[Cite as *State v. Slater*, 2018-Ohio-2566.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. DWIGHT SLATER Appellant	C.A. No. 28648 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE Nos. CR 2015 12 3883 CR 2016 10 3722

DECISION AND JOURNAL ENTRY

Dated: June 29, 2018

CALLAHAN, Judge.

{¶1} Dwight Slater appeals from his convictions in the Summit County Common Pleas Court. This Court affirms.

I.

{¶2} On December 14, 2015, Ohio State Highway Patrol Sergeant Neal Laughlin observed a newer Chevy cross the centerline on Grant Street in Akron. When Sergeant Laughlin turned to follow the car, the driver accelerated and abruptly turned onto Morgan Street. Sergeant Laughlin followed the car on Morgan Street, pacing it at 40 miles per hour in a 25 mile per hour zone. The driver then made a wide right turn onto Brown Street. Based on these traffic violations, Sergeant Laughlin initiated a traffic stop. Mr. Slater was the driver of the car, which was a rental. When Mr. Slater rolled down his window, Sergeant Laughlin noticed a strong odor of marijuana. Mr. Slater appeared more nervous than a typical person Sergeant Laughlin encounters during a traffic stop. A search of the car uncovered marijuana, crack cocaine, and a

digital scale. In addition, $980 was found on Mr. Slater's person. Mr. Slater was charged with trafficking in cocaine, possession of cocaine, possession of drug paraphernalia, and possession of marijuana in case number CR-2015-12-3883.

{¶3} On October 26, 2016, Sergeant Laughlin observed an older Camaro with dark tinted windows lacking proper rear illumination on Inman Street in Akron. Sergeant Laughlin observed the car stop at a stop sign, but no brake lights came on. He further observed the driver make several turns, but fail to signal for one of the turns. Sergeant Laughlin stopped the car on Kipling Street. Mr. Slater was the driver and owner of the car. Upon approaching the driver's side of the car, Sergeant Laughlin immediately smelled a strong odor of marijuana. Mr. Slater once again appeared to be extremely nervous. A search of the car uncovered marijuana, fentanyl, and a digital scale. Fentanyl was also found in one of the socks that Mr. Slater was wearing, and $1,915 was found in his other sock. Mr. Slater was charged with aggravated trafficking in drugs with a forfeiture specification, aggravated possession of drugs with a forfeiture specification, and possession of marijuana in case number CR-2016-10-3722.

{¶4} The State moved to join the two cases for trial, and Mr. Slater opposed that motion. The trial court joined the cases. Prior to the start of trial, Mr. Slater noted his continuing objection to the cases being tried together. He did not, however, renew his objection at the close of evidence.

{¶5} A jury found Mr. Slater guilty of trafficking in cocaine, possession of cocaine, possession of drug paraphernalia, aggravated trafficking in drugs, aggravated possession of drugs, and the associated forfeiture specifications. The court found Mr. Slater guilty of possession of marijuana in the 2015 case and dismissed the possession of marijuana charge in the 2016 case. The court merged the possession of cocaine count into the trafficking in cocaine count

and the aggravated possession of drugs count into the aggravated trafficking in drugs count. The court sentenced Mr. Slater to 12-months imprisonment for trafficking in cocaine, 30 days in jail for possession of drug paraphernalia, and 18-months imprisonment for aggravated trafficking in drugs. The court ordered these sentences be served concurrently. The court further ordered the $1,915 that had been seized in the 2016 case forfeited.[1] Finally, the court sentenced Mr. Slater to pay court costs for his possession of marijuana conviction.

{¶6} Mr. Slater appeals, raising two assignments of error. Mr. Slater's arguments under his assignments of error relate to his convictions for trafficking in cocaine and aggravated trafficking in drugs. This Court limits its analysis accordingly.

II.

ASSIGNMENT OF ERROR NO. 1

> THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION WHEN IT FAILED TO SEVER THE 20[15] CASE FROM THE 201[6] CASE.

{¶7} In his first assignment of error, Mr. Slater argues that the trial court erred by allowing his two cases to proceed to trial jointly. This Court disagrees.

{¶8} "It is well-settled that the law favors joinder." *State v. Merriweather*, 9th Dist. Lorain No. 97CA006693, 1998 Ohio App. LEXIS 2133, *8 (May 13, 1998). Joinder is preferential to multiple trials because it conserves time and expense, diminishes the inconvenience to witnesses, and minimizes the possibility of incongruous results. *State v. Torres*,

[1] Mr. Slater misstates in his brief that the court "declined to impose the forfeiture specification arising out of the trafficking charge." The court, in fact, "decline[d] to impose [an] additional penalty" on the forfeiture specification for the aggravated possession of drugs count, which had merged into the trafficking charge.

66 Ohio St.2d 340, 343 (1981). A trial court "may order two or more indictments * * * to be tried together, if the offenses * * * could have been joined in a single indictment * * *." Crim.R. 13. Offenses may be joined in a single indictment if the offenses "are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." Crim.R. 8(A).

{¶9} "A defendant claiming prejudice by the joinder of offenses may move for severance under Crim.R. 14." *Merriweather* at *8. If a defendant fails to renew such a motion at the close of the State's case or the conclusion of all evidence, the issue is forfeited on appeal. *State v. Hatfield*, 9th Dist. Summit No. 23716, 2008-Ohio-2431, ¶ 15. "A renewal of the motion is necessary because * * * a Crim.R. 14 analysis examines any prejudice resulting from the joinder in light of the evidence introduced at trial." *State v. Greathouse*, 9th Dist. Summit No. 27782, 2017-Ohio-6870, ¶ 19.

{¶10} Under this assignment of error, Mr. Slater sets forth both the abuse-of-discretion and the plain-error standards of review. Mr. Slater acknowledges that he did not renew his request for severance at the close of evidence in the trial. Consequently, this Court's review is limited to plain error.

{¶11} Crim.R. 52(B) permits an appellate court to notice "[p]lain errors or defects affecting substantial rights" that "were not brought to the attention of the [trial] court." Plain error exists only where there is a deviation from a legal rule, that is obvious, and that affected the appellant's substantial rights to the extent that it affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). Plain error is noticed "with the utmost caution, under

exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶12} An appellant claiming that a trial court erred by not ordering separate trials under Crim.R. 14 bears the burden to

> affirmatively demonstrate (1) that his rights were prejudiced, (2) that at the time of the motion to sever he provided the trial court with sufficient information so that it could weigh the considerations favoring joinder against the defendant's right to a fair trial, and (3) that given the information provided to the court, it abused its discretion in refusing to separate the charges for trial.

State v. Schaim, 65 Ohio St.3d 51, 59 (1992), citing *Torres*, 66 Ohio St.2d 340 at syllabus. The State can rebut a claim of prejudice in two ways. *State v. Lott*, 51 Ohio St.3d 160, 163 (1990). First, it can show that evidence of the other offenses would have been admissible "under the 'other acts' portion of Evid.R. 404(B), if the [separate] offenses had been severed for trial." *Id.* Alternatively, the State can "show that evidence of each crime joined at trial is simple and direct." *Id.*

{¶13} In the present appeal, the issue of whether the evidence of each crime was simple and direct is dispositive. *See id.* ("when simple and direct evidence exists, an accused is not prejudiced by joinder regardless of the nonadmissibility of evidence of these crimes as 'other acts'"). The Ohio Supreme Court has repeatedly stated that "the jury is believed capable of segregating the proof on multiple charges when the evidence of each of the charges is uncomplicated." *State v. Brooks*, 44 Ohio St.3d 185, 193 (1989), quoting *Torres* at 343, citing *State v. Roberts*, 62 Ohio St.2d 170, 175 (1980). *Accord State v. Hamblin*, 37 Ohio St.3d 153, 159 (1988).

{¶14} Mr. Slater contends that the jury was unable to separate the offenses due to the similarities between the two incidents. He notes that Sergeant Laughlin made both traffic stops

and smelled marijuana each time before searching the cars. Mr. Slater further points out that at one point during Sergeant Laughlin's testimony, a juror interrupted and stated, "I'm confused as to which charge he is talking about." He does not, however, provide the context in which that occurred.

{¶15} Near the end of the direct examination of Sergeant Laughlin, the prosecutor asked him what Mr. Slater was charged with for the December 14, 2015 incident and what he was charged with for the October 26, 2016 incident. The prosecutor then asked him to "[t]ell the jury why it w[as that he] charged [Mr. Slater] with drug trafficking in addition to [the] drug possession charges." Sergeant Laughlin testified, "The amount of [the] drug [Mr. Slater] had on him was well in excess of what [he] typically see[s] a user have, combined with the scale to weigh it on, and also the money that he had in his possession is not consistent with somebody that's using. It's more so somebody that's selling."

{¶16} Following the juror's interruption, the prosecutor asked Sergeant Laughlin if he was talking about the crack cocaine that was found on December 14, 2015, and Sergeant Laughlin confirmed that he was. The prosecutor then asked about the fentanyl in the October 26, 2016 case. Not only does Mr. Slater fail to address this clarification, he largely ignores the balance of the testimony and evidence presented at trial.

{¶17} Mr. Slater contends that "the State presented no evidence that [he] was trafficking drugs." He essentially argues that the evidence for each of his trafficking convictions "would have been insufficient had these cases not been joined in the same trial." *See Roberts*, 62 Ohio St.2d at 175. This Court disagrees.

{¶18} Mr. Slater briefly lists what Sergeant Laughlin testified to finding each day. On December 14, 2015, Sergeant Laughlin found crack cocaine, marijuana, a digital scale, and $980.

On October 26, 2016, Sergeant Laughlin found fentanyl, marijuana, a digital scale, and $1,915. Mr. Slater notes that there were no drugs packaged for individual sale. He further points to a portion of his cross-examination of Sergeant Laughlin wherein he asked, "Aside from the fact that there are drugs in the car and a scale, there is no other information you have to indicate that Mr. Slater is selling drugs?" to which Sergeant Laughlin responded, "[that a]nd the money."

{¶19} Drug trafficking can reasonably be inferred from "the convergence of illegal drugs, drug paraphernalia * * *, and large sums of cash." *State v. Fry*, 9th Dist. Summit No. 23211, 2007-Ohio-3240, ¶ 50-51 (crack cocaine and large amount of cash found on individual who told police that he was unemployed). The definition of "'[d]rug paraphernalia' includes * * * [a] scale or balance for weighing or measuring a controlled substance." R.C. 2925.14(A)(6). In the present case, a different illegal drug, drug paraphernalia, and large sums of cash were found during each stop. Mr. Slater "has not shown that the proof for an offense for which he was convicted would have been insufficient had these cases not been joined in the same trial." *See Roberts* at 175.

{¶20} Moreover, Mr. Slater does not address Sergeant Laughlin's testimony concerning the circumstances of each stop, nor does he address the testimony of any other witness. Sergeant Laughlin testified that, on December 14, 2015, he stopped a newer Chevy, rental car following a number of moving violations. A search of the vehicle uncovered marijuana and crack cocaine. A criminalist from the Ohio Highway Patrol Crime Lab ("the Criminalist") testified that he tested those substances. His report was submitted into evidence. He reported that he tested the contents of a plastic bag "containing plant material" and of another plastic bag "enclosing white fragments." The "plant material" was found to be 13.443 grams of marijuana, and the "white fragments" were found to be 4.748 grams of crack cocaine. In addition, a deputy who was

working at the jail that day testified that Mr. Slater reported that he was unemployed when he was being booked into the jail.

{¶21} By contrast, on October 26, 2016, Sergeant Laughlin testified that he stopped an older Camaro due to a concern with the rear lights. Following that stop, fentanyl was found both in the car and on Mr. Slater's person. A forensic scientist from the Ohio Bureau of Criminal Investigation ("the Forensic Scientist") testified that he tested those items. His report, which was submitted into evidence, stated that one bag contained 2.46 grams of furanyl fentanyl and another bag contained 26.86 grams of furanyl fentanyl. A different booking deputy was working at the jail that day, and she testified that Mr. Slater reported that he was unemployed at that time.

{¶22} "Joinder may be prejudicial when the offenses are unrelated and the evidence as to each is very weak * * * but it is otherwise when the evidence is direct and uncomplicated and can reasonably be separated as to each offense." *Torres*, 66 Ohio St.2d at 343-344. In the present case, the evidence for each offense was not weak. The evidence was not complicated and was reasonably separated based on the different dates and locations, different cars, and different types of drugs involved. Because there was no error in the joinder of the offenses, Mr. Slater has not demonstrated plain error.

{¶23} Mr. Slater's first assignment of error is overruled.

ASSIGNMENT OF ERROR NO. 2

> APPELLANT'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE [ ] IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1, 10, & 16 OF THE OHIO CONSTITUTION.

{¶24} In his second assignment of error, Mr. Slater argues that his trafficking convictions were against the manifest weight of the evidence. This Court disagrees.

{¶25} A manifest weight challenge addresses whether the greater amount of credible evidence supports one side over the other. *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). When reviewing a manifest weight challenge,

> 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, 33 Ohio App.3d 339, 340 (9th Dist.1986). "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Thompkins* at 387, quoting *Tibbs v. Florida*, 457 U.S. 31, 42 (1982). "The discretionary power to grant a new trial should be exercised only in exceptional cases where the evidence weighs heavily against the conviction." *Otten* at 340. An appellate court "must always be mindful of the presumption in favor of the finder of fact." *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 21.

{¶26} Trafficking in drugs is prohibited under R.C. 2925.03(A), which states:

> No person shall knowingly do any of the following:
>
> (1) Sell or offer to sell a controlled substance or a controlled substance analog;
>
> (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.

{¶27} Mr. Slater first contends that "the State presented no evidence that [he] sold or offered to sell a controlled substance." Mr. Slater, however, was convicted under R.C.

2925.03(A)(2), not R.C. 2925.03(A)(1). Consequently, whether the State presented evidence of a sale or offer to sell is not the pertinent inquiry.

{¶28} As to the prohibition under R.C. 2925.03(A)(2), Mr. Slater suggests that the evidence was consistent with someone who was buying drugs for personal use, rather than someone who was trafficking in drugs. In his brief, Mr. Slater recounts that the evidence found during each stop included a digital scale. He notes that Sergeant Laughlin and the Criminalist both conceded that a person who is buying drugs might have a scale. In addition, Mr. Slater points out that Sergeant Laughlin did not observe him measuring anything with the scales or placing drugs from a larger bag into a smaller bag. Finally, he notes that Sergeant Laughlin did not find any "cutting agents" along with the cocaine.

{¶29} Sergeant Laughlin testified that he had been a trooper for 16 years. He further testified that, on December 14, 2015, a bag of crack cocaine and a digital scale were found in the car that Mr. Slater was driving. In addition, $980 was found on his person. During the search of the car, Mr. Slater was placed in a police cruiser. The dash camera video was played for the jury, and Mr. Slater is heard saying, "They getting me [for] four f***ing grams." The Criminalist testified that the cocaine weighed 4.748 grams. Sergeant Laughlin testified that drug users typically have a smaller amount, such as a "dime bag" or one rock of crack cocaine, but not more than a gram. In addition, he testified that users typically have only "pocket change." Sergeant Laughlin testified that the amount of cocaine and money along with the scale indicated to him that this was someone who was selling, rather than using, cocaine. In addition, the deputy who booked Mr. Slater into the jail that day testified that Mr. Slater reported that he was unemployed.

{¶30} On cross-examination, the Criminalist was asked if a user might have a scale in order not to "get ripped off." He answered that he was "not aware of transactions that go on

specifically * * * [but] a scale could be used on both sides, by the buyer and the seller." Similarly, Sergeant Laughlin was asked on cross-examination whether a user might have a scale. He responded, "They may have, but it is not common." When Sergeant Laughlin was asked on cross-examination if he observed Mr. Slater measuring anything out for sale or if he found any "cutting agents" like baking soda, he responded that he did not.

{¶31} As to the October 26, 2016 stop, Sergeant Laughlin testified that a bag of fentanyl, a number of paper folds, and a digital scale were found in the car that Mr. Slater had been driving. More fentanyl and $1,915 in various denominations were found on Mr. Slater's person. The Forensic Scientist testified that one bag contained 2.46 grams of furanyl fentanyl, and another bag contained 26.86 grams of furanyl fentanyl. In addition to the large amount of fentanyl and the digital scale, Sergeant Laughlin testified that the large amount of money in multiple denominations was indicative of receiving payment from multiple people for drugs. He also testified that, in his experience, "somebody who is selling the drugs packages them in a smaller container, either a folded piece of paper, referred to as a bindle, or a small baggy, referred to as a dime bag." He continued that the number of paper folds found made it "apparent that [Mr. Slater] was removing that substance from one baggy, placing it into a smaller package in order to sell it, the paper bindle." Finally, the deputy who booked Mr. Slater into the jail on this date testified that Mr. Slater reported that he was unemployed.

{¶32} While Sergeant Laughlin did not directly observe Mr. Slater weighing or repackaging the drugs, "'[c]ircumstantial evidence has long been used to successfully support drug trafficking convictions.'" *See State v. Delaney*, 9th Dist. Summit No. 28663, 2018-Ohio-727, ¶ 11 quoting *State v. Washington*, 6th Dist. Ottawa No. OT-12-032, 2014-Ohio-1008, ¶ 36. Moreover, Sergeant Laughlin observed Mr. Slater driving both cars in which the drugs were

found, which would support trafficking convictions based on "transport[ing] * * * controlled substance[s]." *See* R.C. 2925.03(A)(2). Mr. Slater has not explained how the absence of "cutting agents" negates any of the elements for a trafficking conviction, and this Court will not create an argument on his behalf. *See Cardone v. Cardone*, 9th Dist. Summit Nos. 18349, 18673, 1998 Ohio App. LEXIS 2028, *22 (May 6, 1998).

{¶33} Regarding the digital scales, this Court will not reverse a conviction simply because the evidence is open to "alternative interpretations." *See State v. Figueroa*, 9th Dist. Summit No. 22208, 2005-Ohio-1132, ¶ 10; *see also State v. Haydon*, 9th Dist. Summit No. 27737, 2016-Ohio-4683, ¶ 29 (jury chose to believe State's version of events). This is not the exceptional case where the evidence presented weighs heavily in favor of Mr. Slater and against conviction. *See Otten*, 33 Ohio App.3d at 340.

{¶34} Mr. Slater's second assignment of error is overruled.

III.

{¶35} Having overruled Mr. Slater's assignments of error, this Court affirms the judgment of the Summit County Common Pleas Court.

Judgment affirmed.

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(C). 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.

LYNNE S. CALLAHAN
FOR THE COURT

SCHAFER, P. J.
CARR, J.
CONCUR.

APPEARANCES:

PAUL GRANT, Attorney at Law, for Appellant.

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