

ORIGINAL

IN THE SUPREME COURT OF OHIO

11-2115

STATE OF OHIO,

Appellee,

v.

GEORGE DINGESS,

Appellant.

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

Court of Appeals
Case No. 10AP-848

MEMORANDUM IN SUPPORT OF JURISDICTION
APPELLANT GEORGE DINGESS

Toki Michelle Clark, Esq. (#0041493)
CLARK LAW OFFICE
233 South High Street, 3rd Floor
Columbus, Ohio 43215
(614) 224-2125

COUNSEL FOR APPELLANT, GEORGE DINGESS

Seth L. Gilbert, Esq.
369 South High Street, 14th Floor
Columbus, Ohio 43215
(614) 525-3555

COUNSEL FOR APPELLEE, STATE OF OHIO

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**EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT
GENERAL INTEREST AND WHY LEAVE TO APPEAL SHOULD BE
GRANTED**

This case presents two important issues in the field of criminal law and a resolution of these issues by this Court would result in uniform application throughout the state of Ohio. The first pertinent issue involves the manner in which evidence collected during investigations is tested. The Ohio Bureau of Criminal Investigations examiner should not be able to pick and choose and be selective over what evidence should be tested and what evidence should not be tested. In fact, the BCI examiner should know as little as possible about the suspect(s) involved in the criminal case in which they are involved in most instances. When the examiner is aware of a suspect, it can only serve to impact their testing procedures, analyses, and/or determinations.

The most ideal manner to test criminal evidence is when the examiner is blind to the identity of the suspect and free of all bias, the defense would contend. In the instant case, the examiner stopped testing the three items of evidence before her once she determined that the first two items tested contained enough evidence not to rule out Mr. Dingess. Clearly, the suspect, Mr. Dingess, was targeted. Targeting the suspect should be frowned upon. With the Ohio BCI testing voluminous evidence statewide, George Dingess' case is one of public interest as well as great general interest.

The second pertinent issue involves the substantial constitutional question of whether the criminally accused receive a fair trial when the state of Ohio can present large amounts of contraband on counsel table, breaching and impinging upon the presumption of innocence doctrine before trial even commences.

STATEMENT OF THE CASE

This matter stems from a felony possession of drugs case against Appellant George Dingess. On August 5, 2010, a jury found Mr. Dingess guilty of 1) possession of crack cocaine, a felony of the 1st degree; 2) possession of cocaine, a felony of the 4th degree; and 3) possession of marijuana, a felony of the 3rd degree. The trial was held in the Franklin County Common Pleas Court.

Appellant Dingess timely filed a Notice of Appeal with the Franklin County Tenth District Court of Appeals. On November 3, 2011, the Court of Appeals affirmed the trial court. Appellant George Dingess now wishes to appeal the decision of the Tenth District Court of Appeals to the Ohio Supreme Court.

STATEMENT OF THE FACTS

This case involving George Dingess stems back to events that occurred in August, 2006. (T. 15) In August, 2006, Sergeant Dennis Allen of the Columbus Police Department claimed that a confidential informant tipped him off that Mr. Dingess was selling crack cocaine and marijuana from his residence. (T. 16) Sergeant Allen went to Franklin County Municipal court to obtain a search warrant for Mr. Dingess at 1446C, Fountain View Court. (T. 15) However, as Mr. Dingess has maintained all along, 1446C Fountain View Court is not his residence. (T. 88, 105) Nevertheless, according to Sergeant Allen, the confidential informant provided the tip about two weeks prior to the issuance of search warrant. (T. 19)

On August 16, 2006, according to Sergeant Allen, he observed a car arrive at 1446C Fountain View Court, Mr. Dingess' place and he then saw a drug transaction. (T. 22-23) Sergeant Allen testified he did not observe any other vehicle approach the

Fountain View Apartment. (T. 28) He then saw a black male enter the Fountain View Apartment. (T. 28) That male exited Apartment C and Mr. Dingess was with him. (T. 28-29) Sergeant Allen never witnessed Mr. Dingess exchange any narcotic. (T. 26)

Three people were in the car that left the Fountain View Apartment . (T. 32, 34) The police believe the people in the car were involved in drug activity, even though only one person had exited the vehicle. (T. 34-35)

After the car left Fountain View, the driver of the car headed to 4691 Janis Drive where the police stop the car. (T. 26-29, 31) Two people in this car, Glen Burney and Christine Ward, are arrested by police. (T. 29, 31) Burney and Ward both say that they went to the Fountain View court apartment to purchase drugs. (T. 32)

Sergeant Allen used this information that he received from Burney and Ward to draft an affidavit to obtain the search warrant (T. 15, 20-26, 75). However, in the affidavit, Sergeant Allen never swears that he observes any drug transaction. (T. 26, 42) Despite this facet, the Franklin County Municipal Court issued a search warrant. (State Exhibit A, T. 19, 47)

When police arrive to search the Fountain View Court address, a woman named Sharise Clinton answered the door. (T. 68, 98) However, as the police discover, the apartment is leased to another woman named Natasha Felts. (T. 68) They further discover that most of the residential documents inside the apartment are in the name of Natasha Felts. (T. 68) Maintenance bills, including the electric bills, are all in the name of Natasha Felts. (T. 100, 102) The WOW Cable television bills are also in the name of Natasha Felts. (T. 101). In fact, Natasha Felts' payroll statements from Teleperformance USA are found inside the apartment with her name on them. (T. 100-101)

In searching the Fountain View Court Address, the police also discover large quantities of cocaine and marijuana (T. 75-81) However, of all the drugs found in the apartment, Appellant Dingess' fingerprints are not on any bags containing the drugs. (T. 110) Moreover, Defendant-Appellant George Dingess' address is not the Fountain View Court address. His address is 3618 Gender Road, Apt. 108, Canal Winchester, Ohio. (T. 109)

Police collect three toothbrushes, a hair pick, and a comb from the Apartment. (State Exhibit L, T. 84) These five items, the three toothbrushes, hair pick and comb, are submitted to the Ohio Bureau of Criminal Investigations for analysis. (T. 138-140) Emily Draper, a DNA Forensic Scientist for Ohio BCI, takes it upon herself, though, to only conduct analysis on two of the five items presented to her. (T. 153) In fact, once Ms. Draper discovers Appellant Dingess' can't be excluded as a user of the two toothbrushes, she personally decides to not conduct any further testing. Thus, the comb, hair pick and other toothbrush are never analyzed for DNA purposes, despite being submitted to her for analysis. (T. 110, 121) Appellant George Dingess is arrested and transported to the Whitehall police department. (T. 89)

On December 9, 2009, prior to trial, a suppression hearing was held in Franklin County Common Pleas Court. Sergeant Dennis Allen testified at the suppression hearing that a confidential informant told him Defendant Dingess sold crack cocaine and marijuana from his residence on Fountain View. The Sergeant further testified this was corroborated. (T. 16) A judge issued a search warrant. Under cross-examination by defense counsel, however, Sergeant Allen admitted that there was really no corroboration. (T. 16-22)

The sergeant also testified he had seen a drug transaction occur, but under cross-examination, it appears that Sergeant Allen didn't really see all that he claimed to have seen. And even if did, it was not included in the affidavit in support of the Search Warrant. (T. 25) In executing the search warrant, police obtain the drugs, toothbrushes, comb, and hair pick. The trial court denied the Motion to Suppress.

At trial, testimony revolved around the large amount of contraband, namely cocaine and marijuana, discovered in the Fountain View apartment---the Fountain View apartment not being leased, rented, or inhabited by Appellant Dingess. Despite this, and over the objection of the defense, the state of Ohio placed much of the evidence seized from that apartment on a table for the jurors to view the moment they entered the courtroom. (T. 62) Defense counsel objection to the presentation of contraband as follows in open court:

“Your Honor, on behalf of the defense. My understanding that Mr. Insley, and I understand for the sake of convenience, has the evidence displayed on counsel table, I think that until such time that that evidence has been introduced and admitted and testimony is both distractive and also prejudicial to have all that evidence displayed n front of the jury.”

The objection was overruled by the trial court.

Proposition of Law No. 1: A violation to the Ohio Constitution occurs and a criminal defendant fails to get a fair trial where forensic personnel of the Ohio Bureau of Criminal Investigations unilaterally determine what evidence will and will not be examined for evidentiary purposes.

In this case, evidence collected at the crime scene was submitted to the Ohio Bureau of Criminal Investigations for testing. The items collected include three toothbrushes, a hair brush, and a comb. Once the BCI examiner matched then-suspect George Dingess' profile on two toothbrush, other evidence, two combs and another

toothbrush, were not tested. The BCI Forensic Examiner concluded that further testing was not necessary.

In this case, however, Appellant George Dingess has contended all along that other individuals resided in the house where suspected criminal activity took place, and any contraband found in the house may belong to any one of them. He has consistently maintained his innocence. However, when the government gives public forensic examiners the discretion to pick and choose what evidence to test and what evidence not to test, the defendant fails to get a fair trial, in violation of Amendments Six and Fourteen of the Ohio Constitution.

As a result of the discretion given to the examiner, two combs and one toothbrush went untested. No evidence exists in the record revealing the tooth brushing habits of Mr. Dingess, but there is a great chance that the remaining toothbrush belonged to another individual, perhaps even someone who may own the drugs discovered inside the apartment. But since the request by the government to test the items was rejected by the BCI examiner, Mr. Dingess unfairly lost that opportunity to exploit that evidence.

If police submit 10 separate items to a BCI examiner, the examiner should test all 10 separate times, particularly in a case such as the instant case where a defendant proclaims his innocence and the items are found in essentially a crack house. When the police submit evidence, they do so because there is additional evidence to be gleaned from the test. It is the police who should have the discretion as to what should or should not be tested, not a BCI examiner. Given the foregoing, Appellant Dingess respectfully requests this high Court give more consideration to this very important contention.

In further arguing these points, a quote taken straight out of the Appellate decision at Paragraph 30 is illuminating:

“...the trial court found the seizure of the toothbrushes and combs was ‘not an indiscriminate seizure.’ (Tr. 50) The trial court further determined seizing the toothbrush for the purpose of obtaining DNA in order to determine whether or not appellant lived at he apartment was directly related to the drug offenses, **reasoning that if the suspect did not live at the apartment, the argument could easily be made that he had nothing to do with the drugs found in the apartment.** Thus the trial court found the seizure of the toothbrushes and combs was related to the overall issue of drug trafficking (or drug possession) and thus such a seizure was within the scope of the warrant. **We agree with this reasoning.**” (Emphasis supplied)

According to this quote, if George Dingess’ DNA is on a toothbrush, he must live at the apartment in question and he must own up to the drugs. However, assume the opposite to be true. Assume his DNA or profile did not show up on the first two toothbrushes tested at the Ohio BCI. Should the testing cease with a non-testing of the one remaining toothbrush and two combs? Should Mr. Dingess then be cleared after the first two toothbrushes are indicative of innocence? Assume the remaining untested toothbrush and combs prove to be that of another man who has a history of drug trafficking. Or, assume they are the toothbrush and combs of the woman whose name is on the lease of the apartment. Would these assumptions, if real, change the outlook? Clearly they would change the outlook simply based on the reasoning of the trial court at Paragraph 30, and George Dingess *could easily make the argument* that the drugs belonged to another man or to the woman whose name appeared on the lease of the apartment. But, since an examiner working at the BCI has the power and the authority not to conduct any further testing, George Dingess is declared the owner of the drugs.

The foregoing analysis expressly shows why this court should find such procedures unconstitutional.

Proposition of Law No. 2: A violation to the Sixth and Fourteenth Amendments to the Ohio Constitution occurs when the prosecution stacks evidence, not yet admitted into trial, before the jury on the prosecutor's table.

In this case, the prosecutor placed on his courtroom table before the jury an array of documents and evidence. The items stacked on the prosecutor's table were strong visuals indicative of guilt, so much so that Mr. Dingess' attorney made a motion in Court on the record to remove the items from counsel table. The objection was overruled. This decision by an Ohio trial court gives County Prosecutors, who already have so many trial advantages, additional power to deluge a criminal defendant with additional burdens to overcome.

Imagine walking into a courtroom and before any witnesses are called to the stand, observing a table of cocaine and crack cocaine and marijuana stacked up. Clearly, the first item any juror will naturally look at as they enter the courtroom will be the drugs. They won't even look at the judge first. They will look at the presentation of drugs. Their minds will then wonder what the defendant did and who caught him with the cocaine and crack cocaine and marijuana and how could he carry it all and so forth and so on. They will be so engrossed with the overwhelming array of drugs that they won't be able to fully concentrate on what a judge is even saying.

The appellate court cited the case of State v. Trimble, 122 Ohio St.3d 297, 2009-Ohio-2961 as being instructive. However, even in Trimble, where the prosecutor displayed firearms and ammunition in an unduly prejudicial manner, the Trial Court ultimately instructed the prosecution to put away the items in view of the jury.

Studies show that over ninety per cent of all communication is non-verbal. This being said, the incriminating presentation of tremendous contraband placed on the prosecutors table inside the courtroom before its admission into the record serves to inflame the passions of the jury in such a way that prevents a defendant from receiving a fair trial. As such, these portrayals should be prohibited and rendered unconstitutional.

The Court of Appeals held the police were not constitutionally required to test these items. But this is not the point. The point is that once the police do submit items to be tested, those items should all be tested. The manner in which the items were tested here was specifically targeted with George Dingess in mind. This one case involving Mr. Dingess shows the fallacy of only testing for the purpose of one suspect. If the examiner tests all items submitted and other individual(s) DNA is revealed, the fairness in the system is revealed. If the examiner does not test all items submitted and one suspect in essence targeted, the unfairness in the system is illuminated. For the foregoing reasons, the BCI examiner should test all items submitted and not have the discretion to personally pick and choose.

CONCLUSION

Appellant George Dingess' case will provide this Court with an opportunity to address key legal points that affect the entire state of Ohio with respect to public testing procedures and the admissibility of evidence resulting from those testing procedure. In addition, this Court can address the fairness of jury trials for criminal defendants with respect to presentations of evidence in every courtroom in this state.

For all of the foregoing reasons, Counsel for Appellant George Dingess respectfully requests this Court to accept his case on appeal.

Respectfully submitted,

CLARK LAW OFFICE



Toki M. Clark (#0041493)
233 South High Street, 3rd Floor
Columbus, Ohio 43215
(614) 224-2125

Counsel for Appellant
George Dingess

CERTIFICATE OF SERVICE

Counsel for Appellant George Dingess hereby certifies that a true and accurate copy of the foregoing Memorandum in Support of Jurisdiction was hand-delivered to Seth Gilbert, Esq., Office of the Prosecuting Attorney, 369 South High Street, 14th Floor, Columbus, Ohio 43215, this 16th day of December, 2011.



TOKI M. CLARK

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

FILED
COURT OF APPEALS
2011 NOV -3 PM 12:35
CLERK OF COURTS

State of Ohio, :

Plaintiff-Appellee, :

v. :

George L. Dingess, Sr., :

Defendant-Appellant. :

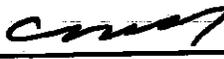
No. 10AP-848
(C.P.C. No. 07CR-08-6217)

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on November 3, 2011, appellant's assignments of error are overruled and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

CONNOR, J., FRENCH and TYACK, JJ.

By 
Judge John A. Connor

Judge Schneider
✓

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

2011 NOV -3 PM 12: 29
CLERK OF COURTS

State of Ohio, :
 :
 Plaintiff-Appellee, :
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 v. :
 :
 George L. Dingess, Sr., :
 :
 Defendant-Appellant. :

No. 10AP-848
(C.P.C. No. 07CR-08-8217)
(REGULAR CALENDAR)

D E C I S I O N

Rendered on November 3, 2011

Ron O'Brien, Prosecuting Attorney, and Seth L. Gilbert, for appellee.

Clark Law Office, and Toki Michelle Clark, for appellant.

APPEAL from the Franklin County Court of Common Pleas

CONNOR, J.

{¶1} Defendant-appellant, George L. Dingess, Sr. ("appellant"), appeals from a judgment entry of conviction entered following a jury trial in the Franklin County Court of Common Pleas in which he was convicted of three counts of possession of drugs. For the reasons that follow, we affirm that judgment.

{¶2} On August 27, 2007, appellant was indicted for three drug offenses: possession of crack cocaine as a felony of the first degree, possession of powder cocaine as a felony of the fourth degree, and possession of marijuana as a felony of the third degree. On July 9, 2009, appellant filed a motion to suppress evidence obtained as a

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result of the issuance of a search warrant executed at 1946 Fountain View Court, Apartment C, in Franklin County, Ohio. The motion raised four challenges: (1) there was no probable cause to support the issuance of the search warrant; (2) the search exceeded the scope of the warrant; (3) the judge who authorized the search failed to make an independent evaluation as to probable cause; and (4) the executing officers failed to make a proper return of the items seized under the warrant.

{¶3} On December 9, 2009, a hearing was held on the motion to suppress. The State of Ohio ("the State") introduced the testimony of Whitehall Police Sergeant Dennis Allen, who had prepared the affidavit used to obtain the search warrant. In the affidavit, Sergeant Allen averred he had been advised by a confidential informant that an individual known as "Dog" was selling crack cocaine from 1946 Fountain View Court, Apartment C. "Dog" was identified as appellant. Based upon this information, Sergeant Allen set up surveillance on the apartment and subsequently observed a vehicle pull up to the area of the apartment and watched a black male exit the vehicle and enter the apartment. A short time later, that same male exited the apartment, followed by appellant. The two men conversed in the parking lot and then appellant re-entered the apartment and the black male returned to the vehicle, which then drove away.

{¶4} According to the affidavit, the police followed the vehicle to 4691 Janis Drive. The black male entered that residence and the vehicle again drove away. The vehicle was subsequently stopped by police and the two individuals inside the vehicle were arrested. Both of those individuals advised Sergeant Allen they had given the black male money to buy drugs and that they went to the Fountain View apartment to purchase crack cocaine. One of the individuals also informed Sergeant Allen that the crack cocaine

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found in the crack pipe recovered from one of the vehicle occupants had been purchased at the Fountain View apartment.

{¶5} At the hearing, Sergeant Allen testified he prepared the request for a search warrant based upon a tip he received from a confidential informant who indicated appellant was selling crack cocaine and marijuana out of his residence. The confidential informant showed the residence to Sergeant Allen. Sergeant Allen testified he set up surveillance on the apartment, and later witnessed what he believed to be a drug transaction when a black male, later identified by the street name of "Animal," exited a vehicle, entered the apartment, and then exited the residence a short time later with appellant. After a few minutes of conversation, "Animal" left in the vehicle.

{¶6} According to Sergeant Allen's testimony, the police followed the vehicle as it left the parking lot of the apartment complex. The vehicle drove to another location on Janis Drive where "Animal" exited the vehicle. Upon leaving that location, the vehicle was stopped by police, who then spoke with the occupants of the vehicle. The occupants were a white female and a white male, identified as Christine Ward ("Ward") and Glen Burney ("Burney"), respectively. Both of them reported they drove to the apartment to buy crack cocaine. As a result of this information, Sergeant Allen testified he went before Judge Green to request a search warrant. Sergeant Allen further testified all of the facts presented were stated in the search warrant affidavit and there was no other testimony provided upon which Judge Green could base his decision of whether or not to grant the search warrant request.

{¶7} Sergeant Allen further testified he obtained the search warrant and drove to the Fountain View Court apartment to assist in executing the search. Appellant was observed leaving the apartment in a vehicle and was subsequently stopped. When police

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entered the apartment, there was a female present who claimed to be a guest of appellant. The police seized narcotics from the apartment, as well as other items to be used to establish residency, since appellant claimed during the execution of the search warrant that he did not live at the apartment. Among the items seized were several toothbrushes and combs.

{18} At the end of the motion hearing, the trial court overruled appellant's motion to suppress. The trial court provided three reasons for doing so. First, the trial court determined the affidavit provided probable cause to search the apartment, based upon the information he received from the informant, combined with Sergeant Allen's own surveillance observations at the apartment. Second, the trial court determined appellant lacked standing to challenge the stop of the vehicle after it drove away from the Janis Drive residence. Third, as to the scope of the warrant, the trial court found the seizure of the toothbrushes was not an indiscriminate seizure because the establishment of residency was directly related to the drug charges, and thus, the seizure of the toothbrushes was within the scope of the warrant.

{19} Several months after the court's ruling denying the motion to suppress, the matter proceeded to a jury trial. At trial, Sergeant Allen testified he conducted surveillance on the Fountain View Court apartment prior to executing the search warrant. He observed appellant leave the apartment and drive away, so he instructed another officer, John Earl, to conduct a traffic stop. Officer Earl stopped appellant's vehicle. A search of appellant produced four bags of marijuana, which were recovered from his back pocket. Police also located \$217 on appellant's person, as well as a key later discovered to open the front door to the Fountain View Court apartment. After he was arrested,

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appellant was advised the police had a search warrant for the Fountain View Court apartment. However, appellant stated it was not his apartment.

{¶10} Officers knocked at the apartment door to execute the search warrant and were greeted by a woman identified as Sharise Clinton. Upon searching the apartment, the officers discovered: four baggies of crack cocaine in the kitchen freezer; one baggie of crack cocaine along with a loose piece of crack in a kitchen drawer; one baggie of powder cocaine in a kitchen drawer; 14 baggies and one large baggie of marijuana in the refrigerator; and some loose marijuana in the bedroom closet and on the kitchen counter. In total, the police recovered 99.7 grams of crack cocaine, 9.7 grams of powder cocaine, and over 1,202 grams of marijuana. The police also recovered walkie-talkies, a scale, and \$1,295 in cash in a jacket located in a bedroom closet.

{¶11} In addition, the police collected various receipts, a work order, utility bills, and a paystub from the apartment, all of which were in the name of Natasha Felts. However, the apartment did not contain other indicia to suggest that a female lived in the apartment, as all of the clothing in the apartment were men's clothing.

{¶12} Following appellant's arrest, Sergeant Allen transported appellant to a jail cell at the Whitehall police department. As Sergeant Allen escorted appellant past one of the cells, appellant looked toward the cell and stated, "I see somebody ratted me out." (Tr. 89.) Sergeant Allen acknowledged that he did not reference this statement in his U10-100 report, which he testified was prepared for the purposes of relaying information about appellant and the alleged offense to the county jail and for arraignment. However, Sergeant Allen testified the statement was documented in his investigative summary included in the grand jury packet.

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{¶13} Testimony and evidence produced at trial revealed that Bureau of Motor Vehicle ("BMV") records showed defendant listed at a Reynoldsburg address and the vehicle-impound form executed upon appellant's arrest listed a Canal Winchester address. Because appellant had denied living at the Fountain View Court apartment, Sergeant Allen testified the police also collected three toothbrushes and two combs from the bathroom of the apartment in order to establish residency. A DNA swab was also obtained from appellant. All of those items were sent to the Bureau of Criminal Identification and Investigation ("BCI&I") for testing and comparison.

{¶14} Forensic scientist Emily Draper testified she tested two of the toothbrushes seized from the Fountain View Court apartment and concluded appellant could not be excluded as the source of the DNA found on those two toothbrushes. Pursuant to BCI&I policy, Ms. Draper would not testify that appellant was a definitive match for the DNA extracted from one of the two toothbrushes tested. However, Ms. Draper testified the expected frequency of occurrence of that DNA profile occurs in 1 in 847.5 quintillion unrelated individuals. She further testified no other DNA was found on the two toothbrushes tested. In addition, Ms. Draper acknowledged she did not test the third toothbrush or the two combs that were submitted once she concluded appellant could not be excluded as the source of the DNA on two of the toothbrushes.

{¶15} Additionally, Sergeant Allen testified there was no fingerprint evidence to link appellant to any of the items recovered from the apartment.

{¶16} Appellant was found guilty of all three drug offenses. The trial court imposed a total prison sentence of six years, to run consecutively to a separate, unrelated federal prison sentence.

{¶17} Appellant now files this timely appeal and raises five assignments of error for our review:

ASSIGNMENT OF ERROR NO. 1:

A TRIAL COURT ERRS WHERE IT DENIES A MOTION TO SUPPRESS EVIDENCE IN A CASE WHERE THE SUPPORTING AFFIDAVIT LACKS SUFFICIENT FACTS TO ESTABLISH PROBABLE CAUSE.

ASSIGNMENT OF ERROR NO. 2:

A TRIAL COURT VIOLATES A DEFENDANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN IT ALLOWS THE GOVERNMENT TO STACK EVIDENCE YET TO BE ENTERED IN THE RECORD ON A TABLE FOR THE JURY PANEL TO SEE PRIOR TO OPENING STATEMENTS EVEN BEING MADE.

ASSIGNMENT OF ERROR NO. 3:

THE CONVICTION IN THIS CASE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. 4:

A CRIMINAL DEFENDANT IS DENIED HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL WHEN A FORENSIC EXAMINER ADMITTEDLY CONDUCTS ANALYSIS IN A MANNER THAT IS FOCUSED EXCLUSIVELY ON THE ACCUSED.

ASSIGNMENT OF ERROR NO. 5:

THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT'S MOTION FOR ACQUITTAL.

{¶18} In his first assignment of error, appellant claims the supporting affidavit attached to the search warrant lacked sufficient facts to establish probable cause, and thus the trial court erred when it denied his motion to suppress evidence because the warrant did not authorize the seizing of the toothbrushes from the apartment.

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{¶19} Appellate review of a motion to suppress presents a mixed question of law and fact. When considering a motion to suppress, the trial court assumes the role of trier of fact, and therefore is in the best position to resolve factual questions and evaluate the credibility of witnesses. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, ¶8. As a result, an appellate court must accept the trial court's findings of fact if they are supported by competent, credible evidence. *Id.* Then, the appellate court must independently determine whether the facts satisfy the applicable legal standard, pursuant to a de novo review and without giving deference to the conclusion of the trial court. *Id.*

{¶20} Appellant challenges the trial court's ruling on the motion to suppress based on three issues. First, appellant contends the search warrant affidavit lacked sufficient probable cause to support the search of the apartment. Appellant attacks the validity of the warrant based upon his assertion that Sergeant Allen's testimony at the motion hearing was contradictory to the averments in the affidavit. For example, appellant alleges the testimony and the affidavit differ as to whether or not Sergeant Allen ever witnessed an actual drug transaction involving appellant and as to whether the allegations that appellant was selling drugs out of his home were corroborated. Appellant submits Sergeant Allen had no real basis for believing there were drugs in the apartment and claims Sergeant Allen was "not really that credible." (Appellant's brief, at 7.)

{¶21} Next, appellant claims the trial court erred in determining appellant lacked standing to challenge the traffic stop on the vehicle in which "Animal," Ward, and Burney were riding in after the vehicle left the Fountain View Court apartment. Appellant contends he should have standing to challenge the stop because he accompanied the driver of the vehicle at one point after the two of them exited the apartment.

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{¶22} Finally, appellant challenges the scope of the warrant and the seizure of the toothbrushes and combs, arguing that the purpose of the warrant was to search for drugs. Appellant asserts the warrant does not permit the seizure of these additional items, as they were not listed in the warrant and a second warrant was not obtained prior to their seizure. Appellant submits the toothbrushes and combs should have been suppressed.

{¶23} Using the deferential standard established by the Supreme Court of Ohio in *State v. George* (1989), 45 Ohio St.3d 325, we believe the affidavit attached to the search warrant was sufficient to establish probable cause:

In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate, neither a trial court nor an appellate court should substitute its judgment for that of the magistrate by conducting a de novo determination as to whether the affidavit contains sufficient probable cause upon which that court would issue the search warrant. Rather, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant.

Id. at paragraph two of the syllabus, following *Illinois v. Gates* (1983), 462 U.S. 213, 103 S.Ct. 2317.

{¶24} In the affidavit, Sergeant Allen swore a confidential informant had recently advised him the informant had purchased crack cocaine from the apartment in question. "[P]ersonal observation by an informant is due greater reliability than a secondhand description." *State v. Coger*, 10th Dist. No. 10AP-320, 2011-Ohio-54, ¶16, citing to *Gates*, 462 U.S. at 234, 103 S.Ct. at 2330. In addition, Sergeant Allen's personal surveillance on the apartment corroborated the informant's tip. He personally observed

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"Animal" exit the car, enter the apartment, and return to the parking lot a short time later with appellant before getting back into the car and leaving the area. When the vehicle was eventually stopped, the two remaining occupants admitted that a man had purchased crack cocaine for them at the apartment and crack cocaine was found in the car.

{¶25} While appellant claims Sergeant Allen testified he did not corroborate the informant's tip, this claim is simply wrong. Sergeant Allen testified the affidavit did not contain a statement in which he specifically used express words stating he had corroborated the tip. Nevertheless, Sergeant Allen testified that such an express statement was unnecessary because the affidavit described the corroboration. Regardless, Sergeant Allen's testimony about what the affidavit says is irrelevant, since the affidavit speaks for itself. Furthermore, the admissions by Burney and Ward stating a man had purchased crack cocaine for them at the apartment, along with Sergeant Allen's surveillance observations and the presence of crack cocaine in the stopped vehicle, certainly corroborated the informant's tip. The fact that Sergeant Allen did not witness an actual hand-to-hand physical exchange of drugs does not weaken the municipal court judge's probable cause determination.

{¶26} Furthermore, as indicated above, the trial court is without authority to make its own determination as to probable cause based upon the testimony presented at the hearing. Instead, the trial court's role was to determine whether the municipal court judge had a "substantial basis" for concluding that probable cause existed and to afford great deference to its determination and resolve doubtful or marginal cases in favor of upholding the warrant. George at paragraph two of the syllabus. We believe the trial court properly executed its role.

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{¶27} Next, we address appellant's objection to the trial court's finding that appellant lacked standing to challenge the stop of the vehicle after it left the Janis Drive residence.

{¶28} We need not address whether or not the stop was unconstitutional as to Burney and Ward, the two occupants of the vehicle at the time it was stopped, because even if the stop was unconstitutional, appellant cannot argue *his* rights were violated. Significantly, appellant was not in the car at the time of the stop, and thus he was not "seized." As a result, appellant cannot argue that his Fourth Amendment rights were violated as a result of the stop. Fourth Amendment rights are personal rights which cannot be asserted vicariously. *Rakas v. Illinois* (1978), 439 U.S. 128, 133-34, 99 S.Ct. 421, 425. "A person who is aggrieved by an illegal search and seizure only through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed." *Id.*, 439 U.S. at 134, 99 S.Ct. at 425, citing *Alderman v. United States* (1969), 394 U.S. 165, 174, 89 S.Ct. 981, 966-67. See also *State v. Spencer* (May 18, 1990), 2d Dist. No. 11740 and *State v. Gaines* (May 29, 1997), 10th Dist. No. 96APA09-1230. Thus, the stop and the statements made by Burney and Ward could not constitute a violation of appellant's rights, even if appellant was the target of the search. See *Rakas*, 439 U.S. at 135-36, 99 S.Ct. at 426.

{¶29} Finally, we address the issue of whether the seizure of the toothbrushes and combs from the bathroom of the Fountain View Court apartment exceeded the scope of the warrant. We find that it did not.

{¶30} In addressing appellant's challenge on this issue, the trial court found the seizure of the toothbrushes and combs was "not an indiscriminate seizure." (Tr. 50.) The

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trial court further determined seizing the toothbrush for the purpose of obtaining DNA in order to determine whether or not appellant lived at the apartment was directly related to the drug offenses, reasoning that if the suspect did not live at the apartment, the argument could easily be made that he had nothing to do with the drugs found in the apartment. Thus, the trial court found the seizure of the toothbrushes and combs was related to the overall issue of drug trafficking (or drug possession) and thus such a seizure was within the scope of the warrant. We agree with this reasoning.

{¶31} The warrant at issue authorized a search of the apartment located at 1946 Fountain View Court, Apartment C. It specifically authorized a search for "evidence of the commission of the criminal offenses of Trafficking in Drugs, 2925.03 R.C., Possession of Drugs, 2925.11 R.C., Drug Paraphernalia Offenses, 2925.14 R.C., Crack cocaine, or any other controlled substance or drug of abuse, as defined in §3719.41 R.C." (R. 57, Motion to Suppress Evidence, Defendant's exhibit A.) Notably, Crim.R. 41 authorizes the issuance of a warrant to search and seize "evidence of the commission of a criminal offense." The search warrant further authorized the seizure of "[p]apers, documents, or utility records indicating ownership of 1946 #C Fountain View Ct." (R. 57, Motion to Suppress Evidence, Defendant's exhibit A.)

{¶32} In considering whether a warrant is unconstitutionally overbroad, reviewing courts must conduct a de novo review. *State v. Enyart*, 10th Dist. No. 08AP-184, 2010-Ohio-5623, ¶38, citing *State v. Gritten*, 11th Dist. No. 2004-P-0066, 2005-Ohio-2082, ¶11, citing *United States v. Ford* (C.A.6, 1999), 184 F.3d 566, 575. The degree of specificity required in a search warrant varies with the nature of the items to be seized. *Enyart* at ¶38, citing *Gritten* at ¶13, and *State v. Benner* (1988), 40 Ohio St.3d 301, 307. A broad description of items to be searched and seized is "valid if it 'is as specific as

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circumstances and nature of the activity under investigation permit' and enables the searchers to identify what they are authorized to seize." *State v. Hale*, 2d Dist. No. 23582, 2010-Ohio-2389, ¶71, quoting *State v. Armstead*, 9th Dist. No. 06CA0050-M, 2007-Ohio-1898, ¶10.

{¶33} Furthermore, "[t]o search for evidence of a crime there must 'be a nexus * * * between the item to be seized and criminal behavior' as well as 'cause to believe that the evidence sought will aid in a particular apprehension or conviction.'" *Enyart* at ¶32, quoting *Warden, Md. Penitentiary v. Hayden* (1967), 387 U.S. 294, 307, 87 S.Ct. 1642, 1650. While the language in the search warrant at issue is somewhat broad, it is not overly broad. Here, the warrant limited the search for evidence to particular offenses (i.e., drug-related offenses).

{¶34} In addition, it was essential to establish who resided in the apartment as an element of the offense since this, in turn, would show who possessed the drugs. It is unreasonable to expect the warrant to describe with more precision all of the items which could be used to establish residency, since it would be extremely difficult to predict in advance all of the items which could be relevant to establishing who lived in the apartment. The toothbrushes and combs were clearly obvious sources of DNA, which would show who lived in the apartment and, thus, who possessed the drugs. As such, the seizure of the toothbrushes and combs did not exceed the scope of the warrant.

{¶35} For the reasons set forth above, we overrule appellant's first assignment of error.

{¶36} In his second assignment of error, appellant submits the trial court violated his constitutional right to a fair trial by allowing the State to store its evidence on counsel

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table, within the view of the jurors, prior to opening statements. Appellant contends this action unlawfully encroached upon his presumption of innocence. We disagree.

{¶37} "Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" *Holbrook v. Flynn* (1986), 475 U.S. 560, 567, 106 S.Ct. 1340, 1345, quoting *Taylor v. Kentucky* (1978), 436 U.S. 478, 485, 98 S.Ct. 1930, 1934-35. However, this does not mean that every practice which singles out the accused from others in the courtroom must be struck down. *Id.*, 475 U.S. at 567, 106 S.Ct. 1345. Courts could never hope to eliminate from trial procedures "every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct." *Id.*

{¶38} In order to guarantee due process, "our legal system has instead placed primary reliance on the adversary system and the presumption of innocence. When defense counsel vigorously represents his client's interests and the trial judge "568 assiduously works to impress jurors with the need to presume the defendant's innocence, we have trusted that a fair result can be obtained." *Id.*

{¶39} Although the circumstances are somewhat different, we find the case of *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, to be instructive to our analysis here. In *Trimble*, the defendant argued the courtroom display of firearms and ammunition, which were not used in the crimes at issue but which were recovered from the defendant's home, was unduly prejudicial. During the testimony of one of the witnesses, the defense objected to the display of the firearms as they were being

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identified and introduced into evidence. The trial court overruled the objection. After their admission into evidence, the defense renewed its objection to the display. The trial court again overruled the objection but instructed the prosecution to put the items away, and the prosecution complied. On appeal, the Supreme Court of Ohio determined there was nothing in the record to demonstrate that the evidence prejudiced the jury by inflaming its passions.

{¶40} Here, given that the objection occurred prior to opening statements, and thus the items had not yet been admitted into evidence, the circumstances are somewhat different. Nevertheless, there is nothing in the record to suggest that the items on counsel table were anything other than items ultimately admitted into evidence or items which were the subject of trial testimony. In fact, trial counsel's objection to the items on the table referred to the items as "evidence," and there is nothing in the record to indicate any of the items on counsel table were prejudicial, non-evidentiary items. Appellant has failed to demonstrate how this arrangement of evidence prejudiced the jury by inflaming its passions and/or deprived him of a fair trial.

{¶41} Furthermore, the jury was instructed that appellant must be presumed innocent unless his guilt is established beyond a reasonable doubt through the production of evidence. "Evidence" was defined as "all the testimony received from the witnesses, facts or stipulations agreed to by counsel, and the exhibits admitted during the trial." (Tr. 190.) Thus, the jury was well aware that it could not determine appellant's guilt using anything other than what was properly admitted into evidence.

{¶42} Accordingly, appellant's second assignment of error is overruled.

{¶43} In his fourth assignment of error, which we address out-of-order, appellant asserts he was deprived of his right to a fair trial as a result of the forensic scientist's

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failure to test all five of the items seized from the bathroom of the apartment and submitted to BCI&I. Appellant contends this analysis was uniquely designed to incriminate him as the only possible offender.

{¶44} Appellant did not raise this issue in the trial court. As a result, he has forfeited all but plain error. Therefore, we review this assignment of error under a plain error analysis. Plain error is limited to the exceptional case in which the error, which was not objected to at the trial court, "rises to the level of challenging the legitimacy of the underlying judicial process itself." *State v. Santiago*, 10th Dist. No. 02AP-1094, 2003-Ohio-2877, ¶11, quoting *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 122, 1997-Ohio-401.

{¶45} We find no plain error here. In the instant case, appellant does not allege that the State destroyed or failed to preserve evidence; rather, appellant claims due process required BCI&I to analyze all five items. However, "[t]he right to due process is not violated when investigators fail to use a particular investigatory tool." *State v. Martin*, 10th Dist. No. 06AP-301, 2007-Ohio-232, ¶15, citing *Arizona v. Youngblood* (1988), 488 U.S. 51, 109 S.Ct. 333. See also *City of Athens v. Gilliland*, 4th Dist. No. 02CA4, 2002-Ohio-4347, ¶5 (there is a difference between failing to create evidence and destroying it; the due process clause is not violated when police fail to utilize a particular investigative tool; sloppy police work does not violate a defendant's due process rights).

{¶46} Counsel for appellant was free to argue (and in fact did argue) that testing the third toothbrush and two combs could have produced exculpatory evidence, but the police were not constitutionally required to test these items. Furthermore, the record supports the position that these items were and still are available for DNA testing, but appellant has only speculated that testing these items would have produced evidence in appellant's favor.

{¶47} Even if the State had failed to preserve the third toothbrush and two combs for DNA testing, appellant cannot show bad faith by the police, as the forensic scientist testified that once she determined appellant could not be excluded as a contributor of the DNA on two of the tested toothbrushes, she did not see any reason to test the other items, particularly given the backlog at BCI&I. "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Youngblood*, 488 U.S. at 56, 109 S.Ct. at 336. When evidence is only potentially exculpatory, its destruction does not constitute a due process violation if the police act in good faith and the evidence is handled in accordance with normal practices. *State v. Rains* (1999), 135 Ohio App.3d 547, 553. See also *State v. Lewis* (1990), 70 Ohio App.3d 624, 634 ("the suppression or failure to preserve potentially useful evidence violates constitutional due process only upon a showing of bad faith").

{¶48} Based upon the foregoing, we overrule appellant's fourth assignment of error.

{¶49} Next, we shall address appellant's fifth and third assignments of error, which are interrelated. In his fifth assignment of error, appellant argues the trial court erred in denying his motion for acquittal. In his third assignment of error, appellant contends his convictions are against the manifest weight of the evidence.

{¶50} A Crim.R. 29 motion for acquittal challenges the legal sufficiency of the evidence and whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. "A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient

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evidence." *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶37. Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict. *Thompkins* at 386. We examine the evidence in the light most favorable to the state and conclude whether any rational trier of fact could have found that the state proved, beyond a reasonable doubt, all of the essential elements of the crime. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶78; *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396.

{¶51} In determining whether a conviction is based on sufficient evidence, an appellate court does not assess whether the evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. See *Jenks*, paragraph two of the syllabus; *Thompkins* at 390 (Cook, J., concurring); *Yarbrough* at ¶79 (noting that courts do not evaluate witness credibility when reviewing a sufficiency of the evidence claim). We will not disturb the verdict unless we determine that reasonable minds could not arrive at the conclusion reached by the trier of fact. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4; *Jenks* at 273. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386.

{¶52} While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief. *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, at ¶25, citing *Thompkins* at 386. Under the manifest weight of the evidence standard, a reviewing court must ask the following question: whose evidence is more persuasive - the state's or the defendant's? *Id.* at ¶25. Although there may be legally sufficient evidence to support a judgment, it

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may nevertheless be against the manifest weight of the evidence. *Thompkins* at 387; See, also *State v. Robinson* (1955), 162 Ohio St. 486 (although there is sufficient evidence to sustain a guilty verdict, a court of appeals has the authority to determine that such a verdict is against the weight of the evidence); *State v. Johnson*, 88 Ohio St.3d 95, 2000-Ohio-276.

{¶53} "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Wilson* at ¶25, quoting *Thompkins* at 387. In determining whether a conviction is against the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving any conflicts in the evidence, the jury clearly lost its way and thereby created such a manifest miscarriage of justice that the conviction must be reversed and a new trial must be ordered. *Thompkins* at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶54} A conviction should be reversed on manifest weight grounds only in the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " *Thompkins* at 387, quoting *Martin* at 175. Moreover, " 'it is inappropriate for a reviewing court to interfere with factual findings of the trier of fact * * * unless the reviewing court finds that a reasonable juror could not find the testimony of the witness to be credible.' " *State v. Brown*, 10th Dist. No. 02AP-11, 2002-Ohio-5345, ¶10, quoting *State v. Long* (Feb. 6, 1997), 10th Dist. No. 96APA04-511.

{¶55} The essential elements of the crime of possession of drugs are "[n]o person shall knowingly obtain, possess, or use a controlled substance." R.C. 2925.11. In the

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case subjudice, appellant argues he did not possess the drugs because he did not live at or rent the Fountain View Court apartment; instead, he asserts he merely visited the apartment. Appellant submits there is overwhelming evidence which establishes that another person other than appellant lived at the Fountain View Court apartment. In addition, appellant contends BCI&I's failure to test all five items submitted resulted in a biased investigation. He further points to the lack of fingerprint evidence linking him to the drugs. As a result, appellant argues the State failed to establish that he was the person in possession of the drugs.

{¶56} We acknowledge that evidence was presented at trial to attempt to support the statement uttered by appellant upon his arrest in which he claimed he did not live at the Fountain View Court apartment. For example, the BMV records and the vehicle impound form provided two different addresses for appellant, neither of which were the Fountain View Court address. In addition, appellant's name was not on the papers recovered from inside the apartment.

{¶57} Nevertheless, the State presented its own evidence to establish that appellant did not simply "visit" the apartment, but in fact lived at the apartment and possessed the drugs, and the jury could have reasonably believed this evidence. Appellant was observed leaving the apartment on more than one occasion. Appellant's DNA was extracted from two toothbrushes seized from the apartment. A key to the front door of the apartment was recovered from appellant following his arrest. Four bags of marijuana were also recovered from his person, which the jury could have considered as circumstantial evidence demonstrating that the drugs in the apartment that he had just left were indeed his drugs. Furthermore, appellant essentially made a confession at the police station when he exclaimed "I see somebody ratted me out."

{¶58} Admittedly, the apartment may have been rented in the name of Natasha Felts (although the record does not contain an actual copy of the lease agreement) and papers containing her name were seized from the apartment. However, despite this, the apartment only contained men's clothing and did not contain any other indicia to suggest that a female lived at the apartment.

{¶59} Moreover, the jury could have reasonably considered the forensic examiner's decision not to conduct further DNA testing on the remaining items to be a sound decision, once it was established that appellant's DNA was contained on two of the toothbrushes recovered from the apartment. Additionally, the jury also could have given little weight to the fact that there was no fingerprint evidence to link appellant to the drugs.

{¶60} In viewing the evidence in a light most favorable to the State, we find that a rationale trier of fact could have concluded that appellant constructively possessed the drugs recovered from the Fountain View Court apartment. See *State v. Bland*, 10th Dist. No. 10AP-327, 2010-Ohio-5874, ¶¶13-14 (constructive possession exists when a person knowingly exercises dominion or control over an object, even though it may not be within the person's immediate physical possession; circumstantial evidence alone may be sufficient to support a finding of constructive possession, based upon factors such as the surrounding facts and circumstances and the defendant's actions).

{¶61} Furthermore, we cannot say, after reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, as well as resolving any conflicts in the evidence, that the jury clearly lost its way and created such a manifest miscarriage of justice that the convictions must be reversed.

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{¶62} For all of these reasons, we reject appellant's challenges and find his convictions are supported by sufficient evidence and are not against the manifest weight of the evidence. Therefore, we overrule appellant's fifth and third assignments of error.

{¶63} In conclusion, we overrule appellant's first, second, third, fourth, and fifth assignments of error. The judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

FRENCH and TYACK, JJ., concur.
