because there was no deficiency in

counsel's failure to file an objection to the photographs in question, we conclude that Appellant's ineffective assistance of counsel claim has no merit and Appellant's seventh assignment of error is without merit and is overruled.

**{¶53}** Based on the foregoing, Appellant's assignments of errors are without merit and the judgment of the trial court is affirmed.

Robb, J., concurs.

D'Apolito, J., concurs.

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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 Jefferson County, Ohio, is affirmed. Costs 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.**