[Cite as *State v. Rackley*, 2019-Ohio-1981.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 17CA3616
	:	
vs.	:	
	:	
JONATHON D. RACKLEY,	:	
AKA JONATHAN D. RACKLEY	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Timothy Young, Ohio State Public Defender, Craig M. Jaquith, Assistant State Public Defender, Columbus, Ohio, for Appellant.

Jeffrey C. Marks, Ross County Prosecuting Attorney, Pamela C. Wells, Assistant Prosecuting Attorney, Chillicothe, Ohio, for Appellee.

Smith, J.

{¶1} Jonathan D. Rackley appeals the "Judgment Entry Sentence" of the Ross County Common Pleas Court, entered August 30, 2017. Mr. Rackley ("Appellant") was convicted by a jury of three felony drug offenses: aggravated possession of drugs, illegal manufacture of drugs, and illegal assembly or possession of chemicals for the manufacture of drugs. He received a seven-year prison term. In the sole assignment of error, Appellant asserts his trial counsel rendered ineffective assistance by failing

to emphasize at sentencing that the liquid substance he possessed was capable of producing only a small amount of useable methamphetamine. Appellant concludes that this key fact would have supported imposition of a shorter prison term. For the reasons which follow, we find no merit to his argument. Accordingly, we overrule the sole assignment of error and affirm the judgment of the trial court.

FACTUAL AND PROCEDURAL BACKGROUND

{¶2} In April 2017, a Ross County Grand Jury returned a secret three-count indictment against Appellant. Count One alleged that on or about October 20, 2016, Appellant knowingly obtained, possessed, or used methamphetamine, a Schedule II controlled substance, in an amount equal to or exceeding five (5) times the bulk amount but less than fifty (50) times the bulk amount, in violation of RC 2925.11 of the Ohio Revised Code. Count Two alleged that on the same date and at the same place, Appellant knowingly manufactured or otherwise engaged in a part of the production of methamphetamine, a Schedule II controlled substance, in violation of R.C. 2925.04 of the Revised Code. Similarly, Count Three also alleged that Appellant knowingly assembled or possessed one or more chemicals that may be used to manufacture methamphetamine, a Schedule II controlled

substance, with the intent to manufacture methamphetamine, in violation of R.C. 2925.041.

{¶3} The indictment stemmed from events which occurred on October 20, 2016. On that date, Ross County Sheriff's Deputy Matthew Sharfenaker responded to a residence in Bainbridge upon a report of "some type of disorderly." When Deputy Sharfenaker arrived at the residence he spoke with Appellant's wife and learned Appellant and another person, Alicia Bennett, had active warrants and could be found in a shed on the property. Deputy Sharfenaker searched the premises and found Appellant outside in a bush. Appellant was holding a dark-colored book bag and a dark-colored duffle bag.

{¶4} Appellant dropped the bags and ran into the woods. Deputy Sharfenaker chased Appellant and eventually subdued him. Sergeant Shane Daubenmire arrived to assist. The officers determined that the contents of the bags were consistent with items used in a one-pot methamphetamine lab. They contacted Detectives Chris Davis and Jason Gannon to process and secure the evidence. Alicia Bennett was found lying in brush. A search of her purse revealed three syringes, one containing a clear liquid.

{¶5} Upon his three-count drug indictment, Appellant entered not guilty pleas and proceeded to jury trial. At trial, the State presented

testimony from the involved law enforcement officials and a scientist from the Ohio Bureau of Criminal Investigation (hereinafter "BCI"), along with several exhibits. After the State rested its case, Appellant's counsel made a Crim. R. 29 motion for acquittal, which the court denied. Appellant elected not to present evidence.

{¶6} The jury convicted Appellant of all three counts. The trial court found that Counts One and Two merged, and further found that Counts Two and Three merged. The trial court sentenced Appellant on Counts One and Three. On Count One, a second-degree felony, Appellant was sentenced to a prison term of seven years. On Count Three, a third-degree felony, Appellant was sentenced to a prison term of twenty-four months. The sentences were to be served concurrently.

{¶7} This timely appeal followed. Where pertinent, additional facts are set forth below.

ASSIGNMENT OF ERROR

I. "MR. RACKLEY'S TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS."

A. STANDARD OF REVIEW

{¶8} In the sole assignment of error, Appellant asserts that his trial counsel rendered constitutionally ineffective assistance. To prevail on a

claim of ineffective assistance of counsel, a criminal defendant must establish (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Short*, 129 Ohio St.3d 360, 2011–Ohio–3641, 952 N.E.2d 1121, ¶113; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052; *State v. Williams*, 4th Dist. Jackson No. 15CA3, 2016-Ohio-733, at ¶32; *State v. Gavin*, 4th Dist. Scioto No. 13CA3592, 2015–Ohio–2996, ¶42. The burden of proof lies with the defendant because, in Ohio, a properly licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006–Ohio–6679, 860 N.E.2d 77, ¶62. Failure to satisfy either part of the test is fatal to the claim. *Strickland* at 697; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989).

LEGAL ANALYSIS

{¶9} Appellant asserts that on the day he was arrested he possessed no useable methamphetamine, and the liquid substance he did possess was only capable of producing a relatively small amount of methamphetamine. At trial, Beth Underwood, a forensic scientist from BCI, testified that she examined and analyzed five vials of liquid submitted as evidence in the case.

She took a sample from each vial and, at the conclusion of her testing, determined within a reasonable degree of scientific certainty that each of the vials contained methamphetamine. She further testified the weight of the liquid contained in the vials was 82.62 grams.

{¶10} In closing, the State argued:

> Now, you heard testimony that the vials that were collected out of that bottle were put into five separate containers. Each of those containers were tested and each of those containers had methamphetamine in them. So, it's not like there might have been a little tiny sliver of methamphetamine. Bulk amount for methamphetamine, which is a schedule two stimulant, is going to be defined to you as three grams. Here we're dealing with eighty-two grams of liquid that contained this amount. * * *The State has the burden of showing you that there are eighty-two grams there, which is approximately twenty-seven times bulk, putting you between the five and fifty when you do the math, and that part of that liquid containing methamphetamine. The State's gone above and beyond that in showing you at least five parts of that liquid contained methamphetamine.

Appellant asserts that this characterization caused the trial court to view the drug quantity as quite substantial and therefore, the trial court imposed a seven-year term of imprisonment instead of the three-year term requested by the defense.[1] Consequently, Appellant argues his counsel failed to demonstrate reasonable assistance when counsel failed to point out to the trial court the "relatively small possible amount of finished product" at

[1] The maximum sentence for aggravated possession of drugs, a second-degree felony, is 8 years.

sentencing. Appellant concludes that his counsel's representation was deficient.

{¶11} For the reasons which follow, we disagree. The fact that Appellant possessed only the liquid substance containing methamphetamine, not a finished or useable product, is not determinative under current Ohio law. Appellee has directed us to *State v. Scoggins*, 4th Dist. Scioto No. 16CA3767, 2017-Ohio-8989.

{¶12} On appeal of his convictions for aggravated possession of drugs/methamphetamine, and aggravated trafficking of methamphetamine, Scoggins contended there was insufficient evidence to support the convictions because all that was recovered by law enforcement was a liquid containing some amount of methamphetamine, not methamphetamine in its raw, useable, or sellable form. In the *Scoggins* case, law enforcement discovered the one-pot methamphetamine labs being used in the process of manufacturing methamphetamine. What was recovered and delivered to BCI was a liquid substance. BCI's testing further confirmed that the liquid contained methamphetamine. At trial, two law enforcement officers and a scientist from BCI testified the liquid substance was not yet in its final, useable form.

{¶13} In our decision, we observed that Scoggins was charged and found guilty of aggravated possession of drugs/methamphetamine, in violation of R.C. 2925.11, which provides, in pertinent part: "(A) No person shall knowingly obtain, possess, or use a controlled substance or a controlled substance analog." We also observed that R.C. 2925.11(C)(1) reads: "If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or II, with the exception of marihuana, cocaine, L.S.D., heroin, hashish, and controlled substance analogs, whoever violates division (A) of this section is guilty of aggravated possession of drugs. * * *." Scoggins was also charged and found guilty of aggravated trafficking of methamphetamine, in violation of R.C. 2925.03. R.C. 2925.03 provides, in pertinent part: "(A) No person shall knowingly do any of the following: * * * (2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person." Furthermore, R.C. 2925.03(C)(1) reads: "If the drug involved in the violation is a compound, mixture, preparation, or substance included in schedule I or schedule II, with the exception of marihuana, cocaine, L.S.D., heroin, hashish, and controlled

substance analogs, whoever violates division (A) of this section is guilty of aggravated trafficking in drugs. * * *."

{¶14} In *Scoggins,* we also noted at 59 that methamphetamine is defined in the Revised Code as "any salt, isomer, or salt of an isomer of methamphetamine, or any compound, mixture, preparation, or substance containing methamphetamine or any salt, isomer, or salt of an isomer of methamphetamine." R.C. 2925.01(II). In Ohio, methamphetamine is treated as a Schedule II controlled substance. See R.C. 3719.41.

{¶15} In *Scoggins,* we were guided by a decision of the Eleventh District Court of Appeals, *State v. Thomason,* 11th Dist. Ashtabula No. 2016-A-0027, 2017-Ohio-7447. The *Thomason* court considered whether a liquid precursor to methamphetamine is in fact methamphetamine as defined by Ohio statutory law. Thomason was convicted for aggravated possession of drugs. On appeal, she argued she was wrongfully convicted when the State failed to establish the weight of the drug possessed, an essential element of the crime.

{¶16} At Thomason's trial, a scientist with BCI testified that she had analyzed the liquid taken from Thomason's motel room; that the liquid contained methamphetamine; and that the total weight of the liquid was more than five times the bulk amount, but less than 55 times the bulk

amount. The liquid was merely a precursor to ingestible methamphetamine. Thomason argued the State was required to prove the amount of methamphetamine in the precursor, i.e. the amount of methamphetamine which would have resulted from the liquid.[2]

{¶17} The *Thomason* court stated at ¶33:

> R.C. 2925.01(I)(I) presupposes that, regardless of the conditional medium, a compound, mixture, preparation, or substance must contain methamphetamine to be considered, as a matter of law, methamphetamine. Although a precursor, by definition, is the substance from which methamphetamine is formed, there was still some amount of methamphetamine in the mixture. And, while the precursor may not have been usable methamphetamine and its weight contributed to a more elevated charge, the unambiguous language of R.C. 2925.01(I)(I) states that a mixture or substance that contains methamphetamine is methamphetamine. The precursor (qua mixture, substance, or preparation) seized during the search contained some undisclosed amount of methamphetamine and, as a result, it is methamphetamine as defined by the legislature. * * *

{¶18} The *Thomason* court also commented at ¶35:

> We acknowledge the ridiculousness of convicting an individual of aggravated possession of drugs even though the "drug," in its existing form, was not marketable or useable. We must, however, apply the unambiguous language of the law as

[2] Thomason urged application of *State v. Gonzales*, 150 Ohio St. 3d 261, 2016-Ohio-8319, 81 N.E. 3d 405, wherein the Supreme Court of Ohio held that offense level for possession of cocaine was determined only by weight of actual cocaine, not by total weight of cocaine plus any filler. However, the *Thomason* court noted that on the state's motion for reconsideration, the Supreme Court issued a new opinion reversing its prior holding and concluding that for purposes of the drug possession statute, all the state must prove regarding weight of cocaine is the total weight of the cocaine, including any filler. *State v. Gonzales, 2017*–Ohio–777, ¶18.

> written. And unless or until the legislature changes the definition of methamphetamine to exclude compounds, mixtures, preparations, or substances that are not useable, strange and arguably absurd results will be achieved. In light of the statutory definition of methamphetamine, the state presented sufficient evidence to establish the total weight of the liquid precursor was more than five times the bulk amount.

In *Scoggins,* we stated at ¶61:

> We agree with our sister district that the unambiguous language of R.C. 2925.01(I)(I) states that a mixture or substance that contains methamphetamine is methamphetamine as a matter of law. Accordingly, because the evidence in this case establishes that the liquid recovered from the one-pot labs contained some amount of methamphetamine, sufficient evidence existed to support the aggravated drug possession and aggravated drug trafficking charges.

{¶19} For the time being, the clear language of R.C. 2925.01(I)(I) provides that a mixture or substance that contains methamphetamine is methamphetamine as a matter of law. However, Appellant's argument is not resolved in its entirety. Appellant claims that his counsel was ineffective in that he failed to make the "useable amount" argument in support of the three-year sentence.

{¶20} Appellant points out that because there was no trial testimony regarding the likely "end-product yield" of the 82.62 grams of methamphetamine contained in the small lab found when he was arrested, it was even more imperative that defense counsel bring this to the court's attention. Given Appellant's prior convictions, although

none were related to the production of methamphetamine, defense counsel could not have cited a lack of criminal record as a basis for the lower sentence. Appellant concludes there was no strategic reason to fail to make the "low potential yield" argument and reasonably competent counsel would have done so. We disagree.

{¶21} Intrinsic within Appellant's assignment of error, he challenges his seven-year prison sentence. When reviewing felony sentences appellate courts must apply the standard of review set forth in R.C. 2953.08(G)(2). *State v. Shankland,* 4th Dist. Washington Nos. 18CA11, 18CA12, 2019-Ohio-404, at 18; *State v. Marcum,* 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶1, 22-23. Under R.C. 2953.08(G)(2), "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." Instead, R.C. 2953.08(G)(2) provides that an appellate court may increase, reduce, modify, or vacate and remand a challenged felony sentence if the court clearly and convincingly finds either:

> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant; or,
>
> (b) That the sentence is otherwise contrary to law.

{¶22} Although R.C. 2953.08(G)(2)(a) does not mention R.C.

2929.11 and 2929.12, the Supreme Court of Ohio has determined that the same standard of review applies to those statutes. *Shankland, supra,* at ¶19; *Marcum* at ¶23; *State v. Butcher,* 4th Dist. Athens No. 15CA33, 2017-Ohio-1544, ¶84. The defendant bears the burden of establishing by clear and convincing evidence that the sentence is either contrary to law or not supported by the record. *Shankland, supra,* at ¶20. See, e.g., *State v. Fisher*, 4th Dist. Jackson No. 17CA5, 2018-Ohio-2718, ¶20, citing *State v. O'Neill,* 3d Dist. Allen No. 1-09-27, 2009-Ohio-6156, fn. 1. Appellant's sentence is not contrary to law because his sentence is within the statutory range, and the trial court stated that it considered the purposes of felony sentencing under R.C. 2929.11 and the seriousness and recidivism factors of 2929.12. The trial court was not obligated to make specific findings concerning these factors. See *Shankland, supra*, at ¶22.

{¶23} Additionally, Appellant cannot establish by clear and convincing evidence that the record does not support his sentence. In imposing sentence, the trial court's entry indicates the court considered the file, the evidence at trial, the statements of counsel and the defendant, and both R.C. 2929.11 and R.C. 2929.12. Simply because Appellant did not receive the lower sentence does not mean the court failed to consider them,

or that clear and convincing evidence shows the court's findings are not supported by the record. See *Shankland, supra,* at ¶24; *State v. Yost*, 4th Dist. Meigs No. 17CA10, 2018-Ohio-2719, ¶20, *State v. Graham*, 4th Dist. Adams No. 17CA1046, 2018-Ohio-1277, ¶26, *State v. Butcher*, 4th Dist. Athens No. 15CA33, 2017-Ohio-1544, ¶87.

{¶24} The record reflects that after the jury returned the verdicts, the trial court immediately proceeded to disposition. The State's attorney pointed out that the drug offenses took place while Appellant was on community control for a theft and an "R.S.P. conviction from the same court." It was also noted that Appellant had a prior felony of the fifth degree for possession of drugs from Highland County in 2012, and a prior felony of the fifth degree for forgery from Highland County in 2003. The new convictions were a fourth set of felonies. We find Appellant's sentence is supported by clear and convincing evidence.

{¶25} It is well established that mere speculation cannot support either the deficient performance or prejudice requirement of an ineffective-assistance claim. *State v. Morgan*, 2nd Dist. Montgomery No. 27774, 2018-Ohio-3198, at ¶16; *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶119; *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶217. It would be pure speculation to conclude that

Appellant's sentence would have been any different had counsel made the "useable" or "lower yield" argument. We find that because Appellant has failed to establish any prejudice resulting from his counsel's failure to make the argument in question, Appellant's ineffective assistance claim fails.

{¶26} For the foregoing reasons, we find no merit to Appellant's sole assignment of error. It is hereby overruled.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and costs be assessed to Appellant.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, J. & Hess, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Jason P. Smith, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.