[Cite as *State v. Bernard*, 2010-Ohio-5345.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2010-CA-00082
JAMES LEE BARNARD	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Stark County Court of Common Pleas, Case No. 2009-CR-1431
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 1, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO PROSECUTING ATTORNEY BY: RONALD MARK CALDWELL 110 Central Plaza South, Ste. 510 Canton, OH 44702	MATTHEW PETIT 111 Second Street N.W. Suite 302 Canton, OH 44702

Gwin, P.J.

{¶1} Defendant-appellant James Barnard appeals his convictions on one count each of the aggravated possession of drugs, a felony of the third degree and operating a motor vehicle while under the influence of a Schedule II Controlled Substance, a misdemeanor of the first degree. Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶2} Appellant waived his right to a jury trial in writing and in open court. The following evidence was presented during his trial to the court.

{¶3} On the afternoon of January 22, 2009, Canton Police Officer Robert E. Smith and his partner were in route to a call when they came upon a car stranded on the medium island in the 2500 block of Fulton Road, N.W., in Canton. The medium island is elevated several inches from the roadway to separate opposing lanes of traffic. The officers also noticed that traffic cones had been broken or bent down behind the vehicle. A second vehicle with a woman inside was parked in close proximity of the stranded vehicle. Her boyfriend, a Mr. Talbot, was sticking his head into the stranded vehicle, and told the approaching officers that the driver appeared to be intoxicated. Mr. Talbot had asked the driver if he had any weapons, and the driver replied that he did. The officers had Mr. Talbot return to his girlfriend and approached the driver.

{¶4} The officers observed that the car was stuck on the medium island and could not move. The officers tried several times to urge the appellant to exit the vehicle. Appellant, however, was not listening to the officers. The officers detected a strong odor of alcohol coming from appellant, noticed that he had very slurred speech, and saw a half-empty bottle of vodka sitting in appellant's lap. Appellant was conscious, his eyes

were glassy, and he was hard to understand when he talked. Believing they had a possible OVI arrest, the officers repeatedly asked appellant to get out of the vehicle. Appellant responded each time using the “F word,” and refused to get out of the vehicle. The officers concluded that force would have to be used in order to get appellant out of the vehicle.

{¶5} Officer Smith used his knife to cut appellant's seatbelt in order to facilitate appellant's forcible removal. Appellant responded by clutching the steering wheel and resisting the efforts of the two officers to pull him out of the vehicle. The struggle continued for some time until a third police officer arrived to assist Smith and his partner. Pepper spray was used on appellant; however, appellant kept his grip on the steering wheel and stayed in the vehicle. Finally, the officers used a taser on appellant once or twice before they could remove him from the vehicle.

{¶6} After arresting appellant, the officers searched him. In the right front pocket of his jacket, the officers found a prescription vial for a George Foster. This vial contained seven 80-milligram tablets of the prescription Oxycontin, a Schedule II substance. The officers did not see any injuries to appellant, and appellant did not complain of any. Appellant was arrested for the illegal possession of the Oxycontin, as well as driving under the influence.

{¶7} Jay Spencer of the Canton-Stark County Crime Lab analyzed the contents of the prescription bottle and determined that the drug was Oxycontin. He tested a portion of one of the seven tablets, after weighing them, to determine the nature of the drug. The tablets, imprinted with "OC80," weighed 80 milligrams apiece, and were the

prescription brand of Oxycodone, an opiate drug. Thus, the total weight of the recovered drugs was 560 milligrams.

{¶8} Spencer also testified about bulk amount for Oxycontin, which is either 20 grams or five times the maximum daily dosage as determined by the Ohio Board of Pharmacy. For Oxycontin in 80-milligram tablets, the bulk amount is six tablets. According to Spencer, the maximum daily dosage was determined by the Ohio Board of Pharmacy to be five tablets for 90-milligram tablets. The total weight for that dosage would be 450 milligrams. Accordingly, the seven 80-milligram tablets recovered from appellant weighing a combined total of 480 milligrams exceed the "bulk amount."

{¶9} Spencer further testified that an individual's particular daily dosage would be determined by that person's physician, but that fact had no bearing on the Ohio Board of Pharmacy's definition of bulk amount under Ohio's drug laws. Spencer further testified that the instructions printed on the vial were, "Take one tablet every 8 hours for pain."

{¶10} At the conclusion of this bench trial, the court found appellant guilty as charged in the indictment.

{¶11} The court, after a presentence investigation report, sentenced appellant to a community control sanction for a period of three years. The court cautioned appellant that a revocation of this community control sanction would result in a prison term of three years. The court also ordered that appellant serve thirty days in jail and have his operator's license suspended for six months for the OVI offense.

{¶12} Appellant timely appeals raising the following three assignments of error,

{¶13} "I. THE TRIAL COURT'S FINDING OF GUILT IS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶14} "II. THE OFFENSE OF AGGRAVATED POSSESSION OF DRUGS LOCATED IN R.C. 2925.11 IS VOID FOR VAGUENESS.

{¶15} "III. THE APPELLANT WAS DENIED HIS RIGHTS TO DUE PROCESS AND OF ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE."

I.

{¶16} In his first assignment of error, appellant maintains that his convictions are against the weight of the evidence and are based upon insufficient evidence. We disagree.

{¶17} Our standard of reviewing a claim a verdict was not supported by sufficient evidence is to examine the evidence presented at trial to determine whether the evidence, if believed, would convince the average mind of the accused's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, 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, 574 N.E.2d 492, superseded by State constitutional amendment on other grounds as stated in *State v. Smith* (1997), 80 Ohio St.3d 89, 684 N.E.2d 668..

{¶18} The Supreme Court has explained the distinction between claims of sufficiency of the evidence and manifest weight. Sufficiency of the evidence is a question for the trial court to determine whether the State has met its burden to produce

evidence on each element of the crime charged, sufficient for the matter to be submitted to the jury.

{¶19} Manifest weight of the evidence claims concern the amount of evidence offered in support of one side of the case, and is a jury question. We must determine whether the jury, in interpreting the facts, so lost its way that its verdict results in a manifest miscarriage of justice, *State v. Thompkins* (1997), 78 Ohio St. 3d 387, 678 N.E.2d 541, 1997-Ohio-52, superseded by constitutional amendment on other grounds as stated by *State v. Smith,* 80 Ohio St.3d 89, 1997-Ohio-355, 684 N.E.2d 668. On review for manifest weight, a reviewing court is "to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the Trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment." *State v. Thompkins*, supra, 78 Ohio St.3d at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Because the Trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the Trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, syllabus 1.

{¶20} In *Thompkins*, the Ohio Supreme Court held "[t]o reverse a judgment of a trial court on the basis that the judgment is not sustained by sufficient evidence, only a concurring majority of a panel of a court of appeals reviewing the judgment is necessary." Id. at paragraph three of the syllabus. However, to "reverse a judgment of

a trial court on the weight of the evidence, when the judgment results from a trial by jury, a unanimous concurrence of all three judges on the court of appeals panel reviewing the case is required." Id. at paragraph four of the syllabus; *State v. Miller* (2002), 96 Ohio St.3d 384, 2002-Ohio-4931 at ¶38, 775 N.E.2d 498

{¶21} In examining the record to determine this issue, we may give weight to the fact that the error occurred in a trial to the court, rather than in a jury trial. *State v. White* (1968), 15 Ohio St.2d 146, 151, 239 N.E.2d 65; *State v. Austin* (1976), 52 Ohio App.2d 59, 70, 368 N.E.2d 59. Indeed, a judge is presumed to consider only the relevant, material and competent evidence in arriving at a judgment, unless the contrary affirmatively appears from the record. *State v. White*, supra, 15 Ohio St.2d at page 151, 239 N.E.2d 65; *State v. Eubank*, 60 Ohio St.2d 183, 187, 398 N.E.2d 567, 569-570; *Columbus v. Guthmann* (1963), 175 Ohio St. 282, 194 N.E.2d 143, paragraph three of the syllabus.

{¶22} In this assignment of error, appellant argues that the evidence in this case was deficient in proving that he actually operated the car and in proving that the Oxycontin that was found in his pocket was actually “bulk amount.”

{¶23} An insightful history of the term “operation” has been detailed by our brethren in the Eighth District,

{¶24} “Before the General Assembly enacted S.B. 123, effective January 1, 2004, there was no statutory definition of ‘operate.’ The meaning of the term ‘operate’ in R.C. 4511.19(A) and (B) had been exclusively a matter of judicial interpretation. In *State v. Cleary* (1986), 22 Ohio St.3d 198, 199, 490 N.E.2d 574, the Supreme Court of Ohio said, ‘Operation of a motor vehicle within contemplation of the statute is a broader term

than mere driving and a person in the driver's position in the front seat with the ignition key in his possession indicating either his actual or potential movement of the vehicle while under the influence of alcohol or any drug of abuse can be found in violation of R.C. 4511.19(A)(1).' See, also, *State v. McGlone* (1991), 59 Ohio St.3d 122, 570 N.E.2d 1115. In *State v. Gill*, 70 Ohio St.3d 150, 152-153, 637 N.E.2d 897, 1994-Ohio-403, the court expanded the definition of 'operate' to include situations where the keys were in the ignition but the engine was not running." *State v. Schultz*, Cuyahoga App. No. 90412, 2008-Ohio-4448 at ¶ 18.

{¶25} "But in S.B. 123, the General Assembly modified the definition in *Gill* and its predecessors by specifically defining 'operate' in R.C. 4511.01(HHH), as well as by adding the words 'at the time of the operation' to R.C. 4511.19(A)(1). *State v. Wallace,* 166 Ohio App.3d 845, 848-849, 853 N.E.2d 704, 2006-Ohio-2477. Effective January 1, 2004, the term 'operate,' as used in R.C. Chapter 4511, 'means to cause or have caused movement of a vehicle * * *.' R.C. 4511.01(HHH). This modification narrows the definition of 'operate,' which effectively eliminates 'drunk radio listeners, or people who use their cars as a four-wheeled, heated hotel room' from being convicted of OVI. *Gill,* 70 Ohio St.3d at 157-158, 637 N.E.2d 897 (Pfeifer, J., dissenting)." *State v. Schultz*, supra at ¶ 19. (Footnotes omitted).

{¶26} "In S.B. 123, the General Assembly created a new *statutory* offense of "Having physical control of a vehicle while under the influence of alcohol." See R.C. 4511.194(B). Cleveland, as well as other municipalities, already prohibited being in physical control of a vehicle while under the influence of alcohol." *State v. Schultz*, supra at ¶20 (Footnotes omitted). (Emphasis in original).

{¶27} "The new statutory offense… prohibits being in physical control of a vehicle while under the influence of alcohol or other drug of abuse. R.C. 4511.194(B). R.C. 4511.194(A) (2) defines 'physical control' as being in the driver's position of the front seat of a vehicle and having possession of the vehicle's ignition key or other ignition device." *State v. Schultz*, supra at ¶ 21. (Footnotes omitted). See also, *City of Columbus v. Freeman*, 181 Ohio App.3d 320, 908 N.E.2d 1029, 2009-Ohio-1046 at ¶11.

{¶28} We agree with the appellant that the evidence did not demonstrate that the vehicle was running or that the appellant had the keys to the vehicle. However, we find under the facts of this case the evidence was sufficient to infer that appellant had operated the vehicle.

{¶29} "Notably, and in relation to movement of a vehicle, R.C. 4511.01(HHH) employs both the present tense ('to cause') and, alternatively, the past tense (to 'have caused'), in defining the conduct to which that section applies. The past tense indicates action already completed. For purposes of R.C. 4511.19, to 'have caused' movement of a vehicle is a fact that may be proved by circumstantial evidence, which inherently possesses the same probative value as direct evidence. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492." *State v. Halpin*, Clark App. No. 07CA78, 2008-Ohio-4136 at ¶24.

{¶30} In the case at bar, the officers came upon appellant's vehicle, stranded on a medium island after having run over a number of orange traffic cones. Appellant was alone and strapped into the driver's seat. Officers had to forcibly remove him from the driver's seat, resorting to force, pepper stray, and a taser. At no time during this

altercation, during which he repeatedly swore at the officers, did appellant indicate that he had not operated the vehicle.

{¶31} If the State relies on circumstantial evidence to prove an essential element of an offense, it is not necessary for "'such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction…Circumstantial evidence and direct evidence inherently possess the same probative value [.]" *Jenks*, 61 Ohio St .3d at paragraph one of the syllabus. Furthermore, "'[s]ince circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that i[t] weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt." ' *Jenks*, 61 Ohio St.3d at 272, 574 N.E.2d 492. While inferences cannot be based on inferences, a number of conclusions can result from the same set of facts. *State v. Lott* (1990), 51 Ohio St.3d 160, 168, 555 N.E.2d 293, citing *Hurt v. Charles J. Rogers Transp. Co.* (1955), 164 Ohio St. 329, 331, 130 N.E.2d 820. Moreover, a series of facts and circumstances can be employed by a jury as the basis for its ultimate conclusions in a case. *Lott*, 51 Ohio St. 3d at 168, 555 N.E.2d 293, citing *Hurt*, 164 Ohio St. at 331, 130 N.E. 2d 820.

{¶32} In the case at bar, reasonable minds could find, beyond a reasonable doubt, that appellant had caused movement of the vehicle to bring it to the location where the officers found it to be stranded on the median island, and therefore that he operated it for purposes of an R.C. 4511.19 violation.

{¶33} Appellant next argues the evidence does not prove that the Oxycontin that was found in his pocket was actually "bulk amount."

{¶34} R.C. 2925.11(A) provides "No person shall knowingly obtain, possess, or use a controlled substance." R.C. 2925.11(C)(1)(b) provides, “If the amount of the drug involved equals or exceeds the bulk amount but is less than five times the bulk amount, aggravated possession of drugs is a felony of the third degree, and there is a presumption for a prison term for the offense."

{¶35} "Bulk amount" of a controlled substance means any of the following:

{¶36} “(1) For any compound, mixture, preparation, or substance included in schedule I, schedule II, or schedule III, with the exception of marihuana, cocaine, L.S.D., heroin, and hashish and except as provided in division (D)(2) or (5) of this section, whichever of the following is applicable:

{¶37} “* * *

{¶38} “(d) An amount equal to or exceeding twenty grams or five times the maximum daily dose in the usual dose range specified in a standard pharmaceutical reference manual's of a compound, mixture, preparation, or substance that is or contains any amount of a schedule II opiate or opium derivative…” R.C. 2925.01(D) (1) (d).

{¶39} In the case at bar, Jay Spencer from the Stark County Crime Lab testified that the prescription bottle contained seven (7) tablets of Oxycodone, the generic form of Oxycontin, a Schedule II drug. Each tablet was in eighty (80) milligram strength. In addition, Spencer testified that the Ohio Board of Pharmacy has established bulk amount for Oxycontin as five tablets for 90-milligram strength tablets. Because of the lesser strength tablets found on appellant, the maximum daily dosage for 80-milligram tablets would be six tablets.

{¶40} According to Spencer, the appellant had not violated the law based on weight, but on the basis that the amount exceeded five (5) times the maximum daily dosage range as specified by the standard pharmaceutical reference manual as defined in Ohio Administrative Code Rule 4729.11.07. The Ohio Board of Pharmacy has followed standard references in establishing the maximum daily dose for Oxycontin at 90-milligram strength. Five times the 90-milligram tablet strength equals 450 milligrams; appellant possessed seven 80-milligram tablets, for a total of 560 milligrams. Thus, the amount contained within the vial found on appellant's person at the time of his arrest exceeded five times the daily dosage.

{¶41} In *State v. Hamlin*, Stark App. No. 2002CA00162, 2003-Ohio-544 this Court found, based upon expert testimony, that six (6) 80 milligrams tablets of Oxycontin would constitute the bulk amount based upon the Controlled Substance Reference Table. Id at ¶17. In *Hamlin* Robert Amiet, a pharmacist and compliance specialist with the Ohio State Board of Pharmacy testified, as to Oxycontin, the trade name, or Oxycodone, the generic product, the "maximum daily dose in the usual dose range specified in a standard pharmaceutical reference as defined in R.C. 2925 for bulk amount is 90 milligrams."

{¶42} "Oxycontin is a Schedule II product. In that definition, it says five times the maximum daily dose in the usual dose range. We have established that that is 90, 5 times 90 is 450 milligrams.

{¶43} "Now, Oxycodone comes in several different strengths. So we then take each specific strength and divide it into 450 to give us the number of tablets for that specific strength.

{¶44} “In general the more, the higher the strength, the less tablets it takes to make the bulk amount.” Id. at ¶ 12-16.

{¶45} In the case at bar, Jay Spencer’s testimony was similar to the testimony elicited in *Hamlin.* Appellant in this case possessed seven 80-milligram tablets, for a total of 560 milligrams.

{¶46} Viewing the evidence in a light most favorable to the prosecution, a rational Trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

{¶47} R.C. 2925.01(K) defines possession as follows: “ ‘Possess' or ‘possession’ means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found.” R.C. 2901.21 provides the requirements for criminal liability and provides that possession is a “voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for sufficient time to have ended possession.” R.C. 2901.21(D) (1).

{¶48} Possession may be actual or constructive. *State v. Haynes* (1971), 25 Ohio St.2d 264, 267 N.E.2d 787; *State v. Hankerson* (1982), 70 Ohio St.2d 87, 434 N.E.2d 1362, syllabus. To establish constructive possession, the evidence must prove that the defendant was able to exercise dominion and control over the contraband. *State v. Wolery* (1976), 46 Ohio St.2d 316, 332, 348 N.E.2d 351. Dominion and control may be proven by circumstantial evidence alone. *State v. Trembly*, 137 Ohio App.3d 134, 738 N.E.2d 93. Circumstantial evidence that the defendant was located in very

close proximity to readily usable drugs may show constructive possession. *State v. Barr* (1993), 86 Ohio App.3d 227, 235, 620 N.E.2d 242, 247-248; *State v. Morales*, 5th Dist. No. 2004 CA 68, 2005-Ohio-4714 at ¶ 50; *State v. Moses*, 5th Dist. No. 2003CA00384, 2004-Ohio-4943 at ¶ 9. Ownership of the drugs need not be established for constructive possession. *State v. Smith*, 9th Dist. No. 20885, 2002-Ohio-3034, at ¶ 13, citing *State v. Mann*, (1993) 93 Ohio App.3d 301, 308, 638 N.E.2d 585. Furthermore, possession may be individual or joint. *Wolery*, 46 Ohio St.2d at 332, 348 N.E.2d 351.

{¶49} Upon a careful review of the record and upon viewing the direct and circumstantial evidence in the light most favorable to the prosecution, this Court cannot conclude that the Trier of fact lost its way and created a manifest miscarriage of justice when it found appellant guilty of the possession of drugs in the bulk amount. A reasonable Trier of fact could have found that, at the least, appellant had dominion and control over and constructive possession of the jacket containing the drugs, and that he had knowledge of drugs found inside. See *Hankerson*, 70 Ohio St.2d at syllabus.

{¶50} As an appellate court, we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence, upon which the fact finder could base its judgment. *Cross Truck v. Jeffries* (February 10, 1982), Stark App. No. CA-5758. Accordingly, a judgment supported by competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Constr.* (1978), 54 Ohio St. 2d 279, 376 N.E. 2d 578.

{¶51} We conclude the Trier of fact, in resolving the conflicts in the evidence, did not create a manifest miscarriage of justice so as to require a new trial. Viewing this

evidence in a light most favorable to the prosecution, we further conclude that a rational Trier of fact could have found beyond a reasonable doubt that appellant possessed the Oxycodone.

{¶52} Accordingly, appellant's conviction for the possession of a bulk amount of Oxycontin and for operating a motor vehicle while under the influence were not against the manifest weight of the evidence.

{¶53} Appellant's first assignment of error is overruled.

II.

{¶54} In his second assignment of error, appellant challenges the constitutionality of the drug statute under which he was convicted. Appellant argues that the bulk amount provisions of the drug possession statute are void for vagueness since they do not give a reasonable person notice as to the prohibited amounts of the particular drug in this case, Oxycontin. We disagree.

{¶55} Appellant concedes that he failed to raise this issue in the trial court.

{¶56} "The general rule is that 'an appellate court will not consider any error which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court.' *State v. Childs* (1968), 14 Ohio St.2d 56 [43 O.O.2d 119], 236 N.E.2d 545, paragraph three of the syllabus; *State v. Glaros* (1960), 170 Ohio St. 471 [11 O.O.2d 215], 166 N.E.2d 379, paragraph one of the syllabus; *State v. Lancaster* (1971), 25 Ohio St.2d 83 [54 O.O.2d 222], 267 N.E.2d 291, paragraph one of the syllabus; *State v. Williams* (1977), 51 Ohio St.2d 112, 117 [5 O.O.3d 98], 364 N.E.2d 1364. Likewise, '[c]onstitutional rights may be lost *686 as

finally as any others by a failure to assert them at the proper time.' *State v. Childs*, supra, 14 Ohio St.2d at 62 [43 O.O.2d 119], 236 N.E.2d 545, citing *State v. Davis* (1964), 1 Ohio St.2d 28 [30 O.O.2d 16], 203 N.E.2d 357; *State, ex rel. Specht, v. Bd. of Edn*.(1981), 66 Ohio St.2d 178, 182 [20 O.O.3d 191], 420 N.E.2d 1004, citing *Clarington v. Althar* (1930), 122 Ohio St. 608, 174 N.E. 251, and *Toledo v. Gfell* (1958), 107 Ohio App. 93, 95 [7 O.O.2d 437], 156 N.E.2d 752. [Footnote omitted.] Accordingly, the question of the constitutionality of a statute must generally be raised at the first opportunity and, in a criminal prosecution, this means in the trial court. See *State v. Woodards* (1966), 6 Ohio St.2d 14 [35 O.O.2d 8], 215 N.E.2d 568. This rule applies both to appellant's claim that the statute is unconstitutionally vague on its face and to his claim that the trial court interpreted the statute in such a way as to render the statute unconstitutionally vague. Both claims were apparent but yet not made at the trial court level." *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168, 170, 522 N.E.2d 524.

{¶57} Assuming arguendo that the appellant had raised his void for vagueness argument in the trial court, our decision would not necessarily change.

{¶58} In *State v. Phipps* (1979), 58 Ohio St.2d 271, 273, 389, N.E.2d 1128, 1130 and *State v. Young* (1980), 62 Ohio St.2d, 370, 372, 406 N.E.2d 499, 501 the Ohio Supreme Court recognized that the legal test for determining whether a statute is unconstitutionally vague was enunciated by the United States Supreme Court in *Connally v. General Construction Co* (1926)*.,* 269 U.S. 385 and *Grayned v. City of Rockford* (1972)*,* 408 U.S. 104. It has long been established that a statute, and especially a criminal statute, is unconstitutional on its face if its provisions are so vague and imprecise that persons of ordinary intelligence must guess at its meaning and differ

as to its application. *Connally,* 269 U.S. at 391; *Grayned,* 408 U.S. at 108-09; *Young,* 62 Ohio St. 2d at 372-73, 406 N.E. 2d at 501. See also *Coates v. Cincinnati* (1971), 402 U. S. 611, 614.

{¶59} R.C. 2925.01(E) defines the "unit dose" measure of the bulk amount, as an alternative to the physical weight, as follows:

{¶60} "'Unit dose' means an amount or unit of a compound, mixture, or preparation containing a controlled substance, such amount or unit being separately identifiable and in such form as to indicate that it is the amount or unit by which the controlled substance is separately administered to or taken by an individual."

{¶61} Appellant argues that the possession statute is unconstitutionally vague because its enforcement can be based on either the weight of drugs recovered or on the number of units of drugs recovered. Initially, we note that the statutory language in R.C. 2925.11(A) and (C) defining the crime of aggravated drug possession is clear and gives fair notice of the conduct prohibited. Appellant does not claim that the definition of that crime is vague or that he did not know his actions were prohibited. Rather, appellant's argument is that the section defining "bulk amount," which helps determine whether the crime of aggravated drug possession is a third degree[1] or a fifth-degree felony[2], is unconstitutionally vague. Therefore, the issue is whether the General Assembly was sufficiently clear in setting forth when aggravated drug possession is a third-degree felony, based on the drug amount exceeding the bulk amount. *State v. Cole*, Warren App. No. CA2004-01-007, 2005-Ohio-2274 at ¶ 17. We agree with the

[1] R.C. 2925.11(C) (1) (b).
[2] R.C. 2925.11(C) (1) (a).

reasoning of the Court in *Cole,* wherein our brethren in interpreting the similar provisions of the aggravated drug trafficking statute, R.C. 2925.03, stated,

{¶62} "We find that R.C. 2925.01(D) (1) (d), the section defining 'bulk amount,' is not unconstitutionally vague. A person of common intelligence could determine what constitutes the 'bulk amount' of Oxycontin, and therefore what amount makes aggravated trafficking in Oxycontin a third-degree felony rather than a fourth-degree felony. Pursuant to R.C. 2925.01(D) (1) (d), the 'bulk amount' is either: (1) 20 grams or, (2) "five times the maximum daily dose in the usual dose range as specified in a standard pharmaceutical reference manual [.]' R.C. 2925.01(M) specifies two such reference manuals… the 'maximum daily dose' can be discerned by consulting one of the specified manuals, such as the 'United States Pharmacopeia.' We do not find that the statute's language is so vague as to violate appellant's due process rights." Id. at ¶18. See also, *State v. Powell* (1993), 87 Ohio App.3d 157, 621 N.E.2d 1328 (rejecting void for-vagueness challenge to "bulk amount" and "unit dose" statutes); *State v. Barr* (1993), 86 Ohio App.3d 227, 620 N.E.2d 242 (rejecting such challenge to "unit dose" statutory definition); *State v. Cole*, Warren App. No. CA2004-01-007, 2005-Ohio-2274, 2005 WL 1077240 (rejecting such challenge to statutory definition of "bulk amount" for Oxycontin).

{¶63} Appellant has failed to demonstrate the term "unit dose" as set forth in R.C. 2925.01(E) or the term "bulk amount" as set forth in R.C. 2925.01(D) (1) (d) is unconstitutionally vague.

{¶64} Appellant's second assignment of error is overruled.

III.

{¶65} In his third assignment of error, appellant claims that his trial counsel was ineffective for failing to properly challenge the constitutionality of Ohio's drug laws in how they define the prohibited amounts. We disagree.

{¶66} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶67} In order to warrant a finding that trial counsel was ineffective, the petitioner must meet *both* the deficient performance and prejudice prongs of *Strickland* and *Bradley*. *Knowles v. Mirzayance* (2009), --- U.S. ----, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251.

{¶68} To show deficient performance, appellant must establish that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. at 688, 104 S.Ct. at 2064. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Strickland v. Washington* 466 U.S. at 687, 104 S.Ct. at 2064. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland v. Washington* 466 U.S. at 688, 104 S.Ct. 2052 at 2065.

{¶69} "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland v. Washington*, 466 U.S. 668 at 689,104 S.Ct. at 2064

{¶70} In light of "the variety of circumstances faced by defense counsel [and] the range of legitimate decisions regarding how best to represent a criminal defendant," the performance inquiry necessarily turns on "whether counsel's assistance was reasonable considering all the circumstances." *Strickland v. Washington*, 466 U.S. 668 at 689,104 S.Ct. at 2064. At all points, "[j]udicial scrutiny of counsel's performance must be highly deferential." *Strickland v. Washington*, 466 U.S. 668 at 689,104 S.Ct. at 2064.

{¶71} Appellant must further demonstrate that he suffered prejudice from his counsel's performance. See *Strickland*, 466 U. S., at 691 ("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"). To establish prejudice, "[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." Id. at 694. To prevail on his ineffective-assistance claim, appellant must show, therefore, that there is a "reasonable probability" that the Trier of fact would not have found him guilty.

{¶72} None of the instances raised by appellant rise to the level of prejudicial error necessary to find that he was deprived of a fair trial. Having reviewed the record that appellant cites in support of his claim that he was denied effective assistance of counsel, we find appellant was not prejudiced by defense counsel's representation of him. The result of the trial was not unreliable nor were the proceedings fundamentally unfair because of the performance of defense counsel. Appellant has failed to demonstrate that there exists a reasonable probability that, had trial counsel challenged the constitutionality of the statute defining "bulk amount" as set forth in his second assignment of error, the result of his case would have been different.

{¶73} Because we have found no instances of error in this case, we find appellant has not demonstrated that he was prejudiced by trial counsel's performance.

{¶74} Appellant's third assignment of error is overruled.

{¶75} For the foregoing reasons, the judgment of the Stark County Court of Common Pleas, Ohio, is affirmed.

By Gwin, P.J.,

Farmer, J., and

Wise, J., concur

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. JOHN W. WISE

WSG:clw 1027

[Cite as *State v. Bernard*, 2010-Ohio-5345.]

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JAMES LEE BARNARD	:	
Defendant-Appellant	:	CASE NO. 2010-CA-00082

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Stark County Court of Common Pleas, Ohio, is affirmed. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. JOHN W. WISE