[Cite as *State v. Boles*, 2010-Ohio-1885.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-08-1352

Appellee — Trial Court No. CR0200801263

v.

Nathaniel Boles — **DECISION AND JUDGMENT**

Appellant — Decided: April 30, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
J. Christopher Anderson, Assistant Prosecuting Attorney,
for appellee.

Tim A. Dugan, for appellant.

* * * * *

OSOWIK, P.J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas that found appellant guilty of one count of aggravated possession of drugs and one

count of failure to comply with the order or signal of a police officer. For the reasons that follow, the judgment of the trial court is affirmed in part and reversed in part.

{¶ 2} Appellant sets forth the following five assignments of error:

{¶ 3} "A. The trial court violated Mr. Boles's right to a speedy trial by not granting his motion to dismiss before trial.

{¶ 4} "B. The State failed to present legally sufficient evidence to sustain the charge of Aggregated [sic] Possession.

{¶ 5} "C. The Trial Court violated Mr. Boles's Sixth Amendment right to confront the witnesses against him.

{¶ 6} "D. The Court lost its way when finding Mr. Boles guilty of Aggravated Possession and Failure to Comply.

{¶ 7} "E. The cumulative effect of all the errors at trial deprived Mr. Boles of a fair trial."

{¶ 8} The undisputed facts relevant to the issues raised on appeal are as follows. On December 19, 2006, Toledo police officers attempted to apprehend appellant for outstanding warrants after they spotted him sitting in his car in a Toledo parking lot. Appellant fled and the police pursued him as he drove through the streets of Toledo. Eventually, appellant stopped, got out of his car and fled on foot. Officers apprehended appellant and arrested him. During a routine inventory of appellant's car, police found a container with 170 pills which were later identified as Percocet, a Schedule II controlled substance. Appellant was charged by information with failure to comply with the order

or signal of a police officer in violation of R.C. 2921.331(B)(1-3) and aggravated possession of drugs in violation of R.C. 2925.11(A) and (C)(1). Appellant appeared in Toledo Municipal Court on December 27, 2006 for a preliminary hearing. At that time, a nolle prosequi was entered as to the two charges upon the recommendation of the prosecutor and appellant was released.

{¶ 9} The pills found in appellant's car were submitted to the crime laboratory immediately after appellant's December 2006 arrest. However, due to the lab's backlog, the detective in charge of the investigation did not receive the lab results until May 2, 2007.

{¶ 10} On February 1, 2008, a grand jury indicted appellant on two felony counts of aggravated possession of drugs and failure to comply with the order or signal of a police officer, in connection with the December 19, 2006 arrest. Appellant filed a motion to dismiss the case based on a violation of his speedy trial rights. The trial court denied the motion on June 30, 2008. After obtaining new counsel, appellant filed another motion to dismiss on August 8, 2008. On September 10, 2008, the trial court denied the motion.

{¶ 11} The case was tried to the bench on September 16, 2008. The trial court found appellant guilty of both counts and sentenced him to five years for the aggravated possession of drugs conviction and four years for the failure to comply conviction, with the sentences to be served consecutively.

{¶ 12} In support of his first assignment of error, appellant asserts that the trial court violated his right to a speedy trial by denying his motion to dismiss before trial. Appellant correctly states that he was originally charged with aggravated possession of drugs and failure to comply on December 19, 2006. The charges were nollied on December 27, 2006, and appellant was reindicted in February 2008.

{¶ 13} Crim.R. 48(A) provides that "[t]he state may by leave of court and in open court file an entry of dismissal of an indictment, information, or complaint and the prosecution shall thereupon terminate." Similarly, R.C. 2941.33 provides that "[a] prosecuting attorney shall not enter a nolle prosequi in any cause without leave of court, on good cause shown, in open court. A nolle prosequi entered contrary to this section is invalid."

{¶ 14} Appellant asserts that the nolle prosequi was not valid and therefore did not toll the running of the speedy trial statute, which required the state to bring him to trial within 270 days from the date of his arrest. When a nolle prosequi is invalid, the days between dismissal and indictment or reindictment are counted against the state. *State v. Davis*, 9th Dist. No. 08CA009412, 2008-Ohio-6741.

{¶ 15} Appellant argues that the state cannot simply state that it has insufficient evidence as a reason for requesting a nolle prosequi and must inform the court of the nature of the insufficiency on the record.

{¶ 16} In this case, the record reflects that the nolle prosequi was entered in open court and on the record. The parties appeared in Toledo Municipal Court on December 27,

2006. At that time, on the record, appellant's attorney informed the court that the state wished to dismiss the charges. The trial court stated that the charges were dismissed. Appellant argues, however, that good cause was not shown on the record because the document on which the state relied did not qualify as a "written motion." We note that there is no requirement in either Crim.R. 48(A) or R.C. 2941.33 that the state's request for a nolle prosequi be presented to the court in the form of a written motion. Appellant takes issue with the state's written statement, signed by the prosecutor, that "[t]here is no drug analysis. When drug analysis is complete, Det. Mugler will give [the] original to [grand jury]."

{¶ 17} Based upon our finding that the state's request to nolle the charges against appellant was made in open court, on the record, and due to the lack of the lab results at that time, we find that the trial court did not err by dismissing the case. Appellant's first assignment of error is not well-taken.

{¶ 18} In his second assignment of error, appellant asserts that the state failed to present legally sufficient evidence to sustain the charge of aggravated possession of drugs. In support, appellant argues that the state did not prove beyond a reasonable doubt the bulk amount for the pills in appellant's possession when he was arrested.

{¶ 19} Sufficiency of the evidence is a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of the crime. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 1997-Ohio-52. When reviewing the sufficiency of the evidence to support a criminal conviction, an appellate court must

examine "the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. A conviction that is based on legally insufficient evidence constitutes a denial of due process, and will bar a retrial. *Thompkins*, supra, at 386-387.

{¶ 20} Appellant was found guilty of R.C. 2925.11 (A) and (C)(1)(c), aggravated possession of drugs, which provide as follows:

{¶ 21} "(A) No person shall knowingly obtain, possess, or use a controlled substance.

{¶ 22} "* * *

{¶ 23} "(C) Whoever violates division (A) of this section is guilty of one of the following:

{¶ 24} "(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.

{¶ 25} "(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 the drugs if a felony of the second degree * * *."

{¶ 26} The pills found in appellant's possession at the time of his arrest were identified through laboratory analysis as Percocet, a compound which contains oxycodone. Specifically, the lab report admitted into evidence identified 170 white tablets with a total weight of 89.36 grams. The tablets contained acetaminophen and oxycodone. Oxycodone is designated as a "Schedule II" substance as a matter of law under R.C. 3719.41, Schedule II, (A)(1)(o).

{¶ 27} R.C. 2925.01(D)(1)(d) defines "bulk amount" for the substance analyzed in this case as:

{¶ 28} "(d) *An amount equal to or exceeding twenty grams* or five times the maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual * * *." (Emphasis added.)

{¶ 29} As stated above, a violation of R.C. 2925.11(A) is a second-degree felony "[i]f the amount of the drug involved *equals or exceeds five times the bulk amount* but is less than fifty times the bulk amount * * *." R.C. 2925.11(C)(1)(c). (Emphasis added.) Appellant was found guilty of violating R.C. 2925.11(C)(1)(c) and sentenced accordingly for the second-degree felony.

{¶ 30} As indicated above, possession of the bulk amount for Percocet can be proved by evidence as to weight or by comparing the number of pills confiscated to an amount equal to five times the maximum daily dose. In this case, the state provided evidence that the pills found in appellant's possession weighed 89.36 grams, which exceeds the bulk amount of 20 grams set forth in R.C. 2925.01(D)(1)(d). However, the

total weight of the pills did not equal or exceed five times the bulk amount, as required to elevate the offense to a second-degree felony.

{¶ 31} Further, based on our review of the record, the state failed to prove that the number of pills (170) found in appellant's possession equaled or exceeded five times the bulk amount. In its attempt to satisfy its burden of showing that appellant possessed five times the bulk amount of the drug, the state presented the testimony of David Cogan, director of the Toledo Police crime laboratory. During his direct examination, Cogan twice stated that bulk amount for the pills confiscated in this case was 60 tablets. Cogan did not identify the source of that information. Under cross-examination, Cogan again stated that bulk amount was 60 pills. Under re-direct, Cogan stated that bulk amount was 30 tablets, which he admitted was different from his earlier testimony. Under re-cross, Cogan stated that, in looking up the maximum daily dose for the pills in question, he had consulted a 2007 edition of the *Physician's Desk Reference* as well as a publication titled *Drug Laws of Ohio.* Cogan again admitted that his testimony was inconsistent as to bulk amount. When asked under re-cross what the bulk amount was in December 2006, Cogan admitted he had also been "fairly certain" during earlier testimony that the correct bulk number was 60 tablets.

{¶ 32} Based on the foregoing, if the bulk amount for the pills was 30, appellant clearly possessed more than five times bulk, which would be sufficient to show a violation of R.C. 2925.11(C)(1)(c), a second-degree felony. If the correct bulk amount was 60, then appellant did not possess five times bulk amount, which would be 300 pills.

The record also reflects that the state did not present evidence as to the bulk amount based on maximum daily dose, either through Cogan's testimony or other documentary evidence.

{¶ 33} Accordingly, we find that the state did not present sufficient evidence to support the trial court's finding of guilt as to a violation of R.C. 2925.11(A) and (C)(1)(c), a second-degree felony. Appellant's second assignment of error is well-taken.

{¶ 34} In his third assignment of error, appellant asserts that his Sixth Amendment right to confront the witnesses against him was violated when the trial court allowed lab director Cogan to testify as to the lab report after it was determined that the analyst who had tested the pills and signed the report was not available. In light of our finding as to appellant's second assignment of error, we find that this assignment of error is moot and not well-taken.

{¶ 35} In his fourth assignment of error, appellant asserts that his convictions of aggravated possession and failure to comply were against the manifest weight of the evidence. Since we have found that appellant's conviction for aggravated possession was not supported by sufficient evidence, further arguments presented as to the conviction for that offense are moot. We will, however, consider appellant's arguments as to the failure to comply conviction.

{¶ 36} A manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins*, 78 Ohio St.3d at 387. This court reviews a manifest weight challenge to a conviction resulting from trial to the bench according to the same standard

of review applicable to all criminal cases. *State v. Collier*, 9th Dist. No. 07CA009115, 2008-Ohio-826, at ¶ 3-4. In making this determination, the court of appeals sits as a "thirteenth juror" and, after "reviewing the entire record, 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*, supra, at 386, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶ 37} R.C. 2921.331(B) states that "[n]o person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop." Additionally, section (C)(5)(a)(ii) of the statute makes such a violation a third-degree felony if the trier of fact finds that "the operation of the motor vehicle by the offender caused a substantial risk of serious physical harm to persons or property."

{¶ 38} Appellant argues that the court lost its way when it found him guilty of this offense because the officers involved were unable to identify him as the driver of the car that sped away from the police.

{¶ 39} The testimony of several officers involved in the pursuit contradicts appellant's argument. Detective Nora Mugler, who had arrested appellant on other

occasions, testified that appellant had several warrants pending prior to his arrest in this case. On the night of the arrest, Mugler received information from a confidential informant that appellant was driving a gold Oldsmobile and would be at a car wash in the vicinity of Douglas Road and Central Avenue in Toledo. Mugler went to the location in an unmarked vehicle with Detective Carol Connelly, along with several other undercover vehicles and two marked units. The officers watched the area and after about an hour, a gold Oldsmobile pulled into the car wash parking lot. Mugler saw appellant alone in the car. At that time, Mugler's car and a marked unit pulled into the lot. Mugler testified that appellant then drove directly toward her vehicle and sped off. The marked unit followed with its lights and siren activated.

{¶ 40} Detective Connelly testified that when she attempted to block appellant's car, he drove straight toward her vehicle, which allowed her to have a clear look at him. Connelly further testified that the marked units activated their lights and sirens as soon as they pulled into the parking lot. She attempted to follow the chase, but it was "all over the place."

{¶ 41} Finally, Officer Donald Scott testified that he and his partner were sent in a marked unit to assist Detective Mugler the night appellant was arrested. When Scott activated his lights and attempted to stop appellant's car, appellant took off, driving over the grass, sidewalk and curb onto the road. Mugler followed appellant until another marked unit took the lead in the pursuit. Mugler continued to follow and observed appellant exceeding the posted speed limits and driving recklessly through traffic signals

and stop signs. When appellant eventually stopped his car and fled on foot, Mugler and her partner chased appellant and apprehended him.

{¶ 42} Based on the testimony summarized above and applicable law, this court cannot say that the trier of fact clearly lost its way or created a manifest miscarriage of justice by finding appellant guilty of violating R.C. 2921.331(B) and (C)(5)(a)(ii). Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 43} As his fifth assignment of error, appellant asserts that he was prejudiced by the cumulative effect of the errors at trial. Upon reviewing all of appellant's assignments of error, this court has found that appellant's conviction for aggravated possession of drugs was not supported by sufficient evidence. However, we have found no other errors in the trial court. Accordingly, appellant's fifth assignment of error is not well-taken.

{¶ 44} On consideration whereof, appellant's conviction on one count of aggravated possession of drugs is reversed. The judgment of the Lucas County Court of Common Pleas is affirmed in all other respects. This matter is remanded to the trial court for further proceedings consistent with this decision. Costs of this appeal are assessed equally to the parties pursuant to App.R. 24.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
JUDGE

Keila D. Cosme, J. _____
CONCUR.
JUDGE