[Cite as *State v. Peoples,* 2010-Ohio-2523.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2005-L-158**
- vs -	:	
JOSEPH PEOPLES,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 05 CR 000282.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, *Craig A. Swenson*, Assistant Prosecutor, and *Alana A. Rezaee*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Erik M. Jones, 1700 West Market Street, #195, Akron, OH 44313-7002 and *Anita B. Staley*, Barthol & Staley, L.P.A., 7327 Center Street, Mentor, OH 44060 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Joseph Peoples appeals from the judgment of the Lake County Court of Common Pleas, sentencing him, upon a jury verdict, to concurrent, six year terms of imprisonment for possession of cocaine and trafficking in cocaine. On this delayed appeal, App.R. 26(B)(5), Mr. Peoples argues appellate counsel was ineffective for failing to challenge the sufficiency of the evidence whereby he was convicted. We disagree, and affirm the judgment of the trial court.

{¶2} The following recitation of facts is drawn from Mr. Peoples' initial appeal, *State v. Peoples*, 11th Dist. No. 2005-L-158, 2007-Ohio-1379, at ¶2-10:

{¶3} "April 14, 2005, the Lake County Narcotics Agency ("LCNA") executed a search warrant on a house at 481 Owego Street, Painesville, Ohio. This followed two controlled purchases of crack cocaine by Confidential Informant 694 from one of the residents of that house, Joseph Peoples. On entering the house, LCNA agents found Mr. Peoples, Mr. Sean Spring, and Mr. Jasper Winchester. They also found three bags of crack, one bag of marijuana, the cell phone Mr. Peoples had used during his negotiations with Confidential Informant 694, and a digital scale. LCNA Special Agent 83 videotaped the premises at 481 Owego Street throughout execution of the search warrant. In one of the bedrooms, he videotaped a marijuana 'grow' room, i.e., a small enclosure, covered in aluminum foil to facilitate the speedy growth of marijuana with high powered lighting. The 'grow' room was evidently unused.

{¶4} "Mr. Peoples executed a written waiver of his Miranda rights. He then admitted to being a dealer in cocaine, and that the marijuana and some of the cocaine found at 481 Owego Street, belonged to him. He admitted to having just concluded a crack deal worth $220, and that most of the $350 found in his pocket resulted from his crack business.

{¶5} "Mr. Spring told the LCNA that he had driven Mr. Peoples, Miss LaBrenda Smith, and her infant child, to the Days Inn in Willoughby, Ohio, earlier that day. After dropping off Miss Smith and her child, Mr. Spring and Mr. Peoples went to a grocery store to purchase food. Upon returning to the Days Inn, Mr. Spring stated that he

observed substantial amounts of crack, marijuana, and cash in the room occupied by Miss Smith.

{¶6} "Based on Mr. Spring's statement, the LCNA obtained a search warrant for Room 216 of the Days Inn. There, they found Miss Smith, her child, eighteen bags of crack in the mattress, marijuana on the table, and $3,660 in cash. Clothing appropriate for a man of Mr. Peoples' size was also discovered. Miss Smith stated that the cash and marijuana were hers, but not the crack.

{¶7} "May 19, 2005, an information in three counts was filed by the Lake County prosecutor against Mr. Peoples, evidently in contemplation of a plea. This information was withdrawn May 27, 2005, when the deal fell through. June 7, 2005, the Lake County Grand Jury returned an indictment against Mr. Peoples, in ten counts: count one, trafficking in cocaine, a felony of the fourth degree, in violation of R.C. 2925.03(A)(1); count two, trafficking in cocaine, a felony of the fifth degree, in violation of R.C. 2925.03(A)(1); count three, possession of cocaine, a felony of the first degree, in violation of R.C. 2925.11, with a forfeiture specification; count four, trafficking in cocaine, a felony of the first degree, in violation of R.C. 2925.03(A)(2), with a forfeiture specification; count five, possession of cocaine, a felony of the third degree, in violation of R.C. 2925.11, with a forfeiture specification; count six, trafficking in cocaine, a felony of the third degree, in violation of R.C. 2925.03(A)(2), with a forfeiture specification; count seven, trafficking in marijuana, a felony of the fifth degree, in violation of R.C. 2925.03(A)(2); count eight, possessing criminal tools, a felony of the fifth degree, in violation of R.C. 2923.24; count nine, possession of cocaine, a felony of the first degree, in violation of R.C. 2925.11, with a forfeiture specification; and count ten, trafficking in

cocaine, a felony of the first degree, in violation of R.C. 2925.03(A)(2), with a forfeiture specification.

{¶8} "A plea of 'not guilty' to each count of the indictment was entered by the trial court on Mr. Peoples' behalf.

{¶9} "The matter came on for jury trial August 8, 2005. August 9, the jury found Mr. Peoples guilty on each charge. The trial court deferred sentencing pending preparation of a pre-sentence report and a drug and alcohol evaluation. September 7, 2005, the trial court held hearing, and sentenced Mr. Peoples, which sentences were memorialized in a judgment entry filed September 15, 2005. The court ordered:

{¶10} "'(t)hat the Defendant serve a stated prison term of seventeen (17) months in prison on Count 1; eleven (11) months in prison on Count 2; six (6) years in prison on Count 3; six (6) years in prison on Count 4; four (4) years in prison on Count 5; four (4) years in prison on Count 6; eleven (11) months in prison on Count 7; eleven months in prison on Count 8; six (6) years in prison on Count 9 and six (6) years in prison on Count 10. Counts 1 through 8 are to run concurrent, Counts 9 and 10 are to run concurrent with each other and Counts 3 and 9 are to run consecutive to each other for a total of twelve (12) years.'

{¶11} "The trial court further granted Mr. Peoples credit for time already served; ordered the forfeiture of the monies found on him and at the Days Inn in Willoughby at the time of his arrest; waived the mandatory fine due to Mr. Peoples' indigency; and, suspended his driver's license.

{¶12} Mr. Peoples appealed. *Peoples*, 2007-Ohio-1379 at ¶11. Relevant to the instant appeal, Mr. Peoples challenged the manifest weight of the evidence used to

convict him for possession of, and trafficking in, the cocaine found in the motel room. Id. at ¶15. Two members of the appellate panel found merit in this assignment of error; the third disagreed. Id. at ¶22-28, 34-37, 39-46. As the Ohio Constitution requires unanimity for an appellate court to reverse a judgment on the manifest weight of the evidence, this court confirmed his convictions, and reversed and remanded for resentencing pursuant to *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. *Peoples*, 2007-Ohio-1379 at ¶38. Mr. Peoples appealed to the Supreme Court of Ohio, which declined jurisdiction. *State v. Peoples*, 114 Ohio St.3d 1482, 2007-Ohio-3699. On or about September 19, 2007, Mr. Peoples was resentenced to the same twelve year term of imprisonment originally imposed. *Peoples v. Eberlin* (Oct. 1, 2008), N.D. Ohio No. 1:07CV:2901, unreported, at 3.

{¶13} The following recitation is from the judgment entry granting, in part, and denying, in part, this delayed appeal:

{¶14} "On or about September 24, 2007, Mr. Peoples petitioned the United States District Court for the Northern District of Ohio, Eastern Division, for a writ of habeas corpus. On or about October 1, 2008, that court issued a decision, staying and holding in abeyance the writ proceedings, pending exhaustion of Mr. Peoples' state court remedies. *Eberlin* at 7-8. The federal court noted that Mr. Peoples had failed to appeal to this court whether the evidence used to convict him of possessing and trafficking in the motel cocaine was insufficient. Id. at 6-7. A mere majority of an Ohio Court of Appeals panel may overturn a conviction for insufficiency of the evidence. Cf. Id. The federal court concluded that Mr. Peoples should be allowed to apply to this

court for a delayed reopening of his state appeal pursuant to App.R. 26(B). *Eberlin* at 7."

{¶15} Mr. Peoples filed this delayed appeal, and we granted it in part, solely to consider the questions of whether Mr. Peoples' initial appellate counsel was ineffective for failing to raise the issue of whether the evidence used to convict him of possessing and trafficking in the cocaine found at the Days Inn was insufficient, and whether that evidence was insufficient. As error, Mr. Peoples assigns:

{¶16} "**THE DEFENDANT-APPELLANT'S DUE PROCESS RIGHTS AND RIGHTS TO FAIR TRIAL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION WERE VIOLATED BY INEFFECTIVE ASSISTANCE OF COUNSEL**."

{¶17} Regarding ineffective assistance of counsel, we stated in *State v. Henry*, 11th Dist. No. 2007-L-142, 2009-Ohio-1138, at ¶50-62:

{¶18} "Preliminarily, we note that *Strickland v. Washington* (1984), 466 U.S. 668, 687, *** states:

{¶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. Unless a defendant makes both showings, it cannot be said that the conviction (***) resulted from a breakdown in the adversary process that renders the result unreliable.'

{¶20} "'(***) 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 687-688. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, ***, quoting *Strickland*, supra, at 694, states: '(t)o 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."'

{¶21} "Very few criminal cases are reversed on the basis of an ineffective assistance of counsel claim due to the fact that there is no clear standard on what dictates 'trial strategy.' The present standard as set forth in *Strickland* sets a broad standard for lawyer competency. Under *Strickland* and its interpretation by Ohio courts, the mere possession of a law license, regardless of experience or criminal defense training, and the most tenuous and reckless of trial strategies, renders counsel effective.

{¶22} "In a civil context, on the other hand, in order to establish a cause of action for malpractice, a reasonableness standard is used in which a plaintiff must establish a tripartite showing: 'an attorney-client relationship giving rise to a duty, a breach of that duty, and damages proximately caused by the breach.' *Savage v. Kucharski*, 11th Dist. No. 2005-L-141, 2006-Ohio-5165, at ¶30, citing *Vahila v. Hall* (1997), 77 Ohio St.3d 421, ***, syllabus.

{¶23} "In order to prevail on a claim of ineffective assistance of counsel, the defendant has the burden to establish two things: (1) that counsel's performance was deficient, and (2) that counsel's deficiency prejudiced the defense. *State v. Reynolds* (1998), 80 Ohio St.3d 670, 674, ***, citing *Strickland*, supra, at 687. The defendant must produce evidence that counsel acted unreasonably by substantially violating essential duties owed to the client. *State v. Sallie* (1998), 81 Ohio St.3d 673, 674, ***.

{¶24} "A criminal defense attorney owes a duty of care to his client. A 'duty' is defined as '(a) legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right.' Black's Law Dictionary (8 Ed.2004) 543.

{¶25} "Under *Strickland* as interpreted by Ohio courts, attorneys are presumed competent, reviewing courts must refrain from second-guessing strategic, tactical decisions and strongly presume that counsel's performance falls within a wide range of reasonable legal assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558, ***. See, also, *State v. Burley* (Aug. 11, 1998), 7th Dist. No. 93-CA-204, 1998 Ohio App. LEXIS 3895, at *9 (a defendant is not guaranteed the right to the best or most brilliant counsel).

{¶26} "Upon demonstrating counsel's deficient performance, the defendant then has the burden to establish prejudice to the defense as a result of counsel's deficiency. *Reynolds*, supra, at 674. The reviewing court looks at the totality of the evidence and decides if there exists a reasonable probability that, were it not for serious errors made, the outcome of the trial would have been different. *Strickland*, supra, at 695-696. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. Id.

{¶27} "An attorney has a duty to zealously represent a criminal defendant. 'Criminal defense is an art, not a science. Criminal defense attorneys adopt different approaches to their craft, based partly upon the demands of the particular case, and partly upon their own personal characteristics. Ordinarily, defense counsel's particular style of defense is not a basis for a claim of ineffective assistance of counsel.' *State v. Benton* (Jan. 20, 1993), 2d Dist. No. 91 CA 71, 1993 Ohio App. LEXIS 172, at *7. Ohio Rule of Professional Conduct 1.1 prohibits a lawyer from representing a client in a legal matter that the lawyer is professionally incompetent to manage. In reading an appellate record, counsel's experience, or lack thereof, in trying a particular type of criminal case becomes evident.

{¶28} "Under the present *Strickland* analysis, 'trial strategy' becomes a constantly moving subjective standard of 'Monday morning quarterbacking' and appellate guesswork as to what strategy was employed, wherein any level of reckless trial practice is considered effective for purposes of guaranteeing an accused the right to effective assistance of counsel, if that defendant cannot prove prejudice in a post trial analysis. The reviewing court requirement of evaluating 'prejudice', 'after the horse has left the barn,' belies the goal of objective evaluation. It is impossible to pretend that you have no knowledge of presented evidence after you have heard that evidence, you know it exists, and it has been admitted. In fact, the second prong of *Strickland* requires the 'but for' showing of prejudice, retrospectively. It is like reading the ending to a novel before you read the book. Facts and events in the story take on new meaning that may not have been relevant before or at trial. It makes it much easier to justify a conviction and does not represent a true picture of the jurors' process of deciding guilt. The

present *Strickland* analysis creates a conflict between the objective reasonable requirements of the first prong of the analysis, and the subjective remedy of the second prong, which results in establishing a broad standard for competency which at some point interferes with the defendant's right to a fair trial and right to counsel.

{¶29} "'The rights of indigent defendants to appointment and effective assistance of counsel are neither lofty philosophical ideals nor rights that only function to give us all faith in the criminal justice system. (***) The rights to appointment of counsel and to effective assistance ultimately impact not only whether people are convicted of crimes based on fair processes but moreover, whether innocent people are convicted of crimes they did not commit. These are both outcomes whose probabilities should be reduced whenever and however feasible.' Note, The Paper Tiger of Gideon v. Wainwright and the Evisceration of the Right to Appointment of Legal Counsel for Indigent Defendants (2005), 3 Cardozo Pub.L., Policy & Ethics J. 495, 500. (Footnote omitted.)

{¶30} "*Strickland* and its Ohio progeny, although black letter law, with their broad standard for effective assistance of counsel, do not serve this purpose. There is an illogical correlation between our present ineffective assistance standard as applied and our goal of fair process and not convicting innocent people and insuring the right to counsel as constitutionally guaranteed. What is the hidden cost of convicting innocent people to the taxpayer, to the defendant, to the state that inevitably pays for the new trial, to the citizenry's confidence in the judiciary and the criminal justice system? With the advent of modern science we now know, objectively, that things have changed since *Strickland* was adopted. DNA evidence and the National Innocence Project have highlighted the weaknesses in the present methodology of administering justice."

{¶31} Mr. Peoples alleges his counsel on his initial appeal was ineffective for failing to challenge his convictions for possession of, and trafficking in, the cocaine discovered at the Days Inn in Willoughby, on the basis of the sufficiency of the evidence.

{¶32} As this court stated in *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, at 13-14:

{¶33} "'Sufficiency' challenges whether the prosecution has presented evidence on each element of the offense to allow the matter to go to the jury, while 'manifest weight' contests the believability of the evidence presented.

{¶34} ""(***) The test (for sufficiency of the evidence) is whether after viewing the probative evidence and the inference[s] drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all of the elements of the offense beyond a reasonable doubt. *The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence*. ***"'

{¶35} "In other words, the standard to be applied on a question concerning sufficiency is: when viewing the evidence 'in a light most favorable to the prosecution,' *** '(a) reviewing court (should) not reverse a jury verdict where there is substantial evidence upon which the jury could reasonably conclude that all of the elements of an offense have been proven beyond a reasonable doubt.' ***" (Emphasis sic.) (Citations omitted.)

{¶36} "'(***) (A) reviewing court must look to the evidence presented (***) to assess whether the state offered evidence on each statutory element of the offense, so

that a rational trier of fact may infer that the offense was committed beyond a reasonable doubt.' *State v. March* (July 16, 1999), 11th Dist. No. 98-L-065, 1999 Ohio App. LEXIS 3333, at *8. The evidence is to be viewed in a light most favorable to the prosecution when conducting this inquiry. *State v. Jenks* (1991), 61 Ohio St.3d 259, ***, paragraph two of the syllabus. Further, the verdict will not be disturbed on appeal unless the reviewing court finds that reasonable minds could not have arrived at the conclusion reached by the trier of fact. *State v. Dennis* (1997), 79 Ohio St.3d 421, 430, ***." *Henry* at ¶162. (Parallel citations omitted.)

{¶37} Application of the foregoing standard to the facts in this case indicates that the evidence presented by the state was sufficient. On both the possession count, and the trafficking count, the state presented evidence, which, when construed in its favor, would allow a rational jury to infer the offenses had been committed.

{¶38} R.C. 2925.11, governing possession of drugs provides, in relevant part: "(A) No person shall knowingly obtain, possess, or use a controlled substance." In this case, the state presented sufficient evidence that Mr. Peoples violated the statute under the doctrine of "constructive possession."

{¶39} "'Constructive possession exists when an individual knowingly exercises dominion and control over an object, even though that object may not be within his immediate physical possession.' *State v. Hankerson* (1982), 70 Ohio St.2d 87, ***, at syllabus, following *State v. Wolery* (1976), 46 Ohio St.2d 316, ***. For constructive possession to exist, '(i)t must also be shown that the person was conscious of the presence of the object.' Id. at 91. 'Dominion and control, as well as whether a person was conscious of the presence of an item of contraband, may be established by

circumstantial evidence.' *State v. Matteson,* Vinton App. No. 06CA642, 2006-Ohio-6827, at ¶23, citing [*State v.*] *Jenks* [(1991), 61 Ohio St.3d 259], at 272-273. Moreover, two or more persons may have joint constructive possession of the same object. [*State v.*] *Riggs* [(Sept. 13, 1999)], [Washington App. No. 98CA39,] 1999 Ohio App. LEXIS 4327, ***, at *4.

{¶40} "Although a defendant's mere proximity to drugs is in itself insufficient to establish constructive possession, proximity to the drugs may constitute some evidence of constructive possession. *State v. Fry,* Jackson App. No. 03CA26, 2004-Ohio-5747, at ¶40. Therefore, presence in the vicinity of contraband, coupled with another factor or factors probative of dominion or control over the contraband, may establish constructive possession. *Riggs*, 1999 Ohio App. LEXIS 4327, ***, at *5." *State v. Brown*, 4th Dist. No. 09CA3, 2009-Ohio-5390, at ¶19-20. (Parallel citations omitted.)

{¶41} In this case, the state presented evidence that Mr. Peoples was an admitted dealer in cocaine, with the tools necessary to prepare it for distribution. It presented evidence that Mr. Peoples had been to the room in the Days Inn where the cocaine was discovered, to drop off Miss Smith, and later, groceries. It presented the testimony of Mr. Spring that, when dropping off the groceries with Mr. Peoples, he noticed cocaine, marijuana, and money in the room. The room was in Miss Smith's name, and the testimony of Mr. Spring indicated that Mr. Peoples had only been in the room briefly – evidence which militates against a finding that Mr. Peoples had constructive possession of the cocaine. However, men's clothing which could fit Mr. Peoples was also in the room – which might allow a jury to infer that he had been there for a sufficient period to have dominion or control of the cocaine. Construing all this

evidence in favor of the state, as we must when considering a sufficiency challenge, leads us to the conclusion that such a challenge would fail. Appellate counsel cannot be held ineffective for not advancing an assignment of error without merit.

{¶42} The result is similar when we consider the trafficking charge. Regarding this crime, R.C. 2925.03 provides, in relevant part:

{¶43} "(A) No person shall knowingly do any of the following:

{¶44} "***

{¶45} "(2) Prepare for shipment, ship, 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."

{¶46} Again, the state presented evidence that Mr. Peoples was an admitted dealer in cocaine; that he possessed the tools necessary to prepare cocaine in a fashion similar to that which was found at the Days Inn; that he had been in the room in which the cocaine was found; and, that due to the clothing and groceries, that stay might be extended. Construing all this most strongly in that state's favor leads to the conclusion that the state presented sufficient evidence on the charge of trafficking.

{¶47} The assignment of error lacks merit.

{¶48} The judgment of the Lake County Court of Common Pleas is affirmed.

{¶49} The court finds there were reasonable grounds for this appeal.

DIANE V. GRENDELL, J.,

TIMOTHY P. CANNON, J.,

concur.