[Cite as *State v. Oliver*, 2009-Ohio-2680.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24500
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
GREGORY L. OLIVER	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 06 2097

DECISION AND JOURNAL ENTRY

Dated: June 10, 2009

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Gregory Oliver awoke alone in a friend's bedroom to find that police had come to search for a fugitive named Greta Ellis. After Ms. Ellis was found hiding in a closet in the adjacent room, police searched the bedroom where Mr. Oliver had been sleeping. They found cocaine and "ripped-off baggies" inside the vanity that was next to the bed where he was found. In the adjacent sitting room, police found a quantity of counterfeit cocaine inside a jacket that was on the couch. When police searched Mr. Oliver, they found a small amount of cocaine in his shirt pocket. A jury found him guilty of possession of cocaine and possession of a counterfeit controlled substance. Mr. Oliver has appealed his convictions, arguing that: (1) his lawyer was ineffective (2) his convictions for possession of cocaine and possession of a counterfeit controlled substance were not based on sufficient evidence and were against the manifest weight of the evidence, and (3) his Rule 29 motion should have been granted. His convictions are

affirmed because Mr. Oliver did not prove that his lawyer was ineffective and his convictions were supported by sufficient evidence and were not against the manifest weight of the evidence.

BACKGROUND

{¶2} According to Officer Donald Schismenos, he went to 924 Bye Street in Akron with a team of officers to serve a felony arrest warrant on Greta Ellis. The person who answered the door identified herself as Denise Wallace and gave the officers permission to enter the house. She led them upstairs where Officer Schismenos swept a sitting room and found Greta Ellis hiding in a closet. He also noticed a marijuana roach in an ashtray on an end table. Therefore, according to the officer, he asked Ms. Wallace if she lived there and, when she said she did, he obtained her permission to search the rest of the apartment. Another officer testified that he found a crack pipe and what appeared to be crumbs of crack cocaine in the couch. Officer Schismenos testified that he found a sweatshirt or jacket on the back of the couch near the end table where the marijuana was found. Inside a pocket of the jacket he found "what appeared to be [two] large bags of crack cocaine." Later, tests revealed the substance was counterfeit.

{¶3} According to Officer Schismenos, after searching the sitting room, he went into an adjoining bedroom where officers were waiting with Mr. Oliver. Although it was midday, the officers reported that Mr. Oliver was asleep on the bed when they arrived. Officer Schismenos testified that he found what proved to be 2.11 grams of crack cocaine as well as "ripped-off baggies indicative of drug activity" in a vanity beside the bed where Mr. Oliver had been sleeping. He testified that he arrested Mr. Oliver, took him outside, and searched him. He found a small amount of cocaine in Mr. Oliver's shirt pocket and $100 in cash in another pocket.

{¶4} Mr. Oliver was initially charged with possession of cocaine with a criminal forfeiture specification, possession of counterfeit controlled substances, illegal use or possession

of drug paraphernalia, and possession of marijuana. The State dismissed the drug paraphernalia and marijuana charges before trial. A jury found Mr. Oliver guilty of possession of at least one gram but less than five grams of crack cocaine and the specification regarding forfeiture of $100 cash. The jury also found him guilty of possession of a counterfeit controlled substance. The court sentenced him to eighteen months for possession of cocaine and a concurrent ninety days for possession of a counterfeit controlled substance.

INEFFECTIVE ASSISTANCE OF COUNSEL

{¶5} Mr. Oliver's first assignment of error is that his trial lawyer was ineffective in various ways and that he would not have been convicted but for his lawyer's errors. First, Mr. Oliver has argued that his lawyer was ineffective in failing to pursue a motion to suppress evidence obtained after he was arrested at Ms. Ellis's home. Mr. Oliver has argued the officers unlawfully entered and searched the room in which he was sleeping and that they unlawfully arrested him, leading to a search of his person. He has argued that he would not have been convicted but for his attorney's failure to pursue the suppression motion that she filed, but later withdrew.

{¶6} In order to establish ineffective assistance of counsel, a defendant must demonstrate that his lawyer's performance was deficient and that he was prejudiced by that deficiency. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The defendant has the burden of proof and must overcome the strong presumptions that his lawyer's performance was adequate and that his lawyer's action might be sound trial strategy. *State v. Smith*, 17 Ohio St. 3d 98, 100 (1985). "To warrant reversal, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the

outcome.'" *State v. Bradley*, 42 Ohio St. 3d 136, 142 (1989) (quoting *Strickland*, 466 U.S. at 694).

{¶7} "[T]he failure to [pursue] a motion to suppress which possibly could have been granted and implicated matters critical to the defense can constitute ineffective assistance of counsel, if such failure prejudices the defendant." *State v. Pitts*, 9th Dist. No. 20976, 2002-Ohio-6291, at ¶88 (citing *State v. Garrett*, 76 Ohio App. 3d 57, 63 (1991)). In order to demonstrate that his lawyer's performance was deficient, a defendant must establish that a valid basis existed to suppress the evidence. *State v. Adams*, 103 Ohio St. 3d 508, 2004-Ohio-5845, at ¶35 (citing *State v. Tibbetts*, 92 Ohio St. 3d 146, 165-66 (2001)).

SEARCH OF THE HOUSE

{¶8} The United States Supreme Court has held that "capacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998) (quoting *Rakas v. Illinois*, 439 U.S. 128, 143 (1978)). Although "an overnight guest in a home may claim the protection of the Fourth Amendment, . . . one who is merely present with the consent of the householder may not." *Id*. at 90. The legitimacy of the expectation of privacy is evaluated in terms of whether the person had a "legally sufficient interest" in the place being searched. *Minnesota v. Olson*, 495 U.S. 91, 97-98 (1990) (quoting *Rakas*, 439 U.S. at 141-42).

{¶9} In this direct appeal, this Court is limited to the evidence that was presented to the trial court. See *Pitts*, 2002-Ohio-6291, at ¶90. Mr. Oliver has failed to point to any evidence in the record tending to show that he had a legitimate expectation of privacy in the Bye Street home. There was no evidence that Mr. Oliver lived in the house or that he was an overnight

guest there. He has not demonstrated, or even argued, that he had any control over the home or a particular connection to it. A review of the record has revealed no evidence to support the position that, at the time of the search, Mr. Oliver was anything more than "merely present with the consent of the householder." *Carter*, 525 U.S. at 90. His mere presence is not sufficient to give him the capacity to challenge the constitutionality of the search of the Bye Street house. Thus, Mr. Oliver has failed to carry his burden to show that a valid basis existed to suppress evidence of the crack cocaine and the "ripped-off baggies" police found in the vanity beside him. See *Adams*, 2004-Ohio-5845, at ¶35 (citing *Tibbetts*, 92 Ohio St. 3d at 165-66).

SEARCH INCIDENT TO ARREST

{¶10} Mr. Oliver has argued that the physical evidence and incriminating statements obtained subsequent to his arrest should have been suppressed because the arrest was improper as he was sleeping and "had done nothing to cause being searched or arrested." The right of the police to search incident to arrest is a well-established exception to the warrant requirement of the Fourth Amendment. *State v. Murrell*, 94 Ohio St. 3d 489, 491 (2002) (citing *Chimel v. California*, 395 U.S. 752, 762-63 (1969)). A warrantless search of the arrested person is justified to discover weapons and to prevent the concealment or destruction of evidence. *Id.* Officers have probable cause to justify an arrest if "from the information known to the arresting officers based on reasonably trustworthy information, a reasonably prudent person would be warranted in believing that the arrestee had committed or was committing an offense." *State v. Scott*, 9th Dist. No. 08CA009446, 2009-Ohio-672, at ¶11 (citing *Beck v. Ohio*, 379 U.S. 89, 91 (1964)). Probable cause does not require evidence sufficient to convict a person of a crime. *State v. Tejada*, 9th Dist. No. 20947, 2002-Ohio-5777, at ¶8 (quoting *State v. Young*, 146 Ohio App. 3d

245, 254 (2001)). "[T]he standard requires 'only a showing that a probability of criminal activity exists.'" *Id*. (quoting *Young*, 146 Ohio App. 3d at 254).

{¶11} In this case, Officer Schismenos had found a bag of crack cocaine as well as "ripped-off baggies indicative of drug activity" in close proximity to where Mr. Oliver had been sleeping. Officer Schismenos said that he brought the jacket he found into the bedroom and confronted Mr. Oliver, telling him that they had discovered his jacket with the crack cocaine in the pocket. According to the officer, Mr. Oliver replied, "[t]hat's fake" and repeatedly stated that the officers had failed to find any drugs on him. The officer also said that Mr. Oliver initially admitted that the jacket was his, but later claimed it was not. Officer Schismenos testified that, when he searched Mr. Oliver, he found a baggie containing what proved to be a small amount of cocaine in Mr. Oliver's shirt pocket.

{¶12} The officers had probable cause to arrest Mr. Oliver. See *id*. They found crack cocaine near him and Mr. Oliver was the only person in the room at the time. Mr. Oliver also admitted that he owned the jacket found in the living room containing a large amount of counterfeit crack. Mr. Oliver announced that the crack in the jacket was fake, which proved to be accurate. His statement indicated that he was not surprised to hear that the officers believed the jacket was his or that it contained something that resembled crack cocaine. The officers conducted a search of his person incident to a lawful arrest and located the baggie of crack in his shirt pocket. See *Murrell*, 94 Ohio St. 3d at 491.

{¶13} Mr. Oliver's argument does not present a valid basis to suppress the crack cocaine found in his shirt pocket or the incriminating statement he made about the fake cocaine found in the other room. He has failed to carry his burden of showing there was a valid basis to suppress

the evidence. Therefore, he has failed to demonstrate that his lawyer's performance was deficient.

MIRANDA WARNING

{¶14} Mr. Oliver has argued that the incriminating statement he made about the "fake" crack cocaine should have been suppressed because he was not warned of his rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966). At trial, the prosecution is not permitted to introduce any statements that resulted from custodial interrogation before the defendant was "warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney . . . ." *State v. White*, 175 Ohio App. 3d 302, 2008-Ohio-657, at ¶13 (quoting *Miranda*, 384 U.S. at 444). In this context, interrogation includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980). "In judging whether an individual has been placed into custody the test is whether, under the totality of the circumstances, a 'reasonable person would have believed that he was not free to leave.'" *State v. Gumm*, 73 Ohio St. 3d 413, 429 (1995) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion)). Once a person has been warned of his *Miranda* rights, he may waive them, provided that he does so knowingly, voluntarily, and intelligently. *Miranda*, 384 U.S. at 444.

{¶15} The evidence indicated that Mr. Oliver was sitting on the bed in handcuffs and was being guarded by other officers when Officer Schismenos first entered the room. Assuming that the officer's comment about the jacket qualified as interrogation, it was custodial because Mr. Oliver was in custody before Officer Schismenos first interacted with him. The trial

transcript does not contain any evidence as to whether police officers gave Mr. Oliver a *Miranda* warning at any time, nor does it indicate whether he properly waived his rights before making the incriminating statement.

{¶16} "It is impossible for this court to determine on a direct appeal from a conviction whether an attorney was ineffective in his representation of a criminal defendant, where the allegation of ineffectiveness is based on facts dehors the record." *State v. Pitts*, 9th Dist. No. 20976, 2002-Ohio-6291, at ¶90 (quoting *State v. Gibson*, 69 Ohio App. 2d 91, 95 (1980)). There is no procedure for this Court to obtain evidence showing whether, in this case, there was any factual basis for a motion to suppress based on a violation of *Miranda*. Cf. R.C. 2953.21. Mr. Oliver has failed to carry his burden of demonstrating his lawyer's ineffective assistance in this regard. See *State v. Bradley*, 42 Ohio St. 3d 136, 142 (1989). Mr. Oliver's first assignment of error is overruled to the extent that it addressed his lawyer's failure to pursue a suppression motion because he has failed to demonstrate that his lawyer's performance was deficient or that he was prejudiced by it. See *id.*

JURY INSTRUCTIONS

{¶17} Mr. Oliver has further argued that his lawyer was ineffective for failing to object or move for a mistrial based on the judge's misstatements while instructing the jury regarding the burden of proof. Twice, while reading the instructions to the jury, the trial court mistakenly substituted the word "defendant" in place of the word "State" when describing which party had the burden of proof. At one point, the court stated, "if you find that the defendant failed to prove beyond a reasonable doubt any one of the essential elements of the offense of Possession of Cocaine in Count One of the indictment, your verdict must be not guilty." The prosecutor interrupted and brought the misstatement to the court's attention. The court responded: "Let me

reread it because maybe I misspoke." The court correctly reread the entire sentence. A short time later, the court misread the instructions again by saying: "If you find that the defendant proved beyond a reasonable doubt all the --." At that point, the prosecutor interrupted the proceedings midsentence. The court immediately corrected the error by correctly rereading that sentence.

{¶18} "A jury charge must be considered as a whole and a reviewing court must determine whether the jury charge probably misled the jury in a matter materially affecting the complaining party's substantial rights." *Perez v. Falls Fin. Inc.*, 87 Ohio St. 3d 371, 376 (2000) (quoting *Becker v. Lake County Mem. Hosp. W.*, 53 Ohio St. 3d 202, 208 (1990)). It is unnecessary for this Court to evaluate Mr. Oliver's lawyer's performance on this point because it is apparent that the trial court's misstatements were immediately corrected. The charge, as a whole, did not mislead the jury to believe that Mr. Oliver had the burden of proof. The errors did not cause any prejudice to Mr. Oliver, and he has failed to carry his burden to show that his lawyer's assistance was ineffective. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

TRIAL WITNESSES

{¶19} In his brief, Mr. Oliver has referred to an objection he made at the trial regarding his lawyer's failure to call certain witnesses on his behalf. In response to that objection, the trial court granted a continuance to give Mr. Oliver's lawyer an opportunity to interview the witnesses and evaluate whether their testimony might be of some value. The lawyer reported to the court that, during the recess, she had interviewed various potential witnesses, but felt that they would not help and may even hurt Mr. Oliver's case. She declined to call them at trial and rested Mr. Oliver's case, over his objection, without presenting any evidence.

{¶20} "When the claimed ineffectiveness is a failure to call certain witnesses, a defendant will never be able to establish prejudice on a direct appeal because the appellate court is limited to facts that appear in the record before the trial court." *State v. Rivera*, 9th Dist. No. 06CA008909, 2007-Ohio-2156, at ¶20. In this case, Mr. Oliver has not explained to this Court which witnesses he believes should have been called to testify. He has merely referred to his own objection and discussion with the court on this topic.

{¶21} After the State rested its case, Mr. Oliver's lawyer explained to the court that Mr. Oliver objected to her decision not to call certain witnesses, including two police officers. Mr. Oliver explained to the court that there were "key things that happened in the house" including that "[Officer Schismenos] went inside my pockets" and "emptied [them] . . . [i]nside the house." Mr. Oliver told the court that "the whole time the other officers . . . were in the same room with us, and it clearly shows that I'm innocent." The record reveals that Mr. Oliver's lawyer determined that the testimony of the additional police officers "would [not] help Mr. Oliver in this case, but . . . would absolutely hurt him." Mr. Oliver has not shown that there is a reasonable probability that, but for his lawyer's failure to call additional witnesses, he would not have been convicted. See *State v. Bradley*, 42 Ohio St. 3d 136, 142 (1989). Mr. Oliver's first assignment of error is overruled because he has failed to carry his burden to prove that his lawyer's performance was deficient and that he was prejudiced as a result. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

SUFFICIENCY OF THE EVIDENCE

{¶22} Mr. Oliver's second assignment of error is that his convictions were not based on sufficient evidence and were against the manifest weight of the evidence. His third assignment of error is that the trial court incorrectly failed to grant his motion for acquittal under Rule 29 of

the Ohio Rules of Criminal Procedure. His primary argument is that there was no evidence that he knowingly possessed the drugs in the vanity or the fake drugs in the living room because he was merely sleeping in a house where he did not live. "Inasmuch as a court cannot weigh the evidence unless there is evidence to weigh," we must first determine if the conviction was supported by sufficient evidence. *Whitaker v. M.T. Automotive Inc.*, 9th Dist. No. 21836, 2007-Ohio-7057, at ¶13.

{¶23} Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. This Court must determine whether, viewing the evidence in a light most favorable to the prosecution, it could have convinced an average juror of Mr. Oliver's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991). Under Rule 29(A) of the Ohio Rules of Criminal Procedure, a defendant is entitled to acquittal on a charge against him "if the evidence is insufficient to sustain a conviction . . . ." Crim. R. 29(A).

{¶24} Mr. Oliver was convicted of violating Section 2925.11(A) of the Ohio Revised Code. Under that section, "[n]o person shall knowingly obtain, possess, or use a controlled substance." R.C. 2925.11(A). He was also convicted of violating Section 2925.37(A). Under that section, "[n]o person shall knowingly possess any counterfeit controlled substance." R.C. 2925.37(A).

{¶25} Section 2925.01(K) of the Ohio Revised Code defines "possession" as "having control over a thing or substance . . . ." A defendant constructively possesses an item if he knowingly exercises dominion or control over it, even if he does not physically possess it. *State v. Lamb*, 9th Dist. No. 23418, 2007-Ohio-5107, at ¶12. "Readily usable drugs in close proximity

to an accused may constitute sufficient circumstantial evidence to support a finding of constructive possession." *State v. Ruby*, 149 Ohio App. 3d 541, 2002-Ohio-5381, at ¶36. "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶26} Police found more than two grams of crack cocaine and ripped-off baggies with white powder residue inside the vanity in close proximity to where Mr. Oliver was sleeping when officers first entered the apartment. Mr. Oliver was alone in the bedroom with the drugs. When confronted about the jacket found in the living room containing what appeared to be crack, Mr. Oliver reportedly stated quite accurately that it was fake. Police also found a small amount of real cocaine on Mr. Oliver's person. He was the only one of the three occupants of the apartment found to have drugs on him.

{¶27} The evidence was sufficient to prove that Mr. Oliver knowingly possessed the crack cocaine found in the vanity. To the extent Mr. Oliver's second and third assignments of error addressed the sufficiency of the evidence of the conviction for possession of cocaine, they are overruled.

{¶28} Mr. Oliver has also argued that there was no evidence linking him to the counterfeit crack. He seems to have relied on the fact that the jacket containing it was found in a different room. But, according to the officers, Mr. Oliver admitted to owning the jacket. In any event, as soon as Officer Schismenos showed Mr. Oliver the jacket and told him they found his crack cocaine, Mr. Oliver immediately replied that it was just "fake" crack. This evidence was sufficient to prove that Mr. Oliver knowingly possessed the counterfeit crack. To the extent they

addressed the sufficiency of the evidence of the conviction for possession of a counterfeit controlled substance, Mr. Oliver's second and third assignments of error are overruled.

MANIFEST WEIGHT OF THE EVIDENCE

{¶29} As part of his second assignment of error, Mr. Oliver has argued that his convictions are against the manifest weight of the evidence. When a defendant argues that his convictions are against the manifest weight of the evidence, this Court "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986).

{¶30} Mr. Oliver has failed to make any argument with regard to the manifest weight, as opposed to the sufficiency, of the evidence. This Court "may disregard an assignment of error . . . if the party raising it . . . fails to argue the assignment separately in the brief, as required under App.R. 16(A)." App. R. 12(A)(2). Regardless, based on the uncontested testimony of the two police officers, the jury did not lose its way and create a manifest miscarriage of justice by finding Mr. Oliver guilty on both counts. To the extent that it addressed the manifest weight of the evidence, Mr. Oliver's second assignment of error is overruled.

CONCLUSION

{¶31} Mr. Oliver's first assignment of error is overruled because he failed to carry his burden to prove that his lawyer's performance was deficient and that he was prejudiced by that deficiency. His second and third assignments of error are overruled because his convictions are based on sufficient evidence and are not against the manifest weight of the evidence. The

judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
CONCURS

CARR, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶32} Respectfully, while I agree with the ultimate resolution of this case, I concur in judgment only.

APPEARANCES:

NICHOLAS J. MARINO, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN R. DIMARTINO, assistant prosecuting attorney, for appellee.