[Cite as *State v. Parsley*, 2010-Ohio-1689.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-612
v.	:	(C.P.C. No. 07CR09-6570)
Bryan A. Parsley,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on April 15, 2010

Ron O'Brien, Prosecuting Attorney, *Sheryl L. Prichard* and *Laura Swisher*, for appellee.

Keith O'Korn, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Defendant-appellant, Bryan A. Parsley, appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas. For the following reasons, we affirm in part and reverse in part and remand the matter for resentencing in accordance with law and this opinion.

{¶2} In the early morning hours of April 3, 2007, Columbus Police Officer Kevin Genter and his partner were dispatched to a house in Columbus, Ohio, in response to a 911 call that originated from the house. En route, the officers learned that the call might

involve domestic violence. Upon arriving, Genter's partner went to the front of the house. Genter went to the back of the house and observed two men talking. The men walked inside the house and, within seconds, one man ran out of the house towards Genter. Genter instructed the man to stop and get on the ground. The man, later identified as appellant, complied.

{¶3} As Genter approached appellant, Genter observed a bag of marijuana sticking out of appellant's jacket pocket. Genter placed appellant in handcuffs, stood him up, and began to search him. Genter felt an object in appellant's right front pants pocket that he thought was narcotics. Genter removed a baggie from appellant's pants pocket that he suspected contained crack cocaine. Later testing of the substance in the baggie confirmed that it was crack cocaine.

{¶4} A Franklin County Grand Jury indicted appellant with one count of possession of cocaine in violation of R.C. 2925.11. Appellant entered a not guilty plea and proceeded to a jury trial. Before trial, appellant filed a motion to suppress the crack cocaine Genter found in appellant's pants pocket. The motion alleged that Genter did not have reasonable suspicion to search appellant. Appellant also argued that Genter had no reason to believe that the object in appellant's pants was a weapon. The trial court denied appellant's motion, finding that Genter acted in a reasonable manner.

{¶5} At trial, Genter testified to the version of events described above. Kathleen Stuebe, a forensic scientist with the Columbus Police Department Crime Lab, was the only other witness to testify. She tested the substance in the baggie found in appellant's pants pocket and concluded it was 13 grams of crack cocaine. The jury convicted

appellant of possession of between 10 and 25 grams of cocaine and the trial court sentenced appellant accordingly.

{¶6} Appellant appeals and assigns the following errors:

> ASSIGNMENT OF ERROR #1
>
> THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTION TO SUPPRESS THEREBY VIOLATING APPELLANT'S RIGHTS UNDER THE FOURTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE I, SECTION 14 OF THE OHIO CONSTITUTION AGAINST UNREASONABLE SEARCHES AND SEIZURES.
>
> ASSIGNMENT OF ERROR #2
>
> THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT ADMITTED THE STATE'S EXHIBITS.
>
> ASSIGNMENT OF ERROR #3
>
> THE TRIAL COURT PLAINLY ERRED WHEN IT ALLOWED THE STATE'S DRUG ANALYST TO OFFER AN OPINION AS TO THE WEIGHT OF THE CRACK COCAINE AFTER SHE ONLY TESTED A SMALL SUBSET OF THE CONTRBAND PURSUANT TO A SAMPLING PLAN IN VIOLATION OF EVID.R. 104, EVID.R. 702(C), THE FEDERAL GATEKEEPING PRINCIPLES AS SET FORTH IN *DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC.* (1993), 509 U.S. 579, THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.
>
> ASSIGNMENT OF ERROR #4
>
> APPELLANT'S CONVICTION WAS BOTH AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S CONSTITUTION, AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #5

THE TRIAL COURT ERRED WHEN IT FAILED TO CREDIT APPELLANT WITH 234 DAYS OF JAIL TIME CREDIT THAT THE COURT SOLELY CREDITED TO ANOTHER CASE THAT THE COURT SENTENCED APPELLANT CONCURRENTLY WITH THIS CASE. THE FAILURE TO ACCORD JAIL TIME CREDIT AGAINST ALL CONCURRENT TERMS VIOLATES R.C. §2967.191 AND THE EQUAL PROTECTION CLAUSES OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 2 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #6

THE TRIAL COURT ERRED IN FINING APPELLANT AT SENTENCING DUE TO HIS INDIGENT STATUS AND INABILITY TO PAY.

ASSIGNMENT OF ERROR #7

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S CONSTITUTION AND ARTICLE I, SECTIONS 10, 16 OF THE OHIO CONSTITUTION.

{¶7} Appellant claims in his first assignment of error that the trial court erred by denying his motion to suppress the crack cocaine Genter found in appellant's pants pocket. We disagree.

{¶8} An appellate court's review of a ruling on a motion to suppress presents a mixed question of law and fact. *State v. Long* (1998), 127 Ohio App.3d 328, 332. When considering a motion to suppress, the trial court assumes the role of the trier of fact and, is therefore, in the best position to resolve factual questions and evaluate witness credibility. *State v. Curry* (1994), 95 Ohio App.3d 93, 96. As such, we accept the trial court's findings of fact so long as they are supported by competent, credible evidence. *State v. Guysinger* (1993), 86 Ohio App.3d 592, 594. However, an appellate court

independently reviews the trial court's legal conclusions based on those facts and determines, without deference to the trial court's decision, "whether as a matter of law, the facts meet the appropriate legal standard." *Curry* at 96.

{¶9} Appellant first claims that the trial court erred by finding Genter's testimony credible. We disagree. Appellant does not identify any specific facts supporting his contention that Genter's testimony was not credible. The trial court is in the best position, as the trier of fact, to determine witness credibility. The trial court observed Genter testify and chose to believe his testimony. We see no reason to disturb that determination. *State v. Heard*, 2d Dist. No. 19322, 2003-Ohio-906, ¶35.

{¶10} Second, appellant claims that Genter did not have reasonable suspicion to search him and, even if he did, his seizure of the drugs violated the "plain-feel" doctrine. We disagree.

{¶11} Initially, we note that appellant does not dispute that Genter legally stopped him after he ran out of the house. In *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, the United States Supreme Court held that a police officer may stop an individual if the officer has a reasonable suspicion, based upon specific and articulable facts, that criminal behavior has occurred or is imminent. Based on the totality of the circumstances in the present case, we agree that Genter had reasonable suspicion to stop appellant. See *State v. Bobo* (1988), 37 Ohio St.3d 177, 178 (reviewing propriety of *Terry* stop based on totality of circumstances). However, Genter's search of appellant requires additional analysis. See *State v. Jones*, 8th Dist. No. 80685, 2002-Ohio-4785, ¶14 (distinguishing *Terry* stop from *Terry* search); *State v. Atchley*, 10th Dist. No. 07AP-412, 2007-Ohio-7009, ¶16.

{¶12} After an officer makes a lawful *Terry* stop, the officer may conduct a limited protective search for weapons if the officer has a reasonable suspicion that the suspect might be armed and dangerous. *Terry* at 27; *State v. Lawson*, 180 Ohio App.3d 516, 2009-Ohio-62, ¶21. The purpose of the search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence. *Bobo* at 180 (quoting *Adams v. Williams* (1972), 407 U.S. 143, 146, 92 S.Ct. 1921, 1923.

{¶13} Appellant claims that Genter did not have reasonable suspicion to believe he was armed. We disagree. Genter testified that he searched appellant for weapons because he observed marijuana in appellant's jacket pocket, and that he had "been in situations where I've recovered narcotics and weapons on people." (Tr. 17.) Indeed, the Supreme Court of Ohio had noted that "[t]he right to frisk is virtually automatic when individuals are suspected of committing a crime, like drug trafficking, for which they are likely to be armed. *State v. Evans*, 67 Ohio St.3d 405, 413, 1993-Ohio-186. This court has also noted that " 'persons who engage in illegal drug activities are often armed with a weapon.' " *State v. McClendon*, 10th Dist. No. 09AP-554, 2009-Ohio-6421, ¶22 (quoting *State v. Hansard*, 4th Dist. No. 07CA3177, 2008-Ohio-3349, ¶26).

{¶14} In light of the nature of the 911 call to which the officers were responding, appellant's flight from the house, and most importantly, the observance of drugs in appellant's jacket pocket, Genter had reasonable suspicion to believe appellant might be armed. *Bobo* at 181 (reviewing propriety of *Terry* search based on totality of circumstances). Accordingly, pursuant to *Terry*, Genter was entitled to conduct a limited protective search for weapons so that he could safely conduct his investigation.

{¶15} Appellant argues, however, that even if Genter's initial protective search was proper, the seizure of the crack cocaine was illegal. Appellant claims that Genter illegally seized the crack cocaine because he did not immediately recognize the item in appellant's pants pocket as contraband but had to first manipulate the item. The evidence does not support appellant's argument.

{¶16} A police officer conducting a *Terry* search for weapons who feels an object, the shape or mass of which makes its identity as illegal contraband immediately apparent without manipulating the object, may seize the object pursuant to the "plain feel" exception to the warrant requirement. *Heard* at ¶27 (citing *Minnesota v. Dickerson* (1993), 508 U.S. 366, 375-76, 113 S.Ct. 2130, 2137).

{¶17} Genter testified that he felt a large bulge inside of appellant's right front pants pocket as he conducted his protective search for weapons. Genter testified that he used a "crushing motion" to search appellant. He testified that he could tell the bulge was consistent with narcotics. Although he could not tell from the pat down what kind of narcotics were in appellant's pants pocket, he immediately recognized the material as illegal contraband. He did not indicate that he had to manipulate the material in appellant's pants pocket to determine its nature. Accordingly, Genter could seize the item pursuant to the "plain-feel" doctrine set forth in *Dickerson*. See *State v. Stewart*, 2d Dist. No. 19961, 2004-Ohio-1319, ¶22-25.

{¶18} Lastly, appellant claims that his encounter with Genter illegally matured from a lawful *Terry* stop into an illegal arrest when Genter handcuffed him. Appellant did not make this argument in his motion to suppress or during the hearing on his motion to suppress. A defendant's failure to raise an issue before the trial court forfeits the right to

raise that issue on appeal. *State v. Vanhoose*, 4th Dist. No. 07CA765, 2008-Ohio-1122, ¶18; *Atchley* at ¶8-9. Because appellant failed to present this argument in support of his motion to suppress, he has forfeited it, and we need not consider it here for the first time. Id.

{¶19} For all of these reasons, the trial court did not err by denying appellant's motion to suppress. Accordingly, we overrule appellant's first assignment of error.

{¶20} For ease of analysis, we address appellant's remaining assignments of error out-of-order. Appellant claims in his third assignment of error that the trial court improperly admitted expert testimony regarding the actual weight of the crack cocaine found in appellant's possession. We disagree.

{¶21} At trial, Kathleen Stuebe described the procedure she used to analyze the substance found in the baggie seized from appellant's pants pocket. There were three separate baggies inside the baggie she received from the crime lab. One of those three baggies contained 19 little baggies with a substance inside each of them. The second baggie contained 23 little baggies with a substance inside each of them. The third baggie contained only a substance. All together, there were 43 smaller baggies inside the one larger baggie. Steube testified that instead of testing the substance in all 43 baggies, she tested only a sample of that number.[1] Based on those sample tests, she concluded that the substance in all of the baggies was crack cocaine. Stuebe weighed all 43 baggies to determine the total weight of crack cocaine inside the baggies: 13 grams.

[1] Stebue did not testify how many bags she actually tested in this case. However, she did testify that her sampling plan tests the number of samples equal to the square root of the total number of samples plus one. (Tr. 76.) For example, if there were 9 baggies, she would test 4 of those baggies, which is three (the square root of 9) plus one.

{¶22} Appellant now objects to Steube's testimony regarding the total weight of crack cocaine in the baggies by challenging the reliability of her sampling plan and the accuracy of her test results. Evid.R. 702(C)(3). He also claims that the trial court, as the "gatekeeper" of expert testimony, should have conducted a hearing to initially determine the reliability of Steube's expert testimony. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993), 509 U.S. 579, 113 S.Ct. 2786.[2]

{¶23} Appellant did not ask the trial court to hold a *Daubert* hearing to determine the reliability of Steube's testimony. Nor did he object to Steube's qualifications as an expert witness, her testimony regarding her tests of the substance found in appellant's pants pocket, or the reliability of her random sampling plan. Accordingly, we review this assignment of error only for plain error. *State v. Singh*, 157 Ohio App.3d 603, 2004-Ohio-3213, ¶33-36; *State v. Funk* (Oct. 25, 2001), 10th Dist. No. 00AP-1352; *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶117.

{¶24} Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. To constitute plain error, there must be: (1) an error, i.e., a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights, i.e., affected the outcome of the trial. *State v. Barnes* (2002), 94 Ohio St.3d 21, 27. Even if an error satisfies these prongs, appellate courts are not required to correct the error. Appellate courts retain discretion to correct plain errors. Id*; State v. Litreal,* 170 Ohio

[2] In *Daubert,* the Supreme Court of the United States "interpreted Fed.R.Evid.702, the federal version of Evid.R.702, as vesting the trial court with the role of gatekeeper. This gatekeeping function imposes an obligation upon a trial court to assess both the reliability of an expert's methodology as well as the relevance of any testimony offered before permitting the expert to testify." *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, ¶24 (citation omitted). The Supreme Court of Ohio adopted this role for Ohio trial courts in *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607.

App.3d 670, 2006-Ohio-5416, ¶12. Courts are to notice plain error under Crim.R. 52(B) " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " Barnes, quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of syllabus.

{¶25} The use of a random sampling method to test a large quantity of drugs has been utilized by expert witnesses for many years. See *State v. Abney* (May 4, 1981), 2d Dist No. 1157 (tests performed only on random sample of substance); *State v. Reynolds* (Sept. 26, 1985), 4th Dist. No. 1185 (expert witness tested six of 30 tablets); *In re Lemons* (1991), 77 Ohio App.3d 691, 696 (affirming conviction based on random testing of substance). Ohio courts have long recognized that random sampling is a reliable means to conduct tests. *State v. Gilbert* (Dec. 7, 2000), 7th Dist. No. 99 JE 14, 2000-Ohio-2676; *State v. Judkins* (Feb. 26, 1999), 2d Dist. No. 17315 (noting testimony indicating "the accepted scientific practice of testing a representative sample" of amount of drugs).

{¶26} In light of the well-accepted and reliable scientific practice of random-sampling, the trial court did not err, let alone commit plain error, by admitting Stuebe's expert testimony that relied on the random sampling of the substance found in appellant's pants pocket. Further, appellant has not identified any reason why Steube's random sampling method was unreliable. *State v. Jackson*, 10th Dist. No. 02AP-867, 2003-Ohio-6183, ¶36. Therefore, the trial court did not err by failing to hold, sua sponte, a *Daubert* hearing to determine the reliability of her expert testimony. Accordingly, we overrule appellant's third assignment of error.

{¶27} Appellant argues in his second assignment of error that the trial court erred by admitting the state's exhibits. Again, we disagree.

{¶28} The admission or exclusion of evidence is a decision within the trial court's sound discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. Thus, the trial court's decision to admit the state's exhibits will only be reversed if the court abused its discretion. *State v. Cunningham*, 10th Dist. No. 06AP-145, 2006-Ohio-6373, ¶33. The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶29} The state sought the admission of three exhibits: the drugs found on appellant, a lab request for testing of the drugs, and Steube's report of her drug testing. Appellant first claims the trial court erred in admitting the drugs found on appellant because the state failed to establish its chain of custody. We disagree. The state is not required to prove a perfect, unbroken chain of custody for evidence to be admissible. *State v. Gross*, 97 Ohio St.3d 121, 2002-Ohio-5524, ¶57. Any breaks in the chain of custody go to the weight afforded to the evidence, not to its admissibility. *State v.* Wallace, 10th Dist. No. 08AP-2, 2008-Ohio-5260, ¶27; *State v. Brown* (1997), 107 Ohio App.3d 194, 200.

{¶30} In any event, the state did prove the chain of custody for the drugs admitted into evidence. To establish a chain of custody, the state need only prove that it is reasonably certain that substitutions, alteration or tampering did not occur. The state need not negate all possibilities of substitution or tampering. *State v. Council* (Dec. 26, 1995), 10th Dist. No. 95APA05-562, quoting *Lemons*. Genter testified that he sealed the drugs in a bag and turned them into the Columbus Police Department property room under property number 07-7356. He testified that the property is secured in the property

room until lab work is performed. Steube testified that she received a lab request to test property room number 07-7356 for drugs. After she received that property, she performed tests on substances from baggies in a sealed bag with a property room number of 07-7356. This testimony is sufficient to establish chain of custody. See id.

{¶31} Appellant also claims the trial court erred by not redacting references to marijuana found on appellant from the lab request and Steube's report. Appellant claims those references unfairly prejudiced him in violation of Evid.R. 403(A). We disagree.

{¶32} Genter testified that he saw marijuana sticking out of appellant's jacket when he first came into contact with him. Appellant's trial counsel did not object to this testimony. Thus, any reference in the state's exhibits indicating that appellant possessed marijuana could not have unfairly prejudiced him because the jury was already aware that appellant possessed marijuana. Nor can we say that two references to a small quantity of marijuana unfairly prejudiced appellant in a trial involving appellant's alleged possession of a large amount of crack cocaine.

{¶33} The trial court did not abuse its discretion by admitting the state's exhibits. Accordingly, we overrule appellant's second assignment of error.

{¶34} Appellant contends in his fourth assignment of error that his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. We disagree.

{¶35} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins* (1997), 78 Ohio St.3d 380, paragraph two of the syllabus. Therefore, we will separately discuss appellant's sufficiency of the evidence and weight of the evidence arguments.

{¶36} The Supreme Court of Ohio delineated the role of an appellate court presented with a sufficiency of the evidence argument in *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus:

> 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. * * *

{¶37} Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Indeed, in determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. A verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *Treesh* at 484; *Jenks* at 273.

{¶38} In order to convict appellant of possession of cocaine, the state had to prove beyond a reasonable doubt that appellant knowingly possessed cocaine. R.C. 2925.11. In this case, the jury found that appellant possessed between 10 and 25 grams

of crack cocaine, making the offense a second degree felony. Appellant claims the state failed to establish that he possessed between 10 and 25 grams of crack cocaine because Steube did not test the substance in all the baggies for crack cocaine. We disagree.

{¶39} The random sampling method of testing has withstood similar sufficiency challenges in this court. See *State v. Samatar*, 152 Ohio App.3d 331, 2003-Ohio-1639, ¶81; *State v. Smith* (Dec. 23, 1997), 10th Dist. No. 97APA05-660. The random sampling method of testing "creates a reasonable inference that all similar contraband contains the same controlled substance as that tested, at least when the contraband is recovered together and similarly packaged. Accordingly, evidence of the random-sampling method is sufficient as a matter of law to support a determination that the entire substance recovered together and similarly packaged is the same controlled substance as that tested." *Samatar*; *State v. Coppernoll*, 6th Dist. No. WM-07-010, 2008-Ohio-1293, ¶13-14.

{¶40} In this case, the evidence presented at trial supported the reasonable inference that all of the substance in the seized baggies was crack cocaine. Steube testified that each of the samples she tested were crack cocaine. The samples came from materials that were recovered together and similarly packaged. Appellant did not present any evidence to rebut this inference. This evidence is sufficient for reasonable minds to conclude that all of the seized contraband was crack cocaine, and that appellant knowingly possessed between 10 and 25 grams of crack cocaine. *Smith*. Accordingly, appellant's conviction is supported by sufficient evidence.

{¶41} Appellant's manifest weight of the evidence claim requires a different review. The weight of the evidence concerns the inclination of the greater amount of

credible evidence offered to support one side of the issue rather than the other. *State v. Brindley,* 10th Dist. No. 01AP-926, 2002-Ohio-2425, ¶16. When presented with a challenge to the manifest weight of the evidence, an appellate court, after " 'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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.' " *Thompkins* at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " Id.

{¶42} A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. Neither is a conviction against the manifest weight of the evidence because the trier of fact believed the state's version of events over the appellant's version. *State v. Gale,* 10th Dist. No. 05AP-708, 2006-Ohio-1523, ¶19; *State v. Williams,* 10th Dist. No. 08AP-719, 2009-Ohio-3237, ¶17. The trier of fact is free to believe or disbelieve all or any of the testimony. *State v. Jackson* (Mar. 19, 2002), 10th Dist. No. 01AP-973; *State v. Sheppard* (Oct. 12, 2001), 1st Dist. No. C-000553. The trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimony is credible. *State v. Williams,* 10th Dist. No. 02AP-35, 2002-Ohio-4503, ¶58; *State v. Clarke* (Sept. 25, 2001), 10th Dist. No. 01AP-194. Consequently, an appellate court must

ordinarily give great deference to the fact finder's determination of the witnesses' credibility. *State v. Covington,* 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28; *State v. Hairston,* 10th Dist. No. 01AP-1393, 2002-Ohio-4491, ¶74.

{¶43} Appellant claims that his conviction is against the manifest weight of the evidence because the state failed to establish the chain of custody for the crack cocaine and because of the alleged deficiencies in Steube's expert testimony. We have already rejected each of these arguments. The state sufficiently proved the chain of custody of the crack cocaine and Steube's testimony supports a reasonable inference that appellant possessed 13 grams of crack cocaine. The jury did not lose its way so as to create a manifest miscarriage of justice. Accordingly, appellant's conviction is not against the manifest weight of the evidence.

{¶44} Appellant's conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. Therefore, we overrule appellant's fourth assignment of error.

{¶45} Appellant contends in his fifth assignment of error that the trial court erred when it awarded him no days of jail-time credit in this case. We disagree.

{¶46} Appellant did not object to the trial court's award of zero days of jail-time credit at sentencing. Because he failed to object, he has forfeited all but plain error for purposes of appeal. *State v. Hunter,* 10th Dist. No. 08AP-183, 2008-Ohio-6962, ¶16; *State v. Miller,* 4th Dist. No. 07CA2, 2007-Ohio-5931, ¶14.

{¶47} On May 27, 2009, the trial court sentenced appellant in this case. When the trial court asked appellant's counsel how many days of jail-time credit applied, trial counsel replied "[i]t is zero. If my number is right, he has not been held in jail in this

case." (Tr. 131.) Trial counsel indicated that appellant was entitled to jail-time credit, but "not on this case number." Id. Accordingly, the trial court did not award jail-time credit in this case. Three months later, appellant received a two-year prison sentence in an unrelated case.[3] The trial court ordered that sentence to be served concurrently with the sentence in this case. The trial court also granted appellant 288 days of jail-time credit in that case.

{¶48} Appellant claims an entitlement to jail-time credit in this case. However, R.C. 2967.191 authorizes jail-time credit for "the total number of days that the prisoner was confined for any reason arising out of the offense for which the prisoner was convicted and sentenced." Appellant was not confined because of this offense. On September 10, 2007, the grand jury indicted him in this case. A summons was sent to appellant the next day which summoned him to appear in court on September 24. On that day, appellant appeared before the court and entered a not guilty plea. He was released on a $10,000 recognizance bond the same day. He was never incarcerated on this charge and only spent time in jail after being arrested based upon charges in another case. Thus, appellant is not entitled to jail-time credit in this case because he was not "confined for any reason arising out of the offense for which the prisoner was convicted and sentenced." R.C. 2967.191.

{¶49} Notwithstanding, appellant claims that because the trial court ultimately ordered the sentences in both of his cases to be served concurrently, he is entitled to an

[3] To completely address this assignment of error, we grant appellant's motion to take judicial notice of a sentencing entry in *State v. Parsley*, Franklin County Court of Common Pleas Case No. 08 CR 7182. The sentencing judge in that case is the same judge that sentenced appellant in this case.

award of jail time credit toward each sentence. See *State v. Fugate*, 117 Ohio St.3d 261, 2008-Ohio-856. We disagree.

{¶50} In *Fugate*, the Supreme Court of Ohio held that "when a defendant is sentenced to concurrent prison terms for multiple charges, jail-time credit pursuant to R.C. 2967.191 must be applied toward each concurrent prison term." Id. at syllabus. However, that holding applies to a defendant that is actually entitled to such credit pursuant to R.C. 2967.191, i.e., that the defendant was held on each charge. Id. at ¶12, 18 ("So long as an offender is held on a charge while awaiting trial or sentencing, the offender is entitled to jail-time credit[.] * * * Fugate was indeed held in custody on [each charge] and is therefore entitled to jail-time credit against each concurrent prison term."). See also *State v. Maynard*, 10th Dist. No. 08AP-43, 2008-Ohio-3829, ¶17 (noting that the parties conceded in *Fugate* that he was held on each charge). In the present matter, appellant was not held in custody on this case. Accordingly, *Fugate* does not mandate an award of jail-time credit because appellant is not entitled, pursuant to R.C. 2967.191, to jail-time credit in this case.

{¶51} For these reasons, we overrule appellant's fifth assignment of error.

{¶52} Appellant contends in his sixth assignment of error that the trial court's imposition of a $7,500 fine was in error. At appellant's sentencing, the trial court imposed the mandatory fine of $7,500 as well as court costs. The trial court deferred the collection of both until appellant was released from custody but did not make a finding that appellant was indigent and unable to pay the fine. Appellant claims the imposition of a fine was in error because he is indigent and unable to pay. We disagree.

{¶53} Pursuant to R.C. 2929.18(B)(1) and 2929.18(A)(3)(b), the trial court was required to impose a fine of at least $7,500 because appellant was convicted of a second degree felony. In order to avoid the mandatory fine, an offender must allege in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine, and the trial court must find that the offender is an indigent person and is unable to pay the fine. R.C. 2929.18(B)(1); *State v. Burnett*, 10th Dist. No. 08AP-304, 2008-Ohio-5224, ¶8.

{¶54} In this case, appellant did not file with the trial court prior to sentencing an affidavit alleging that he was indigent and unable to pay the mandatory fine.[4] Without such filing, the trial court did not err when it imposed the mandatory fine pursuant to R.C. 2929.18(B)(1). Id. at ¶9; *State v. Howard*, 2d Dist. No. 21678, 2007-Ohio-3582, ¶12. Accordingly, we overrule appellant's sixth assignment of error.

{¶55} Lastly, appellant contends in his seventh assignment of error that he received ineffective assistance of trial counsel.

{¶56} To prevail on a claim of ineffective assistance of counsel, appellant must satisfy the two-prong test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; accord *State v. Bradley* (1989), 42 Ohio St.3d 136. Initially, appellant must show that counsel's performance was deficient. To meet that requirement, appellant must show counsel's error was so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Appellant may prove counsel's conduct was deficient by identifying acts or omissions that were not the result of

[4] Although appellant filed an affidavit of indigency for purposes of appointed counsel, that determination is a separate determination then being indigent for purposes of paying a mandatory fine. *Burnett* at ¶9; *State v. Gordon*, 5th Dist. No. CT2007-0011, 2007-Ohio-5545, ¶21-23.

reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. *Strickland* at 690. Appellant's failure to satisfy one prong of the Strickland test negates a court's need to consider the other. Id. at 697.

{¶57} In analyzing the first prong under *Strickland,* there is a strong presumption that defense counsel's conduct falls within a wide range of reasonable professional assistance. Id. at 689. Appellant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Id., citing *Michel v. Louisiana* (1955), 350 U.S. 91, 101, 76 S.Ct. 158, 164. Tactical or strategic trial decisions, even if ultimately unsuccessful, do not generally constitute ineffective assistance. *State v. Carter* (1995), 72 Ohio St.3d 545, 558.

{¶58} If appellant successfully proves that counsel's assistance was deficient, the second prong under *Strickland* requires appellant to prove prejudice in order to prevail. Id. at 692. To meet that prong, appellant must show counsel's errors were so serious as to deprive her of a fair trial, "a trial whose result is reliable." Id. at 687. Appellant would meet this standard with a showing "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." Id. at 694.

{¶59} Appellant first claims that trial counsel was ineffective for failing to argue that he was unlawfully arrested without probable cause in support of his motion to suppress. We disagree.

{¶60} The failure to make an argument to the trial court may be ineffective assistance of counsel if, based on the record, the argument would have been meritorious. *State v. Justice* (Dec. 24, 1996), 10th Dist. No. 96APA05-616 ("Counsel is not ineffective for failing to raise a claim that was not meritorious."). Cf. *State v. Hillman*, 10th Dist. No. 06AP-1230, 2008-Ohio-2341, ¶46 (noting that the failure to file a motion to suppress constitutes ineffective assistance of counsel only if, based on the record, the motion would have been granted). Here, trial counsel was not ineffective for failing to argue that appellant was arrested when he was handcuffed because, based on the record, such an argument would not have been successful.

{¶61} At some point in a *Terry* stop, the investigatory detention may convert into an arrest that must be supported by probable cause. *State v. Davis*, 10th Dist. No. 08AP-102, 2008-Ohio-5756, ¶13. That issue is to be decided on a case-by-case basis. Id. Appellant contends that he was arrested when he was stopped and handcuffed. We disagree.

{¶62} First, we reiterate that appellant does not dispute the validity of the initial *Terry* stop. While Genter did place appellant in handcuffs, the use of handcuffs does not automatically convert an investigative *Terry* stop into an arrest. Id.; *State v. Pickett* (Aug. 3, 2000), 8th Dist. No. 76295 (noting that handcuffing does not make detention an arrest as long as handcuffing was reasonable under the circumstances). Even the complete deprivation of a suspect's freedom does not automatically convert a *Terry* stop into an arrest if the method of restraint is reasonable under the circumstances and not excessive. *State v. Boykins* (Oct. 29, 1999), 1st Dist. No. C-990101; *Davis* at ¶13. When judging the reasonableness of the officer's actions, courts must focus on the totality of the

circumstances. These circumstances are to be viewed through the eyes of the reasonable and prudent police officer on the scene who must react to events as they unfold. *State v. Williams*, 2d Dist. No. 22601, 2008-Ohio-5511, ¶15.

{¶63} Here, Genter observed appellant run out of a house from which a suspected domestic violence 911 call had been made. Genter ordered appellant to stop and get down on the ground. As he approached appellant, Genter observed a bag of marijuana sticking out of appellant's coat pocket. Genter then handcuffed appellant. Under these circumstances, especially in light of the marijuana Genter observed in plain view, his use of handcuffs in order to effectuate the investigative *Terry* stop was reasonable and not excessive. Accordingly, Genter's use of handcuffs did not immediately convert the investigative stop into an arrest. For these reasons, trial counsel was not ineffective for failing to argue that appellant was arrested when he was placed in handcuffs.

{¶64} Appellant next argues that trial counsel was ineffective for failing to ask for a *Daubert* hearing for Stuebe's testimony. Again, we disagree. There is nothing in the record that calls into question the reliability of her testing method. Consequently, there is no indication that her testimony would have been excluded on those grounds. *State v. Sands*, 11th Dist. No. 2007-L-003, 2008-Ohio-6981, ¶108 (noting also that the decision to raise a *Daubert* challenge is a matter of trial strategy).

{¶65} Lastly, appellant contends that trial counsel was ineffective for failing to file an affidavit of indigency in order to avoid the trial court's imposition of a fine. We agree. The failure to file an affidavit of indigency prior to sentencing may constitute ineffective assistance of counsel in a case where the record establishes a reasonable probability that

the trial court would have found the defendant indigent, thereby relieving him of the obligation to pay a mandatory fine. *State v. Gilmer*, 6th Dist. No. OT-01-015, 2002-Ohio-2045; *State v. McDowell*, 11th Dist. No. 2001-P-0149, 2003-Ohio-5352, ¶75.

{¶66} Here, the presentence investigation report provides evidence of appellant's employment history and background. Id. at ¶76 (looking at presentence investigation report to determine whether or not trial counsel was ineffective for failing to file affidavit of indigency). The report shows that appellant had no source of income and no employment at the time of this offense. The report also indicated that he had no prior employment. Selling drugs was his only means of financial support. Appellant had only a high school education.

{¶67} In light of the presentence investigation report, there is a reasonable probability that the trial court would have found the defendant indigent, thereby relieving him of the obligation to pay a mandatory fine. Therefore, we conclude that appellant did receive ineffective assistance of counsel, but only to the extent that his trial counsel failed to file an affidavit of indigency in order to avoid the trial court's imposition of a fine. Id.; *Gilmer*.

{¶68} Appellant's seventh assignment of error is overruled in part and sustained in part.

{¶69} In conclusion, we overrule appellant's first, second, third, fourth, fifth, and sixth assignments of error. His seventh assignment of error is overruled in part and sustained in part. Accordingly, the judgment of the Franklin County Court of Common Pleas is affirmed in part and reversed in part, and this matter is remanded solely for the

trial court to resentence appellant and to provide him an opportunity to file an affidavit of indigency prior to sentencing.

Judgment affirmed in part and sustained in part; and cause remanded with instructions.

McGRATH, J., concurs.
TYACK, P.J., dissents.

TYACK, P.J., dissenting:

{¶70} I do not believe that seeing a baggie of marijuana extending out of a jacket pocket makes the person with the marijuana any more or less likely to be armed. To the extent the majority opinion relies upon a baggie of marijuana as cause for a search for weapons, I disagree.

{¶71} I also doubt that feeling something crunchy in someone's pants pocket makes a search of the pants pocket justifiable. Testimony that something "is consistent with" something else means nothing other than the one fact does not make the other fact impossible. In the context of the present case, the crunchy stuff meant Parsley did not have a weapon in his pocket, but little or nothing else.

{¶72} Warrantless searches are per se unreasonable unless a well-delineated exception to the warrant requirement is demonstrated. This has been so ever since the Supreme Court of the United States decided *Katz v. United States* (1967), 389 U.S. 347, 88 S.Ct. 507. No warrant is involved here and the acts of the police officer went well beyond a stop and frisk as allowed by *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868.

{¶73} The trial court overruled the motion to suppress at least in part upon a "plain feel doctrine." I am aware of no such doctrine as a well-delineated exception to the

warrant requirement. The plain view doctrine would support the seizure of the baggie of marijuana, but not the then unknown crunchy substance in Parsley's pocket.

{¶74} In short, I do not believe the State of Ohio demonstrated an applicable exception to the warrant requirement. Since no such demonstration was made, we are bound by the consistent case law from the United States Supreme Court to find that the Fourth Amendment to the United States Constitution was violated and that the motion to suppress should have been sustained.

{¶75} I feel that we are obligated to sustain the first assignment of error. Since the majority of this panel does not, I respectfully dissent.

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