[Cite as *State v. Wilson*, 2010-Ohio-3065.]

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

State of Ohio — Court of Appeals No. L-09-1233

Appellee — Trial Court No. CR0200901290

v.

Lewis Wilson — **DECISION AND JUDGMENT**

Appellant — Decided: June 30, 2010

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jeffrey D. Lingo, Assistant Prosecuting Attorney, for appellee.

Mollie B. Hojnicki, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals a judgment of conviction for drug possession entered on a jury verdict in the Lucas County Court of Common Pleas. For the reasons that follow, we affirm.

{¶ 2} On June 12, 2007, police executed a search warrant on a house on Indiana Avenue in Toledo. Inside the house was appellant, Lewis Wilson. When police searched appellant, they found a small bag containing what was later determined to be crack cocaine. Police also seized seven similarly sized bags of crack in a bedroom where appellant's personal belongings were also found.

{¶ 3} Police arrested appellant. A Lucas County Grand Jury subsequently named him in a two count indictment, charging one count of drug possession and one count of drug trafficking. Appellant pled not guilty and the matter proceeded to trial.

{¶ 4} At trial the investigating officer testified that in June 2007, a confidential informant advised police that an unidentified black man was selling crack from the Indiana Avenue house. According to the officer, in response to this information, police set up surveillance on the house. While police were watching, they observed numerous individuals come to the house and leave after only a few minutes. The investigating officer testified that such traffic is indicative of drug activity at a location.

{¶ 5} The investigating officer testified that police then decided to attempt to make a controlled drug buy from the house. According to the officer, he sent a confidential informant into the Indiana Avenue house. The informant successfully purchased $20 worth of crack cocaine. Based on this investigative activity, police obtained the warrant authorizing the search of the Indiana Avenue house. The affidavit for a search warrant and the warrant itself were introduced into evidence.

{¶ 6} Also introduced into evidence were the bags seized during the search. A forensic expert identified the substance contained in the bags as crack cocaine. The expert testified the quantity was 18.31 grams.

{¶ 7} The case was submitted to the jury which acquitted appellant of the trafficking charge, but found him guilty of possession, a second degree felony. The trial court entered judgment on the verdict and sentenced appellant to a two year term of incarceration. From this judgment of conviction, appellant now brings this appeal. Appellant sets forth the following two assignments of error:

{¶ 8} "First Assignment of Error:

{¶ 9} "The use of testimonial hearsay at trial constituted a violation of appellant's Sixth Amendment right to confront his witnesses.

{¶ 10} "Second Assignment of Error:

{¶ 11} "The appellant was not afforded effective assistance of counsel as required by the United States and Ohio Constitutions."

I. Testimonial Hearsay

{¶ 12} In his first assignment of error, appellant asserts that the investigating officer's testimony concerning information from the confidential informant was "testimonial hearsay," the admission of which constituted a violation of his Sixth Amendment right to confront witnesses against him.

{¶ 13} "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." *Davis v. Washington* (2006), 547 U.S. 813,

821. Evidence that is "testimonial hearsay" offends a defendant's Sixth Amendment right to confrontation. *Crawford v. Washington* (2004), 541 U.S. 36, 51. Hearsay is, "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matters asserted." Evid.R. 801(C). Much of the jurisprudence surrounding the *Crawford* case revolves around the United States Supreme Court's decision not to expressly define that which is "testimonial." *Crawford*, supra; *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, ¶ 22. In this matter, however, the question is not so much the definition of "testimonial," but what is "hearsay."

{¶ 14} "To constitute hearsay, two elements are needed. First, there must be an out-of-court statement. Second, the statement must be offered to prove the truth of the matter asserted. If either element is not present, the statement is not 'hearsay.'" *State v. Maurer* (1984), 15 Ohio St.3d 239, 262.

{¶ 15} The testimony concerning the confidential informant's statements was not entered into evidence to prove the truth of the matter asserted. The confidential informant's statement that an "unknown black male" was selling crack cocaine at the Indiana Avenue house was offered, not for the purpose of establishing that appellant was said black male, but to explain the investigator's subsequent actions. The statement was used to obtain a search warrant for the premises, but appellant never challenged the warrant.

{¶ 16} At trial, testimony regarding the confidential informant was admitted to give a factual context as to why the police were at the residence at the time of appellant's

arrest, not to prove the truth of the matter asserted. As a result, such testimony and its recitation in the affidavit for a search warrant is not within the definition of hearsay. Since the evidence of which appellant complains was not hearsay, *Crawford* is inapplicable. There was no violation of the right to confrontation.

{¶ 17} Accordingly, appellant's first assignment of error is not well-taken.

II. Ineffective Assistance of Counsel

{¶ 18} Appellant, in his second assignment of error, asserts that he was not afforded effective assistance of counsel for two reasons. He maintains (1) counsel failed to object to the admittance of testimonial hearsay which violated appellant's constitutional rights; and (2) counsel failed to request the trial court instruct the jury on the lesser included offense of possession of crack cocaine as a fourth degree felony.

{¶ 19} "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction * * * has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 688.

{¶ 20} Scrutiny of counsel's performance must be deferential. *Strickland v. Washington* at 689. In Ohio, a properly licensed attorney is presumed competent and the burden of proving ineffectiveness is the defendant's. *State v. Smith* (1985), 17 Ohio St.3d 98, 100.

{¶ 21} Counsel's actions which "might be considered sound trial strategy," are presumed effective. *Strickland v. Washington* at 687. "[E]ven 'debatable trial tactics' do not 'constitute a deprivation of the effective assistance of counsel.'" *State v. Clayton* (1980), 62 Ohio St.2d. 45, 49.

{¶ 22} Appellant's first argument within the second assignment of error is predicated on counsel's purported ineffectiveness in failing to object to the admission of the confidential informant's statements as testimonial hearsay. Since we have concluded that the confidential informant's statements were not testimonial hearsay, this argument is without merit.

{¶ 23} Appellant's second argument is that counsel was ineffective for failing to request an instruction on a lesser included offense. In order to determine whether appellant's claim warrants reversal, appellant must first show that counsel's performance was deficient.

{¶ 24} A lab analyst testified that the total amount of crack cocaine recovered from the Indiana Avenue house equaled 18.31 grams. This total amount was comprised of eight similarly sized bags of crack cocaine. Appellant testified that only one of the bags of crack cocaine was his and the seven found in the bedroom were not. The jury

concluded that all eight bags belonged to appellant and he was convicted of having an amount of crack cocaine which equaled or exceeded ten grams but is less than 25 grams, a second degree felony.

{¶ 25} Defense counsel could have requested that the jury be instructed on the lesser included offense of possession of less than five grams of crack cocaine, a fourth degree felony. See R.C. 2925.11(C)(4)(b). By not requesting such an instruction, however, appellant's counsel forced the jury to decide between acquittal and conviction of the greater amount, without a compromise option. Failure to request the lesser included offense, then, amounted to a trial strategy intended to gain an acquittal on the possession charge for appellant.

{¶ 26} Although counsel's strategy resulted in conviction, the fact that there was another strategy available does not amount to ineffective assistance of counsel. *Strickland v. Washington* at 687. Accordingly, counsel's performance was not deficient within the meaning of *Strickland*. Having concluded that counsel's performance was not deficient, we need not determine whether counsel's performance prejudiced the defense. Appellant's second assignment of error is not well-taken.

{¶ 27} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is affirmed. Costs to appellant, pursuant to App.R. 24.

JUDGMENT AFFIRMED.

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