

IN THE SUPREME COURT OF OHIO

ORIGINAL

STATE OF OHIO,	:	CASE NO. <u>09-2218</u>
	:	
Plaintiff-Appellee,	:	On Appeal from the Franklin
	:	County Court of Appeals,
vs.	:	Tenth Appellate District.
	:	
TORRANCE C. PILGRIM	:	C.A. Case No. <u>08-AP-993</u>
	:	
Defendant-Appellant.	:	
	:	

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLANT TORRANCE C. PILGRIM

Torrance C. Pilgrim A589102
Hocking Correctional Facility
16759 Snake Hollow Road
Nelsonville, Ohio 45764
(740) 753-1917 Fax 753-4277

DEFENDANT-APPELLANT, PRO SE

Ron O'Brien and John H. Cousins IV
373 South High Street, 13th Floor
Columbus, Ohio 43215

COUNSEL FOR APPELLEE, STATE OF OHIO

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TABLE OF CONTENTS

	<u>PAGE NOS.</u>
TABLE OF AUTHORITIES	iii,iv
EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION	1-5
STATEMENT OF THE CASE	5
STATEMENT OF THE FACTS	5-8
ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW	8
<u>Proposition of Law I:</u> Where there has been a "landmark" ruling or decision regarding any violation(s) of a "basic" Constitutional Right, as envisioned by the IV,V,VI, and/or XIV Amendments to the United States Constitution, members of the Ohio judiciary must be promptly aware of the violation and held accountable. Any conviction stemming from said violation of rights is 'plain' error and must be reversed	8-9
<u>Proposition of Law II:</u> Errors that can be determined through strict interpretation of constitutional provision cannot be dismissed because "specific case law" regarding that protection was not raised, as long as the specific Amendment was presented by the accused to the court, i.e., that there was a due process, search and seizure, criminal rule, etc. violation	9-10
<u>Proposition of Law III:</u> A conviction that is based upon circumstantial evidence that is based on inference upon an inference, unsupported by any additional facts may not be indulged in by a jury and any conviction thus obtained must be reversed	10-11
<u>Proposition of Law IV:</u> The record contains insufficient evidence to support appellant's conviction, and his conviction is against the manifest weight thereof	11
<u>Proposition of Law V:</u> Where the trial court fails to hear a prima facie motion to dismiss on speedy trial grounds, and the appeals court is required to review said claim, it shall calculate time from the date whereon accused, after being arrested, charged, have a bond set on said offense, is held in excess of twenty-four hours. If s/he is not released pursuant to Crim.R. 48(A) and R.C. 2943.33, all days between arrest and indictment shall count day-for-day against the State	11-12

Proposition of Law VI: Where counsel fails to; fully investigate the case; call vital witnesses; object to obvious prosecutorial misconduct during trial; require full discovery; act on a prima facie case for dismissal; and attempts to waive speedy trial rights of his client after time has elapsed, constitutes ineffective assistance of counsel 12-13

Proposition of Law VII: Appellant was denied due process and prejudiced thereby when prosecutor coached witnesses and knowingly and intentionally made false statements during opening and closing arguments and denied appellant a fair trial 13-14

Proposition of Law VIII: When a jury is instructed to deliberate on a charge not in the indictment; a prima facie case for dismissal is refused a hearing; prejudicial inferences are made by the court; and prohibited contact is made with the jury, it is abuse of discretion which denies defendant a fair trial 14

CONCLUSION 14-15

CERTIFICATE OF SERVICE 15

APPENDIX:

- Judgment Entry
- Opinion
- Sentence
- Motion to Expand the Record

TABLE OF AUTHORITIES

	<u>PAGE NOS.</u>
Alabama v. White (1990) 496 U.S. 266	10
Arizona v. Gant, 128 S.Ct. 2897 (2009)	1,4,9
Chimel v. California, 395 U.S. 752	1,3
Florida v. J.L. (2000) 529 U.S. 266	9,10
In re Jones, 1 Dist., 2007 WL 3306748	10
Johnson v. Mitchell, 2009 WL 3617497 (CA 6)	12
Katz v. United States, (1967) 389 U.S. 347	8
New York v. Belton, 453 U.S. 454	1,3
O'Hara v. Wiggington, 24 F3d 823 (CA 6, 1994).....	12
Shank v. Mitchell, 2009 WL 3210350	12
State v. Baker, 2009 WL 372362	2
State v. Chandler, 94APA02-172, 1994 WL 435386	4
State v. Davis, 2008-Ohio-6741, 2008 WL 5329973	2,12
State v. Heft, 2009 WL 3720562	13
State v. Johnson, 2009 WL 2024801, 2009-Ohio-3436	8,9
State v. King, 70 Ohio St.3d 158	2
State v. Lloyd, 2006-Ohio-1356	12
State v. Mays, 108 Ohio App3d 598	13
State v. Rutkowski, 2006-Ohio-1087, WL 562160	2,12
State v. Taylor, 05AP-1016, 2006-Ohio-5866	8
Terry v. Ohio, (1968) 392 U.S. 1	4,8
United States v. Atkinson (1936) 297 U.S. 157	4
Won Sun v. United States (1962) 371 U.S. 471	9
Workman v. Tate, 957 F2d 1339 (CA 6)	12
<u>OHIO REVISED CODE:</u>	
R.C. 2925.01(K)(L)	1,2,
R.C. 2943.33	11
R.C. 2945.71(C)(2).....	2
<u>CRIMINAL RULES:</u>	
Fed. R. Cr. Proc. 52 (b)	4
Crim. R. 12	10
Ohio Crim. R. 52(A)	4
Ohio Crim. R. 48(A)	11,14
<u>OHIO CONSTITUTION:</u>	
Article I, section 10	1,3,14

UNITED STATES CONSTITUTION:

Amendment IV	4,8,10
Amendment V	3,8,14
Amendment VI	3,8,14
Amendment XIV	3,8,14

EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION.

This cause presents constitutional issues regarding warrantless searches and the extent of search allowed by a "Terry stop". It will clearly align the use of a 'Terry stop' with the recent decision of the United States Supreme Court in Arizona v. Gant, 128 S.Ct. 2897 (2009), and how specific one must be when alleging constitutional violation of rights at trial level to preserve that issue for appeal. This Court must clarify if and when contraband is 'stop related' and, if a party is already under arrest, can he/she "knowingly possess" out of reach articles.

It is of great public or general interest that the Court declare the limits of law enforcement in attachment of contraband discovered on public property, -to a party-, in light of the statutory provisions of O.R.C. §2925.01(K)(L), which emphatically states that 'proximity does not prove possession'. The Gant decision supports R.C. §2925.01's statutory provisions that 'circumstance' cannot constitutionally prove possession, in the case sub judice.

It is of great public and general interest that the Court clearly define the extent appeal courts should rely on the prosecutors' versions of the "facts" without personally reviewing the written transcripts and records of the case, fairly and impartially. Instructions to this effect are direly needed for several of the appeal districts whose "Opinions" are, for all practical purposes, boilerplate copies of prosecutors' briefs; especially where statutory provisions and the Ohio and United States Constitutions are implicated. A biased appellate review, because the party is a felon, opens the doors for abuse in non-felony cases, or, abuses such as were born of the [now overruled] decisions in Chimel v. California, 395 U.S. 752, and New York v. Belton, 453 U.S. 454, corrected by Gant, which had permitted the flagrant violations of citizens' rights, regardless of social standing or class, by over zealous law enforcement personnel.

This case offers the Court the opportunity to give much needed instructions to the lower courts in reaching their decisions,

the weight to be given the prosecutors' versions of the "facts", "evidence", and "testimony", in deciding sufficiency or weight of the evidence; that appellate courts should not (in its opinions) quote a litigant's phraseology nor rely upon what is said if said wording/phraseology is not identically reflected in the recorded transcripts of the proceedings.

This Court's wisdom and input are critically needed to clarify the 'day-of-arrest', 'pending charges', and in what instance a "mixed counting" in the calculation of days (as in State v. Rutkowski, 2006-Ohio-1087, WL 562160) is to be applied, pursuant to R.C. §2945.71, since the appeals court conflicts in such a manner with Rutkowski, State v. Davis, 2008-Ohio-6742, State v. Baker, 2009 WL 372362, and Ohio v. King, 70 Ohio St.3d 158, that it is baffling as to the above issues, as no certainty exist.

It is of great public interest that a citizen knows "when" a charge is "pending" and when it is not; to know if she/he is free to go where he wills when, having been arrested, charged with an offense, bond is set, she is released (without notice or written explanation) after being held over a week on said charges. How long does the State have to indict?

R.C. §2945.71(C)(2) mandates, "Shall be brought to trial within two hundred seventy days after his arrest". (emphasis) In issues of pre-indictment delay, days are counted from the day after a party is arrested and charged, or held on the evidence or information. Still, some courts only count from the date of arrest "after" indictment, especially when only the day of trial is the main issue.

The legislative intent was that there be one "day of arrest" for purposes of R.C. §2945.71(C)(2), otherwise the statute is unconstitutionally vague. The day from which "pre-indictment delay is calculated is the "arrest date" for all calculations of time regarding the speedy trial clock. The decision and calculations of the court of appeals undermines the intent of R.C. §2925.01 in a similarly confusing manner.

Pilgrim cited violations of Rules of Criminal Procedures and the Canons, in support of his assignments of errors which were

not addressed in the appeal court's "Opinion", nor in appellee's brief, despite the fact that they were rules upon which said errors were premised, in pertinent parts. The omission of the court of appeals in that respect is of great general interest as it questions the integrity of the court and the guarantee of a fair and unbiased review on appeal as well as setting a judicial precedent for errors and abuses by other courts in their rulings, i.e., Chimel and Belton, supra.

"Fundamental Fairness" is the keystone of American jurisprudence. It is the common thread of the IV,V,VI, and XIV Amendments to the United States and Ohio Constitutions. Pilgrim's rights have been violated to his prejudice, under both, as well as his statutory rights under the Ohio Revised and Rules of Criminal Procedure. He did not receive a fair suppression hearing nor a fair trial as a result of tainted evidence. The verdict of the jury defies logic and merits this Court's review.

Appellant has been denied effective assistance of counsel at both trial and (as inferred by the court of appeal's "Opinion") appellate levels. At trial level, appellee allege that defense counsel did not argue the laws and issues applicable to the case at the suppression hearing. Pilgrim's counsel did not subpoena requested witnesses and ignored a prima facie case for dismissal in a manner that was an outright betrayal of his client's interests, or, collusion. In either case, both trial counsels breached the Code of Professional Responsibility.

Counsel, on appeal wrote a fifteen page argument pertaining to errors (the court of appeal opined) that were waived except as 'plain error' on part of the court.

Pilgrim, pro se, believes that trial counsel's argument during the suppression, which appellee described as a 'broad argument of Fourth Amendment protections, was sufficient to preserve the issue of reliability of the informant (as a reading of the suppression transcript would show) and reasonable suspicion argued on appeal. It was, or should have been, 'plain' to the trial court that there was an "obvious defect" occurring at the suppression hearing in regards the anonymous informant; in which case,

the issue was appealable and the court of appeals erred in determining that the issue was waived. "Mere forfeiture as opposed to waiver does not extinguish an error under Fed.R. Cr. Proc. 52 (b) [Ohio Crim.R. 52(A)]. 'Waiver is the intentional relinquishment or abandonment of a known right'. U.S. v. Olano, 113 S.Ct. @ 1777. God willing, the Supreme Court will agree.

If a legal rule was violated during the proceedings and the defendant did not waive the rule, then there has been an error within the meaning of Rule 52(b)/(A), despite the absence of a timely objection. Olano suggests that appellate courts should correct a plain error if the error 'seriously affects the fairness, integrity, or public reputation (emphasis) of judicial proceedings', citing U.S. v. Atkinson, (1936) 297 U.S. 157 @ 160. The prejudicial nature of the 22.8 grams of drugs found while officers were searching for a gun is obvious. Had it been suppressed, Pilgrim would not have been convicted as charged.

The court of appeals totally ignored the testimony of officer Timothy Shepard and Arkadiusz Augustyniak; that appellant started sweating "...as soon as I found the drugs in his pocket ..." (Shepard) and that Pilgrim "...was laying on the ground when I arrived..." (Augustyniak). Pilgrim is factually innocent of knowing of the 22.8 grams found during the search for a gun. The drugs taken from his pocket were the 'fruit of the poisonous tree'. The drugs found by Officer Burkey were not 'related to the purpose' of the [investigative] stop. Gant, supra.

The plain errors committed by the trial court in failing to suppress the evidence in the face of so many obvious violations of the Fourth Amendment; and the court's failure to address the speedy trial issues wherein a vital witness had died during the delay in indictment and prosecution should warrant this Court's acceptance of this appeal. Pilgrim asks that counsel be appointed to represent him in this matter, as he, pro se, is attempting to litigate at levels beyond his knowledge.

This case puts at issue the impact of the landmark rulings in Gant, Terry, and the disposal of contraband found in public domain. State v. chandler, Franklin App.No.94APA02-172, 1994 WL

435386. Moreover, what was found was not related to the purpose of the stop. Appellant submits that this Honorable Court should grant jurisdiction and review the erroneous and dangerous decision of the court of appeals. It is so prayed.

STATEMENT OF THE CASE

Defendant-Appellant, Torrance C. Pilgrim was arrested on September 30, 2007, in front of his apartment at 2606 Knightsway Lane, Columbus, Ohio, and charged with possession of more than twenty-five grams of crack cocaine. Bond was set at \$50,000.00. On April 11, 2008 he was indicted on one count of possession of cocaine, a first degree felony.

On August 13, 2008, appellant, pro se, filed a Motion to Dismiss for speedy trial violation. On the same date, his counsel filed a Motion to Suppress Evidence. On September 26, 2008, Judge Richard A. Frye denied the Motion to Suppress, and on October 6, 2008, refused to hold a hearing on Pilgrim's pro se Motion to Dismiss. Trial began on October 6, 2008, 1 year and 6 days after his arrest.

On October 8, 2008, Defendant-Appellant was found guilty of the charge in the indictment. On October 10, 2008, he was sentenced to four years and fined \$10,000.00.

On November 11, 2008, appellant filed a timely notice of appeal of his October conviction to the Tenth District Court of Appeals. On October 8, 2009, the Court of Appeals affirmed the conviction, finding that; (1) the trial court did not abuse its discretion in denying defendant's motion to suppress evidence, (2) legally sufficient evidence and the manifest weight of the evidence support defendant's conviction, (3) defendant's right to a speedy trial was not violated, (4) the prosecutor and the trial court did not engage in conduct prejudicing defendant or denying him a fair trial, and (6) the court did not err in imposing a \$10,000.00 fine on defendant.

STATEMENT OF THE FACTS

On September 30, 2007, appellant, a small business owner, went

into the yard in front of his apartment, located in the West of Eastland apartment complex, a two-square block area that contains 15 to 20 "row-house", single floor, apartment buildings, each having 4 to 6 units. He went in the yard to inspect the damage that had been done to his window by a woman he dated.

The window he went to see faces a sidewalk along the edge of which was one hedgerow shrub, approximately 36 inches high (the "bushes"). Towards the end of the row-house is a large plant about 6 to seven feet tall. As he was inspecting the window, a patrol car pulled into the parking lot on the other side of the sidewalk, across a grassy area in front of appellant's apartment. Thinking that one of his neighbors had called about the vandalism, Pilgrim waved to Officer Shepard to get his attention. Had he been behind the large plant at the end of the apartment building he could not have seen the patrol car, nor could Officer Shepard have seen him. Officer Shepard testified at trial and suppression hearing that, "...I saw the defendant standing...as soon as I pulled in..." He did not say "lurking" in the bushes, or, "emerging from behind" the bushes.

When Shepard saw Pilgrim waving at him, he ordered appellant over to the police cruiser. Appellant immediately walked over to explain about his windows, but, when he got there he was told to put his hands on the hood of the patrol car. Officer Shepard had his hands on his gun holster so Pilgrim obeyed him.

As Shepard started searching him, Pilgrim began to hyperventilate in reaction to the unexpected search, (and the drugs he had used a few minutes earlier) and began sweating profusely. By the time Shepard finished searching and handcuffed him, appellant had collapsed by the side of the cruiser.

Appellant was laying on the ground when Officer Augustyniak arrived, still sweating. Appellant heard Officer Shepard tell some of the spectators to "stand back". The people who lived in the apartments that bordered the lot where the police had parked were also observing the search and arrest.

After laying on the ground for about an hour, Shepard stood Pilgrim up to place him in his car. As he was getting in, Offi-

cer Burkey and another officer came over to the car and showed appellant some drugs in a plastic bag. "This is yours too, isn't it?" he said. "No, I didn't have that", Pilgrim answered. Burkey replied, "It is now", or something to that effect, then asked "Where's the gun?" "I don't own a gun", Pilgrim said.

The officers then asked Pilgrim where he lived. When he told them, one of the officers (not Shepard or Augustyniak) went to the door of 2606 Knightsway Lane, appellant's apartment, and tried to get in. He came back and asked where the key to the apartment was. Appellant told him that it was inside and that he had a guest in his apartment. The officer went back and pounded on the door but appellant's friend would not open it. Neither Officer Augustyniak nor Shepard participated in the search. The other officer who participated was not allowed to testify at suppression or trial, nor was his report of the incident supplied in discovery. Appellant believes that the testimony of that officer would have impeached some of the testimony given at trial and suppression. Pilgrim believes that he was deliberately prevented from testifying for that reason.

Appellant was taken to the Franklin County Jail on September 30, 2007, charged with possession of crack cocaine, given a \$50,000.00 bail, then was transferred to the Franklin County Correctional Center, where he was held for ten days awaiting indictment. On October 10, 2007, he was released without a hearing or written notice of dismissal. He was told by deputy sheriffs not to leave the State because he would be indicted at a later date, at the time of his release.

During jury deliberations, the court and prosecutor made proscribed contact (defendant was told the day after the fact) with the jury, who requested use of the police and investigative reports to use in deliberations. The request was denied. The reports should have been allowed for reason that the officers used them during trial, "to refresh their memories". Defense counsel did not call for a mistrial. When the court refused to hear his motion to dismiss, Pilgrim was told he could not defend himself, that his counsel was the only person permitted to act in that re-

spect, so Pilgrim could not preserve his own errors for purposes of appeal or ask for a mistrial.

The court of appeals erred when it found; legally sufficient evidence to support a conviction; that the manifest weight of the evidence supported a conviction; that Pilgrim's right to a speedy trial was not violated; that the prosecutor and trial court did not engage in conduct prejudicing defendant, denying him a fair trial; and the trial court did not abuse discretion imposing a \$10,000.00 fine on defendant. The court of appeals also erred when it found that appellant received effective assistance of counsel. In support of his position of these issues, appellant, pro se, presents the following arguments.

ARGUMENTS IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. I: Where there has been a "landmark" ruling or decision regarding any violation(s) of a "basic" Constitutional Right, as envisioned by the IV, V, VI, and/or XIV Amendments to the United States Constitution, members of the Ohio Judiciary must be promptly aware of the violation and held accountable. Any conviction stemming from said violation of rights is 'plain' error and must be reversed.

The Fourth Amendment to the United States Constitution prohibits warrantless searches and seizures. State v. Taylor, Franklin App.No. 05AP-1016, 2006-Ohio-5866, at ¶5, State v. Johnson, Ohio App. 10 Dist., 2009 WL 2028401, 2009-Ohio-3436, Katz v. United States, (1967) 389 U.S. 347. Warrantless searches and seizures are per se unreasonable unless an exception applies. *Id.* The investigative stop exception...permits a police officer with reasonable suspicion...to briefly stop an individual and conduct a pat-down of the outer clothing...*Id.*, citing Terry v. Ohio (1968) 392 U.S. 1, 21.

Taylor, supra, instructs how to categorize an informant for purposes of an investigative stop exception. Because of appellate counsel's zealous detailing of "how" to categorize an informant, the court of appeals missed the point of the Terry stop violation that counsel was making, i.e., the tip in the case sub judice being provided by an anonymous informant.

The United States Supreme Court has held; "an anonymous tip

that a person is carrying a gun, without more, is insufficient to justify a police officer's stop and pat-down of that person." Florida v. J.L. (2000) 529 U.S. 266. So, where Shepard failed to corroborate the tipster, the court should have realized that "plain" error and suppressed the evidence. (emphasis)

In Johnson, supra, [¶6] Officer Sanderson of the Columbus Police Department '...frisked Johnson for weapons and found none.. .then searched Johnson's pockets and found...cocaine and crack cocaine in a cigarette case...' The court opined the evidence should have been suppressed.

Bryant, J., concurring and writing separately stated, at [¶10] Officer Sanderson went well beyond a frisk of Johnson. Having conducted a frisk, the officer searched Johnson's pockets... Sanderson's action was beyond...authorized by Terry.

When Pilgrim was called over to the cruiser by Officer Shepard, no lawful arrest was occurring. Pursuant to the holding in Arizona v. Gant, 129 S.Ct. 1710, and Won Sun v. United States (1962)371 U.S. 471, a search incident to a lawful arrest could not occur. When Shepard reached into Pilgrim's pocket he exceeded Terry. The 22.8 grams had nothing to do with a gun so it should have been suppressed. The trial court knew or should have known that the drugs to which it was linked was fruit of the poisonous tree. It was plain prejudicial error.

The court of appeals, as did the jury, used drugs found in Pilgrim's pocket as in inference that he knew of the drugs found by police and erroneously concluded that the trial court did not abuse discretion when it overruled the motion to suppress. The court of appeals, Bryant, P.J., ruled in conflict with her own, separately, concurring opinion in Johnson, supra, and Tyack, P.J. therein.

Proposition of Law II: Errors that can be determined through strict interpretation of constitutional provisions cannot be dismissed because "specific case law" regarding that protection was not raised as long as the specific Amendment was presented by the accused to the court, i.e., that there was a due process, search and seizure, Criminal Rule, etc., violation

Pursuant to the facts and testimony of the stop, search, and arrest of appellant on September 30, 2007, the court of appeals erred when it failed to rule on assignment of error number one as submitted by counsel on appeal. Counsel clearly stated that Pilgrim's '**Fourth Amendment rights were violated**' by Shepard's failure to follow due process provisions protected by the Fourteenth Amendment and Criminal Rule 12, of Ohio Rules of Criminal Procedure. Florida v. J.L., 529 U.S. 266, and Alabama v. White (1990) 496 U.S. 325, were aptly cited, as Shepard testified that Pilgrim made no threatening or unusual movement, (Trial Tr. 12, 23), and that he did not qualify the informant. (Supp.H. Tr.)The court of appeals, prejudicially, did not make a "de novo" review of the transcripts in reaching its decisions.

Proposition of Law III: a conviction that is based upon circumstantial evidence that is based on inference upon an inference, unsupported by any additional fact may not be indulged in by a jury and any conviction thus obtained must be reversed.

Citing Presiding Judge, Painter, In re Jones, 1 Dist., 2007, WL 3306748;

"The whole case is simply speculation, followed by conjecture, followed by inference of guilt. Has reasonable doubt left the country?"

Officer Shepard, the first officer on the scene, testified, that as he pulled into the parking lot he saw Pilgrim "standing" behind a bush. The photos in the trial exhibits shows those two shrubs which are part of the hedgerow along the sidewalks in the area. If Pilgrim had been behind the large bush, Shepard could not have seen him. The other/shrub "bush", 24 to 36 inches high, is not the one Burkey testified he found the drug "under" (Supp. H. Tr.) or "behind in a corner" (Trial Tr. 34-35).

The court of appeals constantly used the plural term "bushes" in its determination, which, again, is indicative that the court did not "de novo" review the photos or transcripts. As with the jury, the prosecutor's words "painted a picture" in the minds of the court of numerous, wild, shrubs and vegetation wherein appellant was concealing himself. This inference, created by the pro-

secutor, based on no "fact" except an insidiously vivid imagination, is the first of the three inferences upon which the misled jury indulged to reach a manifestly unjust verdict. The court of appeals likewise indulged in the same manner in finding the evidence sufficient to support a conviction, and said decision should be reversed.

Proposition of Law IV: The record contains insufficient evidence to support appellant's conviction, and his conviction is against the manifest weight thereof.

Proposition of Law III is herein incorporated as though fully rewritten. No evidence was produced at trial that attaches appellant to the drugs found by officer Burkey and Officer "John Doe" who was not used to testify at trial. When, at trial, Burkey stated that he found the drugs "...in a corner...", Shepard suddenly had a lapse of memory and was unable to recall exactly which shrub he saw Pilgrim standing behind. He did state that he "...saw defendant as he pulled up...". There was only one shrub low enough to allow him to do that.

Proposition of Law V: Where the trial court fails to hear a prima facie motion to dismiss on speedy trial grounds, when the appeals court is required to review said claim, it shall calculate time from the 'date' whereon accused, after being arrested, charged, having a bond set on said offense, is held in excess of twenty-four hours. If s/he is not released pursuant to Crim.R. 48(A) and R.C. §2943.33, all days between arrest and indictment shall count d-for-day against the State.

Appellant was searched, charged, and jailed on September 30, 2007. His bond was set at \$50,000.00, on or about October 1, 2007. He was held in the Franklin County Correctional Center until October 10, 2007, and upon being released was told that he was not to leave the Franklin County area because he would be indicted at a later date.

Upon release, the State had 240 days to try appellant since 30 days had elapsed (3 x 10 days). When he was arrested on May 12, 2008, 245 days had tolled against the State. It had 25 days to bring appellant to trial from May 13, 2008. See State v. Rutkowski, 2006-Ohio-1087, State v. Lloyd, 2006-Ohio-1356, State v.

Davis, 08CA009412, 2008 WL 5329973, 2008-Ohio-6741.

Appellant should have been tried on or about Friday, May 30, 2008. He was not brought to trial until October 6, 2008, more than a year from the day of arrest.

Proposition of Law VI: Where counsel fails to; fully investigate the case; call vital witnesses; object to obvious prosecutorial misconduct during trial; require full discovery; act on a prima facie case of dismissal; and attempts to waive speedy trial rights of his client after time has elapsed, constitutes ineffective assistance of counsel.

Counsel failed to fully investigate whether there were witnesses to the arrest or if his client's apartment had been vandalized on September 30, 2007. He knew, from the suppression hearing, that the State would present that his client was the only person in the vicinity of where the drugs were found. He knew that defendant would need witnesses to impeach the State's witnesses testimony. He failed to even question witnesses whose names were given to him by his client, and sat mute as the prosecutor spun fanciful theories connecting appellant to drugs that he did not know existed. When Pilgrim told him, on August 13, 2008, that time had elapsed for trial, Will Ireland attempted to get Pilgrim to sign a waiver. When Pilgrim refused, he filed a waiver of speedy trial rights unknown to Pilgrim. When told that one of the officers knocked on his (Pilgrim's) door, counsel did nothing to locate "John Doe" officer, who had to have seen the broken window of appellant's apartment. See Johnson v. Mitchell, 2009 WL 3617497 (CA 6), Shank v. Mitchell, 2009 WL 3210350, citing O'Hara v. Wiggington, 24 F3d 823 (6th Cir. 1994) and Workman v. Tate, 957 F2d 1339 (6th Cir.) (Reasonable investigation was lacking so counsel's performance was deficient)

Counsel for defense did not subpoena or attempt to contact Todd Hayes or his wife, both of whom could have altered the outcome of the trial, nor did he inform the court of Todd's demise. Because he did not act immediately in investigating, Todd's death totally crippled the defense of appellant.

This was another crucial factor of the speedy trial claim

that counsel failed to pursue. The delayed prosecution and trial was presumably prejudicial and a prima facie case of dismissal was blocked by counsel for defense. The court of appeals erred when it determined that appellant received effective assistance of counsel. See State v. Mays, 108 Ohio App3d 598, and State v. Heft, 2009 WL 3720562. "If any ambiguity exists, this court will construe the record in defendant's favor".

Counsel did not object as the prosecutor twisted the facts and disparaged the only witness that did come forth to testify for appellant. Even then, Adrienne had to insist on being subpoenaed. Counsel failed to demand full discovery, including investigative records whereas he knew that there was conflicting testimony that could have impeached one or more State witnesses and bolstered the testimony of appellant and Adrienne Davis. Counsel failed to request a mistrial when he learned of the contact with the jury outside of his and defendant's presence.

Proposition of Law VIII: Appellant was denied due process and prejudiced thereby when prosecutor coached witnesses and knowingly and intentionally made false statements during opening and closing argument and denied appellant a fair trial.

It is apparent that Officer Burkey gave coached testimony at trial by the fact that the 22.8 grams of drugs 'moved' from "...beneath the bushes..." at the suppression hearing to the "...corner behind the bushes..." at trial (Tr.II, 31-35), to get the drugs closer to defendant's apartment for the jury. "Behind the bushes, In the corner", "...emerged from behind The bushes..." "...saw defendant "lurking in the bushes...", "...began sweating as soon as Officer burkey brought the drugs from behind the bushes ...", "...began throwing drugs everywhere..." (Trial Tr. II, 120).

With those few well chosen verbs and adjectives, the prosecutor painted a completely fabricated version of what occurred September 30, 2007, which completely bamboozled the gullible jurors into losing their ways. The invidious cortortion of the facts conned the jury into ignoring or forgetting the fact that (1) all three State witnesses testified that they did not know which shrub defendant stood by; (2) "...defendant was laying on the ground

when I arrived..." (Augustyniak); and (3) "...defendant was [handcuffed/under arrest] and being watched when I arrived..." (Burkey)

Appellant's conviction stemmed from an unfair, prejudicial proceeding, permeated by prosecutorial misconduct from beginning to the end of trial, including prohibited contact with the jury without the presence of defendant or his counsel during deliberations. All these actions were condoned by the court in violation of appellant's rights under the V, VI, and XIV Amendments to the United States Constitution, Article I, Section 10 of the Ohio Constitution, Ohio Criminal Rules, and the Code of Professional Responsibility.

Proposition of Law VIII: When a jury is instructed to deliberate on a charge not in the indictment; a prima facie case for dismissal is refused a hearing; prejudicial inferences are made by the court; and prohibited contact is made with the jury, it is an abuse of discretion which denies defendant a fair trial.

The jury was given instructions to choose between convicting appellant of either the charge in the indictment, or of a fourth degree felony not in the indictment, the latter of which defendant could not plea guilty or innocence violated appellant's rights under the Fifth and Fourteenth Amendments. Comments by the court of defendant's sweating on the night of arrest as being an indicator of veracity at trial assisted the prosecutor in misleading the jury, and the prohibited contact with the jury outside the presence of defendant denied Pilgrim a fair trial.

CONCLUSION

This case raises substantial constitutional questions, involves a felony and is one of public or great general interest. Review should be granted in this case and counsel should be appointed to represent appellant in this matter as the presiding on appeal is refusing to allow appellant use of the suppression and trial transcripts to attempt to represent himself, at the writing of this memorandum in support.

For the relief sought, appellant, Torrance C. Pilgrim, prays.


Torrance C. Pilgrim, pro se

STATE OF OHIO
HOCKING COUNTY

ss:

AFFIDAVIT OF VERITY

I, Torrance Charles Pilgrim, having been forced to write the foregoing Memorandum In Support without benefit of transcripts, and forced to rely on his vivid recollection of the suppression and trial proceedings and testimony, do hereby solemnly swear, upon penalty of law, that the foregoing document and the statements therein are true to the best of my knowledge and ability.

Torrance C. Pilgrim
Torrance C. Pilgrim, pro se

SWORN TO and subscribed in my presence
this 21 day of February, 2010.

Jan
Chris Conner
NOTARY PUBLIC
Notary Public, State of Ohio
My Commission Expires 1-26-16
Commission Recorded in 1-15-15

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum and Motion was placed in the HCF Mailbox, to be sent via regular U. S. Mail, postage prepaid to; Ron O'Brien and John H. Cousins IV; 373 South High Street - 13th Floor, Columbus, Ohio 43215 this 21 day of February, 2010.

Jan

Torrance C. Pilgrim
Torrance C. Pilgrim

Notary Public, State of Ohio
My Commission Expires _____
Commission Recorded in _____

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

CASE NO. 90-2218

Plaintiff-Appellee

On Appeal from the Franklin
County Court of Appeal, Ten-
th Appellate District.

vs.

TORRANCE C. PILGRIM,

CA Case No. 08AP-993

Defendant-Appellant

MOTION TO EXPAND THE RECORDS

Comes now Defendant-Appellant, Torrance C. Pilgrim, pro se, and move this Honorable Court to require that the records on appeal be expanded to include the entire records, including documents of appellant's arrest on September 30, 2007, when \$650.00+ was taken from his pockets, copies of the charges placed against appellant for which he was held awaiting indictment from September 30, 2007, to October 10, 2007. These records are necessary for the purpose of appellant's arguments and errors pertaining the speedy trial errors and issues that the court of appeals failed to address reference Crim. R. 48(A) and R.C. 2941.33.

Effectiveness of counsel on appeal is in question where counsel failed to have the above records transmitted to the court of appeals. As supported by the Opinion, the court of appeals seemed unsure as to just when appellant was arrested, for purposes of calculating the speedy trial clock, and the day-for-day count pertinent thereto. Cf. State v. Davis, 2008 WL 5329973.

The transcripts of the oral arguments held on or about June 10, 2008 should be required to determine if counsel Shannon S. Leis presented to the Court why the error and arguments presented

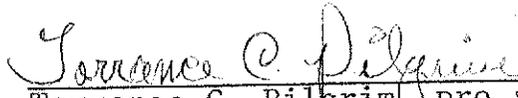
on appeal were issues that were preserved at the trial level.

In its opinion, the court of appeals alleged that the issue of anonymous information was not raised in the trial court, (Opinion at ¶18), and that the unlawful search was not argued on appeal (Opinion at ¶20). The transcripts of the oral arguments will reveal if counsel on appeal was deficient in her representation of appellant in the case at bar.

Appellant, pro se, submits that the transcript of the oral will further substantiate his allegations that he did not receive a 'de novo' review as guaranteed by the Ohio and United States constitution when the court reviewed his assignment of error on the weight of the evidence, plain errors on part of the court, calculation of speedy trial days, and prosecutorial misconduct where the court acted as advocate in concert with the state attorney to influence and sway the jury to ignore testimony and completely lose its way. The records and document sought in the expansion of the records will support what appellant avers.

For the relief sought, appellant prays.

Respectfully submitted,



Torrance C. Pilgrim, pro se
A589102 - B076
16759 Snake Hollow Road
Nelsonville, Ohio 45764

KK

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO OHIO

2009 OCT -8 PM 12:05
CLERK OF COURTS

State of Ohio,

Plaintiff-Appellee,

v

Torrance C Pilgrim,

Defendant-Appellant

No. 08AP-993
(C P C No 08CR-04-2691)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on October 8, 2009, and having overruled all of defendant's assignments of error, it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs assessed to defendant.

BRYANT, KLATT & CONNOR, JJ.

By 

Judge Peggy Bryant

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2009 OCT -8 PM 12:03
CLERK OF COURTS

State of Ohio, :
Plaintiff-Appellee, :
v. : No. 08AP-993
Torrance C. Pilgrim, : (C.P.C. No. 08CR-04-2691)
Defendant-Appellant. : (REGULAR CALENDAR)

D E C I S I O N

Rendered on October 8, 2009

Ron O'Brien, Prosecuting Attorney, and *John H. Cousins, IV*,
for appellee.

Scott & Nemann Co., L.P.A., and *Shannon S. Leis*;
Torrance C. Pilgrim, pro se.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, J.

{¶1} Defendant-appellant, Torrance C. Pilgrim, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to a jury verdict, of one count of possession of crack cocaine in violation of R.C. 2925.11, a first-degree felony, and sentencing him to serve a four-year prison term and pay a mandatory fine in the amount of \$10,000. Because (1) the trial court did not abuse its discretion in denying defendant's motion to suppress evidence of the crack cocaine, (2) legally sufficient

evidence and the manifest weight of the evidence support defendant's conviction, (3) defendant's right to speedy trial was not violated, (4) defendant was not denied the effective assistance of counsel, (5) the prosecution and the trial court did not engage in conduct prejudicing defendant or denying him a fair trial, and (6) the trial court did not err in imposing a \$10,000 fine on defendant, we affirm the trial court's judgment.

I. Factual and Procedural Overview

{¶2} By indictment filed April 11, 2008, defendant was charged with one count of possession of crack cocaine in an amount equal to or over 25 grams but less than 100 grams, a first-degree felony in violation of R.C. 2925.11. Following resolution of the parties' motions and completed discovery, a jury trial commenced on October 6, 2008.

{¶3} According to the state's evidence, Columbus police officers were dispatched at approximately 9:30 p.m. on September 30, 2007 to the West of Eastland Apartments complex in Columbus in response to a "gun run," a report that someone had a gun. The apartment complex, which consists of several single-story "row" apartment buildings, has a higher than average amount of drug, gang, and firearm activity. The police dispatch described the suspect as an African-American male wearing a white tank top, dark pants, and a yellow baseball hat.

{¶4} Moments after hearing the dispatch, Columbus Police Officer Timothy Shepard was the first of four police officers to arrive at the apartment complex. Shepard saw defendant emerging from behind some bushes in front of an apartment and, upon observing that he matched the description of the suspect, directed defendant to come to the police cruiser. Officer Shepard conducted a protective pat-down search of defendant and then arrested him when the officer discovered a baggie containing 4.8 grams of crack

cocaine in defendant's pants pocket and a marijuana cigarette tucked behind his right ear. Defendant had \$654 in cash on him at the time of his arrest.

{¶5} Not finding a gun on defendant during the pat-down search, Officer Shepard directed two other police officers to search for a firearm in the area behind the bushes from which defendant emerged when Shepard first arrived at the scene. The officers did not find a firearm during their search, but on the ground behind the bushes they discovered individually wrapped baggies of crack cocaine in two pill bottles and a separate, large rock of crack cocaine. The crack cocaine found on the ground had a combined weight of 22.8 grams.

{¶6} According to Officer Burkey, the contraband appeared to have been placed on the ground recently, because the pill bottles were clean and rested on top of, rather than underneath, any leaves, spider webs or other debris. He believed the contraband was placed deliberately, not dropped casually, because the pill bottles were carefully grouped together on the ground in a corner behind the bushes in a location where people usually would not be present. None of the police officers saw anyone other than defendant in the vicinity while they were at the scene, although Officer Burkey acknowledged other people could have been in the area.

{¶7} When the officers brought the contraband out from behind the bushes, defendant began sweating profusely and collapsed to the ground; the officers summoned a medical squad, who examined defendant and determined he did not need medical assistance. Defendant admitted to the officers the drugs found during the pat-down search were his, but he denied the drugs found behind the bushes belonged to him.

{¶8} In his testimony at trial, defendant confessed he had been a crack addict since 2002 and acknowledged he was "high" at the time of his arrest because he had been smoking marijuana laced with crack cocaine. Defendant conceded he possessed the 4.8 grams of crack cocaine found in his pocket during the pat-down search, but he again denied knowledge or possession of the 22.8 grams of crack cocaine found behind the bushes outside his apartment. According to defendant, he was in the process of moving into a new apartment at West of Eastland Apartments on the evening of September 30, 2007, when a jealous "lady friend" damaged the windows of the apartment on seeing him there with another woman. Defendant testified he was standing in the bushes outside his apartment when Officer Shepard arrived at the scene, because he was looking at the damage to the windows. He denied seeing the drugs or putting them on the ground while he was standing there. Defendant explained he had \$654 in cash on him that evening because he was going to pay his rent that was due the next day.

{¶9} After two days of testimony, the jury found defendant guilty as charged in the indictment. On October 10, 2008, the trial court sentenced defendant to four years in prison, with 163 days of jail-time credit, and imposed a mandatory fine of \$10,000. The trial court journalized its sentencing decision in a judgment entered October 17, 2008 from which defendant timely appealed.

II. Assignments of Error

{¶10} On appeal, six errors are assigned in appellate counsel's brief:

Assignment of Error One

THE TRIAL COURT ABUSED ITS DISCRETION BY DENY-
ING APPELLANT'S MOTION TO SUPPRESS EVIDENCE.

Assignment of Error Two

APPELLANT'S CONVICTION IS BASED UPON CIRCUMSTANTIAL EVIDENCE THAT IS IMPERMISSIBLY BASED ON INFERENCE UPON INFERENCE.

Assignment of Error Three

THE RECORD CONTAINS INSUFFICIENT EVIDENCE TO SUPPORT APPELLANT'S CONVICTION FOR POSSESSION OF A CONTROLLED SUBSTANCE.

Assignment of Error Four

APPELLANT'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

Assignment of Error Five

THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING APPELLANT'S MOTION TO DISMISS FOR SPEEDY TRIAL IN VIOLATION [sic].

Assignment of Error Six

APPELLANT WAS DENIED HIS DUE PROCESS RIGHT TO A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL.

{¶11} Four additional errors are assigned in a supplemental brief defendant filed

pro se:

Supplemental Assignment of Error One

APPELLANT'S RIGHT TO A SPEEDY TRIAL AS GUARANTEED BY RC §2945.71 et seq., THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE 1, SECTION §10 OHIO CONSTITUTION WAS VIOLATED.

Supplemental Assignment of Error Two

THE PROSECUTOR'S PATTERN OF MISCONDUCT THROUGHOUT THE PROCEEDINGS IN CASE NO. 08 CR

2691 AND AT TRIAL DENIED APPELLANT/DEFENDANT HIS RIGHTS UNDER O. R.C. §2945.71 et seq., AND THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTION §10 OF THE OHIO CONSTITUTION AND DEPRIVED APPELLANT OF A FAIR TRIAL.

Supplemental Assignment of Error Three

THE TRIAL COURT PLAINLY ERRED WHERE IT FAILED TO PROVIDE APPELLANT A SPEEDY TRIAL; ALLOWED TRIAL TO PROCEED ON A CHARGE NOT INCLUDED IN THE INDICTMENT; FAILED TO MAKE A JOURNAL ENTRY PRIOR TO THE TOLLING OF TIME FOR SPEEDY TRIAL; FAILED TO SUPPRESS EVIDENCE; DENIED USE OF POLICE REPORTS BY JURY DURING DELIBERATIONS; ADVISED JURORS WITHOUT APPELLANT BEING PRESENT; AND ASSISTED THE PROSECUTOR IN SWAYING THE JURORS.

Supplemental Assignment of Error Four

THE FINE IMPOSED AT SENTENCE AND THE FORCED COLLECTION THEREOF INFRINGES UPON APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, R.C. §2929.18(B)(1), R.C. 2947.14, AND RELATED SECTIONS OF THE OHIO CONSTITUTION.

III. Denial of Motion to Suppress

{¶12} The first assignment of error that defendant's appellate counsel presented contends the trial court abused its discretion in denying defendant's motion to suppress evidence of the crack cocaine.

{¶13} "[A]ppellate review of a trial court's decision regarding a motion to suppress evidence involves mixed questions of law and fact." *State v. Vest*, 4th Dist. No. 00CA2576, 2001-Ohio-2394. Thus, an appellate court's standard of review of the trial court's decision denying the motion to suppress is two-fold. *State v. Reedy*, 10th Dist. No.

05AP-501, 2006-Ohio-1212, ¶5, citing *State v. Lloyd* (1998), 126 Ohio App.3d 95, 100-01. Because the trial court is in the best position to weigh the credibility of the witnesses, "we must uphold the trial court's findings of fact if they are supported by competent, credible evidence." *Id.*, citing *State v. Klein* (1991), 73 Ohio App.3d 486, 488. We nonetheless must independently determine, as a matter of law, whether the facts meet the applicable legal standard. *Id.*, citing *State v. Claytor* (1993), 85 Ohio App.3d 623, 627. The state bears the burden of establishing the validity of a warrantless search. *Xenia v. Wallace* (1988), 37 Ohio St.3d 216, 218, citing *State v. Kessler* (1978), 53 Ohio St.2d 204, 207.

{¶14} Challenging the lawfulness of Officer Shepard's investigatory stop, defendant contends on appeal "the state did not demonstrate at the suppression hearing that the facts precipitating the police dispatch justified a reasonable suspicion of criminal activity." (Appellant's brief, 2.) Defendant notes Officer Shepard conducted the investigatory stop "based solely on a tip received from an anonymous informant that did not possess sufficient indicia of reliability." (Appellant's brief, 2.) Defendant then postulates that because "the informant is properly categorized as an anonymous informant," the state needed to produce independent police corroboration to render the anonymous informant's tip sufficiently reliable to justify reasonable suspicion. In the absence of such evidence, defendant contends "the fruits of the unlawful investigatory stop must be suppressed," because Officer Shepard's investigatory stop was unreasonable under the totality of the circumstances. (Appellant's brief, 2.)

{¶15} The Fourth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Section 14, Article I, of the Ohio Constitution, prohibit the government from conducting warrantless searches and seizures,

rendering them per se unreasonable unless an exception applies. *State v. Mendoza*, 10th Dist. No. 08AP-645, 2009-Ohio-1182, ¶11, citing *Katz v. United States* (1967), 389 U.S. 347, 357, 88 S.Ct. 507, 514; *State v. Stanley*, 10th Dist. No. 06AP-323, 2007-Ohio-2786, ¶13. The exception at issue here is an investigative stop, commonly referred to as a *Terry* stop. See *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868. "An investigative stop does not violate the Fourth Amendment to the United States Constitution if the police have reasonable suspicion that 'the person stopped is, or is about to be, engaged in criminal activity.'" *State v. Jordan*, 104 Ohio St.3d 21, 2004-Ohio-6085, ¶35, quoting *United States v. Cortez* (1981), 449 U.S. 411, 417, 101 S.Ct. 690, 695. The propriety of a police officer's investigative stop is viewed in light of the totality of the surrounding circumstances. *State v. Bobo* (1988), 37 Ohio St.3d 177, paragraph one of the syllabus.

{¶16} Informants fall into one of three classes: anonymous informants, known informants, and identified citizen informants. *City of Maumee v. Weisner* (1999), 87 Ohio St.3d 295. An anonymous informant's tip can assist in creating a reasonable suspicion of criminal activity but, standing alone, is generally insufficient because it lacks the necessary indicia of reliability. *Jordan* at ¶36, citing *Alabama v. White* (1990), 496 U.S. 325, 110 S.Ct. 2412. "Accordingly, anonymous tips normally require suitable corroboration demonstrating 'sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop.'" *Jordan* at ¶36, quoting *Florida v. J.L.* (2000), 529 U.S. 266, 270, 120 S.Ct. 1375, 1378, quoting *White* at 496 U.S. 329, 110 S.Ct. 2412.

{¶17} In moving to suppress evidence, a defendant must state the legal and factual grounds of the motion with particularity in challenging the validity of a warrantless search or seizure. Crim.R. 47; *State v. Shindler*, 70 Ohio St.3d 54, 1994-Ohio-452,

syllabus; *Xenia* at 218-19. The prosecution cannot be expected to anticipate the specific legal and factual grounds upon which the defendant challenges the legality of a warrantless search and seizure. *Xenia* at 218. The prosecution must know the grounds of the challenge in order to prepare its case, and the court must know the grounds of the challenge in order to rule on evidentiary issues at the hearing and properly dispose of the merits. *Id.*

{¶18} The sole ground for defendant's motion to suppress in the trial court was the allegedly invalid warrantless "search" conducted "in the vicinity of defendant's residence." Defendant did not assert in the trial court that the investigatory stop was invalid because it was "based solely on a tip received from an anonymous informant that did not possess sufficient indicia of reliability." As a result, the issue was not litigated and no evidence was presented in the trial court either to identify the person who provided the "gun-run" tip or to classify the person as an "anonymous informant."

{¶19} Well established in law is the principle that a party cannot raise new issues or legal theories for the first time on appeal. *State v. Atchley*, 10th Dist. No. 07AP-412, 2007-Ohio-7009, ¶18, citing *Stores Realty Co. v. Cleveland* (1975), 41 Ohio St.2d 41, 43. Specifically, with regard to motions to suppress, a failure on the part of a defendant to raise the specific basis of a challenge to the admission of evidence in the trial court constitutes a waiver of that issue on appeal. *Atchley*, citing *Xenia* at 218-19; *Stanley* at ¶25; *State v. Hernandez*, 10th Dist. No. 01AP-23, 2001-Ohio-4086. See *Shindler* at 58 (stating that "[b]y requiring the defendant to state with particularity the legal and factual issues to be resolved, the prosecutor and court are placed on notice of those issues to be

heard and decided by the court and, by omission, those issues which are otherwise being waived").

{¶20} Defendant's failure to raise in the trial court the issue now raised on appeal constitutes a waiver of that issue on appeal. Moreover, because defendant did not separately argue on appeal that the crack cocaine must be suppressed as the fruit of an unlawful "search," we need not address that issue. See App.R. 12(A)(2) and 16(A)(7); *Hernandez*, supra.

{¶21} Even if we were to consider defendant's challenge to the lawfulness of the investigatory stop, it is without merit on this record. The state presented evidence at the suppression hearing that defendant matched the description of the suspect who reportedly had a gun in the West of Eastland Apartments complex shortly before Officer Shepard conducted his investigatory stop of defendant. It was dark at the time of the investigatory stop, the apartment complex had a higher than average amount of gun and drug activity, and defendant was alone and lurking behind some bushes when Officer Shepard observed him. Given the circumstances, Officer Shepard reasonably detained defendant to question him and to conduct a protective pat-down search of him for a weapon. *Mendoza* at ¶12, citing *City of Pepper Pike v. Parker* (2001), 145 Ohio App.3d 17, 20, citing *United States v. Cortez* (1981), 449 U.S. 411, 417, 101 S.Ct. 690, 694-95 (noting "[e]ven facts that might be given an innocent construction will support the decision to detain an individual momentarily for questioning" as long as it is reasonable to infer from the totality of the circumstances that the individual may be involved in criminal activity); *Bobo*, paragraph two of the syllabus (holding "[w]here a police officer, during an investigative stop, has a reasonable suspicion that an individual is armed based on the

totality of the circumstances, the officer may initiate a protective search for the safety of himself and others").

{¶22} Defendant's first assignment of error is overruled.

IV. Sufficiency of the Evidence

{¶23} The second and third assignments of error defendant's appellate counsel presented are related and together assert the state failed to present sufficient evidence, absent the impermissible stacking of inferences, to prove defendant possessed the crack cocaine found on the ground outside his apartment. Defendant contends his mere proximity to the drugs found on the ground was the only evidence linking him to those drugs: no fingerprint evidence linked him to the drugs, and no evidence indicates he knew the drugs were on the ground behind the bushes, he placed or dropped the drugs there, or he attempted to exercise dominion or control over the drugs. Defendant maintains his mere presence in the location where the drugs were found does not conclusively establish his constructive possession of the drugs, especially in light of evidence that the location is a common area of the apartment complex, the complex has a high volume of drug activity, and people regularly move about the apartment complex. As in the trial court, defendant does not contest that he had possession of the 4.8 grams of crack cocaine found in his pants pocket during the pat-down search.

{¶24} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency is a test of adequacy. *Id.* We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the

offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387.

{¶25} "Although inferences cannot be built upon inferences, several conclusions may be drawn from the same set of facts." *State v. Grant* (1993), 67 Ohio St.3d 465, 478, citing *Hurt v. Charles J. Rogers Transp. Co.* (1955), 164 Ohio St. 329, paragraph three of the syllabus. "And it is equally proper that a series of facts or circumstances may be used as the basis for ultimate findings or inferences." *Id.* at 334. "Because reasonable inferences drawn from the evidence are an essential element of the deductive reasoning process by which most successful claims are proven, the rule against stacking inferences must be strictly limited to inferences drawn exclusively from other inferences." *State v. Evans*, 10th Dist. No. 01AP-594, 2001-Ohio-8860, citing *Donaldson v. N. Trading Co.* (1992), 82 Ohio App.3d 476, 481. See also *Motorists Mut. Ins. Co. v. Hamilton Twp. Trustees* (1986), 28 Ohio St.3d 13, 17 (remarking on the rule's "dangerous potential for subverting the fact-finding process and invading the sacred province of the jury").

{¶26} Defendant was convicted of violating R.C. 2925.11, which provides, in relevant part, that "[n]o person shall knowingly obtain, possess, or use a controlled substance." Pursuant to R.C. 2901.22(B), "[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." Similarly, "[a] person has knowledge of circumstances when he is aware that such circumstances probably exist." *Id.* "[P]ossession" 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).

{¶27} Possession of a controlled substance may be actual or constructive. *State v. Saunders*, 10th Dist. No. 06AP-1234, 2007-Ohio-4450, ¶10, citing *State v. Burnett*, 10th Dist. No. 02AP-863, 2003-Ohio-1787, ¶19, citing *State v. Mann* (1993), 93 Ohio App.3d 301, 308. A person has actual possession of an item when it is within his immediate physical control. *Saunders*; *State v. Norman*, 10th Dist. No. 03AP-298, 2003-Ohio-7038, ¶29; *State v. Messer* (1995), 107 Ohio App.3d 51, 56. Constructive possession exists when a person knowingly exercises dominion and control over an object, even though the object may not be within the person's immediate physical possession. *State v. Hankerson* (1982), 70 Ohio St.2d 87, syllabus. Because the crack cocaine here was not found on defendant's person, the state was required to prove he constructively possessed it.

{¶28} Circumstantial evidence alone may be sufficient to support the element of constructive possession. *Jenks* at 272-73. Absent a defendant's admission, the surrounding facts and circumstances, including the defendant's actions, constitute evidence from which the trier of fact can infer whether the defendant had constructive possession over the subject drugs. *Stanley* at ¶31; *Norman* at ¶31; *State v. Baker*, 10th Dist. No. 02AP-627, 2003-Ohio-633, ¶23. The mere presence of an individual in the vicinity of illegal drugs is insufficient to establish the element of possession, but if the evidence demonstrates the individual was able to exercise dominion or control over the drugs, he or she can be convicted of possession. *Saunders* at ¶11, citing *State v. Wyche*, 10th Dist. No. 05AP-649, 2006-Ohio-1531, ¶18, and *State v. Chandler* (Aug. 9, 1994), 10th Dist. No. 94AP-172.

{¶29} When viewed in a light most favorable to the prosecution, the evidence presented at trial was legally sufficient to prove defendant's constructive possession of the 22.8 grams of crack cocaine found outside his apartment. Defendant admitted he was a crack cocaine addict with two prior convictions for drug possession, admitted the crack cocaine and marijuana cigarette found during the pat-down search were his, and admitted he had smoked marijuana laced with crack cocaine shortly before Officer Shepard arrived at the scene. The police found the 22.8 grams of crack cocaine in the location where defendant was standing when Officer Shepard arrived at the scene, the drugs appeared to have been placed in that location shortly before police discovered them, and no one other than defendant was in the area. Although the location where the drugs were found was a "common area" of the apartment complex, it was not one where people usually would be present, as it was in a corner behind some bushes outside of defendant's apartment. Based upon the evidence, the jury could reasonably find, without the impermissible stacking of inferences, that defendant, who had recent and sole proximity to the drugs and an ability to exercise dominion and control over the drugs, placed the drugs on the ground behind the bushes in order to prevent police from detecting them.

{¶30} Because defendant's conviction of possession of crack cocaine in an amount exceeding 25 grams but less than 100 grams is supported by (1) defendant's admission that he had actual possession of the 4.8 grams of crack cocaine found during the pat-down search and (2) legally sufficient evidence that defendant had constructive possession of an additional 22.8 grams of crack cocaine, we overrule defendant's second and third assignments of error.

V. Manifest Weight of the Evidence

{¶31} The fourth assignment of error asserts defendant's conviction is against the manifest weight of the evidence. Defendant contends the jury "lost its way" in finding him guilty of possession of cocaine because (1) evidence presented at trial was contradictory and did not fit together in a logical pattern, and (2) the state relied on unreliable and uncertain circumstantial evidence that was based upon an impermissible stacking of inferences to prove defendant had knowledge and constructive possession of the drugs found on the ground outside his apartment.

{¶32} When presented with a manifest weight argument, we engage in a limited weighing of the evidence to determine whether sufficient competent, credible evidence supports the jury's verdict to permit reasonable minds to find guilt beyond a reasonable doubt. *Conley, supra; Thompkins* at 387 (noting that "[w]hen 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"). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury thus may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver*, 10th Dist. No 02AP-604, 2003-Ohio-958, ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67. Reversals of convictions as being against the manifest weight of the evidence are reserved for exceptional cases where the evidence weighs heavily in favor of the defendant. *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

{¶33} Defendant initially contends the jury "lost its way" because the evidence presented at trial contradicted the prosecution's theory of the case. Defendant argues the state's theory in closing argument was that defendant quickly "tossed the drugs" behind the bushes when he saw Officer Shepard. Defendant asserts that, contrary to the state's theory, Officer Burkey at trial testified the drugs appeared to have been intentionally and carefully placed on the ground behind the bushes. The record, however, does not support defendant's contention that the prosecution argued defendant "tossed the drugs" upon seeing Officer Shepard.

{¶34} Defendant also argues the jury "lost its way" due to contradictory evidence offered through the testimony of Adrinne Davis. Although she stated she was in the area and saw the police outside defendant's apartment the night he was arrested, police officers testified no one other than defendant was in the vicinity. Even if Davis' testimony were true, it does not necessarily contradict the police officers' testimony that they personally did not see anyone other than defendant at the scene. Moreover, Officer Burkey expressly acknowledged "there could have been other people in the area." (Tr. II, 39.) Regardless, defendant "is not entitled to reversal on manifest weight grounds merely because inconsistent evidence was offered at trial," as "[t]he trier of fact is free to believe or disbelieve any or all of the testimony presented." *State v. Favor*, 10th Dist. No. 08AP-215, 2008-Ohio-5371, ¶10.

{¶35} Defendant next contends the jury clearly lost its way in finding him guilty, because the verdict is not logical: the jury, defendant asserts, necessarily concluded defendant disposed of some, but not all, of the drugs in his possession upon seeing the police. Contrary to defendant's contention, the jury logically could reach such a

conclusion. Especially in light of defendant's admission that he was "high" due to smoking a marijuana cigarette laced with crack cocaine shortly before Officer Shepard arrived, the jury logically could find defendant discarded the larger amount of crack cocaine that was in his possession but simply forgot about the marijuana cigarette tucked behind his ear and overlooked the smaller amount of drugs in his pants pocket.

{¶36} Finally, defendant contends his conviction is against the manifest weight of the evidence because the state relied solely upon evidence of defendant's "mere proximity" in order to prove he had possession of the drugs found on the ground behind the bushes outside his apartment. We addressed defendant's contention, in part, in concluding the state presented legally sufficient evidence to prove defendant's constructive possession of the drugs at issue. The evidence defendant presented at trial created, at best, a credibility determination properly left to the jury, so we cannot say this is the exceptional case where the evidence weighs heavily in favor of defendant.

{¶37} Because defendant's conviction is not against the manifest weight of the evidence, defendant's fourth assignment of error is overruled.

VI. Denial of Right to Speedy Trial

{¶38} The fifth assignment of error appellate counsel presented and the first assignment of error raised in defendant's supplemental brief on appeal contend the state violated defendant's right to a speedy trial.

{¶39} The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to a speedy trial by the state; Section 10, Article I of the Ohio Constitution independently guarantees the right. *State v. Bayless*, 10th Dist. No. 02AP-215, 2002-Ohio-5791, ¶10. Pursuant to R.C. 2945.71(C)(2), a person "against

whom a felony charge is pending" must be "brought to trial within [270] days after the person's arrest." A felony charge is not "pending" under the statute until the accused has been formally charged by a criminal complaint or indictment, is held pending the filing of charges, or is released on bail or recognizance. *State v. Azbell*, 112 Ohio St.3d 300, 2006-Ohio-6552, syllabus.

{¶40} R.C. 2945.73(B) provides that a person charged with an offense shall be discharged, upon his or her motion made at or prior to the commencement of trial, if he or she is not brought to trial within the time required by R.C. 2945.71. The time to bring an accused to trial can be extended for reasons enumerated in R.C. 2945.72, including "[a]ny period of delay necessitated by reason of a plea in bar or abatement, motion, proceeding, or action made or instituted by the accused[.]" R.C. 2945.72(E). See *State v. Sanchez*, 110 Ohio St.3d 274, 2006-Ohio-4478; *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374. The speedy-trial time can also be extended for "[t]he period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion[.]" R.C. 2945.72(H).

{¶41} When reviewing a speedy-trial issue, an appellate court must calculate the number of days chargeable to either party and determine whether the accused was properly brought to trial within the time limits set forth in R.C. 2945.71. *State v. Riley*, 162 Ohio App.3d 730, 2005-Ohio-4337, ¶19, citing *State v. DePue* (1994), 96 Ohio App.3d 513, 516. For purposes of computing time under the statute, each day an accused is held in jail in lieu of bond counts as three days under R.C. 2945.71(E), but the date of arrest is not included. *State v. Miller*, 10th Dist. No. 06AP-36, 2006-Ohio-4988, ¶7; *State v. Steiner* (1991), 71 Ohio App.3d 249. See Crim.R. 45(A) (stating that the date of the act or event

from which the designated period of time begins to run shall not be included); R.C. 1.14 (stating that "[t]he time within which an act is required by law to be done shall be computed by excluding the first and including the last day").

{¶42} Here, because defendant was incarcerated pretrial, the state was required to bring him to trial within 90 days after his arrest on the felony drug charge. *State v. Small*, 10th Dist. No. 06AP-1110, 2007-Ohio-6771, ¶4, discretionary appeal not allowed, 118 Ohio St.3d 1409, 2008-Ohio-2340. According to the record, defendant demanded discovery and requested a bill of particulars on July 2, 2008, and the state responded on July 21, 2008, a 19-day response time. Defendant's demand for discovery and request for a bill of particulars was a tolling event under R.C. 2945.72(E). *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, syllabus (concluding a demand for discovery or a bill of particulars is a tolling event). Moreover, the 19 days the state used to respond to defendant's demand for discovery and request for a bill of particulars was reasonable and tolled the speedy trial time requirements for that length of time. See *State v. Lair*, 10th Dist. No. 05AP-1083, 2006-Ohio-4109, ¶22, and *Small* at ¶7 (both determining a 20-day response time to a defendant's request for discovery is not unreasonable and tolls the time for speedy trial).

{¶43} Defendant's time for speedy trial was tolled an additional 49 days from August 8, 2008, the date defense counsel filed a motion to suppress evidence of the crack cocaine, to September 26, 2008, the date the trial court held a suppression hearing and overruled the motion. R.C. 2945.72(E); see *Sanchez* at ¶25, citing *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, ¶44. Although defendant did not personally agree to a continuance or waive his right to speedy trial for that period of time, his attorney did so on

his behalf. See *State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, ¶33; *State v. McBreen* (1978), 54 Ohio St.2d 315, syllabus (holding an attorney may waive a defendant's right to a speedy trial even without his client's consent). When combined, the two tolling events extended by 68 days the time required to bring defendant to trial.

{¶44} A remaining question is when the time under the speedy-trial statutes began to run in this case. Although the 270-day statutorily prescribed limitation period begins to run after a person's "arrest," R.C. 2945.71(C)(2), the record in this case contains conflicting information concerning the date of defendant's arrest.

{¶45} Initially, the record indicates the warrant on the indictment was served on defendant on June 4, 2008, and he was placed under arrest and incarcerated that same day. Based upon a June 4, 2008 "arrest" date, the speedy-trial limitation period began to run on June 5, 2008, the day after defendant's arrest, and it ended on October 6, 2008, the date he was brought to trial. Crim.R. 45(A); R.C. 1.14. The length of time from June 5, 2008 and October 6, 2008 is 124 days, or 34 days outside the 90-day speedy trial window. When, however, the 68 days of the two tolling events are factored in, the period of time that elapsed before defendant was brought to trial after his arrest is 56 days, or within the statutorily prescribed limitation period.

{¶46} The record nonetheless also contains a document formalizing defendant's "plea of not guilty" and stating he was arrested on "May 19, 2008." The date is handwritten on the document in a blank space provided for that purpose. The document was entered into the record on June 9, the same date as defendant's arraignment, and defendant, defense counsel, counsel for the state, and a judge or magistrate who accepted defendant's plea of not guilty all signed it. If we assume defendant was arrested

on May 19, 2008, the length of time between his "arrest" and the date he was brought to trial is 140 days. When the 68 days of tolling are factored in, the length of time before he was brought to trial is 72 days, still well within the statutory time constraints.

{¶47} Apart from those two "arrest" dates reflected in the record, defendant pro se proffers two other "arrest" dates for this court to utilize in calculating his speedy trial time. Defendant claims he initially was arrested on September 30, 2007, the date of the drug offense, and at that time was held in jail for a period of 10 days before being released pending an indictment. He further claims that after the indictment was filed on April 11, 2008, he was re-arrested on May 12, 2008 for the same offense and was incarcerated for a period of 148 days from that date until trial began on October 6, 2008. According to defendant, the combined pretrial incarceration periods total 158 days and violate his speedy trial rights.

{¶48} Although the record supports defendant's assertion that he initially was arrested on September 30, 2007, nothing in the record indicates he at that time was a person "against whom a felony charge [was] pending," as required by R.C. 2945.71(C)(2) to start the speedy-trial clock. Specifically, the record does not show that anytime prior to April 2008 defendant was (a) formally charged by a criminal complaint or indictment, (b) held pending the filing of charges, or (c) released on bail or recognizance. See *Azbell*. Even if we could assume some felony charge was pending at the time, the record does not substantiate defendant's claim that he was "re-arrested" on May 12, 2008. Finally, even if we accept defendant's claim that he was arrested and held in jail in lieu of bond for two periods totaling 158 days prior to being brought to trial, the state did not violate his right to a speedy trial. When the 68 days of tolling are applied to the 158 days defendant

claims he awaited trial, the result is he was brought to trial within 90 days, the statutorily prescribed time limitation.

{¶49} Because defendant's right to a speedy trial was not violated, we overrule the fifth assignment of error his appellate counsel raised and the first assignment of error presented in defendant's supplemental brief on appeal.

VII. Ineffective Assistance of Counsel

{¶50} In the sixth assignment of error, defendant claims he was denied the effective assistance of trial counsel because his counsel (1) failed to object to the violation of defendant's right to a speedy trial and (2) failed to subpoena witnesses and documents that would have contradicted the state's theory of the case, impeached the testimony of its witnesses, and bolstered defendant's credibility.

{¶51} To prove ineffective assistance of counsel, defendant must show that defense counsel's performance was deficient. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064. Defendant thus must show his counsel made errors so serious that counsel was not functioning as the "counsel" the Sixth Amendment guarantees. *Id.* Defendant also must establish that his counsel's deficient performance prejudiced him, demonstrating that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. *Id.* Unless defendant makes both showings, it cannot be said that the conviction resulted from a breakdown in the adversary process that renders the result unreliable. *Id.*

{¶52} Initially, defense counsel was not deficient in failing to object or move to dismiss on speedy-trial grounds. As noted, defendant was brought to trial within the time constraints prescribed by R.C. 2945.71, and his right to a speedy trial was not violated.

Defendant was not denied the effective assistance of counsel because (1) defense counsel had no duty under *Strickland* to file an unmeritorious motion, and (2) defendant suffered no prejudice due to his counsel's failure to object or move to dismiss based on speedy-trial grounds.

{¶53} Nor can we conclude on this record defense counsel rendered deficient performance by failing to subpoena witnesses and documents that defendant here claims would have bolstered his defense. Defendant contends he was prejudiced because defense counsel (1) failed to call witnesses who would have testified defendant was not the only person in the area surrounding his apartment when he was arrested, (2) failed to subpoena the apartment complex's maintenance records that would have established the windows on defendant's apartment were broken on September 30, 2007, adding credibility to defendant's reason for standing outside his apartment behind the bushes, and (3) failed to subpoena the apartment complex manager, who could corroborate defendant's testimony that he had \$654 on him at the time of his arrest to pay his rent due the next day, thus undermining the state's suggestion that defendant possessed the fairly significant amount of cash for drug-related reasons.

{¶54} "Generally, counsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Madison*, 10th Dist. No. 08AP-246, 2008-Ohio-5223, ¶11, citing *State v. Treesh* (2001), 90 Ohio St.3d 460, 490. ^{the} ^{Failed} "An appellant has the burden to show that the witness' testimony would have significantly assisted the defense and would have affected the outcome of the case." *State v. Dennis*, 10th Dist. No. 04AP-595, 2005-Ohio-1530, ¶22. Defendant here cannot demonstrate his trial counsel rendered ineffective assistance because nothing in

as well as in

the record reveals what the purported witnesses would have testified to or what the maintenance records would have revealed. Absent a showing of prejudice, this court will not consider such decisions ineffective assistance. *State v. Mathias*, 10th Dist. No. 06AP-1228, 2007-Ohio-6543, ¶36.

{¶55} Because nothing in the record supports defendant's claim the witnesses' testimony or the maintenance records for defendant's apartment would have significantly assisted the defense or affected the outcome at trial, on this record we can conclude only that defense counsel's failure to present the witnesses and documentary evidence was the result of reasonable trial strategy. Defendant's sixth assignment of error is overruled.

VIII. Prosecutorial Misconduct

{¶56} The second assignment of error in defendant's supplemental brief on appeal contends the prosecution denied him a fair trial by engaging in a "pattern of misconduct throughout the proceedings." Defendant asserts the prosecution (1) failed to respond to defendant's pro se motion to dismiss on speedy trial grounds, (2) made remarks during opening and closing arguments that the evidence does not support and were designed to inflame the jurors, and (3) used a police report at trial to refresh a witness' testimony without disclosing the report to defendant during discovery.

{¶57} The test for prosecutorial misconduct is whether the prosecution's conduct was improper and, if so, whether the conduct prejudicially affected substantial rights of the accused. *State v. Smith* (1984), 14 Ohio St.3d 13, 14. " '[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.' " *State v. Wilkerson*, 10th Dist. No. 01AP-1127, 2002-Ohio-5416, ¶38, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940,

947. As such, prosecutorial misconduct is not grounds for reversal unless the defendant has been denied a fair trial. *State v. Maurer* (1984), 15 Ohio St.3d 239, 266.

{¶58} Because defense counsel failed to object to any of the alleged instances of prosecutorial misconduct, the alleged improprieties are waived, absent plain error. *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, ¶139; *State v. Saleh*, 10th Dist. No. 07AP-431, 2009-Ohio-1542, ¶68. A court recognizes plain error with the utmost caution, under exceptional circumstances, and only to prevent a miscarriage of justice. *Id.* We may reverse only where the record is clear defendant would not have been convicted in the absence of the improper conduct. *State v. Williams* (1997), 79 Ohio St.3d 1, 12.

{¶59} Initially, defendant argues the prosecution failed to seek justice and sought only to convict, citing as support the prosecution's failure to respond to defendant's pro se motions that sought relief on speedy trial grounds. The record, however, reflects that at the conclusion of the September 26, 2008 suppression hearing, defendant's attorney withdrew defendant's pro se motions asserting speedy trial violations. (Tr. 105.) Moreover, under well established Ohio law, a criminal defendant has the right either to appear pro se or to representation by counsel, but has no corresponding right to act as co-counsel on his or her own behalf. *State v. Martin*, 103 Ohio St.3d 385, 2004-Ohio-5471, paragraph one of the syllabus; *State v. Thompson* (1987), 33 Ohio St.3d 1, 6-7. "[T]hese two rights are independent of each other and may not be asserted simultaneously." *Martin*. Accordingly, even if defense counsel had not withdrawn defendant's pro se motions, the trial court had no obligation to entertain them, and the prosecution had no obligation to respond to them.

{¶60} Defendant next claims the prosecution was untruthful during opening statement to the jury when it stated, "I will prove that when the officers brought the defendant out of the bushes," the defendant "tried to throw away" the drugs. (Supp. brief, 4.) Defendant contends no testimony or evidence was presented at trial to support the prosecution's statements. The trial transcript reveals the prosecution never made the statements defendant asserts it did. Accordingly, defendant's claim lacks merit.

{¶61} Defendant also claims the prosecution's statements during closing arguments were "a ploy designed to inflame the jurors and appeal to their passions, and cause them to lose their way during deliberations." (Supp. brief, 5). We review the prosecution's summation in its entirety to determine if the allegedly improper remarks prejudicially affected defendant's substantial rights. *Treesh* at 466; *State v. Smith* (2000), 87 Ohio St.3d 424, 442, citing *Smith*, 14 Ohio St.3d at 14. Here, the prosecution's closing arguments appropriately summarized the evidence adduced at trial and did not make improper remarks prejudicial to defendant as he claims for the first time on appeal. Defendant's claim is thus without merit.

{¶62} Lastly, defendant claims the prosecution engaged in misconduct when, after failing to disclose the police report to defendant during discovery, the prosecution used the report at trial to refresh a witness' memory that defendant had \$654 cash on him when he was arrested. Defendant contends he was prejudiced because the prosecution used the evidence of the amount of defendant's cash to infer that he was engaged in drug trafficking, not drug possession.

{¶63} The prosecution has a duty to disclose to a criminal defendant evidence material to guilt or punishment. *Brady v. Maryland* (1963), 373 U.S. 83, 87, 83 S.Ct. 1194,

1197. The prosecution's duty to disclose encompasses impeachment evidence, exculpatory evidence, and evidence known only to police investigators and not to the prosecution. *Strickler v. Green* (1999), 527 U.S. 263, 280-81, 119 St.Ct. 1936, 1948-49. Here, nothing in the record suggests the police inventory report was not disclosed or made available to defendant. The record thus does not demonstrate any error, let alone plain error.

Defendant's Supp brief stated - that the police Report of the police officer who helped Barney in the search was not disclosed

{¶64} Because defendant failed to demonstrate the prosecution engaged in misconduct that denied him a fair trial, we overrule the second assignment of error presented in his supplemental brief on appeal, *should have been sustained*

IX. Judicial Misconduct/Trial Court Errors

{¶65} Defendant's third assignment of error of his supplemental appellate brief asserts the trial court committed plain error prejudicial to defendant by (1) failing to dismiss based on violation of defendant's right to speedy trial, (2) allowing the jury to consider a lesser included drug possession offense that was not charged in the indictment, (3) communicating with the jury outside the presence of defendant and his counsel, and (4) instructing the jury on tests to be used in evaluating defendant's credibility. Because defendant did not object to any of the alleged errors, we review the alleged improprieties under the "plain error" standard of review. See Crim.R. 52(B).

since defendant's speedy trial rights contentions are constitutionally meritorious, the trial court plainly erred in not hearing his pro se motion.

{¶66} Initially, defendant claims the trial court plainly erred by failing to entertain a pro se motion defendant filed seeking dismissal on speedy trial grounds. Apart from the reasons already noted that render defendant's speedy trial contentions unmeritorious, the additional argument he presents under this assignment of error also is unpersuasive.

Defendant claims the trial court plainly erred by failing to file a journal entry prior to the

expiration of the time limits under the speedy trial statutes when the court, on its own motion, continued the trial from September 26, 2008 to October 6, 2008. See *State v. Mincy* (1982), 2 Ohio St.3d 6, syllabus (holding the trial court must journalize an order granting a sua sponte continuance prior to the expiration of the statutorily prescribed speedy trial limit). Contrary to defendant's assertion, the record reflects that the trial court filed an "entry" on September 29, 2008 journalizing its order for the continuance of trial. Defendant's claim thus lacks record support.

{¶67} Next, defendant asserts he was prejudiced because the trial court instructed the jury on an offense not charged in the indictment: possession of crack cocaine in an amount equal to or exceeding one gram but less than five grams, a felony of the fourth degree. See R.C. 2925.11(C)(4)(b). Defendant argues he should have been tried solely on the offense charged in the indictment: possession of crack cocaine in an amount equal to or exceeding 25 grams but less than 100 grams, a felony of the first degree. Defendant's argument lacks merit.

{¶68} Where the evidence at trial would reasonably support both an acquittal on the crime charged in the indictment and a conviction upon a lesser included offense, a trial court must instruct the jury on the lesser included offense. See *State v. Thomas* (1988), 40 Ohio St.3d 213, paragraph two of the syllabus. At trial, defendant admitted having possession of the 4.8 grams of crack cocaine found in his pants pocket, but he denied having possession of the 22.8 grams of crack cocaine found on the ground. Based on defendant's testimony, the jury could have convicted him of the lesser included, fourth-degree drug possession offense and acquitted him of the first-degree felony drug possession offense. The trial court thus committed no error, much less plain error

prejudicing defendant's substantial rights, when the trial court instructed the jury on fourth-degree felony drug possession and the jury found him guilty of the original charge of first-degree felony drug possession. *Id.*

{¶69} Defendant next claims the trial court and the prosecution improperly communicated with the jury during deliberations outside the presence of defendant and his counsel. Defendant maintains that "neither [defense] counsel nor appellant knows exactly what transpired in their absences when the jury made its request." (Supp. brief, 11.)

{¶70} "As a general rule, any communication between judge and jury that takes place outside the presence of the defendant or parties to a case is error which may warrant the ordering of a new trial." *Bostic v. Connor* (1988), 37 Ohio St.3d 144, 149. "Such communications are required to be made in the presence of the defendant or parties so that they may have an opportunity to be heard or to object before the judge's reply is made to the jury." *Id.*

{¶71} Here, the record reflects that during deliberations and in the absence of the court reporter, the jury sent a note to the trial judge requesting one of the police reports and stating the jury had a question regarding police procedure. The trial court notified the prosecution and defense counsel of the jury's communication and, with their agreement, sent the note back to the jury with the court's response: "You have received all the evidence that was admitted." (Tr. II, 165; record.) Even if the trial court's communication with the jury outside of defendant's presence were error, defendant failed to demonstrate he was prejudiced where not only did defense counsel agree with the trial court's response to the jury but the court's communication was brief and nonsubstantive in

nature. See *Bostic* at 149-50 (finding no prejudice where the trial court's ex parte communication with the jury was limited to a denial of the jury's request for written instructions); *State v. Abrams* (1974), 39 Ohio St.2d 53, 55-56 (concluding the defendant's right to a fair trial was not prejudiced by a communication between the trial judge and the jury where the judge responded to the jury's request for further instructions by telling them the only further instruction he would give would be to reread his original charge, which the jury refused).

{¶72} Lastly, defendant claims the trial court's instructions to the jury concerning witness credibility constituted plain, prejudicial error. Defendant argues the trial court "inflamed" and "swayed" the jurors when it instructed them on "signs" for evaluating the credibility of witnesses. Crim.R 30(B) permits the trial court to provide the jury with instructions of law relating to credibility and weight of the evidence. The trial court committed no error, plain or otherwise, when it instructed the jury on witness credibility in compliance with the standard jury instructions on credibility. See 4 Ohio Jury Instructions (2007) 41, Section 405.20 (reorganized and now found in Ohio Jury Instructions (2008), CR Section 409.05). Defendant's claim is without merit.

{¶73} Because defendant failed to demonstrate the trial court committed plain, prejudicial error denying him a fair and impartial trial, we overrule the third assignment of error presented in his supplemental appellate brief.

X. Mandatory Fine Imposed Upon Defendant

{¶74} In the fourth assignment of error of his supplemental appellate brief, defendant contends the trial court abused its discretion in imposing a mandatory fine

upon him in the amount of \$10,000. Defendant claims he is indigent and unable to pay the fine.

{¶75} In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, a plurality opinion, the Supreme Court of Ohio established a two-step analysis of sentencing issues. The first step is to "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Id.* at ¶4. If the sentence is not clearly and convincingly contrary to law, the second step under *Kalish* is to review whether the trial court abused its discretion in imposing the sentence. *Id.*; *State v. Easley*, 10th Dist. No. 08AP-755, 2009-Ohio-2984, ¶15. An abuse of discretion is " 'more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable.' " *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶76} Pursuant to R.C. 2929.18(A), a trial court that imposes a sentence upon a felony offender may sentence the offender to any financial sanction or combination of financial sanctions the statute authorizes. While a trial court may conduct a hearing to determine an offender's ability to pay a fine, a hearing is not required. R.C. 2929.18(E); *State v. Conway*, 10th Dist. No. 03AP-1120, 2004-Ohio-5067, ¶7. Nevertheless, before imposing a financial sanction under R.C. 2929.18, the trial court must consider the offender's present and future ability to pay the amount of the sanction or fine. R.C. 2929.19(B)(6); *State v. Brinkman*, 168 Ohio App.3d 245, 2006-Ohio-3868, ¶17. No express factors are set out that a court must consider or findings a court must make when determining the offender's present and future ability to pay. *State v. Loving*, 180 Ohio

App.3d 424, 2009-Ohio-15, ¶9; *State v. Silverman*, 10th Dist. No. 05AP-837, 2006-Ohio-3826, ¶144, affirmed sub nom *In re Criminal Sentencing Cases*, 116 Ohio St.3d 31, 2007-Ohio-5551. Rather, the record need only reflect that the court considered the offender's present and future ability to pay before it imposed a financial sanction on the offender. *Loving* at ¶9; *Brinkman* at ¶17; *State v. Finkes*, 10th Dist. No. 01AP-310, 2002-Ohio-1439.

{¶77} In this case, defendant was found guilty of possession of crack cocaine in violation of R.C. 2925.11, a first-degree felony. R.C. 2929.18(B)(1) provides that for an offender convicted of a first-degree felony under Chapter 2925, the sentencing court "shall impose upon the offender a mandatory fine of at least one-half of, but not more than, the maximum statutory fine amount authorized" for the offense. R.C. 2929.18(A)(3)(a) authorizes a maximum fine in the amount of \$20,000 for a felony of the first degree. The trial court ordered defendant to pay a mandatory fine in the amount of \$10,000, one-half of the maximum fine amount authorized by statute. The record reflects that, in sentencing defendant, the trial court considered his present and future ability to pay a fine and made no determination he is unable to pay the mandatory fine the statute authorizes. To the contrary, after imposing the fine, the trial court remarked at the sentencing hearing that since defendant had "a tax refund floating around and there was \$650 found on him, which is in the custody of the police department, why we'll get some of this fine back, so that's one reason I'm leaving the fine and costs in force in this thing." (Tr. 191-92.)

{¶78} The record demonstrates that the \$10,000 mandatory fine imposed on defendant is neither contrary to law nor an abuse of the trial court's discretion. R.C.

2929.18(B)(1) requires a sentencing court to impose a mandatory fine upon an offender convicted of first-degree felony drug possession unless (1) the offender files an affidavit prior to sentencing that he or she is indigent and unable to pay the mandatory fine and (2) the trial court finds that the offender is an indigent person and is unable to pay the mandatory fine. *State v. Gipson*, 80 Ohio St.3d 626, 634, 1998-Ohio-659. The Supreme Court of Ohio determined that "the required filing of an affidavit of indigency for purposes of avoiding a mandatory fine is, in effect, a jurisdictional issue." *Id.* at 633. The court held that an offender's failure to file the statutorily required affidavit of indigency prior to sentencing "is, standing alone, a sufficient reason" to find that the trial court did not err in imposing a mandatory statutory fine. *Id.*

{¶79} Prior to sentencing in this case, defendant filed an affidavit of indigency alleging he was financially unable to retain private counsel to defend him in the matter; he did not file an affidavit alleging he was "indigent and unable to pay the mandatory fine." Courts in Ohio have found " 'a difference between a defendant's inability to raise an initial retainer in order to obtain trial counsel and the ability to gradually pay an imposed mandatory fine over a period of time.' " *State v. Burnett*, 10th Dist. No. 08AP-304, 2008-Ohio-5224, ¶9, quoting *State v. Banks*, 6th Dist. No. WD-06-094, 2007-Ohio-5311, ¶15, citing *State v. Young*, 5th Dist. No. 03-CAA-10051, 2004-Ohio-4002, ¶16. An offender's indigency for purposes of receiving appointed counsel is separate and distinct from his or her indigency for purposes of avoiding having to pay a mandatory fine. See *Gipson* at 631-33. See also *Burnett* at ¶9; *Banks*; *State v. Millender*, 5th Dist. No. 03-CA-78, 2004-Ohio-871, ¶8. As a result, defendant "cannot rely on the affidavit of indigency for the purpose of receiving appointed trial counsel to demonstrate indigency for the purpose of

avoiding having to pay the mandatory fines after [his] conviction." *Banks* at ¶15. Because defendant did not file an affidavit of indigency alleging he is "unable to pay the mandatory fine," the trial court was required to impose a fine on defendant of at least \$10,000, one-half of the \$20,000 authorized by statute. See R.C. 2929.18(A)(3) and (B)(1); *Gipson* at 633; *Burnett* at ¶9.

{¶80} In further rejecting defendant's challenge to the \$10,000 fine, we note he neither objected to the fine nor requested an opportunity to demonstrate to the trial court his inability to pay a financial sanction. "[T]he burden is upon the offender to affirmatively demonstrate that he or she is indigent and is *unable to pay* the mandatory fine." (Emphasis sic.) *Gipson* at 635. Because the record lacks evidence showing defendant's inability to pay the mandatory fine the trial court imposed, defendant did not carry his burden to affirmatively demonstrate his inability to pay the mandatory fine. *Id.*

{¶81} The fourth assignment of error in defendant's supplemental brief on appeal is overruled.

XI. Conclusion

{¶82} Having overruled each of the assignments of error presented in this appeal, we affirm the trial court's judgment.

Judgment affirmed.

KLATT and CONNOR, JJ., concur.

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CRIMINAL DIVISION

STATE OF OHIO,	:	TERMINATION NO. <u>5</u> BY: <u>SL</u>
	:	
Plaintiff,	:	
	:	
vs	:	CASE NO 08CR-04-2691
	:	
TORRANCE C. PILGRIM,	:	JUDGE FRYE
	:	
Defendant.	:	

FILED
 COMMON PLEAS COURT
 FRANKLIN CO. OHIO
 2008 OCT 17 AM 9:25
 CLERK OF COURTS

FINAL JUDGMENT ENTRY
(Prison Imposed)

The State was represented in this case by Assistant Prosecuting Attorney Jeffrey Rogers and the Defendant was represented by William Ireland, Esq. The court heard evidence on a motion to suppress evidence on September 26, 2008, which was denied Commencing on October 6, 2008 the case was tried by a jury, which on October 8, 2008, returned a verdict finding Defendant **guilty** as to **Count One** of the indictment, to-wit: **POSSESSION OF COCAINE**, in violation of Section 2925.11 of the Ohio Revised Code, being a **felony of the 1st degree**

Defendant and counsel were informed of the aforesated verdict and the jury was dismissed

On October 10, 2008, a sentencing hearing was held pursuant to R.C. 2929.19 The State was represented by Assistant Prosecuting Attorney Jeffrey Rogers and the Defendant was represented by William Ireland, Esq. The Court afforded counsel an opportunity to speak on behalf of the Defendant and addressed the Defendant personally affording him an opportunity to make a statement on his own behalf in the form of mitigation and to present information regarding the existence or non-existence of the factors the Court has considered and weighed.

The Court has considered the purposes and principles of sentencing set forth in R.C. 2929.11 and the factors set forth in R.C. 2929.12. In addition, the Court has weighed the factors as set forth in the applicable provisions of R.C. 2929.13 and R.C. 2929.14. The Court further finds that a prison term is not mandatory pursuant to R.C. 2929.13(F)

The Court hereby imposes the following sentence **FOUR (4) YEARS** at the **OHIO DEPARTMENT OF REHABILITATION AND CORRECTION. THE DEFENDANT'S OHIO BUREAU OF MOTOR VEHICLES DRIVER'S LICENSE SHALL BE SUSPENDED FOR A PERIOD OF FIVE (5) YEARS, WITHOUT WORK PRIVILEGES, EFFECTIVE IMMEDIATELY.**

The Court notified the Defendant at sentencing of his right to appeal and Mr.

Pilgrim acknowledged both orally and in writing that he understood his right to appeal the verdict and sentence, the time constraints to do so, and the fact that counsel would be made available to the Defendant for purposes of appeal at no cost. At his request the court appoints new counsel for appeal, namely Morgan Masters, Esq.

In imposing sentence, the Court stated its reasons as required by RC. 2929.19 consistent with State v. Foster, 2006-Ohio-856. The Court finds that prison is consistent with the purposes and principles of sentencing, notwithstanding the relatively advanced age of the defendant. The Court also notified the Defendant of the applicable period of **5 years mandatory post-release control** pursuant to R.C. 2929.19(B)(3)(c), (d) and (e).

The Court has considered the Defendant's present and future ability to pay a fine and financial sanction and does, pursuant to R.C. 2929.18, hereby render judgment for the following fine and/or financial sanctions: **DEFENDANT TO PAY THE minimum MANDATORY FINE in the amount of \$10,000.00. DEFENDANT TO PAY COURT COSTS IN AN AMOUNT TO BE DETERMINED.**

The Court finds that the Defendant has (- 163 -) days of jail credit and hereby certifies the time to the Ohio Department of Rehabilitation and Correction. The Defendant is to receive credit for all additional jail time served while awaiting transportation.

IT IS SO ORDERED.


RICHARD A. FRYE, JUDGE

Copies to:

Assistant Prosecuting Attorney Rogers
William Ireland, Esq
Morgan Masters, Esq



Ohio Department of Rehabilitation and Correction

HCF

770 West Broad Street
Columbus, Ohio 43222

Ted Strickland, Governor

www.drc.ohio.gov

Terry J. Collins, Director

Tuesday, October 28, 2008 3:17 PM

CRC [BOSC - UPDATE & CORRECTION]

BY: HEISS

INMATE # : A589102
NAME : PILGRIM, TORRANCE C
INST : CORRECTIONAL RECEPTION CENT
ENTERED : 10/28/2008

REMARKS: CORRECTION OF JTC AND EST DATE.

ADMISSION DATE: 10/23/2008 **FBI#:** **BCI#:** **SSN#:**

- INACTIVE

** - OFFENSE INFORMATION: Att. = 1; Con. = 2; Com = 3

START	OFFENSE			CR	C/E	FEL	ORC/ORN	CNTY	CASE #	C	##	##
GUN	DEF/TERM	MIN FULL	MAX	AL/MAN	RVO MDO	JUDGE	PROSECUTOR			E	JTC	
10/23/2008	POSS. OF DRUGS			1	C	1	2925.11 4	FRAN	08CR042691	C		
0	4.00	0	0	0/0	/0	RICHARD FRYE	RON OBRIEN				175	

AGGREGATE SENTENCE: 4.00 TERM

REMARKS:

DATES: *2*

HEARING DATE	AGG DEF SENT YEARS
2/3 HD	AGG STATED TERM SENT YRS 4.00
ACTUAL HD	AGG MIN/FULL SENT YEARS
2/3 ACTUAL	AGG AI SENT YEARS
MAX SENT EXP DATE	AGG MANDATORY YEARS
EXPIRATION DEF SENT	AGG MAX SENT YEARS
2/3 EDS	AGG MDO YEARS
STATED TERM EXP DATE 04/29/2012	AGG RVO YEARS
GUN EXPIRATION DATE	AGG JAIL TIME CRE (days) 175
EXP OF MANDATORY TERM	