[Cite as *State v. Smith*, 2016-Ohio-8208.]

STATE OF OHIO, JEFFERSON COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO, PLAINTIFF-APPELLEE, V. DEANGELO W. SMITH, DEFENDANT-APPELLANT.	)))))))))	CASE NO. 15 JE 0025 OPINION

CHARACTER OF PROCEEDINGS:	Criminal Appeal from Court of Common Pleas of Jefferson County, Ohio Case No. 15 CR 19
JUDGMENT:	Affirmed
APPEARANCES: For Plaintiff-Appellee	Jane Hanlin Prosecutor Edward L. Littlejohn, Jr. Assistant Prosecutor 16001 S.R. 7 Steubenville, Ohio 43952
For Defendant-Appellant	Attorney Bernard C. Battistel 2021 Sunset Boulevard Steubenville, Ohio 43952

JUDGES:

Hon. Gene Donofrio
Hon. Mary DeGenaro
Hon. Carol Ann Robb

Dated: December 14, 2016

[Cite as *State v. Smith*, 2016-Ohio-8208.]
DONOFRIO, P.J.

{¶1} Defendant-appellant, Deangelo Smith, appeals from a Jefferson County Common Pleas Court judgment convicting him of possession of drugs, trafficking in drugs, tampering with evidence, and possession of drug paraphernalia, following a jury trial.

{¶2} On January 18, 2015, Patrolman Mason Gambos received a call from police dispatch about a possible drunk driver on Route 7. Patrolman Gambos located the vehicle in question, a Ford Explorer, and followed it. The patrolman observed the Explorer signal to pass another vehicle. The driver of the Explorer, who was later identified as appellant, turned his left turn signal on and moved into the left lane. Appellant then left his left turn signal on as he passed the other vehicle and moved back into the right lane, almost striking the vehicle he was passing and forcing it off of the side of the road. As a result of this activity, Patrolman Gambos activated his overhead lights.

{¶3} Appellant stopped in the middle of Route 7. Patrolman Gambos exited his vehicle and asked appellant to move the Explorer off to the berm of the road. Appellant complied. The patrolman then asked appellant for his driver's license and registration. Patrolman Gambos took appellant's documents back to his cruiser to check his information. As he was sitting in his cruiser, Patrolman Gambos saw an object being thrown out of the passenger side window of the Explorer. Appellant was the only person in the Explorer. The patrolman called for back-up.

{¶4} Trooper Trevor Koontz arrived on the scene. Trooper Koontz stayed with appellant while Patrolman Gambos looked on the ground next to the passenger side of the Explorer. The patrolman located two baggies with what was eventually determined to be cocaine in them. The officers placed appellant under arrest. Trooper Koontz had appellant perform the horizontal gaze nystagmus test, which revealed to the trooper the presence of alcohol. Trooper Koontz also noticed that when he examined appellant's eyes, they were unreactive to light, which indicated to the trooper that appellant was impaired by drugs.

{¶5} Upon searching appellant, the officers located $322 in his pocket. And

in searching appellant's car, they located an additional $9,700 in his console and a digital scale. Additionally, later testing of appellant's urine sample revealed cocaine in his system.

{¶6} A Jefferson County Grand Jury indicted appellant on one count of possession of drugs for possessing cocaine in an amount greater than five grams but less than ten grams, a fourth-degree felony in violation of R.C. 2925.11(A)(C)(4)(b); one count of trafficking in drugs for an amount that exceeds the bulk amount but not exceeding five times that amount, a fourth-degree felony in violation of R.C. 2925.03(A)(2)(C)(4)(c); one count of tampering with evidence, a third-degree felony in violation of R.C. 2921.12(A)(1); and one count of possession of drug paraphernalia, a fourth-degree misdemeanor in violation of R.C. 2925.14(C)(1). The trafficking in drugs charge also contained forfeiture specifications for appellant's Ford Explorer and the $10,022 seized on the night of appellant's arrest.

{¶7} The matter proceeded to a jury trial. The jury heard evidence from the officers involved, crime lab personnel, and appellant. The jury returned guilty verdicts on all four charges and both specifications.

{¶8} The trial court subsequently held a sentencing hearing. It sentenced appellant to 18 months for possession of drugs, 18 months for trafficking in drugs, 36 months for tampering with evidence, and 30 days for possession of drug paraphernalia. The court ordered the sentences for possession of drugs, trafficking in drugs, and possession of drug paraphernalia to run concurrent with each other and consecutive to the sentence for tampering with evidence. Thus, appellant's total prison sentence was 54 months.

{¶9} Appellant filed a timely notice of appeal on November 25, 2015. He now raises two assignments of error.

{¶10} Appellant's first assignment of error states:

> THE STATE PRESENTED INSUFFICIENT EVIDENCE TO SUPPORT A CONVICTION FOR TRAFFICKING IN DRUGS OR TAMPERING WITH EVIDENCE.

{¶11} Appellant argues the evidence was insufficient to support his convictions for trafficking in drugs and tampering with evidence. He does not take issue with his convictions for possession of drugs or possession of drug paraphernalia. Therefore, we will only address appellant's convictions for trafficking in drugs and tampering with evidence.

{¶12} Sufficiency of the evidence is the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the verdict. *State v. Smith*, 80 Ohio St.3d 89, 113, 684 N.E.2d 668 (1997). In essence, sufficiency is a test of adequacy. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). Whether the evidence is legally sufficient to sustain a verdict is a question of law. *Id.* In reviewing the record for sufficiency, 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. *Smith*, 80 Ohio St.3d at 113.

{¶13} As to his trafficking in drugs conviction, appellant claims there was no evidence that he intended to deliver, sell, or resell the cocaine. He claims the only indicators of trafficking were a scale and a large amount of money. He attributes the money, however, to winnings from a casino.

{¶14} The jury convicted appellant of trafficking in drugs in violation of R.C. 2925.03(A)(2), which provides that no person shall knowingly:

> (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.

{¶15} We must review the record to determine whether the state presented evidence going to each of the above elements of trafficking in drugs.

{¶16} Mingo Junction Patrolman Mason Gambos was the first witness. Patrolman Gambos testified that on January 18, 2015, he received a call from the dispatch center regarding a possible impaired driver on Route 7. (Tr. 160). Patrolman Gambos located the vehicle, a Ford Explorer, and began to follow it. (Tr. 161-162). Patrolman Gambos observed the Explorer use its left turn signal to pass another vehicle. (Tr. 162). The Explorer then kept its left turn signal on as it passed the other vehicle and moved back into the right lane. (Tr. 162). The patrolman stated that the Explorer almost struck the vehicle it was passing and caused the other vehicle to drive off the side of the road. (Tr. 162). Consequently, Patrolman Gambos activated his overhead lights and stopped the Explorer. (Tr. 162-163). The Explorer stopped in the middle of Route 7 and Patrolman Gambos had to ask the driver, who was later identified as appellant, to move to the berm of the road. (Tr. 163).

{¶17} Once appellant moved his Explorer to the side of the road and gave Patrolman Gambos his driver's license and registration, the patrolman went back to his cruiser, which was parked behind appellant's Explorer. (Tr. 163-164). Appellant remained in his Explorer. (Tr. 164). Patrolman Gambos then observed an object being thrown from the Explorer's passenger side window. (Tr. 164). Upon seeing this, he radioed for backup. (Tr. 164).

{¶18} Ohio State Highway Patrol Trooper Trevor Koontz responded to the call for back up. (Tr. 165). Patrolman Gambos asked Trooper Koontz to stay with appellant while he looked for the object that had been thrown from the window. (Tr. 165). Patrolman Gambos found two baggies with suspected cocaine in them by the passenger side of the Explorer. (Tr. 165). At that point, appellant was placed in custody. (Tr. 166). Patrolman Gambos asked appellant what he threw out of the window and appellant told him he threw cigarettes. (Tr. 166).

{¶19} Patrolman Gambos read appellant his Miranda rights and the officers searched his person. (Tr. 166-167). They found $322 cash on appellant. (Tr. 167, 250; joint stipulation three). They also searched his car and found $9,700 in a bag in the console and a digital scale. (Tr. 167-168, 249, joint stipulation two). Appellant

told the officers that he had won the money gambling. (Tr. 184-185).

{¶20} Shay Shaw, a chemist at the Ohio State Highway Patrol Crime Lab, was the next witness. Shaw tested the white substance found in the two baggies appellant threw from his vehicle. Her testing revealed that both baggies contained cocaine and that the cocaine totaled 8.508 grams. (Tr. 200-201).

{¶21} Trooper Koontz was also called to testify. Trooper Koontz testified that he was in the area when he heard Patrolman Gambos request backup so he responded. (Tr. 219). Trooper Koontz asked the patrolman what the situation was and the patrolman stated that he just saw appellant throw something out of the passenger side window. (Tr. 221). Appellant was the only person in the Explorer. (Tr. 221). When asked, appellant told the trooper he had not thrown anything from the window. (Tr. 221). Patrolman Gambos then informed Trooper Koontz that he located two baggies with suspected drugs. (Tr. 222). Trooper Koontz subsequently placed appellant in administrative detention. (Tr. 222). The trooper stated that when they searched appellant prior to placing him in the cruiser they found $322 in cash. (Tr. 225). Appellant then told the trooper that there was an additional approximately $10,000 in cash in his center console. (Tr. 225). Appellant also told the trooper he was coming from a casino where he won the money. (Tr. 225, 242). And appellant told the trooper his brother was going to get him a receipt for his winnings. (Tr. 242). Trooper Koontz stated that they located the additional cash along with a digital scale in appellant's vehicle. (Tr. 225-226).

{¶22} Finally, Trooper Koontz testified regarding the difference between a drug user and a drug trafficker. He stated that a drug user usually has a small amount of their drug of choice with them. (Tr. 232). In contrast, he stated, a drug trafficker usually has a larger quantity of drugs, a method to weigh the drugs, and a source of money. (Tr. 233).

{¶23} Construing the evidence in the light most favorable to the state, as we are required to do when reviewing the sufficiency of the evidence, sufficient evidence exists to support appellant's conviction for trafficking in drugs.

{¶24} Appellant had two baggies of cocaine with him that exceeded the bulk amount for that drug. He was the only person in the vehicle, so he was the one transporting the cocaine. Moreover, it is reasonable to draw an inference that appellant knew or had reasonable cause to believe that the cocaine was intended for sale or resale by either him or another person. In addition to the cocaine, appellant had a digital scale, which is commonly used for weighing drugs. Moreover, he had over $10,000 in cash with him. And Trooper Koontz testified that the characteristics of a drug trafficker include having a larger quantity of drugs, a means to weigh the drugs, and money. Given this evidence, a rational trier of fact could have found the essential elements of trafficking in drugs proven beyond a reasonable doubt.

{¶25} As to his tampering with evidence conviction, appellant asserts he was pulled over on suspicion of operating a vehicle while intoxicated (O.V.I.). Therefore, the only investigation the police could have been conducting was for an O.V.I. Appellant claims the evidence was not sufficient to prove that he was tampering with evidence.

{¶26} The jury convicted appellant of tampering with evidence in violation of R.C. 2921.12(A)(1), which provides:

> (A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:
> (1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation[.]

{¶27} Here we must determine whether the state presented evidence going to all of the elements of tampering with evidence.

{¶28} In addition to the evidence set out above, the following testimony is also relevant to the tampering with evidence conviction.

{¶29} Patrolman Gambos testified that when he stopped appellant's vehicle,

an official investigation had begun in to whether appellant was driving under the influence. (Tr. 164, 187, 188).

{¶30} Tiffany Paugh analyzes urine and blood for the presence of drugs and alcohol at the Ohio State Highway Patrol Crime Lab. She analyzed a urine sample taken from appellant shortly after he was arrested. Paugh testified that appellant's urine contained the cocaine metabolite, which is what a person's body produces after the person ingests cocaine. (Tr. 214-215).

{¶31} In *State v. Straley*, 139 Ohio St.3d 339, 2014-Ohio-2139, 11 N.E.3d 1175, the Ohio Supreme Court addressed the issue appellant raises here. In that case, police stopped Straley for driving left of center. Police noticed an odor of an alcoholic beverage and slurred speech by Straley. Nonetheless, they decided not to pursue any charges against her. They did insist, however, that Straley not drive home. While the police were attempting to arrange a ride for Straley, she indicated that she had to urinate. She then ran 20 to 30 feet from the officers and urinated. After she was done, she returned to the officers. One of the officers walked over to the area where Straley had been and found a cellophane baggie covered with urine. Inside the baggie there appeared to be crack cocaine. The officers then arrested Straley. The case proceeded to jury trial on the count of tampering with evidence and Straley was found guilty. She appealed her conviction.

{¶32} The Second District Court of Appeals reversed the conviction finding nothing in the record supported a finding that Straley acted with purpose to impair the value of evidence of any ongoing investigation, i.e., of driving under the influence of alcohol or driving without a license, or of any likely investigation, i.e., of public urination. It found the defendant has to "impair" evidence in an investigation that is ongoing or likely to occur by tampering with evidence related to that investigation. Recognizing that its decision was in conflict with a decision of the Ninth District, the Court certified a conflict to the Ohio Supreme Court. The Supreme Court accepted the certified question: "[w]hether a tampering conviction requires proof that the defendant impaired evidence in an investigation by tampering with evidence related

to the investigation." *Id*. at ¶ 8.

{¶33} The Ohio Supreme Court initially noted that tampering with evidence requires three elements:

> (1) the knowledge of an official proceeding or investigation in progress or likely to be instituted, (2) the alteration, destruction, concealment, or removal of the potential evidence, (3) the purpose of impairing the potential evidence's availability or value in such proceeding or investigation.

Id. at ¶ 11.

{¶34} The Court went on to find that the evidence tampered with must have had some relevance to an ongoing or likely investigation to support a tampering charge. *Id*. at ¶ 16. The Court concluded:

> There is nothing in the record to suggest that the officers were conducting or likely to conduct an investigation into trafficking or possession of cocaine when Straley discarded the baggie. The baggie of cocaine did not relate to either an ongoing investigation of driving while under the influence of alcohol or driving without a license and had no evidentiary value to a likely investigation of public urination, and thus the record does not support a conviction for tampering with evidence.

Id. at ¶ 19.

{¶35} This case, however, is distinguishable from *Straley*. In this case, Patrolman Gambos stopped appellant on reasonable suspicion of impaired driving and a turn-signal violation. Impaired driving does not apply only to drunk driving, but also encompasses driving under the influence of drugs. Thus, an official investigation into impaired driving had begun. While appellant was stopped under suspicion of impaired driving, he threw the cocaine from his window in an attempt to conceal if from Patrolman Gambos. The cocaine was potential evidence of

appellant's impaired driving, as a later urine screen revealed that appellant did in fact have cocaine in his system. Moreover, when appellant was stopped by Patrolman Gambos, he knew an investigation was in progress or was likely to be instituted.

{¶36} Thus, sufficient evidence existed that (1) appellant knew that an investigation was in progress or was likely to be instituted for O.V.I., (2) appellant concealed or removed the cocaine by throwing it from the window, and (3) appellant acted with the purpose of impairing the potential cocaine's availability in the O.V.I. investigation. Therefore, sufficient evidence exists to support appellant's conviction for tampering with evidence.

{¶37} Accordingly, appellant's first assignment of error is without merit and is overruled.

{¶38} Appellant's second assignment of error states:

> THE DEFENDANT-APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶39} Appellant asserts here that his convictions are against the manifest weight of the evidence. He points out that both officers testified that appellant told them the money they found was from winnings at a local casino. He further points out that neither officer testified that they had any knowledge of appellant being involved in drug trafficking.

{¶40} In determining whether a verdict is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins*, 78 Ohio St.3d at 387. "Weight of the evidence concerns 'the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other.'" *Id*. (Emphasis sic.) In making its determination, a reviewing court is not required to view the evidence in a light most favorable to the prosecution but may

consider and weigh all of the evidence produced at trial. *Id*. at 390.

{¶41} Yet granting a new trial is only appropriate in extraordinary cases where the evidence weighs heavily against the conviction. *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). This is because determinations of witness credibility, conflicting testimony, and evidence weight are primarily for the trier of the facts who sits in the best position to judge the weight of the evidence and the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *State v. Rouse*, 7th Dist. No. 04-BE-53, 2005-Ohio-6328, ¶ 49, citing *State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. Thus, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke*, 7th Dist. No. 99-CA-149, 2002-Ohio-1152.

{¶42} In addition to the evidence set out in appellant's first assignment of error, we must also consider appellant's testimony that he offered in his defense.

{¶43} Appellant testified that he has been a "binge" cocaine user since 2003. (Tr. 261). On the night in question, January 17 into January 18, 2015, appellant stated he was at a bar called The Legion, which has slot machines, until approximately 10:30 p.m. (Tr. 262). Appellant testified that he "hit" on a slot machine called "Kayman Keno" at The Legion for $4,000. (Tr. 262).

{¶44} Appellant stated that he has good luck with slot machines and won large amounts of money five times in the weeks leading up to his arrest. (Tr. 263). Appellant submitted a gambling receipt from January 2, 2015, for $8,000 from a bar called the "Third Alarm." (Tr. 264; Defendant Ex. B). However, the receipt did not have appellant's name on it. (Tr. 276). Appellant testified that he won large amounts of money on slot machines on January 14, 15, and 17 (the night in question), but he did not have receipts for those winnings. (Tr. 264-265). Appellant stated that the bar owner told him he did not have the forms to give him. (Tr. 265).

{¶45} Appellant testified that on the night in question, he returned to The

Legion around 2:30 a.m. and stayed until 3:30 a.m. (Tr. 266). He then left to go to "Club 106." (Tr. 266). He stated Patrolman Gambos stopped him on Route 7. (Tr. 266-267). When asked by the patrolman what he threw out of his window while he was stopped, appellant told him that he threw out a cigarette. (Tr. 268). During his testimony, however, he admitted he threw cocaine from his window. (Tr. 274). Appellant stated that he had used cocaine that night around 10:00 p.m. (Tr. 268).

{¶46} When asked about the scale in his car, appellant stated that he had it because he did not want to get cheated out of his money. (Tr. 270). He stated that when he purchases cocaine, he "just purchases enough to last me." (Tr. 270). Appellant testified that he does not sell cocaine. (Tr. 271).

{¶47} The jury's verdict is supported by the manifest weight of the evidence. The jury did not find appellant's testimony to be credible. Although appellant testified that he did not sell drugs and that he won the large amount of cash gambling, the jury was not required to believe him. The jury is in the best position to judge witnesses' credibility and conflicting testimony. *Rouse*, 2005-Ohio-6328, at ¶ 49, citing *Hill*, 75 Ohio St.3d at 205. That is because the jurors can observe witnesses' gestures, voice inflections, and demeanor. *Id*. We will not second-guess the jury's determinations of credibility.

{¶48} Here the evidence demonstrated that appellant was transporting cocaine, a digital scale, and a large amount of cash. He was the only person in his vehicle. And he tried to discard the cocaine when he was stopped. Although he claimed he won his money from slot machines, he had no receipts or witnesses to corroborate his story. The jury simply did not believe him. Thus, we cannot conclude that the jury clearly lost its way in convicting appellant.

{¶49} Accordingly, appellant's second assignment of error is without merit and is overruled.

{¶50} For the reasons stated above, the trial court's judgment is hereby affirmed.

DeGenaro, J., concurs.

Robb, J., concurs.