[Cite as *State v. Foti*, 2010-Ohio-5931.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-163**
- vs -	:	
ANGELO J. FOTI,	:	
Defendant-Appellant.	:	

Civil Appeal from the Court of Common Pleas, Case No. 00 CR 00315.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Joshua S. Horacek*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Angelo Foti, pro se, PID: 398-522, Lake Erie Correctional Institution, P.O. Box 8000, Conneaut, OH 44030-8000 (Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Angelo J. Foti, appeals from the judgment of the Lake County Court of Common Pleas. Foti was convicted, following a jury trial, of corrupting another with drugs and receiving stolen property. Foti was sentenced to a 16-year term of imprisonment. For the following reasons, we affirm the trial court's decision.

{¶2} A.L., a 17-year-old high school student from Perry, Ohio, met J.A.F, Foti's 16-year-old son, while the two were working together at Burger King. The two dated for

a few weeks and then A.L. began dating J.A.F.'s brother and Foti's other son, 17-year-old J.O.F.

{¶3} J.O.F. and A.L. began spending a great deal of time together, usually at Foti's home in South Euclid, Ohio. Foti began joining the two on a regular basis, and soon the three were "hanging out" at Foti's home and smoking crack cocaine.

{¶4} A.L. began spending even more time with Foti and J.O.F. and, at times, spent the night at their home. A.L. testified at trial that, at one point, she stole her mother's ("Ms. Lewis") checkbook and went to Foti's home. There she told J.O.F. and Foti that she had taken her mother's checkbook. Later that day, the three decided to go to a local Giant Eagle grocery store, purchase goods with one of Ms. Lewis' checks, and write the check for over the amount of the order to receive money back. After receiving the money, the three drove to Cleveland to buy crack cocaine. The three then proceeded to the J & L Motel in Wickliffe, Ohio, where they smoked the crack for the remainder of the night.

{¶5} That same evening, Ms. Lewis became concerned regarding the whereabouts of A.L. She contacted the Perry Police Department and told them she thought A.L. may be at the J & L Motel and that A.L. was driving Ms. Lewis' white, four-door Chevrolet. The Perry Police contacted Officer Jonathan Thompson of the Wickliffe Police Department. Officer Thompson responded to the call and proceeded to the motel. He observed Ms. Lewis' car in the parking lot. Officer Thompson ascertained which room A.L. was in and knocked on the door. When the door was opened, Officer Thompson noted that A.L. was in the room with Foti and J.O.F. Officer Thompson received social security numbers and birth dates from each individual. Officer

Thompson subsequently left the motel with A.L. and took her to the police station to wait for her mother to pick her up.

{¶6} The next day, Ms. Lewis and her other daughter drove to the J & L Motel to pick up Ms. Lewis' car. Upon entering the car, Ms. Lewis discovered some of her checks inside the car. One was made out to Foti in A.L.'s handwriting for $65. Another check was blank except for an "L" on the signature line. Ms. Lewis then verified her checking account balance and discovered that her balance had gone from approximately $1,500 to $12. Ms. Lewis confronted A.L., who admitted taking the checkbook and writing out checks. A.L. testified that she had subsequently returned the checkbook to her mother but first removed several additional blank checks.

{¶7} The next day, Foti and J.O.F. picked up A.L. from her house, and the three spent much of the day with Foti's four-year-old daughter. They went to an IGA grocery store in Painesville where they again wrote out a check for more than the order to receive cash back. They then went to an Auto Zone store in Painesville where they purchased a part for a car. Finally, they went to another Auto Zone and returned the part for cash. They then took the four-year-old to the park for a few hours before returning her home.

{¶8} After taking the child home, Foti, A.L., and J.O.F. drove to different places in the Cleveland area to purchase crack cocaine. After purchasing the crack cocaine, Foti drove to the Plaza Motel in Wickliffe. There, the three smoked the crack cocaine. Foti then left to go home but left the crack cocaine with J.O.F. and A.L., who stayed in the room for several more hours.

{¶9} Ms. Lewis again called the Perry Police Department. The Perry Police contacted the Wickliffe Police Department to request a search of the J & L Motel. Officer Thompson again responded and went to the J & L Motel to look for A.L. After not locating her, he went to the Plaza Motel, where he found A.L. and J.O.F. Officer Thompson took A.L. into custody and transported her to a meeting place arranged with the Perry Police for transfer of custody.

{¶10} After she was in the custody of the Perry Police, Officer Anthony Costello inventoried her possessions. Items recovered were parts and pieces of a tire pressure gauge, a state identification card with A.L.'s name and picture but a false date of birth, a pack of lighters, two packs of cigarettes, an opened bag of scouring pads, a Giant Eagle Advantage card, a Giant Eagle receipt, an IGA grocery store receipt, and seven blank checks belonging to Ms. Lewis.

{¶11} On September 8, 2000, Foti was indicted on two counts of corrupting another with drugs and two counts of receiving stolen property. Foti waived his right to be present at his arraignment, and the trial court entered pleas of "not guilty" on his behalf to the charges as set forth in the indictment.

{¶12} On November 8, 2000, the state filed a motion for grand jury testimony, seeking that the grand jury testimony of J.O.F. be prepared and filed under seal with the court for the trial. The state cited the fact that J.O.F. was Foti's son and that J.O.F. gave conflicting statements as to his anticipated testimony to the state and defense counsel as the underlying reasons in support of the motion. The trial court granted the motion on November 15, 2000.

{¶13} On November 16, 2000, the state filed a request for immunity of witness turning state's evidence for J.O.F. The state's request was granted by the trial court on that same day.

{¶14} A jury trial commenced. The state presented eight witnesses. The defense made a Crim.R. 29 motion for judgment of acquittal at the end of the state's case-in-chief. That motion was denied. Foti did not present any evidence or witnesses on his behalf. The jury ultimately found Foti guilty on both counts of corrupting another with drugs and made a special finding as to both counts that the controlled substance was crack cocaine. Foti was also found guilty on both counts of receiving stolen property.

{¶15} Foti received a prison term aggregating 16 years from the Lake County Court of Common Pleas on January 11, 2001. The trial court sentenced Foti to eight years of imprisonment on each of the corruption charges, to be served consecutively, and one year of imprisonment on each of the receiving stolen property charges, to be served concurrently with the other charges.

{¶16} Foti subsequently filed several pro se motions, including a motion to vacate void sentence and for resentencing, a motion to "certify to the court of claims the defendant was wrongfully incarcerated," a motion for appointed counsel, a motion for leave to supplement authority, a motion for release on personal bond and/or reasonable bond and to convey him to the trial court, and a motion to vacate void sentence and resentencing. In a November 24, 2009 judgment entry, the trial court denied Foti's motions to certify and for appointed counsel, granted his motion for leave to supplement authority, and determined his motion for release on personal bond was moot.

{¶17} A hearing was held on Foti's motion to vacate void sentence and resentencing. In said motion, Foti claimed the trial court incorrectly advised him both orally and in the sentencing journal that post-release control pursuant to R.C. 2967.28 was optional, thus rendering his sentence void. Foti further argued the trial court failed to fully explain post-release control to him.

{¶18} In its November 24, 2009 judgment entry, the trial court noted that it had reviewed the transcript of the original sentencing hearing, which indicated the sentencing judge correctly notified Foti that he was subject to a term of three years of post-release control. Further, the trial court stated that the sentencing judge explained the nature of post-release control; however, the judgment entry incorrectly stated that post-release control was optional.

{¶19} The November 24, 2009 judgment entry ordered:

{¶20} "That the Judgment Entry of Sentence filed January 11, 2001 be corrected to state that the defendant was notified that three years of post release control is mandatory, that the defendant was notified of the consequences for violating post release control imposed by the Parole Board under R.C. 2967.28 and that the defendant was ordered to serve as part of his sentence any term of post release control imposed by the Parole Board, and any prison term for violation of that post release control."

{¶21} The trial court, after conducting a sentencing hearing, resentenced Foti to a prison term aggregating 16 years—the same term of imprisonment previously imposed.

{¶22} On May 21, 2010, we filed our opinion in this matter affirming the trial court's judgment. On June 2, 2010, Foti filed a motion to reconsider, which we granted on July 15, 2010. In so doing, we vacated our May 21, 2010 judgment entry and opinion. In our July 15, 2010 judgment entry, we noted that although Foti had appealed his conviction of 2001, the order from which that appeal was taken was not a final, appealable order. See *State v. Foti*, 11th Dist. No. 2001-L-020, 2003-Ohio-796. In 2000, the failure to properly notify a defendant of post-release control rendered a defendant's sentence void. *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, at ¶23. As a result of that judgment being void, the issues raised were not barred by the doctrine of res judicata. *State v. Barber*, 2d Dist. No. 22929, 2010-Ohio-831, at ¶15. (Citation omitted.)

{¶23} We now proceed in light of the issues raised in Foti's motion for reconsideration. On appeal, Foti alleges 11 assignments of error. For ease of discussion, we address Foti's alleged errors out of numerical order.

{¶24} As his first, second, and tenth assignments of error are interrelated, we address them in a consolidated analysis. Foti alleges:

{¶25} "[1.] The trial court abused its discretion and committed plain error and/or reversible error in violation of the Ohio and United States Constitutions by re-sentencing the appellant pursuant to R.C. 2929.191 et seq., as this remedial statute is in [conflict] with Crim.R. 32(A), Sup.R[.] 39, requiring a defendant to be lawfully sentenced 'within 15 days' of the verdict or finding of guilt or [receipt] of the pre-sentence investigation, as the criminal rules prevail divesting the trial court[']s jurisdiction to re-sentence, *Willoughby v. Lukehart* ***.

{¶26} "[2.] The trial court abused its discretion and committed plain error and/or reversible error in violation of the Ohio and United States Constitutions by re-sentencing the appellant to prison terms for criminal cases the appellant had [acquired] a satisfaction of judgment for *In re Bradley* ***.

{¶27} "[10.] The trial court abused its discretion and committed plain error and/or reversible error in violation of the Ohio and United States Constitutions when the trial court made a pre[-]determination of sentencing the appellant to a maximum consecutive sentence prior to the appellant ever having a sentencing hearing, *State v. Garrett* ***."

{¶28} Foti alleges that the trial court erred in his resentencing due to a jurisdictional defect, as the resentencing hearing was not held within 15 days of the verdict. Foti further maintains the trial court erred when it resentenced him on counts 1, 2, and 3, as he completed those terms of imprisonment, and when it imposed a sentence aggregating 16 years of imprisonment.

{¶29} The Supreme Court of Ohio released its opinion in *State v. Singleton*, 124 Ohio St.3d 173, 2009-Ohio-6434, where it addressed R.C. 2929.191, the statutory remedy to correct the trial court's failure to properly impose post-release control. The *Singleton* Court held:

{¶30} "[F]or sentences imposed prior to July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall conduct a de novo sentencing hearing in accordance with decisions of the Supreme Court of Ohio. However, for criminal sentences imposed on and after July 11, 2006, in which a trial court failed to properly impose postrelease control, trial courts shall apply the procedures set forth in R.C. 2929.191." Id. at ¶1.

{¶31} In discussing the retroactive application of R.C. 2929.191, the *Singleton* Court, supra, at ¶25, stated:

{¶32} "Before the enactment of R.C. 2929.191, no statutory remedy existed for the correction of a sentence that failed to properly impose postrelease control. In the absence of a statutory remedy, we recognized that a sentence that failed to properly impose a statutorily mandated period of postrelease control was contrary to law when imposed. See [*State v.*] *Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, *** ¶23; [*State v.*] *Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, *** ¶13. When a sentence is a nullity, it is as though it never occurred. Id., citing *Romito v. Maxwell* (1967), 10 Ohio St.2d 266, 267 ***. Accordingly, we directed trial courts to conduct a de novo sentencing." (Parallel citations omitted.)

{¶33} As Foti's sentencing entry failed to comply with the mandate of R.C. 2967.28(B)(3) and he was sentenced in 2000, prior to the effective date of R.C. 2929.191, the trial court was required to conduct the de novo sentencing procedure set forth in *Singleton*, supra, at ¶26. As the November 16, 2009 record demonstrates, the trial court properly conducted a de novo sentencing hearing.

{¶34} At the hearing on Foti's motion, which was held prior to the release of *Singleton*, the trial court engaged in a lengthy discussion as to the appropriate remedy for correcting the failure to properly impose post-release control. The trial court stated:

{¶35} "Now, the Court is going to go not only to modify that entry, but I'm going to go one step further in what correction may mean and, in fact, I'm going to resentence the Defendant here today to make sure that the corrective action being taken is, in fact, clear. And in fairness to the Defendant I am going to give him the opportunity to be

heard with respect to that resentencing, thereby granting him the relief he was asking for in terms of resentencing."

{¶36} At the hearing, the trial court heard from both Foti and one of the victims and stated that it had also reviewed a written victim impact statement from the second victim. The trial court then stated on the record that it had considered the purposes and principles set forth in R.C. 2929.11 and considered the factors set forth in R.C. 2929.12. The trial court noted that it had reviewed the presentence investigation report, dated December 7, 2000. The trial court found that Foti's relationship with the victims facilitated the commission of the crimes; one of the victims suffered serious psychological harm as a result of Foti's criminal conduct; Foti has a significant criminal conviction history, including conspiracy to distribute cocaine and drug abuse; Foti has not shown genuine remorse for his actions; and Foti has not responded favorably to sanctions that had previously been imposed. See R.C. 2929.12(B)(2), (B)(6), (D)(3), (D)(4), and (D)(5).

{¶37} The record reveals that the trial court sentenced Foti to the same terms of imprisonment as previously imposed, granting Foti credit for "all the time that has previously been served with respect to this case." The trial court stated, "[o]riginally, there was local time of 92 days of credit that was served, and obviously [Foti] be given credit for the time that he has been continuously incarcerated in prison will be credit against that as well."

{¶38} Foti further maintains the trial court erred in sentencing him "to a maximum consecutive sentence prior to [him] ever having a sentencing hearing." To support this argument, Foti points to a judgment entry issued one month prior to the

sentencing hearing directing the Sheriff of Lake County to convey Foti to the hearing on his pending motion. The judgment entry further states that the sheriff shall "reconvey [Foti] back to the custody of the Lake Erie Correctional Institution at the end of said hearing which is held on November 16, 2009 ***."

{¶39} Contrary to Foti's assertion, the trial court did not make a "pre-determination of sentencing" prior to the November 16, 2009 hearing. The record clearly establishes that the trial court engaged in a de novo sentencing hearing on November 16, 2009.

{¶40} The Supreme Court of Ohio, in a plurality opinion, has recently held that felony sentences are to be reviewed under a two-step process. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶26. The Court held:

{¶41} "First, [appellate courts] must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision in imposing the term of imprisonment is reviewed under the abuse-of-discretion standard." Id.

{¶42} The *Kalish* Court affirmed the sentence of the trial court as not being contrary to law, since the trial court expressly stated that it had considered the R.C. 2929.11 and R.C. 2929.12 factors, post-release control was applied properly, and the sentence was within the statutory range. *Kalish*, supra, at ¶18.

{¶43} An abuse of discretion is the trial court's "'failure to exercise sound, reasonable, and legal decision-making.'" *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, quoting Black's Law Dictionary (8 Ed.Rev.2004) 11.

{¶44} The jury found Foti guilty of two felonies of the second degree and two felonies of the fifth degree. The statutory range for a second-degree felony is two to eight years. R.C. 2929.14(A)(2). Further, the statutory range for a fifth-degree felony is six to 12 months. R.C. 2929.14(A)(5). The trial court sentenced Foti to a prison term of eight years on each second-degree felony and a term of 12 months on each of the fifth-degree felonies, which is within the statutory range. Further, as indicated above, the trial court expressly stated that it had considered the R.C. 2929.11 and R.C. 2929.12 factors. The trial court also stated on the record that, upon Foti's release from prison, he would be subject to post-release control for a term of three years.

{¶45} Additionally, in its November 24, 2009 judgment entry of sentence, the trial court stated that "a prison sentence is consistent with the purpose and principles of sentencing set forth in R.C. 2929.11" and that it had "balanced the seriousness and recidivism factors under R.C. 2929.12."

{¶46} Upon a review of the record, we do not determine that the trial court's sentence is clearly and convincingly contrary to law. Furthermore, taking all of the above into consideration, we cannot find that the trial court abused its discretion by sentencing Foti to an aggregate prison term of 16 years.

{¶47} Based on the foregoing analysis, Foti's first, second, and tenth assignments of error are without merit.

{¶48} In his third assignment of error, Foti alleges:

{¶49} "The manifest weight of the evidence does not support the appellant[']s convictions in violation of the Ohio and [United] States Constitutions."

{¶50} "'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. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'" *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. (Citations omitted.)

{¶51} Under this assigned error, Foti maintains that the testifying witnesses were not credible. However, the weight to be given to the evidence and the credibility of witnesses are primarily matters for the jury to decide. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. In assessing the witnesses' credibility, the trial court, as the trier of fact, had the opportunity to observe the witnesses' demeanor, body language, and voice inflections. *State v. Miller* (Sept. 2, 1993), 8th Dist. No. 63431, 1993 Ohio App. LEXIS 4240, at *5-6. Thus, in this matter, the jury was "clearly in a much better position to evaluate the credibility of witnesses than [this] court." Id. at *6.

{¶52} We defer to the judgment of the jury and find that its verdict did not create such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Foti's third assignment of error is without merit.

{¶53} Foti's fourth assignment of error alleges:

{¶54} "The sufficiency of the evidence does not support the appellant[']s convictions in violation of the Ohio and [United] States Constitutions."

{¶55} When measuring the sufficiency of the evidence, an appellate court must consider whether the state set forth adequate evidence to sustain the jury's verdict as a matter of law. *Kent v. Kinsey*, 11th Dist. No. 2003-P-0056, 2004-Ohio-4699, at ¶11. A verdict is supported by sufficient evidence when, after viewing the evidence most strongly in favor of the prosecution, there is substantial evidence upon which a jury could reasonably conclude that the state proved all elements of the offense beyond a reasonable doubt. *State v. Schaffer* (1998), 127 Ohio App.3d 501, 503, citing *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *14-15.

{¶56} Foti was convicted of two counts of corrupting another with drugs, a violation of R.C. 2925.02(A)(4)(a), and two counts of receiving stolen property, a violation of R.C. 2913.51(A).

{¶57} R.C. 2925.02(A)(4)(a) states:

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

{¶59} "***

{¶60} "(4) By any means, do any of the following:

{¶61} "(a) Furnish or administer a controlled substance to a juvenile who is at least two years the offender's junior, when the offender knows the age of the juvenile or is reckless in that regard[.]"

{¶62} First, Foti maintains that he did not know the age of A.L., as she was using a "false identification" and appeared to be the "lawful age of '20.'" Second, Foti states that when the police searched the motel room, there were "absolutely no drugs found."

{¶63} We first note that R.C. 2925.02(A)(4)(a) includes a "reckless" standard with respect to a defendant's knowledge of the age of the juvenile.

{¶64} "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist." R.C. 2901.22(C).

{¶65} The state presented the testimony of A.L. A.L. indicated that she met J.A.F., Foti's minor son, while working at Burger King. As a result of that relationship, she began dating J.O.F., also a minor. Consequently, she was introduced to Foti. A.L. testified that she graduated from high school in 2000 at the age of 17. The night of her high school graduation, she met both J.O.F. and Foti and stayed with them for an extended length of time. The jury also heard the testimony of Ms. Lewis who testified she had informed Foti that A.L. did not have permission to stay out all night nor did she have permission to violate her curfew.

{¶66} A.L. testified that she smoked crack cocaine with Foti. A.L. also stated that Foti had bought her crack cocaine. J.O.F. testified that he, A.L., and Foti would smoke crack cocaine together. J.O.F. further stated that Foti had provided both him and A.L. with crack cocaine.

{¶67} Accordingly, viewing the evidence before us in a light most favorable to the prosecution, we hold reasonable triers of fact could have found, beyond a reasonable doubt, that Foti committed the crime of corrupting another with drugs.

{¶68} Next, Foti alleges that the state failed to prove beyond a reasonable doubt that he received stolen property. Foti maintains that he "did not have any knowledge that any personal checks in [A.L.'s] possession were stolen[.]"

{¶69} R.C. 2913.51(A) states:

{¶70} "(A) No person shall receive, retain, or dispose of property of another knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense."

{¶71} The jury heard the testimony of A.L. who stated she informed Foti that she had stolen a checkbook from her mother. Further, the jury heard testimony relating to the use of the stolen checks. Ms. Lewis testified that Foti did not have permission to use her checks.

{¶72} Accordingly, viewing the evidence before us in a light most favorable to the prosecution, we hold reasonable triers of fact could have found, beyond a reasonable doubt, that Foti committed the crime of receiving stolen property.

{¶73} Foti's fourth assignment of error is without merit.

{¶74} As Foti's fifth assignment of error, he alleges:

{¶75} "The trial court abused its discretion and committed plain error and/or reversible error in violation of the Ohio and United States Constitutions by failing to conduct an evidentiary hearing on the appellant's motion for a new trial based on documentation the original trial court judge absented himself from the court room on several occasions during the appellant's trial while testimony was being provided, that destroyed the forum and removed the structure rendering the verdict a nullity, *United States v. Mortimer* ***."

{¶76} Foti alleges that the trial court erred in not granting a new trial, pursuant to Crim.R. 33, based on an affidavit of Attorney Charles R. Grieshammer, his trial counsel.

{¶77} In August 2007, Foti filed a motion "for leave to file motion for new trial pursuant to Crim.Rule 33(B)" in the trial court. The newly-discovered evidence at issue in the instant case was an affidavit of Foti's public defender, Attorney Charles R. Grieshammer, executed on August 28, 2001. Foti filed the motion at issue in August of 2007, over six years after the affidavit was dated.

{¶78} We recognize that the allowance or denial of a motion for a new trial is within the sound discretion of the trial court and will not be disturbed save an abuse of discretion. *State v. Hill* (1992), 64 Ohio St.3d 313, 333. Further, the decision of whether to hold an evidentiary hearing on a defendant's motion for new trial is within the sound discretion of the trial court. *State v. Tomlinson* (1997), 125 Ohio App.3d 13, 20.

{¶79} Crim.R. 33 governs motions for new trials, and provides, in pertinent part:

{¶80} "(A) Grounds. A new trial may be granted on motion of the defendant for any of the following causes affecting materially his substantial rights:

{¶81} "***

{¶82} "(6) When new evidence material to the defense is discovered, which the defendant could not with reasonable diligence have discovered and produced at the trial. ***

{¶83} "(B) *** Motions for new trial on account of newly discovered evidence shall be filed within one hundred twenty days after the day upon which the verdict was rendered ***. If it is made to appear by clear and convincing proof that the defendant was unavoidably prevented from the discovery of the evidence upon which he must rely, such motion shall be filed within seven days from an order of the court finding that he

was unavoidably prevented from discovering the evidence within the one hundred twenty day period."

{¶84} While a party may move for a new trial on the grounds of newly-discovered evidence after the 120-day period has elapsed, pursuant to Crim.R. 33(B), a defendant may only do so after proving by clear and convincing evidence that he was unavoidably prevented from discovering such evidence. Under these circumstances, the trial court must first find that the defendant was unavoidably prevented from discovering the evidence and, then, the defendant must file his motion for a new trial within seven days of such order.

{¶85} Although Crim.R. 33 does not set forth any specific time restrictions on when a motion for a new trial may be filed after unavoidable prevention has been found, "case law has adopted a reasonableness standard." *State v. Griffith*, 11th Dist. No. 2005-T-0038, 2006-Ohio-2935, at ¶15. As such, the trial court may require a defendant to file a Crim.R. 33 motion within a reasonable time after he discovers the evidence. Id.

{¶86} In his motion, Foti alleges that he "lacks the modicum of legal knowledge to identify the error in his case." Foti's "asserted ignorance of the law and of legal procedure is not a defense since all persons are conclusively presumed to know the law." *State v. Marshall* (Sept. 6, 2000), 5th Dist. No. 00CA26, 2000 Ohio App. LEXIS 4118, at *6. (Citation omitted.) "Courts have long held that lack of effort, imagination, or ignorance of the law does not excuse procedural inadequacies, such as the failure to file a motion in a timely manner." *State v. Elersic*, 11th Dist. No. 2007-L-104, 2008-Ohio-2121, at ¶32. (Citations omitted.) Therefore, ignorance of the law does not provide Foti with an adequate explanation for not filing his motion for leave within a

reasonable time, and, as such, the trial court certainly was within its discretion in overruling his motion for a new trial.

{¶87} Based on the foregoing, Foti's fifth assignment of error is without merit.

{¶88} As Foti's sixth and ninth assignments of error are interrelated, we address them in a consolidated analysis. Under the sixth and ninth assignments of error, Foti alleges:

{¶89} "[6.] The trial court abused its discretion and committed plain error and/or reversible error in violation of the Ohio and United States Constitutions by failing to conduct an evidentiary hearing with an in[-]camera inspection of the grand jury transcripts that would [support] the appellant's motion for a new trial and/or dismissal based on the state[']s known use of perjured testimony by state[']s [witnesses] before the grand jury to secure an indictment, a transcript that was filed with the trial court under seal.

{¶90} "[9.] The trial court abused its discretion and committed plain error and/or reversible error in violation of the Ohio and United States Constitutions by not conducting an evidentiary hearing on the appellant's motion for a new trial when the [appellant] presented competent credible evidence that his conviction was the result of perjured testimony, *U.S. v. Baserto* ***. *State v. Defronzo* ***."

{¶91} Under his sixth and ninth assignments of error, Foti asserts that he is entitled to a new trial based on the grand jury testimony of J.O.F. Foti claims that his conviction "was the result of the use of perjured testimony."

{¶92} In the case sub judice, J.O.F. was granted immunity after the state filed a written request seeking immunity. The trial court informed J.O.F. of the following on the record:

{¶93} "Upon consideration and for good cause shown, the Court finds said request [for immunity] to be well taken and will further the administration of justice. The Court informs the witness that by answering or producing the information he will receive immunity under Division (B) of 2945.44. Specifically, [J.O.F.] shall not be prosecuted or subjected to any criminal penalty through the courts of this state for or on account of any transaction or matter concerning which, in compliance with this order, he gave an answer or produced any information."

{¶94} J.O.F. testified on September 1, 2000. The transcript of his testimony was sealed. Thereafter, J.O.F. also testified at trial. J.O.F.'s testimony of September 1, 2000, was to determine whether the matter should be referred to the Grand Jury for indictment. The trial court reiterated this during the trial in a side bar conference, stating:

{¶95} "The Court has no desire to review the sealed transcript of the witness at every indication upon request of the prosecutor. It's the Court's inclination that you proceed as best you can with the tools which are available to you, excluding the sealed transcript. It's the judgment of the Court that the sealed transcript is the Court's comparing what the Grand Jury – what the testimony in court for the purpose of whether or not the matter should be referred to the Grand Jury for indictment."

{¶96} Additionally, the jury was made aware that J.O.F. was granted immunity in exchange for his testimony. The jury, based on the testimony elicited at trial, found Foti

guilty. As previously noted, the state presented sufficient evidence to support a finding of guilty on two counts of corrupting another with drugs and two counts of receiving stolen property. Consequently, Foti's sixth and ninth assignments of error are without merit.

{¶97} Foti's seventh assignment of error states:

{¶98} "The trial court abused its discretion and committed plain error and/or reversible error in violation of the Ohio and United States Constitutions for failing to provide the jury with an 'anti jury nullification' jury instruction, *Duncan v. Louisiana* ***."

{¶99} Foti maintains that the trial court erred by failing to provide the jury with an "anti jury nullification jury instruction." Based on this perceived error, Foti demands that this court reverse and remand this matter to the trial court for a new trial. We find this request not well-taken.

{¶100} "The prevailing view in the United States is that the jury need not be notified of its nullification power. *** Thus, courts have uniformly held that a trial court is not required to provide an instruction on jury nullification. ***. Indeed, other appellate courts in Ohio have recognized that a trial court is not required to inform the jury about jury nullification. ***.

{¶101} "While we recognize that a jury may render a verdict at odds with the evidence or the law, we agree with the courts noted above that a trial court is not required to inform the jury about jury nullification. Such information would convey an implied approval of jury nullification and run the risk of 'degrading the legal structure requisite for true freedom, for an ordered liberty that protects against anarchy as well as

tyranny.' ***." *State v. Jackson* (Feb. 20, 2001), 10th Dist. No. 00AP-183, 2001 Ohio App. LEXIS 589, *35-36.

{¶102} The trial court did not err by failing to provide a jury instruction on the doctrine of jury nullification, and, as such, Foti's seventh assignment of error is without merit.

{¶103} Foti's eighth assignment of error states:

{¶104} "The appellant was denied the effective assistance of counsel, in violation of the Ohio and United States Constitutions, by counsel[']s failure to object, investigate, procure discovery and, withdraw when a conflict of interest arose when counsel was named as a material witness in the defendant's case."

{¶105} To establish a claim for ineffective assistance of counsel, this court has held that a defendant must prove that counsel's performance fell below an objective standard of reasonable representation and that prejudice arises from counsel's performance. *Schlee*, supra, at *30, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687. "[C]ounsel is 'strongly presumed' to have rendered adequate assistance, and 'the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."'" *State v. Smith* (1985), 17 Ohio St.3d 98, 100, quoting *Strickland*, supra, at 694-695, quoting *Michel v. Louisiana* (1955), 350 U.S. 91, 101.

{¶106} Foti fails to cite to any specific testimony in the transcript or any area in the record in which trial counsel was ineffective. Rather, Foti argues that counsel was ineffective for "failing to [withdraw] as attorney," as the submitted affidavit "subject[ed] him as a witness for a hearing on a new trial motion created a conflict of interest." We

find this argument without merit. As we determined in Foti's fifth assignment of error, the trial court did not err in failing to hold a hearing on his motion for a new trial, pursuant to Crim.R. 33. Foti's eighth assignment of error is without merit.

{¶107} Foti's eleventh assignment of error alleges:

{¶108} "The appellant is entitled to a new trial based on the cumulative effect of all issues combined."

{¶109} As his eleventh assignment of error, Foti claims that the errors committed by the trial court were of such magnitude that, when combined, warrant reversal of his conviction. We disagree. Foti's final argument is not well-taken, as we found all of his assignments of error without merit.

{¶110} Based on the opinion of this court, the judgment of the Lake County Court of Common Pleas is hereby affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.