[Cite as *State v. Pryor*, 2010-Ohio-6154.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93970

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ANTONIO PRYOR

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-523682

BEFORE: Celebrezze, J., Gallagher, A.J., and Kilbane, J.

RELEASED AND JOURNALIZED: December 16, 2010

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Antonio Pryor, appeals his convictions for drug trafficking and possessing criminal tools, arguing that there was insufficient evidence to support his convictions, his convictions were against the manifest weight of the evidence, and he was denied the effective assistance of counsel. Based on our review of the facts and relevant case law, we affirm.

{¶ 2} The relevant facts were adduced from the testimony of Sergeant Thomas Shoulders, Detective Patrick Brown, and Officer John Lally, all of whom work for the Cleveland Police Department ("CPD"). On April 24, 2009,

Detective Brown was approached by a confidential reliable informant ("CRI"),[1] who indicated that he could purchase crack cocaine from someone he knew to be a drug dealer. Detective Brown used his personal cell phone to call the alleged drug dealer ("the target"). Detective Brown sat next to the CRI, who spoke to the target and arranged to purchase $40 worth of crack cocaine.

{¶ 3} Detective Brown coordinated with other officers from CPD, and the group traveled in individual vehicles to the area where the controlled drug buy was to take place. After waiting several minutes, Detective Brown called the target on his cell phone and had the CRI confirm that the sale of drugs was going to take place. The target informed the CRI that he would be approaching the area on foot and would arrive in approximately five minutes.

{¶ 4} As the target approached the area, the CRI confirmed the target's identity with Detective Brown. The CRI then stood in the parking lot of a convenience store waiting for appellant to approach. As appellant reached the store's parking lot, a marked police cruiser, which was conducting a standard patrol of the area, drove by. Appellant was "spooked" and walked into the store. Detective Brown signaled Sergeant Shoulders and Officer Lally, who immediately began the take-down process.

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[1]According to Sergeant Shoulders, a CRI is someone who works with the police on a regular basis and has a history of providing the police with accurate information related to crimes that have been or are going to be committed.

{¶ 5} According to Sergeant Shoulders, he followed appellant into the store, identified himself as a police officer, and told appellant to stop. Sergeant Shoulders and Officer Lally both testified that they saw appellant put his hand to his mouth and that it looked as if he was attempting to swallow something. Although the officers did not see what appellant put in his mouth, an examination of his mouth revealed an off-white substance.[2]

{¶ 6} The officers placed appellant under arrest and conducted a search of his person, which revealed a cell phone, but no money or drugs. After confiscating appellant's cell phone and returning to police headquarters, Detective Brown used his personal cell phone to call the number the CRI had given him for the suspected drug dealer — appellant's cell phone immediately began to ring.

{¶ 7} Appellant was indicted in a three-count indictment for drug trafficking, tampering with evidence, and possessing criminal tools. After a trial by jury, he was acquitted of tampering with evidence, but was found guilty of drug trafficking and possessing criminal tools.[3] The trial court sentenced him to 11 months on each count to run concurrently to one another for an aggregate sentence of 11 months in prison. This appeal followed.

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[2]Officer Lally compared this substance to what it would look like if appellant had eaten a cracker.

[3]R.C. 2925.03(A)(1) and 2923.24(A), respectively, both of which are fifth-degree felonies.

Law and Analysis

Ineffective Assistance of Counsel

{¶ 8} In his first assignment of error, appellant argues that he was denied the effective assistance of trial counsel. 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, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 9} Appellant argues that trial counsel was ineffective in failing to raise a meritorious motion to suppress the search of his cell phone. According to appellant, "[d]efense counsel failed to challenge the search of Appellant's cell phone by the police by way of a motion to suppress and/or by properly arguing that issue. Defense counsel failed to challenge or move to suppress the evidence after there was no probable cause to open, examine and search Appellant's cell phone. Defense counsel was arguing something about wiretaps and missed the main issue, which was the actual police search of Appellant's cell phone."

{¶ 10} What appellant neglects to recognize is that the police did not search his cell phone. Detective Brown unequivocally testified that in order to

confirm that the cell phone on appellant's person was the same phone the CRI had called to set up the drug buy, he merely used his personal cell phone to call the same number the CRI used and waited for appellant's phone to ring. Because no search of appellant's cell phone was conducted, any motion to suppress such a search would have inevitably been denied.[4] As such, appellant is unable to demonstrate that the outcome of his trial would have differed had such a motion been made, and his first assignment of error must fail.

Sufficiency and Manifest Weight of the Evidence

{¶ 11} In his second and third assignments of error, appellant argues that his convictions were not supported by sufficient evidence and that they were against the manifest weight of the evidence. 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. When deciding whether a conviction was based on sufficient evidence 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* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

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[4]We recognize that Detective Brown did turn on appellant's cell phone at trial in order to retrieve the phone number associated with the phone. While we are troubled by this procedure, no assignment of error was raised on this issue, and any error in

{¶ 12} 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* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652, 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. Id. at 43. 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 that "[t]he 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 175.

{¶ 13} The gravamen of appellant's argument is that because no drugs or money were found on his person, he could not be convicted of drug trafficking. Despite this assertion, Ohio courts have consistently held that finding drugs on the offender is irrelevant to a conviction for drug trafficking. *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, 846 N.E.2d 1234, ¶9 ("Undoubtedly, a

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allowing such procedure to occur was harmless.

person can be convicted for offering to sell a controlled substance in violation of R.C. 2925.03(A)(1) without actually transferring a controlled substance to the buyer. * * * Therefore, there is no doubt that appellees' convictions can stand despite the fact that the substance offered as crack cocaine was actually baking soda."). See, also, *Garr v. Warden, Madison Corr. Inst.*, 126 Ohio St.3d 334, 2010-Ohio-2449, 933 N.E.2d 1063, ¶28-29 (holding that the court's holding in *Chandler*, supra, which held that actual drugs must be found in order to sentence someone as a major drug offender, "does not apply to offer-to-sell trafficking cases where no drugs are recovered or tested").

{¶ 14} To support a drug trafficking conviction, the state was required to prove that appellant knowingly sold *or offered to sell* a controlled substance. R.C. 2925.03(A)(1). Evidence of a willingness to transfer the drug to another person is sufficient to prove an offer to sell. *State v. Pimental*, Cuyahoga App. No. 84034, 2005-Ohio-384, ¶24, citing *State v. Esposito* (Dec. 30, 1994), Medina App. No. 2337-M, citing *State v. Scott* (1982), 69 Ohio St.2d 439, 440, 432 N.E.2d 798. Based on this analysis, "the crime of offering to sell a controlled substance is committed when the offer is made, not when the transaction is consummated." *Pimental* at ¶25, citing *State v. Mosley* (1977), 55 Ohio App.2d 178, 183, 380 N.E.2d 731.

{¶ 15} Although no drugs were recovered from appellant's person, much like *Pimental*, the CRI arranged to purchase a specific amount of a controlled substance from appellant, namely crack cocaine. *Pimental* at ¶27. Also, the

CRI and appellant planned to meet at a specific location where the drug transaction was to take place. Id. When appellant was arrested, the officers confiscated a cell phone, which was later confirmed to be the same phone the CRI had called to arrange the purchase. This evidence, although circumstantial, was sufficient to find appellant guilty of drug trafficking.

{¶ 16} Appellant makes no specific arguments related to his conviction for possessing criminal tools. Nonetheless, we will analyze this conviction using the same standard set forth above. R.C. 2923.24(A) provides that "[n]o person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally." As stated above, Detective Brown identified appellant's cell phone as the same phone used to arrange the drug deal with the CRI. Based on this evidence, appellant's conviction for possessing criminal tools was based on sufficient evidence.

{¶ 17} We have thoroughly reviewed the testimony of Sergeant Shoulders, Detective Brown, and Officer Lally. This review revealed no significant discrepancies in their testimony that would cause this court to question the officers' credibility. As such, we cannot find that appellant's convictions are against the manifest weight of the evidence. Appellant's second and third assignments of error are overruled.

Conclusion

{¶ 18} The evidence at trial showed that appellant used his cell phone when offering to sell drugs to the CRI. This evidence, which was obviously believed by

the jury, was sufficient to find appellant guilty of drug trafficking and possessing criminal tools. The fact that no drugs were recovered is of no consequence. The jury did not lose its way nor did a manifest miscarriage of justice occur. Appellant's convictions were based on sufficient evidence and were not against the manifest weight of the evidence. Appellant's assignments of error are overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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 conviction 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

SEAN C. GALLAGHER, A.J., and
MARY EILEEN KILBANE, J., CONCUR