

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
PORTAGE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	
- vs -	:	CASE NO. 2009-P-0053
JIMMIE LEE SANDERS,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2002 CR 0198.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosectuor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Richard E. Hackerd, 231 South Chestnut Street, Ravenna, OH 44266 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, Jimmy Lee Sanders, appeals the judgment of the Portage County Court of Common Pleas, resentencing Sanders and merging his convictions for a total prison term of nine years for Possession of Crack Cocaine and Trafficking in Crack Cocaine. For the following reasons, we affirm the decision of the trial court.

{¶2} On June 6, 2002, the Portage County Grand Jury indicted Sanders for Possession of Cocaine, a felony of the first degree in violation of R.C. 2925.11(A) and (C)(4)(f); Trafficking in Cocaine, a felony of the first degree in violation of R.C. 2925.03(A)(2) and (C)(4)(g); Failure to Comply with Order or Signal of Police Officer, a felony of the third degree in violation of R.C. 2921.331(B) and (C)(3); and Possessing Criminal Tools, a felony of the fifth degree in violation of R.C. 2923.24(A) and (C).

{¶3} Sanders subsequently filed a Motion to Dismiss, seeking to dismiss the Failure to Comply count of the indictment. Sanders argued that he had previously pled guilty, in Kent Municipal Court, to Reckless Operation, “a crime arising out of the same transactions and occurrences” and a “lesser included offense” as the Failure to Comply count. The State then filed an Amended Indictment, now charging Sanders with fourth degree Failure to Comply, in violation of R.C. 2921.331(B) and (C)(4), rather than third degree Failure to Comply as in the original indictment.

{¶4} On October 28, 2002, Sanders filed a Motion to Dismiss the Criminal Tools count, pursuant to Crim.R. 12 on the grounds that a specific misdemeanor statute, R.C. 2925.14 (Possession of Drug Paraphernalia), covered the same conduct alleged in that count of the indictment.

{¶5} The trial court granted Sanders’ Motion to Dismiss the Failure to Comply count and accepted the State’s Amended Indictment.

{¶6} The matter proceeded to a jury trial where the following testimony provided the following¹:

{¶7} Officer Christopher J. Adkins of the Brimfield Police Department testified that, at about 3:25 a.m., on June 4, 2002, he was driving northbound on Mogadore

1. For additional facts, see *State v. Sanders*, 11th Dist. No. 2007-P-0072, 2008-Ohio-6771.

Road when he passed a red Ford Explorer travelling southbound without tail lights. As Adkins passed the Explorer, it accelerated “very rapidly.” Adkins turned his cruiser around in a driveway, notified dispatch, and activated his overhead lights and siren. The Explorer hit a curve and went off-road, hitting a pole and turning the vehicle over on its passenger side.

{¶8} Adkins stopped his cruiser and approached the Explorer, viewing four occupants in the vehicle. Adkins testified that Sanders was in the driver’s seat.

{¶9} Shortly after, Officer William Reese and Officer Paul F. Delisle arrived on the scene to assist. The officers had the occupants exit from the rear of the Explorer, one at a time. As Sanders exited the vehicle, his back was to the officers and he began to move toward the front of the vehicle along the roof. Sanders appeared to be fidgeting with his clothing and adjusting his pants. Sanders claimed his pants were falling down. Adkins testified that he could not see Sanders’ hands for a time because he was adjusting his pants.

{¶10} Adkins frisked Sanders and found a digital scale in the front pocket of his coat. Sanders told Adkins the scale was for his medicine. Adkins asked what medicine he was taking, but Sanders did not know the name and nothing was found at the crash location.

{¶11} After Adkins searched Sanders and discovered the scale, Reese noticed three plastic bags among the debris that were not there previously. A canine officer was summoned and his dog indicated the bags contained narcotics. Testing of the bags revealed that the first bag contained 3.72 grams of crack cocaine; the second bag contained 26.55 grams of crack cocaine; the third bag contained three smaller bags,

which, in turn, contained 28.51, 26.55, and 27.43 grams of crack cocaine. The total amount of crack cocaine recovered was 110.83 grams.

{¶12} All three officers testified that, of the occupants of the Explorer, only Sanders was in the vicinity where the bags were found.

{¶13} At the close of the State's case, Sanders motioned the court for a judgment of acquittal pursuant to Crim.R. 29, which the court subsequently denied.

{¶14} The jury found Sanders guilty of all counts including the additional finding that he was fleeing a police officer after the commission of a felony offense.

{¶15} The trial court sentenced Sanders to a nine year sentence for Possession of Crack Cocaine, a nine year sentence for Trafficking in Crack Cocaine, and a one year sentence for Failure to Comply. The court ordered the sentences for Possession and Trafficking in Crack Cocaine to be served concurrently with each other and consecutively with the sentence for Failure to Comply.

{¶16} Sanders subsequently appealed to this court, raising the following assignments of error:

{¶17} “[1.] Did the trial court err by sentencing Mr. Sanders for Failure to Comply, a third degree felony, when in fact the jury convicted Mr. Sanders of a different offense, Failure to Comply, a fourth degree felony.

{¶18} “[2.] The trial court committed reversible error by failing to address the defendant personally and/or ask whether Mr. Sanders wished to make a request for allocution.

{¶19} “[3.] Mr. Sanders’ counsel’s performance fell below an objective standard of reasonableness at sentencing as counsel failed to articulate the parties’ sentencing agreement, request a PSI or present any mitigating factors on the client’s behalf.

{¶20} “[4.] The State failed to present sufficient evidence to support Mr. Sanders’ convictions and/or the jury’s verdict against the manifest weight of the evidence.”

{¶21} This court found merit in the first and second assignments, and, consequently, vacated Sanders’ sentence and remanded the matter for resentencing. This court also found that “the trial court also erred by entering a judgment of conviction for third degree Failure to Comply *** [and] also erred by failing to merge the convictions for Possession and Trafficking in Crack Cocaine.” *State v. Sanders*, 11th Dist. No. 2007-P-0072, 2008-Ohio-6771, at ¶57.

{¶22} This court further instructed the trial court “to vacate its October 31, 2002 Order and Journal Entry and enter a new judgment, reflecting Sanders’ conviction for fourth degree Failure to Comply and merging the Possession and Trafficking counts.” *Id.* at ¶60. In all other respects, the judgment of the Portage County Court of Common Pleas was affirmed.

{¶23} On remand, the trial court vacated its October 31, 2002, Judgment Entry and entered a nunc pro tunc Judgment Entry dismissing count four of the indictment and merging the Possession of Crack Cocaine and Trafficking in Cocaine for sentencing purposes.

{¶24} Sanders was then resentenced to a mandatory term of nine years in prison for the Possession of Crack Cocaine and a consecutive term of six months for

the Failure to Comply offense, to be served concurrent to Sanders' federal prison sentence.

{¶25} On August 31, 2009, Sanders sought a delayed appeal from the trial court's April 30, 2009, re-sentencing order. Sanders' delayed appeal was subsequently granted.

{¶26} Sanders raises the following assignments of error:

{¶27} "[1.] It was error to fail to grant defendant's motion for acquittal made pursuant to Ohio Crim.R. 29.

{¶28} "[2.] The verdict was against the manifest weight of the evidence."

{¶29} Since both assignments of error raise challenges to the sufficiency and/or manifest weight of the evidence supporting Sanders' convictions, we will address them jointly.

{¶30} Sanders first argues that "the evidence is insufficient as a matter of law to sustain Sanders' convictions of possession, trafficking or failure to comply and reasonable minds could not find the prosecution proved every element of the crime beyond a reasonable doubt." He further argues that Sanders' "convictions are against the manifest weight of the evidence and are not supported by sufficient evidence."

{¶31} The State contends that "this Court has previous[ly] held that there was sufficient evidence to support the Appellant's convictions and those convictions were not against the manifest weight of the evidence *** [thus,] the Appellant is barred from again raising these arguments on appeal." We agree.

{¶32} Both a sufficiency and manifest weight arguments were raised in Sanders' original appeal. This court found that "there is sufficient evidence to support Sanders'

convictions and those convictions are not against the weight of the evidence.” *Sanders*, 2008-Ohio-6771, at ¶56.

{¶33} “The law of the case is a longstanding doctrine in Ohio jurisprudence. ‘(T)he doctrine provides that the decision of a reviewing court in a case remains the law of that case on the legal questions involved for all subsequent proceedings in the case at both the trial and the reviewing levels.’ *** The doctrine is necessary to ensure consistency of results in a case, to avoid endless litigation by settling the issues, and to preserve the structure of superior and inferior courts as designed by the Ohio Constitution.” *State v. Jackson*, 11th Dist. No. 2008-T-0024, 2010-Ohio-1270, at ¶24 (citations omitted); and ¶29 (“[s]ince this court has already addressed and rejected [appellant’s] alleged meritorious claims, these claims lack merit at this time under the law of the case doctrine”).

{¶34} Furthermore, [u]nder the doctrine of res judicata, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was raised or could have been raised by the defendant *** on an appeal from that judgment.” *State v. Saxon*, 109 Ohio St.3d 176, 2006-Ohio-1245, at ¶17 (citation omitted) (emphasis omitted).

{¶35} We recognize, however, a claim is not barred by operation of res judicata to the extent “a petitioner sets forth competent, relevant, and material evidence dehors the record.” *State v. Burgess*, 11th Dist. No. 2003-L-069, 2004-Ohio-4395, at ¶11. However, this is not the case in the instant situation.

{¶36} Sanders is barred by res judicata from raising the same arguments again in the present appeal.

{¶37} Sanders' first and second assignments of error are without merit.

{¶38} For the foregoing reasons, the Judgment Entry of the Portage County Court of Common Pleas, resentencing Sanders and merging his convictions for a total prison term of nine years for Possession of Crack Cocaine and Trafficking in Crack Cocaine, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

COLLEEN MARY O'TOOLE, J.,

concur.