

[Cite as *State v. Banks*, 2011-Ohio-1039.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF SUMMIT    )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.     25279

Appellee

v.

MYRON J. BANKS

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF SUMMIT, OHIO  
CASE No.    CR 08 10 3305(C)

Appellant

DECISION AND JOURNAL ENTRY

Dated: March 9, 2011

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CARR, Judge.

{¶1} The appellant, Myron Banks, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} This case stems from a traffic stop which occurred in Green, Ohio, on October 4, 2008. On October 17, 2008, the Summit County Grand Jury indicted Myron J. Banks on one count of illegal assembly or possession of chemicals for the manufacture of drugs in violation of R.C. 2925.041, a felony of the third degree; tampering with evidence in violation of R.C. 2921.12(A)(1), a felony of the third degree; and possessing drug abuse instruments in violation of R.C. 2925.12, a misdemeanor of the second degree.

{¶3} After a jury trial, Banks was found guilty of illegal assembly or possession of chemicals for the manufacture of drugs and tampering with evidence. The count of possessing drug abuse instruments was dismissed prior to the commencement of trial.

{¶4} Banks filed his original notice of appeal on April 23, 2009. By journal entry dated November 13, 2009, this Court concluded that Banks' sentence was void due to an error in the imposition post-release control. This Court vacated the trial court's order and remanded the matter for a de novo sentencing hearing. On remand, Banks filed with the trial court a joint-motion captioned, "MOTIONS FOR COUNSEL, TO DISMISS, FOR PSI." On January 28, 2010, the trial court denied the motions for dismissal and presentence investigation and then conducted a de novo sentencing hearing. A new sentencing entry was journalized on February 3, 2010. Banks filed a notice of appeal on March 3, 2010. On appeal, Banks raises six assignments of error. This Court rearranges his assignments of error to facilitate review.

## II.

### **ASSIGNMENT OF ERROR II**

"THERE WAS INSUFFICIENT EVIDENCE TO FIND MR. BANKS GUILTY OF TAMPERING WITH EVIDENCE[.]"

### **ASSIGNMENT OF ERROR III**

"THERE WAS INSUFFICIENT EVIDENCE TO FIND MR. BANKS GUILTY OF ILLEGAL ASSEMBLY OR POSSESSION OF CHEMICALS FOR THE MANUFACTURE OF DRUGS."

{¶5} In his second and third assignments of error, Banks argues that his convictions for tampering with evidence and illegal assembly or possession of chemicals for the manufacture of drugs were not supported by sufficient evidence. This Court disagrees with both assertions.

{¶6} The law pertaining to a challenge to the sufficiency of the evidence is well settled:

"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a 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. Galloway* (Jan. 31, 2001), 9th Dist. No. 19752.

The test for sufficiency requires a determination of whether the State has met its burden of production at trial. *State v. Walker* (Dec. 12, 2001), 9th Dist. No. 20559; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390.

{¶7} The elements of illegal assembly or possession of chemicals for the manufacture of drugs are found in R.C. 2925.041(A), which provides, “[n]o person shall knowingly assemble or possess one or more chemicals that may be used to manufacture a controlled substance in schedule I or II with the intent to manufacture a controlled substance in schedule I or II in violation of section 2925.04 of the Revised Code.”

{¶8} R.C. 2901.22(B) states:

“A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.”

{¶9} R.C. 2925.01(J) defines “manufacture” as

“to plant, cultivate, harvest, process, make, prepare, or otherwise engage in any part of the production of a drug, by propagation, extraction, chemical synthesis, or compounding, or any combination of the same, and includes packaging, repackaging, labeling, and other activities incident to production.”

{¶10} To “possess” or have “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. 2925.01(K). A “controlled substance” is “a drug, compound, mixture, preparation, or substance included in schedule I, II, III, IV, or V.” R.C. 3719.01(C). Methamphetamine is classified as a controlled substance. R.C. 3719.41, Schedule II (C)(2).

{¶11} In support of his argument that his conviction for illegal assembly or possession of chemicals for the manufacture of drugs was not supported by sufficient evidence, Banks contends that the State did not demonstrate that he actually possessed chemicals. Banks contends that being near the items in the trunk does not constitute possession. Furthermore, Banks argues that none of the items found in the trunk of the vehicle were chemicals.<sup>1</sup>

{¶12} The State's first witness at trial was Deputy Michael Lowe. Deputy Lowe is a member of the patrol division of the Summit County Sheriff's Office. Deputy Lowe testified as follows. On October 4, 2008, he was on patrol in Green, Ohio. Deputy Lowe stopped a vehicle because of a loud exhaust. The vehicle came to a stop in the parking lot of the Lowe's Home Improvement store on South Arlington Road. Deputy Lowe elicited the identification of the driver, Carissa Cole, and the passenger, Myron Banks. Deputy Lowe testified that when he placed Banks in the back of his car, he noticed that Banks appeared to have something in his mouth. When Deputy Lowe asked Banks if he had something in his mouth, Banks indicated that it was paper. Banks proceeded to spit the paper onto the ground beside the cruiser. Banks told Deputy Lowe that placing the paper in his mouth was a "nervous habit." Deputy Lowe testified that the paper turned out to be receipts for items purchased earlier in the day. Deputy Lowe further testified that "seven to eight minutes" passed between the time the stop was made and the time he observed that Banks had something in his mouth. Deputy Lowe testified as to the contents of three receipts which were found on the ground. The first receipt indicated that "Wal-phed" and four punch balls had been purchased at Walgreens. The second receipt indicated that

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<sup>1</sup> In his merit brief, Banks argues that items seized by law enforcement at a residential location were destroyed in violation of the law. In support of his position that the State did not present evidence to show that he possessed chemicals, Banks contends that evidence relating to these items should not have been admitted at trial. We note that in reviewing the sufficiency of the

a mini glass scraper and a 32-ounce Pro Drain Opener had been purchased from Olde Hardware. The third receipt indicated that a coffee filter, a 30-gallon trash bag, hydrogen peroxide, isopropyl alcohol, and a bottle of spring water had been purchased at a Dollar General Store. When Deputy Lowe called for assistance, Deputy Molea arrived with a K-9 deputy. Deputy Molea performed a K-9 sweep of the exterior of the vehicle. Deputy Lowe participated in the subsequent search and found, in the passenger compartment, a Taco Bell bag containing eight hypodermic needles. When Deputy Molea subsequently opened the trunk, Deputy Lowe initially observed a yellow bag containing “some Heet and some other components that appear to be things that would manufacture meth[.]” Deputy Lowe testified that he contacted his sergeant and informed him that he “may have some components for manufacturing meth, that we bagged.” Deputy Lowe also contacted Detective Barker from the Summit County Drug Unit who responded to the scene. Deputy Lowe testified that the investigation with respect to the items in the trunks was turned over to Detective Barker.

{¶13} Deputy Anthony Molea of the Summit County Sheriff’s Department was the second witness to testify on behalf of the State at trial. Deputy Molea testified that his current assignment was the K-9 unit. Deputy Molea testified that on October 4, 2008, he received a call to assist Deputy Lowe in Green. Upon arriving at the scene, Deputy Molea “[r]an the dog around the exterior of the vehicle.” Deputy Molea testified that the dog is trained to search for the odor of narcotics including cocaine, methamphetamine, heroin, and marijuana. Deputy Molea testified that the dog alerted to the driver’s side front door and the trunk of the vehicle. Deputy Molea testified that he and Deputy Lowe then conducted a search. Deputy Molea testified that when he searched the trunk of the vehicle, he observed coffee filters, trash bags, a

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evidence to support a conviction, an appellate court considers all evidence admitted at trial. See

bottle of Heet, and Sudafed. Deputy Molea testified that, at that point, he realized that he was dealing with a possible methamphetamine laboratory. Deputy Molea testified that, for safety reasons, he notified Deputy Lowe and his sergeant. His sergeant then contacted the drug unit. Deputy Molea testified that he was able to observe Myron Banks when he arrived at the scene. Deputy Molea testified that when he observed Banks, he was in the cruiser and appeared to be chewing something. Deputy Molea made this observation “probably a minute” after arriving at the scene. Deputy Molea testified that Banks was not handcuffed at the time. After Banks spit the receipts onto the ground, Deputy Molea had an opportunity to observe them. Deputy Molea testified that the receipts matched the items he observed in the trunk.

{¶14} Grant Givens also testified on behalf of the State at trial. Givens testified that he was currently in prison as a result of his involvement in this case. Givens testified that on October 4, 2008, Carissa Cole picked him up from his workplace at the Harry London Chocolate Factory and drove him to his home. Givens waited for his paycheck to arrive and, upon its arrival, proceeded to cash it. After he cashed his check, he and Cole drove to meet Banks at a house in Akron. When asked why he was going to meet Banks, Givens testified, “So I could get high, basically.” Givens testified that after he arrived, he stayed at the house while Cole and Banks “left to go get chemicals.” Givens testified that Cole and Banks were going to get “[c]hemicals to manufacture methamphetamine” but he did not know the specific stores they were going to. Givens testified that Cole and Banks returned to the house but had forgotten to purchase one item. Givens testified he thought they had forgotten to purchase naptha. Givens then rode with Cole and Banks to Target where he was dropped off so that he could purchase pseudoephedrine tablets. He was unable to purchase the tablets because the pharmacy was

closed. Givens testified that he had contact with the police at Target. Givens testified he told the police that he was “waiting for the drugs to be made so [he] could get high.” When asked at trial who was going to cook the methamphetamine, Givens responded, “Myron.” Givens testified that he eventually pleaded guilty to charges relating to the incident. Givens further testified that in exchange for “tell[ing] the truth” he would receive “six months judicial.”

{¶15} Carissa Cole also testified on behalf of the State at trial. Cole testified that she has known Banks for several years. Cole testified that she had observed Banks manufacturing methamphetamines. When asked how many times, Cole responded, “I can’t even count the number; I mean, over 13, 14, 15; I don’t know, a lot.” Cole testified that on October 4, 2008, she picked up Grant Givens from work and drove him to his house where they waited for his paycheck to arrive. When Given’s paycheck arrived, they drove to Wal-Mart to cash it. Cole testified that they waited for Givens’ paycheck so they “would have the finances for the rest of the materials needed to manufacture the meth.” Cole and Givens then drove to meet Banks in Akron. Cole testified that she and Givens were meeting Banks because he knew how to cook methamphetamine and he had the iodine, red phosphorus, and glassware. Cole testified that she knew Banks had iodine because he had shown it to her in a previous visit. Cole testified that after she and Givens met Banks at the house, she and Banks then drove to “get the rest of the materials needed.” Givens stayed back at the house. Cole testified that they stopped at a Dollar General in Akron where Banks went into the store and purchased coffee filters, trash bags, hydrogen peroxide, rubbing alcohol, and a bottle of water. Cole testified that after Banks purchased the items, he placed them in the trunk of the vehicle. Cole testified that she and Banks drove to the True Value Hardware Store in North Canton. Both Cole and Banks went into the store and purchased sulfuric acid, black electric tape, and razor blades.

{¶16} Cole and Banks then drove to Rite Aid where Cole went in and purchased a box of Sudafed. Cole testified that she went into the store to make the purchase because Banks did not have his ID. Cole and Banks then proceeded to drive to a Walgreens where both individuals entered the store. Cole testified that she purchased another box of pills containing pseudoephedrine, which were called “Wal-phed,” as well as punching balloons and sea salt. The couple then drove to a Speedway gas station where Cole purchased two bottles of Heet. Cole testified that Banks was collecting all of the receipts for the purchases. Cole testified that they also stopped at her grandpa’s house because she had a relative who is diabetic and she “needed some syringes.” Cole testified that they eventually returned to the house where she met Banks because they had run out of money and still needed to purchase naphtha. Cole and Banks picked up Givens because he had the additional money to make the purchase. Cole testified that Givens wanted to purchase another box of Sudafed so she and Banks dropped him at the Target on Arlington Road in Akron. Cole testified that purchasing more Sudafed was beneficial because “the more Sudafed you have the more meth you make[.]”

{¶17} Cole testified that as she dropped off Givens, there was an officer in a squad car located near entrance. Cole testified that the “catalytic converter was off [her] car” and it was very loud. The officer followed her to the Lowe’s parking lot and pulled her over. Cole testified she was driving to Lowe’s to purchase naphtha. Banks was in the front passenger seat when the car was pulled over. Cole testified that Banks was taken out of the car when they were pulled over because “he had warrants or something.” Cole testified that she thought Banks had taken the items they purchased into the house when they picked up Givens and she did not realize the items were still in the trunk. The police searched the vehicle and found the items in the trunk, as well as the pack of syringes which belonged to Cole. Cole testified that she pleaded guilty to



“illegal assembly of chemicals” and it was her understanding that her role in the case after pleading guilty was “to be completely truthful and be here for his trial to testify.”

{¶18} The State’s final witness at trial was Detective Susan Barker of the Summit County Sheriff’s Office. Detective Barker is assigned to the Summit County Drug Unit. Detective Barker testified that she completed the 80-hour DEA narcotics investigator school as well as a clandestine laboratory training certification course. Detective Barker testified that she received training to understand the process to manufacture methamphetamine and that she has participated in “hundreds” of investigations involving the production of methamphetamine since 2002. Detective Barker indicated that she has testified previously as an expert witness with respect to the process of manufacturing methamphetamines.

{¶19} Detective Barker testified that the process of manufacturing methamphetamine can be broken down into four stages, namely “extraction, reaction, separation and crystallization.” Detective Barker testified that each of the four phases involves a different chemical. Detective Barker testified that the extraction process involves extracting the ephedrine from the pseudoephedrine tablets. The tablets are soaked in Heet, a gas-line anti-freeze, to remove the ephedrine from the binders. Detective Baker testified that the three primary ingredients are the ephedrine, the red phosphorus, and iodine. Detective Barker testified that red phosphorus is not commonly found and individuals are obtaining it by taking the striker plates off matchbooks. The red phosphorus is obtained by soaking the striker plates in a solvent such as acetone. Detective Barker testified that iodine, which can be purchased at a feed store, acts as a catalyst in the process of manufacturing methamphetamine.

{¶20} Detective Barker then described the reaction process, where, “[ephedrine, red phosphorus, and iodine] are mixed together and applied to a heat source and glassware, beakers,

all different kinds of containers, that causes the chemical reaction, basically converting the pseudoephedrine into methamphetamine. And then you filter that out, they often reuse the red phosphorus because it is hard to obtain, and then you're left with a liquid."

{¶21} Detective Barker testified that the reaction stage is followed by the separation phase. Detective Barker testified that, during the separation phase, "you have your liquid that came from the reaction and you add Red Devil lye, which is sodium hydroxide, which changes the PH of that from an acid to a base." Detective Barker further testified, "they then add naptha which causes the methamphetamine to separate out of the original level into the naptha layer."

{¶22} Detective Barker testified that the final stage is the crystallization phase. In this stage, the "naptha liquid that contains the methamphetamine and solution is filtered off" into containers. Detective Barker testified that they usually find "improvised containers, which can be soda bottles with tubing with electrical tape attached[.]" Detective Barker testified that she knew of two methods that can be used during this stage. The first method involves muriatic acid and aluminum foil. The alternative method involves sulfuric acid, such as drain opener, and salts. Detective Barker testified that the salt and sulfuric acid is mixed together causing a reaction which is hydrogen gas. That gas then travels through the tube into the solution that contains the methamphetamine. Detective Barker explained that "[i]t salts the methamphetamine out of that naptha layer to which we can – they can filter the methamphetamine, evaporate the liquid off of that and, again, scrape or dry out their finished product."

{¶23} Detective Barker testified that she arrived at the scene on South Arlington Road after her supervisor informed her that a patrol deputy had stopped a car and possibly found a methamphetamine laboratory. Detective Barker placed a call for personal protective equipment (PPE) and then proceeded to search the trunk of the vehicle. Detective Barker photographed the

items in the trunk prior to removing them. Detective Barker testified that “those bags were each found to contain chemicals that I know to be used to manufacture methamphetamine.” The bags were introduced as exhibits at trial. Detective Barker testified that through conversations with Carissa Cole and other officers involved, she learned that there was a location where the suspects intended to go and manufacture drugs. Detective Barker testified that she, Deputy Molea, and other drug unit officers responded to that location with the purpose of making contact with someone at that address. Detective Barker testified that after obtaining consent to search the residence, they found a backpack containing several items that, based on her training and experience, she knew to be used to manufacture drugs. Detective Barker testified that the bag was found to contain iodine, several glass jars, a digital scale, and a box of Sudafed. A photograph of these items was introduced as an exhibit at trial.

{¶24} Banks argues on appeal that there was not sufficient evidence that he actually possessed chemicals with the intent to manufacture methamphetamine. In support of his argument, Banks contends merely being near the items in the trunk does not constitute possession. At trial, Carissa Cole testified that she witnessed Banks in possession of chemicals. Carissa Cole testified that she and Givens drove to meet Banks because he knew how to cook methamphetamine and he had the iodine, red phosphorus, and glassware. Cole specifically testified that Banks had shown her the iodine during a previous visit. Cole also testified that she and Givens waited for his paycheck to arrive so they would have “the finances for the rest of the materials to manufacture the meth.” Cole and Banks proceeded to drive to several stores and purchase a variety of items. While Banks did not enter each store, Cole testified that he did go into Dollar General where he purchased coffee filters, trash bags, hydrogen peroxide, rubbing alcohol, and a bottle of water. Cole also testified that she and Banks entered True Value

Hardware where they purchased sulfuric acid, black electric tape, and razor blades. Cole also testified that Banks was in charge of holding the receipts for the items purchases. Detective Barker testified that the bags found in the trunk of the vehicle “contain[ed] chemicals that I know to be used to manufacture methamphetamine.” This evidence, when construed in the light most favorable to the State, was sufficient to show that Banks possessed chemicals with the intent to manufacture methamphetamine. Banks’ third assignment of error is overruled.

{¶25} The elements of tampering with evidence are set forth in R.C. 2921.12, which provides:

“(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

“(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation;

“(2) Make, present, or use any record, document, or thing, knowing it to be false and with purpose to mislead a public official who is or may be engaged in such proceeding or investigation, or with purpose to corrupt the outcome of any such proceeding or investigation.”

{¶26} In support of his position that his conviction for tampering with evidence was not supported by sufficient evidence, Banks argues that there was no evidence presented tending to show that Banks knew an “official investigation” was in progress when he placed the receipts in his mouth. Banks further argues that the receipts were not evidence of value in any proceeding. Banks also contends that because the State had the actual items which were purchased that the receipts were irrelevant pursuant to Evid.R. 403(B).

{¶27} Deputy Lowe testified that after pulling over the vehicle, he identified Carissa Cole as the driver and Myron Banks as the passenger. He proceeded to place Banks in the back of his cruiser. After Banks had been placed in the cruiser, Deputy Lowe noticed that Banks appeared to have something in his mouth. Deputy Lowe then discovered that Banks had receipts

in his mouth. Deputy Lowe testified that when Banks spit the receipts onto the ground, they were “balled up like a big wad of gum” and then subsequently had to be flattened out. The testimony of Givens and Cole tended to show that Cole, Banks, and Givens were engaged in an endeavor to acquire the items necessary to manufacture methamphetamine. When Banks was placed in the cruiser, he had knowledge that, at the very least, an investigation was “about to be or likely to be instituted.” R.C. 2921.12(A). The testimony of Cole and Givens suggests that Banks had knowledge that the items listed on the receipts were items used in the process of manufacturing methamphetamine. The receipts served as a direct link between Banks and the items in the trunk. By placing the receipts in his mouth, Banks concealed the receipts from law enforcement and attempted to impair their availability for an investigation.

{¶28} Furthermore, Banks’ contention that the receipts were not relevant to a proceeding or investigation is not well taken. The fact that items necessary to manufacture methamphetamine were found in the trunk, and subsequently introduced at trial, does not diminish the fact that the receipts linked Banks to the items found in the trunk. The receipts were also introduced as evidence at trial. Even if the receipts had not been introduced, they still had value within the scope of the investigation. Banks’ second assignment of error is overruled.

#### **ASSIGNMENT OF ERROR I**

“THE CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

{¶29} In his first assignment of error, Banks argues that his convictions are against the manifest weight of the evidence. This Court disagrees.

{¶30} An appellate court’s review of the sufficiency of the evidence and the manifest weight of the evidence adduced at trial are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600. “While the test for sufficiency requires a

determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion.” *Id.*, citing *Thompkins*, 78 Ohio St.3d at 390 (Cook J., concurring).

{¶31} A determination of whether a conviction is against the manifest weight of the evidence, however, does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

“an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of 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 conviction must be reversed and a new trial ordered.” *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

“Weight of the evidence concerns the tendency of a greater amount of credible evidence to support one side of the issue more than the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that it was against the manifest weight of the evidence, an appellate court sits as a ‘thirteenth juror,’ and disagrees with the factfinder’s resolution of the conflicting testimony. *Id.*” *State v. Tucker*, 9th Dist. No. 06CA0035-M, 2006-Ohio-6914, at ¶5.

This discretionary power should be exercised only in exceptional cases where the evidence presented weighs heavily in favor of the defendant and against conviction. *Thompkins*, 78 Ohio St.3d at 387.

{¶32} In support of his position that his conviction for illegal assembly or possession of chemicals for the manufacture of drugs was against the manifest weight of the evidence, Banks argues that the testimony of his co-defendants was not credible. Banks contends in his merit brief that, aside from “eating the receipts,” the evidence linking him to the possession of chemicals charge was solely the testimony of his co-defendants. In support of his position that his tampering with evidence conviction was against the manifest weight of the evidence, Banks

contends the State did not show that an official investigation was underway. Banks also argues that the State failed to prove that the receipts were relevant evidence or that they were actually damaged.<sup>2</sup>

{¶33} Banks testified in his own defense at trial. Banks testified that he and Cole knew each other through a mutual friend, Christina Memmers. Banks testified that he had only met Givens on one occasion prior to October 4, 2008, and that was through Cole. On October 4, 2008, Banks was visiting Memmers at her house in Akron. Banks testified that he had spent the previous night at the house and was still there when Cole and Givens arrived. Banks testified that Cole and Givens stopped at the house twice that day. Banks testified that he did not speak to Cole or Givens before they left the first time and he did not know where they went. Banks testified that he and Memmers were having an argument when Cole and Givens returned. Banks felt as though he needed to leave and he accepted a ride from Cole. Givens testified that he did not look in the trunk or under the seats prior to getting into the vehicle. Banks testified that he was in the backseat while Cole was in the driver's seat and Givens rode in the front passenger's seat. Cole drove to Target and, when Givens went into the store, Banks moved to the front passenger's seat. Banks testified he did not know why Givens went into the store. Banks further testified that he did not drive with Cole and Givens to Canton on the day of the stop and that he had not seen the black bag containing iodine which was recovered from the house.

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<sup>2</sup> We note that, in support of his first assignment of error, Banks argues that Cole's testimony that she saw Banks cook methamphetamine 13 to 15 times was "plain abuse of the other acts statute." In support of his position, Banks cites this Court's decision in *State v. Halsell*, 9th Dist. No. 24464, 2009-Ohio-4166. Unlike the circumstances this Court confronted in *Halsell*, Banks has not assigned as error the admission of the testimony in question. As Banks has not adequately developed this argument on appeal, this Court declines to address the issue. See App.R. 16(A)(7).

{¶34} Banks testified that Cole asked him to move into the front seat when Givens entered Target. Banks testified there were receipts on the seat and he asked Cole if he could put them on the floor. According to Banks, Cole “freaked out” and asked him to “just hold on to them until we get Grant.” Cole indicated those receipts were to be given to Givens so she could get money back. Banks testified that he then folded the receipts and placed them in his front shirt pocket. Banks testified the car was eventually pulled over and he was taken into the cruiser because he had not paid a speeding ticket in Boston Heights and a bench warrant had been issued. Banks testified that the deputies immediately placed him in the cruiser with handcuffs on.

{¶35} When asked if at some point it became evident that there was an investigation going on, Banks stated, “I didn’t know what was going on. I saw that something was going on. Actually the one officer came back and asked me if I knew about [Cole’s] heroin addiction or something of this sort.” Banks testified that he later noticed law enforcement opening the trunk but that was after he had “presented those receipts to them.” Banks further testified that at least an hour elapsed between the time they were pulled over and the time he “presented the receipts.” Banks testified that after he was placed in the cruiser, law enforcement came to search him a second time. During the search, Cole “yelled across the drive talking about the receipt for the needles or something of the sort[.]” Banks testified he “really didn’t think too much” about what Cole said because he was in the midst of being searched. Banks testified that it later “dawned” on him that the receipts might have something to do with why he had not been picked up by the Boston Heights police. Banks testified that he pulled the receipts out of his pocket with his teeth and attempted to get the attention of law enforcement. Banks testified that he did not swallow the receipts and he did not “shoot them down” his throat. When asked if he voluntarily spit the



receipts onto the ground, Banks responded, “I specified to that officer that I had paper in my mouth, which were receipts that Carissa asked about. I told him about those receipts. I specified that to the officer. And he told me at that point to spit them out and I did exactly that.” Banks further testified that he had been handcuffed “[s]ince the time they pulled me from Carissa’s vehicle[.]”

{¶36} While Banks’ testimony conflicted with that of his co-defendants, as well as Deputy Lowe and Deputy Molea, this Court will not overturn the trial court’s verdict on a manifest weight of the evidence challenge only because the trier of fact chose to believe certain witnesses’ testimony over the testimony of others. *State v. Crowe*, 9th Dist. No. 04CA0098-M, 2005-Ohio-4082, at ¶22. Both Cole and Givens testified at trial that they had cooperated with the State. Thus, the trier of fact was aware of their cooperation when it evaluated the credibility of witnesses. Banks’ testimony indicated that he did not travel with Cole to purchase items to manufacture methamphetamine. Banks also testified that he was not aware of the items in the trunk of the vehicle and that he was not familiar with the bag containing iodine that was later recovered from the house. On the contrary, Givens testified that Banks and Cole went together to get “[c]hemicals to manufacture methamphetamine.” Cole testified that Banks traveled with her to purchase some of the items to manufacture methamphetamine and, in some cases, Banks went into the store to purchase the items himself. Givens testified that Banks was going to cook the methamphetamine. In light of the testimony of Givens and Cole, this Court concludes that this is not the exceptional case where the trier of fact clearly lost its way.

{¶37} With respect to the tampering with evidence conviction, a review of the record suggests that Banks was aware that an investigation was underway when he placed the receipts in his mouth. Banks testified that he was in the cruiser for approximately an hour before he

realized that law enforcement might be in search of the receipts that were in his front pocket. Banks testified that he had the receipts in his mouth because he was handcuffed and he wanted to bring the receipts to the attention of law enforcement. Banks also testified that he never chewed on the receipts or “[shot] them down” his throat. When asked if he knew an investigation was taking place, Banks testified that he “didn’t know what was going on” but he “saw that something was going on.” Banks’ testimony that he had been searched and handcuffed prior to being placed in the cruiser would tend to show that he knew that an investigation was either underway or likely to be initiated. We also note that Banks’ testimony conflicted with the testimony of Deputy Lowe and Deputy Molea on several issues. Deputy Lowe testified that when Banks spit the receipts onto the ground, they were “balled up like a big wad of gum” and had to be flattened out. Deputy Lowe also testified that Banks told him that the receipts were in his mouth because he had a “nervous habit.” Deputy Molea testified that Banks was not handcuffed when he was in the cruiser. While the testimony of Deputy Lowe and Deputy Molea did conflict with Banks’ testimony, Banks has not demonstrated that this is the exceptional case where the evidence weighs highly in his favor. The testimony of Deputy Lowe and Deputy Molea suggests that Banks placed the receipts in his mouth in order to conceal them from the deputies and to impair their availability in an investigation. Furthermore, as discussed above, Banks’ argument that the receipts were not necessary or relevant evidence is not well taken as the receipts served as a direct evidentiary link between Banks and the items which were found in the trunk.

{¶38} Banks’ first assignment of error is overruled.

**ASSIGNMENT OF ERROR IV**

“THE TRIAL COURT ERRED IN FAILING TO DISMISS DUE TO UNREASONABLE DELAY IN IMPOSING SENTENCE.”

{¶39} In his fourth assignment of error, Banks argues that the trial court erred in denying his motion to dismiss. This Court disagrees.

{¶40} On March 5, 2009, a jury found Banks guilty of tampering with evidence and illegal assembly or possession of chemicals for the manufacture of drugs. Banks was originally sentenced on March 24, 2009. On November 13, 2009, this Court concluded that Banks’ sentence was void due to an error in the imposition post-release control. This Court vacated the trial court’s order and remanded the matter for a new sentencing hearing. On January 28, 2010, Banks filed a motion to dismiss with the trial court, arguing that the trial court could not lawfully impose a sentence due to the unreasonable delay between the time he was found guilty and the time of the imposition of a lawful sentence. Banks noted in his motion that ten months had elapsed since the jury rendered its verdicts. At the sentencing hearing on January 28, 2010, Banks’ motion to dismiss was denied. The entry from which Banks now appeals was journalized on February 3, 2010.

{¶41} On appeal, Banks contends that the trial court erred in denying his motion to dismiss because there had been unreasonable delay between the time Banks was found guilty and the time a lawful sentence was imposed. Banks notes that because this Court concluded that the sentence imposed on March 24, 2009, was void, nearly eleven months passed between the time he was found guilty and the time he was sentenced. Banks also argues that R.C. 2929.191 does not address the issue of delay in sentencing.

{¶42} Crim.R. 32(A) states that a sentence “shall be imposed without unnecessary delay.” The Supreme Court of Ohio has recognized that delay for a reasonable time does not

invalidate a sentence. *Neal v. Maxwell* (1963), 175 Ohio St. 201, 202. This Court has recognized that Crim.R. 32(A) does not apply in cases where an offender must be re-sentenced. *State v. Spears*, 9th Dist. No. 24953, 2010-Ohio-1965, at ¶19, citing *State v. Huber*, 8th Dist. No. 85082, 2005-Ohio-2625, ¶8. “This logic, as it relates to Crim.R. 32(A), recognizes the distinction between a trial court refusing to sentence an offender and a trial court improperly sentencing an offender.” *Spears* at ¶19. Furthermore, the Supreme Court of Ohio has held that a trial court retains continuing jurisdiction to correct a void sentence. *State ex rel. Cruzado v. Zaleski*, 111 Ohio St.3d 353, 2006-Ohio-5795, at ¶19, citing *State v. Beasley* (1984), 14 Ohio St.3d 74, 75.

{¶43} In this case, the trial court did not refuse to sentence Banks. Rather, the trial court attempted to sentence Banks on March 24, 2010. After determining that the sentence was void, this Court issued a journal entry on November 13, 2009, vacating Banks’ sentence. The delay which occurred between the date Banks was found guilty on March 5, 2009, and the time he was re-sentenced on February 3, 2010, was a result of an error in the imposition of post-release control that was identified when Banks utilized the appellate process. As a trial court retains continuing jurisdiction to correct a void sentence, there was not an unreasonable delay in sentencing Banks which impacted the trial court’s jurisdiction. See *Zaleski* at ¶19. Thus, the trial court did not err in denying Banks’ motion to dismiss. The fourth assignment of error is overruled.

**ASSIGNMENT OF ERROR V**

“THE MANDATORY MINIMUM SENTENCE REQUIRED TO BE IMPOSED IS DISPROPORTIONATE TO THE SEVERITY OF THE OFFENSE IN VIOLATION OF EIGHTH AMENDMENT AND THE SEPARATION OF POWERS, AND AN ABUSE OF DISCRETION[.]” (sic)

{¶44} In his fifth assignment of error, Banks argues that the mandatory minimum sentence is disproportionate to the severity of the offense in violation of the Eighth Amendment and the separation of powers doctrine. This Court disagrees.

{¶45} Banks’s general position in support of his assignment of error is that the sentencing statute which requires a mandatory minimum prison term, as applied in this case, violated the prohibition against cruel and unusual punishment in the Eighth Amendment as well as the separation of powers doctrine. In support of his position, Banks notes that he was given a mandatory prison term despite the fact that he had no prior felony convictions; had never been placed under an extended period of incarceration; had earned a degree in higher education; and had never been charged with failing to provide for his five-year-old child. Banks further highlights that he was not convicted of a violent offense or an offense in which he exhibited a disregard for human life. Banks contends the law should provide for the consideration of mitigating factors to avoid a mandatory prison term.<sup>3</sup>

{¶46} At the outset, we note that “[a]n enactment of the General Assembly is presumed to be constitutional, and before a court may declare it unconstitutional it must appear beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible.”

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<sup>3</sup> In support of his fifth assignment of error, Banks contends that “the jury instructions were in plain error as the jury was told that the possession/assembly was for methamphetamine.” The issue of whether the trial court committed plain error in giving jury instructions falls outside the scope of Banks’ fifth assignment of error in which he challenges the constitutional validity of the sentencing scheme. As Banks has not raised a separate plain error challenge to the jury

*State v. Cook* (1998), 83 Ohio St.3d 404, 409, quoting *State ex rel. Dickman v. Defenbacher* (1955), 164 Ohio St. 142, paragraph one of the syllabus. R.C. 2925.041 states:

“(C) Whoever violates this section is guilty of illegal assembly or possession of chemicals for the manufacture of drugs. Except as otherwise provided in this division, illegal assembly or possession of chemicals for the manufacture of drugs is a felony of the third degree[.] \*\*\* If the chemical or chemicals assembled or possessed in violation of division (A) of this section may be used to manufacture methamphetamine, the court shall impose a mandatory prison term on the offender as follows:

“(1) If the violation of division (A) of this section is a felony of the third degree under division (C) of this section and the chemical or chemicals assembled or possessed in committing the violation may be used to manufacture methamphetamine, except as otherwise provided in this division, the court shall impose as a mandatory prison term one of the prison terms prescribed for a felony of the third degree that is not less than two years.”

{¶47} The Second District has stated:

“While the judicial branch unquestionably has authority, pursuant to the cruel and unusual punishment provisions of the Eighth Amendment to the United States Constitution and Article I, Section 9 of the Ohio Constitution, to strike down a criminal penalty as being in violation thereof, that authority must be exercised cautiously, only in the most egregious circumstances. The separation of powers requires not only that the judicial branch be vigilant in the protection of its proper powers from usurpation by the legislative branch, but also that the judicial branch be appropriately deferential in its reluctance to invade those powers properly possessed by the legislative branch, of which the power to define offenses and to provide for the punishment of offenses is a long-established, core example.” *State v. Keller* (June 1, 2001), 2d Dist. No. 18411.

{¶48} The plain language of R.C. 2925.041 reveals that the Ohio General Assembly intended to impose a mandatory prison term upon defendants convicted of violating R.C. 2925.041(A) when the controlled substance involved is methamphetamine. This Court has recognized the legislature’s desire to combat the inherent danger involved with the production of methamphetamine. In discussing R.C. 2933.33, we stated, “It is clear that the legislature has

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instructions with an adequate argument in support thereof, this court declines to reach the issue. App.R. 16(A)(7).

deemed the very real threat of explosion and fire due to the volatility of the materials used to produce methamphetamines a sufficient enough threat to justify warrantless searches.” *State v. Sandor*, 9th Dist. No. 23353, 2007-Ohio-1482, at ¶11. It is well settled that the General Assembly has the plenary power to prescribe crimes and fix penalties. *State v. Morris* (1978), 55 Ohio St.2d 101, 112. “Mandatory sentencing laws enacted pursuant to this authority do not usurp the judiciary’s power to determine the sentence of individual offenders.” *State v. Campa* (Mar. 29, 2002), 1st Dist. No. C-010254; see, also *State v. Thompkins* (1996), 75 Ohio St.3d 558, 560. “There is no federal constitutional impediment to mandatory minimum prison terms. Such minimum sentences are properly within the scope of the power of the General Assembly.” *State v. Austin* (May 28, 1980), 1st Dist. No. C-790465, citing *State ex rel. Owens v. McClure* (1976), 48 Ohio St.2d 1. In light of the danger which is inherent with the materials used in the production of methamphetamine, Banks has not demonstrated on appeal that R.C. 2925.041(C) is unconstitutional as applied. The mandatory two-year prison term that he received as a result of being found guilty of possessing chemicals with the intent to manufacture methamphetamine did not run afoul of constitutional principles.

{¶49} The fifth assignment of error is overruled.

#### **ASSIGNMENT OF ERROR VI**

“THE SENTENCES I[M]POSED ARE PLAINLY IN ERROR AND CONTRARY TO LAW.”

{¶50} In his sixth assignment of error, Banks argues that his sentence is contrary to law.

This Court disagrees.

{¶51} Banks raises several arguments in support of his assignment of error. Banks first argues that the fact that the sentencing entry was not signed by the assigned judge constituted reversible error. In this case, the sentencing entry is signed by a judge, albeit by the Honorable

Lynne S. Callahan for the Honorable Brenda Burnham Unruh, the judge assigned to this case. In support of his position that the judgment is contrary to law due to the lack of a proper assignment, Banks cites *State ex rel. Lomaz v. Court of Common Pleas of Portage Cty.* (1988), 36 Ohio St.3d 209, 212. The facts at issue in *Lomaz* are distinguishable from the circumstances in the instant matter in that *Lomaz* involved the assignment of an injunctive relief action by the administrative judge of a common pleas general division to a domestic relations court judge.

{¶52} Crim.R 25(B) states, in relevant part: “If for any reason the judge before whom the defendant has been tried is unable to perform the duties of the court after a verdict or finding of guilt, another judge designated by the administrative judge \*\*\* may perform those duties.” In this case, the transcript reveals that Judge Unruh presided at Banks’ sentencing hearing. The judgment entry of conviction reflects the sentence pronounced on the record. Furthermore, Judge Callahan signed “for” the assigned judge over Judge Unruh’s signature line. Because Judge Unruh had already imposed sentence, and the sentencing entry reflects both her sentence and her name, Judge Callahan’s signing on her behalf was a ministerial act. “Although the file does not explain why another judge signed the [entry], defendant still ‘has not contradicted the presumption of regularity accorded all judicial proceedings.’” *State v. Robb* (2000), 88 Ohio St.3d 59, 87, quoting *State v. Hawkins* (1996), 74 Ohio St.3d 530, 531.

{¶53} Banks also argues that consecutive sentences were imposed as punishment for exercising his right to a jury trial. In support of his position, Banks points to comments made by the trial judge at the March 19, 2009 sentencing hearing with respect to the favorability of the plea bargaining offer made by the State. This Court found the initial sentence rendered by the trial court to be void, and thus a nullity, due to an error in the imposition of post-release control.



This Court vacated Banks' original sentence and remanded the matter to the trial court.<sup>4</sup> On remand, the parties were placed "in the same position as if there had been no judgment" as though "such proceedings had never occurred." *State v. Bloomer*, 122 Ohio St.3d 200, 2009-Ohio-2462, at ¶27, quoting *State v. Bezak*, 114 Ohio St.3d 94, 2007-Ohio-3250, at ¶12. Banks currently appeals from the sentence rendered at a de novo sentencing hearing which took place on January 28, 2010. Banks has not pointed to anything from this sentencing hearing or the February 3, 2010 sentencing entry in support of his argument, other than to argue the sentencing hearing and entry are devoid of any reasons supporting consecutive sentences. It is well-settled that a trial court does not have to make findings on the record to support its decision to impose consecutive sentences. See *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at paragraph three of the syllabus. Banks' argument must be rejected as he has not pointed to anything from the current sentencing hearing or entry which would allow him to prevail.

{¶54} Banks' final argument in support of his fifth assignment of error is that the trial court erred by not excusing or imposing a fine as required by R.C. 2925.041(D). The trial court sentenced Banks to a two-year term of incarceration for the crime of illegal assembly or possession of chemicals or the manufacture of drugs. The fact that the trial court did not impose an additional fine with respect to the same charge did not result in prejudice to Banks. "It is axiomatic that a reversal may only be rendered for errors that caused prejudice to the complaining party." *Natl. Check Bur., Inc. v. Woodgeard*, 5th Dist. No. 05-CA-23, 2006-Ohio-140, at ¶17. While the State was arguably prejudiced by this error, it has not raised the issue on

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<sup>4</sup> Unlike the circumstances the Supreme Court of Ohio confronted in *State v. Fischer*, -- N.E.2d --, 2010-Ohio-6238, Banks' original sentence was vacated in its entirety. Thus, the trial court in this case was required to conduct a de novo sentencing hearing.

appeal. As Banks was not prejudiced by the error, reversal is not warranted. *State v. Jamison*, 9th Dist. No. 03CA0107-M, 2004-Ohio-2514.

{¶55} The sixth assignment of error is overruled.

III.

{¶56} Banks' assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

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DONNA J. CARR  
FOR THE COURT

MOORE, J.  
BELFANCE, P. J.  
CONCUR

APPEARANCES:

MARK H. LUDWIG, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.