[Cite as *State v. Young*, 2010-Ohio-3402.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92744

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MICHAEL YOUNG

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTIONS AFFIRMED;
REVERSED IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-515454

BEFORE: Celebrezze, J., Kilbane, P.J., and Sweeney, J.

RELEASED: July 22, 2010

JOURNALIZED:

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Michael Young, appeals his convictions for drug possession and drug trafficking, arguing that his convictions were not supported by sufficient evidence and were against the manifest weight of the evidence, he was unlawfully seized, and his counsel was constitutionally ineffective. After a thorough review of the record and based on the pertinent case law, we affirm appellant's convictions, but remand the case for resentencing.

{¶ 2} Just after midnight, on August 20, 2008, appellant was at a multi-unit house on East 139th Street in Cleveland, Ohio. He and several

other people were sitting on the steps in front of the house. Appellant walked off the porch and down the walk toward the street as Cleveland police officers from the Community Services Unit were patrolling the area in force. Officer Sean Dial testified that, upon seeing the officers, appellant turned around and bounded up the porch steps two at a time. He was then observed trying to enter the house, but was prevented by the locked front door. Appellant then took something from his mouth, placed it on the window sill next to the door, and walked away.

{¶ 3} Officer Dial testified that the members of his unit immediately exited their vehicles and rushed the porch. They ordered those present to the ground and handcuffed them for officer safety. Jason Pulley, one of those present on the steps of the porch that night, testified that one officer went straight toward appellant. Lieutenant Gordon Holmes, a member of the Fourth District vice unit, recovered a moist, clear plastic bag containing 12.29 grams of crack cocaine.

{¶ 4} Appellant was arrested and charged with one count of drug possession, one count of drug trafficking, and one count of possession of criminal tools — approximately $70. Trial commenced on January 14, 2009 with the testimony of several officers and two of the individuals who were on the porch steps that night. Appellant's Crim.R. 29 motion made at the conclusion of the state's case was partially granted, and the judge dismissed

the charge of possession of criminal tools. On January 20, 2009, the jury found appellant guilty of possession and trafficking. He was sentenced to seven years incarceration for each charge, to be served concurrently.

{¶ 5} Appellant filed the instant appeal raising three assignments of error.

Law and Analysis

Sufficiency and Manifest Weight

{¶ 6} In appellant's first assigned error, he argues that there was insufficient evidence to support the guilty verdicts and his convictions were against the manifest weight of the evidence.

{¶ 7} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 486, 124 N.E.2d 148. A conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 8} Where there is substantial evidence upon which the trier of fact has based its verdict, a reviewing court abuses its discretion in substituting its judgment for that of the trier of fact as to the weight and sufficiency of the evidence. *State v. Nicely* (1988), 39 Ohio St.3d 147, 156, 529 N.E.2d 1236.

{¶ 9} The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. On review, the appellate court must determine, after viewing the evidence in a light most favorable to the prosecution, whether 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, 273, 574 N.E.2d 492; *Jackson v. Virginia*.

{¶ 10} Sufficiency of the evidence is subjected to a different standard than is manifest weight of the evidence. Article IV, Section 3(B)(3) of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the factfinder. Thus, when a claim is assigned concerning the manifest weight of the evidence, an appellate court "has the authority and duty to weigh the evidence and to determine whether the findings of * * * the trier of facts were so against the weight of the evidence as to require a reversal and a remanding of the case for retrial." *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 345, 82 N.E.2d 709.

{¶ 11} The United States Supreme Court recognized the distinction in considering a claim based upon the manifest weight of the evidence as opposed to sufficiency of that evidence. The court held in *Tibbs v. Florida* that, unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does

not require special deference accorded verdicts of acquittal, i.e., invocation of the double jeopardy clause as a bar to relitigation. Id. at 43.

{¶ 12} Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated: "The court, 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." Id. at 720.

{¶ 13} Here, appellant was convicted of drug trafficking in violation of R.C. 2925.03(A)(2), and drug possession in violation of R.C. 2925.11(A). Appellant first argues that there is insufficient evidence to support a drug trafficking conviction.

{¶ 14} R.C. 2925.03(A)(2) provides that "[n]o person shall knowingly * * * transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person." Appellant argues that the evidence presented at trial, the

nearly 13 grams of crack cocaine found on the window sill, was inadequate to convict appellant of drug trafficking.

{¶ 15} Appellant correctly points out that none of the accouterments associated with drug trafficking were found on him. The crack cocaine found was not individually packaged for resale, and appellant had no packaging materials, scales, or weapons.

{¶ 16} The discovery of these items is not dispositive of the issue. This court has previously held that sufficient evidence of drug trafficking existed based on "the large number of rocks in appellant's possession, large amount of cash on appellant, an unlikely explanation for carrying the cash, that appellant was better dressed than the others, and the behavior of appellant and the other men when they saw the marked police car." *State v. Bryant* (June 2, 1994), Cuyahoga App. No. 65614, *6. Bryant was observed in an area of high drug activity congregating on a corner with three or four other individuals. When the police officers stopped their car at the curb, the individuals began walking away in different directions. Bryant was observed discarding an item into a bush. Police recovered a plastic bag containing 33 rocks of crack cocaine and almost $200.

{¶ 17} Similarly, appellant was observed in an area of high drug activity late at night. When he noticed police officers in the area, he turned around, mounted the steps to the porch, and tried to enter the house. After failing to

gain entry, he removed something from his mouth and discarded it. Detective Thomas Barnes of the Cleveland police department testified that, in his experience, drug dealers often carry their wares in their mouths. He also testified that the street value of the drugs found was between $1,000 to $1,200, which was far more than one would normally have for personal consumption.

{¶ 18} In *State v. Batin*, Stark App. No. 2004-CA-00128, 2005-Ohio-36, the Fifth District held that "[t]he appellant's possession of a large amount of crack cocaine [13.45 grams], both cut and uncut, as well as his possession of a large sum of money [$432] permitted the jury to draw the logical inference that he was involved in the distribution of drugs. Likewise, the lack of any cocaine smoking paraphernalia on his person at the time of his arrest suggested that the drugs he possessed were not for personal use." Id. at ¶24.

{¶ 19} Similar to *Batin*, no drug paraphernalia was found on appellant, undercutting his argument that the drugs were for personal use. Det. Barnes testified that the quantity of crack recovered was not typical for personal use. We have held in several cases that police officers may testify to the nature and amount of drugs and its significance in drug trafficking. See *State v. Fellows* (May 22, 1997), Cuyahoga App. No. 70900, citing *State v. Crenshaw* (June 4, 1992), Cuyahoga App. No. 60671; *State v. Wilson* (Oct. 3, 1996), Cuyahoga App. No. 69751. Therefore, this evidence was properly

before the jury and they could make reasonable inferences to conclude that appellant was involved in the transport of crack cocaine for sale. Viewing the evidence in a light most favorable to the state, as we must, appellant's conviction for drug trafficking is supported by sufficient evidence.

{¶ 20} Also based on this evidence, the jury did not clearly lose its way in convicting appellant of drug trafficking. The amount involved, as well as the testimony of Det. Barnes regarding the typical method of transportation, was a sufficient basis for the jury to find appellant guilty. The evidence in this case does not demonstrate that manifest injustice occurred when the jury found appellant guilty of drug trafficking.

Propriety of Investigation

{¶ 21} Appellant next argues that his constitutional rights were violated when officers seized and investigated him without reasonable suspicion.

{¶ 22} The suppression of evidence must be raised in a pretrial motion. Crim.R. 12(C)(3). Because appellant did not challenge the admissibility of his search and seizure prior to trial, he has removed this from our consideration except as it relates to appellant's next assignment of error. *State v. Chandler*, Cuyahoga App. No. 81817, 2003-Ohio-6037, ¶32 ("[b]y failing to file a motion to suppress illegally obtained evidence, a defendant waives any objection to its admission."); *State v. Roskovich*, Belmont App. No. 04 BE 37, 2005-Ohio-2719, ¶13 ("a defendant's failure to raise an issue in a motion to suppress constitutes a waiver of that issue on appeal."); *State v. Stuber*, Allen App. No. 1-02-66, 2003-Ohio-982, ¶10 ("[b]ecause the Appellant failed to request a motion to suppress, the issues asserted in his assignment of error are waived.").

Ineffective Assistance of Counsel

{¶ 23} Appellant next argues that he received ineffective assistance of counsel in violation of his rights pursuant to the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution, and the trial court erred by not sua sponte declaring a mistrial.

{¶ 24} In order to substantiate a claim of ineffective assistance of counsel, the appellant is required to demonstrate that: 1) the performance of defense counsel was seriously flawed and deficient; and 2) the result of appellant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 687-696, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 25} In reviewing a claim of ineffective assistance of counsel, it *must* be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶ 26} The Ohio Supreme Court held in *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373, that, "'[w]hen considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.' *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 2 O.O.3d 495, 498, 358 N.E.2d 623, 627, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135, 57 L.Ed.2d 1154. This standard is essentially the same as the one enunciated

by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668 * * *."

{¶ 27} "Even assuming that counsel's performance was ineffective, this is not sufficient to warrant reversal of a conviction. 'An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison*, 449 U.S. 361, 364-365 [101 S.Ct. 665, 667-68, 66 L.Ed.2d 564] (1981).' *Strickland*, supra, 466 U.S. at 691, 104 S.Ct. at 2066. To warrant reversal, '[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.' *Strickland*, supra, at 694, 104 S.Ct. at 2068." *Bradley* at 142.

{¶ 28} Appellant first argues that his retained counsel was ineffective because he failed to file a motion to suppress. The Ohio Supreme Court has "rejected claims of ineffective counsel when counsel failed to file or withdrew a suppression motion when doing so was a tactical decision, there was no reasonable probability of success, or there was no prejudice to the defendant." *State v. Nields*, 93 Ohio St.3d 6, 34, 2001-Ohio-1291, 752 N.E.2d 859. To establish ineffectiveness in this context, "a defendant must prove that there was a basis to suppress the evidence in question. In other words, the

defendant must show that a motion to suppress would have had a reasonable probability of success." (Internal citations omitted.) *State v. Siders*, Gallia App. No. 07CA10, 2008-Ohio-2712, ¶11.

{¶ 29} The evidence, as sifted through below, demonstrates that officers had a reasonable suspicion of criminal activity to justify the seizure and investigation of appellant.

{¶ 30} The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures, rendering them per se unreasonable unless an exception applies. *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576. The analysis for a search requires a two-step inquiry where probable cause is required and, if it exists, a search warrant must be obtained unless an exception applies. *State v. Moore*, 90 Ohio St.3d 47, 2002-Ohio-10, 734 N.E.2d 804. "If the state fails to satisfy either step, the evidence seized in the unreasonable search must be suppressed." Id. at 49, citing *Mapp v. Ohio* (1961), 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081; *AL Post 763 v. Ohio Liquor Control Comm.*, 82 Ohio St.3d 108, 111, 1998-Ohio-367, 694 N.E.2d 905.

{¶ 31} One common exception is the investigatory or *Terry* stop. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. Under *Terry*, a police officer may stop and investigate unusual behavior, even without probable cause to arrest, if he or she has sufficient evidence to reasonably

conclude that criminal activity is afoot. The officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Terry* at 21. An investigatory stop "must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." *U.S. v. Cortez* (1981), 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621.

{¶ 32} "In determining the reasonableness of the officer's belief, courts examine the totality of the circumstances, including the following factors: (1) whether the location of the contact is an area of high crime or high drug activity, (2) the suspect's non-compliance with the officer's orders, (3) the time of the occurrence, (4) the officer's experience, (5) the lack of backup for the officer, (6) the contact's location away from the police cruiser, (7) whether the suspect is fleeing the officer or the scene, (8) any furtive movements by the suspect, (9) the precautionary measures taken by the officer, and (10) the suspected offense." (Internal citations omitted.) *State v. Stiles*, Ashtabula App. No. 2002-A-0078, 2003-Ohio-5535, ¶17.

{¶ 33} In the present case, officers with considerable experience in narcotics investigations observed appellant change direction when he spotted the police. They further observed him try to gain entry to a house by putting his shoulder to the door as well as knocking on the door. They then observed him remove something from his mouth and discard it. Det. Barnes testified

that in his experience drug dealers often keep drugs in their mouths. The incident occurred late at night in an area of high drug activity. Officers were in that area investigating complaints of drug trafficking, although none involved appellant or that specific location.

{¶ 34} Generally, simply being in a high drug activity area or walking away from police officers does not subject one to search or seizure. *State v. Williams,* Cuyahoga App. No. 92822, 2010-Ohio-901, ¶12-13, citing *State v. Fanning* (1990), 70 Ohio App.3d 648, 650, 591 N.E.2d 869. However, when this court has been faced with situations where police officers observed one suspected of drug activity walk away from officers and discard something, we have upheld investigatory stops. See *State v. Edwards* (1992), 80 Ohio App.3d 319, 322-323, 609 N.E.2d 200; *State v. White*, Cuyahoga App. No. 93109, 2010-Ohio-521, ¶18, ("attempting to hide something from the police in a high drug activity area is suspicious enough to investigate further * * *.").

{¶ 35} "[W]e presume that defense counsel was effective if defense counsel could reasonably have decided that the filing of a motion to suppress would have been a futile act." *State v. Jackson*, Cuyahoga App. No. 86542, 2006-Ohio-1938, ¶18, citing *State v. Edwards* (July 11, 1996), Cuyahoga App. No. 69077. That is the case here. The factors above are sufficient to conclude that a properly submitted motion to suppress would not have

changed the outcome of appellant's trial. Therefore, trial counsel was not constitutionally ineffective in this regard.

{¶ 36} Appellant next complains of his counsel's behavior at trial. Defense counsel did demonstrate some odd behavior. When appellant was missing the second morning of trial, the court asked defense counsel for appellant's whereabout. Counsel claimed that any conversation he had with his client was privileged and he could not, in good conscience, divulge anything his client had told him. This led the trial court to believe appellant had fled and precipitated a long colloquy between defense counsel and the court about the nature of attorney-client privilege. About an hour later, appellant arrived. During a recess, while the jury was outside the court room, the judge asked appellant to explain his absence. Appellant stated that he had overslept. The trial judge became exasperated at defense counsel for failing to relay this information, choosing instead to waste the court's time claiming the conversation was protected. Trial counsel was held in contempt and fined $250. Later, trial counsel's cell phone rang on two occasions; it was taken by the judge. The trial judge even went so far as to ask defense counsel if he was feeling alright after counsel objected to the state's admission of exhibits without any basis, claiming it was routine to object.

{¶ 37} Appellant argues that this behavior abridged fundamental rights and the trial court should have sua sponte declared a mistrial. "A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened, unless the substantial rights of the accused or the prosecution are adversely affected; this determination is made at the discretion of the trial court." *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33, 550 N.E.2d 490. "Ultimately, a defendant is only entitled to a mistrial 'when the ends of justice so require and when a fair trial is no longer possible.'" *State v. Jackson*, Lucas App. No. L-07-1184, 2008-Ohio-1563, ¶42, citing *State v. Williams*, Hamilton App. Nos. C-060631 and C-060668, 2007-Ohio-5577, ¶50, citing *State v. Brewster*, Hamilton App. Nos. C-030024 and C-030025, 2004-Ohio-2993.

{¶ 38} While defense counsel's actions were unusual at certain points in the trial, he vigorously cross-examined witnesses, made cogent arguments on appellant's behalf, and presented evidence and witnesses rebutting the state's case. Defense counsel was not constitutionally ineffective. The behavior appellant complains of, such as defense counsel's cell phone going off and his failure to disclose appellant's whereabouts, did not diminish appellant's ability to receive a fair trial. Therefore, the trial court did not err by not sua sponte ordering a new trial.

Allied Offenses

{¶ 39} Although not raised by either party, appellant was improperly convicted and sentenced for drug possession and drug trafficking. R.C. 2941.25(A) provides that "[w]here the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant can be convicted of only one." The Ohio Supreme Court has "held that drug possession under R.C. 2925.11(A) and drug trafficking under R.C. 2925.03(A)(2) were allied offenses." *State v. Seljan*, Cuyahoga App. No. 89845, 2009-Ohio-340, ¶7, citing *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, paragraph two of the syllabus.

{¶ 40} Even though the trial court sentenced appellant to concurrent terms for each conviction, "a defendant is prejudiced by having more convictions than are authorized by law." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶31. Therefore, this case must be remanded to the trial court for resentencing where the state shall elect on which charge appellant should be convicted and sentenced. *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, 922 N.E.2d 937, paragraph three of the syllabus.

{¶ 41} Convictions affirmed; cause reversed in part and remanded to the lower court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

FRANK D. CELEBREZZE, JR., JUDGE

MARY EILEEN KILBANE, P.J., and
JAMES J. SWEENEY, J., CONCUR