[Cite as *State v. Alston*, 2015-Ohio-2723.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2014-L-083**
- vs -	:	
BYRON A. ALSTON, SR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 13 CR 000907.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Paul H. Hentemann, Northmark Office Building, 35000 Kaiser Court, Suite 305, Willoughby, OH 44094-4280 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from the sentencing judgment in a criminal action before the Lake County Court of Common Pleas. Following a two-day jury trial, appellant, Byron A. Alston, Sr., was found guilty of six fifth-degree felony drug offenses. Under his sole assignment of error, appellant maintains that two of the six charges should have been dismissed because the state failed to present sufficient evidence to satisfy the elements

of trafficking in drugs and possessing criminal tools. For the following reasons, we hold that the record supports appellant's convictions.

{¶2} In March 2013, two police officers with the Painesville Police Department were conducting surveillance of a residence at 805 North Avenue. This residence was a rental property that was occupied at that time by appellant, his wife, and their children.

{¶3} As part of the investigation, the two officers tried to conduct a controlled purchase of cocaine at the residence. While the attempted purchase was occurring, a second vehicle arrived at the home. Since the driver of the second vehicle had been in the home during the course of the attempted controlled purchase, the officers stopped the second vehicle after it drove from the general vicinity of the target residence. During the traffic stop, the driver admitted that he had cocaine in his possession. After talking to the officers about his situation, the driver agreed to become a confidential informant for the department. He became known as CI-242.

{¶4} Beginning in early April 2013, CI-242 made three controlled purchases of cocaine as part of the continuing investigation into the North Avenue residence. In each instance, one of the officers would have the home under surveillance during the early evening, when he would see an individual leave the home and drive away in the same car. The officer would then follow the car to 121 Barnes Court in Painesville, where CI-242 would be waiting in his vehicle. On all three occasions, CI-242 would purchase $50 worth of cocaine from the same person. At trial, CI-242 testified that appellant was the individual who sold him the cocaine on each occasion.

{¶5} After the third controlled purchase, the officers took the requisite steps to obtain a search warrant for the North Avenue residence. Appellant was not present at

the home when the warrant was executed; only appellant's wife, the children, and one other adult was there.

{¶6} One of the two investigating officers conducted the search of the home's master bedroom. According to this officer, the bedroom had a prefabricated closet which contained clothing for an adult male. On a shelf near the top of this closet, the officer found a small digital weighing scale which appeared to have some type of residue on its weighing plate. The bedroom also had a dresser beside the bed, by which the officer found a plastic sandwich baggie. This baggie was tied off at one end, torn open at the other end, and had a white residue inside. In addition, an empty box of plastic baggies was found in that bedroom.

{¶7} The second investigating officer searched a trashcan in the residence, and found the remnants of ten plastic sandwich baggies. Each of the baggies was missing the two bottom corners, which had been torn off from the remainder of the baggie.

{¶8} Based upon the controlled purchases and the evidence seized during the search of the residence, a six-count indictment was returned against appellant in early December 2013. Under each of the first three counts, he was charged with trafficking in cocaine under R.C. 2925.03(A)(1). These counts alleged that appellant sold cocaine to another person. Under the fourth count, appellant was again charged with trafficking in cocaine, but this time under R.C. 2925.03(A)(2). This count asserted that he knowingly prepared cocaine for distribution to others. Under the final two counts, he was charged with possession of cocaine and possessing criminal tools. The latter count was based upon the digital weighing scale that was found in the master bedroom.

{¶9} Appellant's jury trial was held in June 2014. In addition to presenting the

testimony of the investigating officers and CI-242, the state also called Douglas Rohde, the supervisor of the chemistry/toxicology section at the Lake County Crime Laboratory, to testify.

{¶10} Rohde testified that that he performed chemical tests on the digital weighing scale, the one plastic baggie found in the master bedroom, and the ten "corner-less" baggies found in the trashcan. As to the scales, Rohde stated that the weighing plate tested positive for both cocaine and marijuana residue. As to all of the plastic baggies, his tests established that each contained a residue of cocaine.

{¶11} After the jury found appellant guilty on all six counts, the trial court held a separate sentencing hearing. At the outset of that proceeding, the court merged counts five and six, possession of cocaine and possession of criminal tools, into count four, trafficking in cocaine under R.C 2925.03(A)(2). The court then imposed a nine-month sentence for each of the remaining four counts. Regarding the three trafficking counts under R.C. 2925.03(A)(1), the trial court ordered that the three nine-month terms were to be served concurrently, but that the separate nine-month term on count four was to be served consecutively. Therefore, appellant was sentenced to an aggregated term of eighteen months.

{¶12} In appealing his conviction, appellant asserts one assignment of error for our review:

{¶13} "Where a defendant is charged with preparing cocaine for distribution in violation of R.C. 2925.02(A)(2) and the only evidence to support such a charge is the testimony of a Painesville Police Officer who stated he saw a number of small plastic sandwich bags in the trash can, State's Exhibit 9, T.p. 36, together with a residue in a

plastic bag found at the Appellant's home, State's Exhibit 8, T.p. 34, as well as a digital scale, State's Exhibit 7, T.p. 24, 25, 31, with a residue of cocaine and marijuana, such evidence as a matter of law is insufficient to sustain a conviction."

{¶14} Under this assignment, appellant essentially contends that the trial court erred in denying his motion for judgment of acquittal in relation to the fourth count of the indictment, trafficking in cocaine under R.C. 2925.03(A)(2). Regarding the standard to be applied in reviewing the denial of a Crim.R. 29 motion, this court has noted:

{¶15} "In *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus, the Supreme Court of Ohio established the test for determining whether a Crim.R. 29 motion for acquittal is properly denied: '[p]ursuant to Crim.R. 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt.' 'Thus, when [a defendant] makes a Crim.R. 29 motion, he or she is challenging the sufficiency of the evidence introduced by the state.' *State v. Patrick*, 11th Dist. Nos. 2003-T-0166 and 2003-T-0167, 2004 Ohio 6688, at ¶18." *State v. Franklin*, 11th Dist. Geauga No. 2010-G-2979, 2012-Ohio-1267, ¶67.

{¶16} In turn, the standard for reviewing the sufficiency of the state's evidence in a criminal case is also well-established under Ohio law:

{¶17} "The Supreme Court of Ohio has clearly defined an appellate court's role in reviewing the sufficiency of evidence to support a criminal conviction. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus (1991). In *Jenks*, the Court held that:

{¶18} "'An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' *Id*., citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979)." *State v. Wooten*, 11th Dist. Ashtabula No. 2012-A-0021, 2013-Ohio-1841, ¶30-31.

{¶19} In this case, appellant's challenge to the sufficiency of the state's evidence focuses upon his conviction for trafficking in cocaine under R.C. 2925.03(A)(2). That particular provision does not deal with the sale of a controlled substance, but instead bans its preparation for distribution:

{¶20} "(A) No person shall knowingly do any of the following:

{¶21} "* * *

{¶22} "(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person."

{¶23} R.C. 2925.03(A)(2) sets forth four different ways in which a defendant can be convicted of trafficking in drugs, i.e., the state needs "to prove that he knowingly did one of the following: (1) prepared the [drugs] for shipment; (2) shipped, transported, or delivered the [drugs]; (3) prepared the [drugs] for distribution; or (4) distributed the

[drugs]." *State v. Serina*, 8th Dist. Cuyahoga No. 96989, 2012-Ohio-2193, ¶18. In this case, the state's theory was that appellant prepared the cocaine for distribution to other individuals.

{¶24} The items obtained during the search of the 805 North Avenue home, and subsequently introduced into evidence at trial, constitute sufficient evidence demonstrating that cocaine had been prepared for distribution inside the residence. First, as noted above, the digital weighing scale was found in the home's master bedroom. Tests performed on the scale's weighing plate indicated a residue of cocaine on the plate. Furthermore, the officer who found the scale testified that this item is often used in the trafficking of drugs: "[A] scale is often used to weigh out the narcotics or items that you're selling to a weight." In other words, a mere user of cocaine would have no need for a scale, while a distributer of cocaine would need a scale to ensure that he was selling an amount of the drug that was consistent with the amount of money received.

{¶25} Second, the state introduced into evidence the remnants of the ten plastic sandwich baggies that were found in a trashcan. The officer who found the ten baggies testified the bottom corners of each baggie was torn off, and that the remainder of each baggie was discarded. As to the significance of the condition of the baggies, the officer testified:

{¶26} "Because in drug trafficking a person will take a bulk amount and will cut it up in smaller amounts to serve to people as they request it. You can have a large amount of crack cocaine, you can cut it and put smaller rocks in the corner of these bags, twist them up and rip them off and the rest of the bag is useless, you can't use it

for anything. Compared to a user who will have a bunch of empty baggy corners around because you've used it, you've already got the product, you take it out of that package and you consume the product. He did not prepare it, he's getting it delivered to him, and it's a consumed package."

{¶27} The state also presented evidence showing that there was cocaine residue in each of the torn baggies. Thus, when considered together, the scales and the baggie remnants establish that cocaine was being weighed on the scale and then placed into the sandwich baggies in a method that was typically used to distribute the drug to other persons. According to the testimony of the two investigating officers, the presence of these items in the home was only consistent with the preparation of cocaine to others, not its mere usage.

{¶28} In contesting the sufficiency of the state's evidence, appellant first notes that the remnants of the plastic sandwich baggies only contained a residue of cocaine. Although the exact nature of his argument is not clear, appellant appears to be arguing that the presence of a mere residue is not logically consistent with the proposition that the baggies were being used to distribute the drug. However, pursuant to the testimony of the officers who found the ten baggies, when the person preparing the cocaine puts the cocaine in the baggie after weighing it, he would allow it to fall to one of the bottom corners. That bottom corner would then be torn off with the cocaine still in it. Therefore, since only a bottom corner is used as the package for the cocaine, it is logical that the remainder of the baggie, i.e., the remnant that is thrown away, only has a residue of the drug.

{¶29} Second, appellant submits that the evidence was not sufficient to convict

him under R.C. 2925.03(A)(2) because there was nothing to directly connect him to the digital weighing scale. Building upon this, he further contends that the evidence did not support his conviction for possessing criminal tools.

{¶30} As noted above, the officer who found the scale testified that the item was located in the home's master bedroom. The officer further testified that the scale was in a prefabricated closet that contained male clothing. Given that appellant and his wife were the only adults residing in the home, a reasonable juror could justifiably infer that the articles inside the closet, including the scale, belonged to him.

{¶31} Finally, appellant maintains that his conviction on the fourth count cannot be upheld because the state did not present any evidence directly connecting him to the remnants of the ten plastic sandwich baggie in the trashcan. However, given the other evidence in this case, evidence of a direct connection, such as his fingerprints, was not necessary to warrant the submission of the fourth count to the jury. First, there was evidence before the jury that appellant was the person from the residence who was involved in the sale of cocaine to CI-242. Second, the evidence supported the finding that the digital weighing scale was found in appellant's closet, and that the scale's plate had a residue of cocaine. Third, since an empty box of plastic sandwich baggies was found in the master bedroom, appellant clearly had access to the baggies. Accordingly, there was sufficient evidence upon which a reasonable person could find that appellant not only sold cocaine to other individuals, but was also directly involved in the preparation of the drug for distribution.

{¶32} When viewed in a light most favorable to the prosecution, the evidence it presented at trial was sufficient for any rational trier of fact to find that all elements for

trafficking in cocaine under R.C. 2925.03(A)(2) had been proven beyond a reasonable doubt. As a result, the trial court did not err in denying appellant's Crim.R. 29 motion for judgment of acquittal as to the fourth court or any other charge in the indictment. For this reason, appellant's sole assignment of error is without merit.

{¶33} The judgment of the Lake County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.