[Cite as *State v. Jackson*, 2010-Ohio-3723.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93699

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JONATHAN JACKSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART; REVERSED IN PART AND REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-522653

BEFORE: Blackmon, P.J., Boyle J., and Cooney, J.

RELEASED AND JOURNALIZED: August 12, 2010

ATTORNEY FOR APPELLANT

Britta M. Barthol
P.O. Box 218
Northfield, Ohio 44067

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Vincent I. Pacetti
Assistant County Prosecutor
8th Floor, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

PATRICIA ANN BLACKMON, P.J.:

{¶ 1} Appellant Jonathan Jackson appeals his convictions for drug possession and drug trafficking and assigns the following three errors for our review:

> **"I. The trial court erred when it denied the appellant's motion to disclose the identity of the informant which was material to the defense."**

"II. Appellant's convictions for drug possession and drug trafficking were against the manifest weight of the evidence."

"III. The trial court erred by sentencing the appellant to consecutive sentences on the drug possession and drug trafficking charges where those charges were allied offenses of similar import and no separate animus existed."

{¶ 2} Having reviewed the record and relevant law, we affirm the finding of guilt, but reverse the sentence and remand for resentencing. The apposite facts follow.

Facts

{¶ 3} On March 25, 2009, Cleveland police set up a controlled buy using a confidential reliable informant ("CRI"). The department had used the CRI on many other occasions. In the instant case, the officers took the CRI to a high drug trafficking area at East 55th Street and Central Avenue to see if someone would offer to sell him drugs. The CRI was searched prior to the buy to ascertain there were no drugs. He was then given prerecorded money with which to purchase the drugs.

{¶ 4} Detective George Redding was responsible for driving the CRI in an undercover car to the targeted area. He stated that shortly after the CRI

got out of the car, Jackson approached the CRI, and the two men had a brief conversation. The detective, who was only 8 to 10 feet away, witnessed the two men engage in a hand-to-hand transaction. The CRI then got back into the undercover car. Detective Redding notified the waiting take-down unit that a drug sale had been completed and left the area immediately in order to protect the CRI's identity. A bag of crack cocaine was retrieved from the CRI. A search of Jackson revealed he had the marked money that was given to the CRI with which to purchase the drugs.

{¶ 5} The jury found Jackson guilty of one count of drug possession and two counts of drug trafficking. Based on Jackson's lengthy prior drug-related crimes, the trial court sentenced him to the maximum sentence of one year in prison on each count. The court merged the drug trafficking counts and ordered the drug possession count be served consecutively to the trafficking counts, for a total of two years in prison.

Identity of the CRI

{¶ 6} In his first assigned error, Jackson contends the trial court erred by not requiring the identity of the CRI to be disclosed.

{¶ 7} We will not reverse a trial court's decision regarding the disclosure of the identity of a confidential informant absent an abuse of discretion. *State v. Bays*, 87 Ohio St.3d 15, 1999-Ohio-216, 716 N.E.2d 1126. See, also, *State v. Glenn*, Cuyahoga App. No. 85005, 2005-Ohio-2009, citing

State v. Brown (1992), 64 Ohio St.3d 649, 597 N.E.2d 510; *State v. Richard* (Dec. 7, 2000), Cuyahoga App. No. 76796. An abuse of discretion is defined as a decision that is unreasonable, arbitrary, or unconscionable, rather than a mere error in judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 450 N.E.2d 1140.

{¶ 8} Generally, "the identity of an informant must be revealed to a criminal defendant when the testimony * * * is vital to establishing an element of the crime or would be helpful or beneficial to the accused in preparing or making a defense to criminal charges." *State v. Williams* (1983), 4 Ohio St.3d 74, 446 N.E.2d 779, syllabus; *State v. Kelley*, 179 Ohio App.3d 666, 2008-Ohio-6598, 903 N.E.2d 365, ¶10. Here, neither one of these scenarios is met.

{¶ 9} The testimony of the CRI is not vital to establishing any element of the crimes for which Jackson was charged. The CRI participated in a controlled buy, which was observed by a detective who had an unobstructed view of the transaction. As previously noted, Detective Reddy's car was parked approximately 8 to 10 feet away from the transaction. He stated that from this vantage point he was able to observe the controlled buy. Additionally, Jackson was apprehended within seconds after the transaction was completed, with the buy money in his possession. Further, Detective Reddy retrieved crack cocaine from the CRI whom had been searched prior to

the transaction. Thus, with the overwhelming evidence against Jackson, by virtue of how the controlled buy transpired, the CRI's testimony would not be vital to establishing any element of the crimes.

{¶ 10} Nor would the CRI's testimony have been beneficial in preparing a defense. The CRI could only testify to his participation in the controlled buy, which the police officers observed. *State v. Wallace*, Cuyahoga App. No. 85541, 2005-Ohio-4397. Accordingly, Jackson's first assigned error is overruled.

Manifest Weight of the Evidence

{¶ 11} In his second assigned error, Jackson argues his convictions were against the manifest weight of the evidence.

{¶ 12} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> **"The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of**

> **adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive --- the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."**

{¶ 13} However, an appellate court may not merely substitute its view for that of the jury, but must find that "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. Accordingly, reversal on manifest weight grounds is reserved for "the

exceptional case in which the evidence weighs heavily against the conviction." Id.

{¶ 14} While Jackson contends the testimony of the detectives regarding the buy was conflicting and unreliable, the record indicates otherwise. The detectives' testimony was clear and concise and did not conflict. Jackson also contends there was no evidence as to what was exchanged during the hand-to-hand transaction. However, Detective Reddy testified that he retrieved crack cocaine in a baggie from the informant.

{¶ 15} Jackson also contends that the informant's failure to testify affected the credibility of the evidence presented. However, as we stated in the first assigned error, the informant's testimony was not necessary when Detective Reddy was able to observe the entire transaction from 8 to 10 feet away. Jackson also argues that it was crucial to present evidence regarding the amount the CRI was paid for his assistance. However, because there was independent evidence of the transaction that did not require the CRI to testify, the fact the jury was not apprised of how much the CRI was paid was irrelevant.

{¶ 16} Finally, Jackson contends the convictions were against the manifest weight of the evidence because the Record Management System Number ("RMS") placed on the report was different from the RMS number assigned to the case in the database. The officer's report had the number

09-88532 written on it, while the database had the number 09-86532 assigned to the case. Lieutenant James Barrow testified he wrote the number on the report and admitted that he must have written the fourth number as "8" instead of the correct number "6." He stated that he received the number assigned to the case over the radio from the police department and must have transcribed it incorrectly.

{¶ 17} Additionally, Detective Foster stated that the "8" was definitely a typo because all the cases from that night had the beginning numbers of 09-86. To reach 09-88, would have required them to make another 2,000 arrests that night. The typo also did not affect the fact that the remaining parts of the report matched. Accordingly, Jackson's second assigned error is overruled.

Allied Offenses

{¶ 18} In his third assigned error, Jackson contends that the trial court erred by not merging his convictions for drug trafficking under R.C. 2925.03(A)(2) and drug possession under R.C. 2925.11, because they are allied offenses.

{¶ 19} The state concedes this argument pursuant to *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, ¶31. The Supreme Court of Ohio in *Cabrales* specifically held that "trafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of that same controlled

substance under R.C. 2925.11(A) are allied offenses of similar import because commission of the first offense necessarily results in commission of the second." Id. at ¶30.

{¶ 20} Because Jackson's convictions for drug trafficking and drug possession were for the same controlled substance, crack cocaine, we find them allied offenses of similar import. Moreover, these offenses were committed with one animus — selling the drug. Therefore, Jackson cannot be sentenced for both offenses. Accordingly, Jackson's third assigned error is sustained.

{¶ 21} The matter is remanded for the trial court to vacate appellant's sentence for drug possession and drug trafficking and for the prosecution to elect which allied offense it will pursue in this regard at the resentencing hearing. *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 99 N.E.2d 152; *State v. White*, Cuyahoga App. No. 92972, 2010-Ohio-2342.

Judgment affirmed in part; reversed in part and remanded for resentencing.

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 be sent to said court to carry this judgment into execution.

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

PATRICIA ANN BLACKMON, PRESIDING JUDGE

MARY J. BOYLE, J., and
COLLEEN CONWAY COONEY, J., CONCUR