[Cite as *State v. Hamilton*, 2011-Ohio-3305.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-543
v.	:	(C.P.C. No. 06CR-02-1010)
Dante L. Hamilton,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	
State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-544
v.	:	(C.P.C. No. 09CR-08-5147)
Francis Hamilton aka Dante L. Hamilton,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 30, 2011

Ron O'Brien, Prosecuting Attorney, and *Sarah W. Creedon*, for appellee.

Bellinger & Donahue, and *Kerry M. Donahue*, for appellant.

APPEALS from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} In these consolidated appeals, defendant-appellant, Francis Hamilton aka Dante L. Hamilton, appeals from a judgment of sentence and conviction entered by the Franklin County Court of Common Pleas in case No. 09CR-5147 following a jury trial in which appellant was found guilty of possession of drugs, and from a judgment in case No. 06CR-1010 revoking appellant's community control sanctions and imposing sentence, following revocation, for his aggravated robbery conviction.

{¶2} On August 26, 2009, appellant was indicted in case No. 09CR-5147 on one count of possession of cocaine, in violation of R.C. 2925.11. Appellant was on community control at the time of the indictment, having entered a guilty plea to one count of aggravated robbery on August 4, 2008 in case No. 06CR-1010. On October 27, 2009, a probation officer filed a request for revocation of appellant's community control. On December 21, 2009, a probation officer filed an amended request for revocation.

{¶3} The charge for possession of cocaine was tried before a jury beginning April 6, 2010. At trial, the state presented evidence that Columbus Police Officers Cory Canter and Quoc Nguyen were on duty April 19, 2009 in the "Four Precinct" of Columbus. (Tr., 17.) At approximately 4:45 p.m., the officers made a stop of a vehicle for a traffic violation near 4th Street and 9th Avenue. There were three males inside the vehicle, and Officers Canter and Nguyen both testified that appellant was one of the passengers. Officer Canter testified that he had come in contact with appellant on three or four other occasions prior to this date, including an encounter within the previous week. Officer Nguyen similarly testified that he recognized two of the car's occupants, including appellant, "from patrolling the area and from previous contact." (Tr., 67.)

{¶4} During the traffic stop on April 19, the officers determined that the driver did not have a driver's license, and the officers made a decision to impound the vehicle and have it towed from the scene. The occupants were told they were "free to go," but instead "[t]hey kind of hung around the area in the parking lot." (Tr., 21.) At about that time, the officers received a dispatch reporting a shooting in the area. The officers drove away from the scene of the traffic stop, but they soon discovered the report was "a fake shooting call." (Tr., 23-24.)

{¶5} Based upon his experience, Officer Canter became concerned that the fake call may have been related to the impounded car. The officers returned to the area of the traffic stop and observed the three individuals "back at the location where we were impounding the car." (Tr., 63.) The three men were standing in an alley near a dumpster. Officer Canter testified that he observed appellant "pitch a white object under" a dumpster. (Tr., 28.) Officer Nguyen similarly testified that he observed appellant "have something in his hand and immediately pitch it on the ground on the corner of the Dumpster." (Tr., 64.) Officer Nguyen then exited the cruiser and told appellant to stop. Appellant "immediately took off running," and a foot chase ensued with Officer Nguyen in pursuit. (Tr., 27.)

{¶6} At around this time, Columbus Police Officer Wesley Hurley, who was on patrol in the area, responded to a call that Officer Nguyen was pursuing an individual on foot. Officer Hurley drove to the scene of the traffic stop, and Officer Canter told Officer Hurley to "stay there and to not allow anybody into this surrounding area." (Tr., 105.) Officer Hurley testified that Officer Canter then left and "traveled * * * south." (Tr., 106.) A short time later, Officers Canter and Nguyen returned to the traffic stop location. Officer

Nguyen had been unsuccessful in pursuing the suspect. When the officers looked under the dumpster they discovered a bag containing a white substance.

{¶7} A field test was conducted on the substance, and Officer Hurley then took the baggie to a police property room. The officer filled out a lab request to verify the substance. At trial, Officer Hurley identified State's Exhibit C as containing (1) a field test kit, (2) a clear cellophane bag containing a white substance, and (3) a scale. Officer Nguyen testified that the digital scale was obtained from the inventory of the vehicle. He stated that no one was charged with possessing the scale because "[i]t wasn't on anybody. It was in the vehicle." (Tr., 95.) State's Exhibit A, a "request for laboratory examination," contained testing results indicating that the substance in the baggie had been analyzed, and that the findings revealed a "cocaine base" with a weight of "3.25 grams." (Tr., 115.) The report further stated that residue on the electronic scale was examined, but that "the quantity was not sufficient for analysis." (Tr., 115.)

{¶8} At the close of the state's evidence, defense counsel made a Crim.R. 29 motion for judgment of acquittal, which the trial court denied. Following deliberations, the jury returned a verdict finding appellant guilty of possession of cocaine. On May 13, 2010, the trial court sentenced appellant to 17 months incarceration in case No. 09CR-5147. The court also filed an entry of revocation of community control in case No. 06CR-1010 (in which appellant had previously entered a guilty plea to one count of aggravated robbery), and sentenced appellant to seven years incarceration. Finally, the court ordered the sentence in case No. 09CR-5147 to be served consecutive with appellant's sentence in case No. 06CR-1010.

{¶9} On appeal, appellant sets forth the following seven assignments of error[1] for this court's review:

> I. THE EVIDENCE WAS NOT SUFFICIENT TO SURVIVE THE DEFENDANT'S MOTION FOR A RULE 29 ACQUITTAL AT THE CLOSE OF THE STATE'S CASE.
>
> II. THE JURY FINIDNG WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> [III.] DUE PROCESS HAS BEEN DENIED DUE TO INEFFECTIVE ASSISTANCE OF COUNSEL.
>
> [IV.] PERJURY OF OFFICER SERVED TO DENY APPELLANT HIS DUE PROCESS RIGHT TO A FAIR TRIAL AND WAS AN INFRINGEMENT UPON THE INTEGRITY OF THE COURT.
>
> [V.] IT WAS ERROR FOR THE COURT TO SUA SPONTED [SIC] APPOINT COUNSEL FOR THE DEFENSE WITNESS WHO WAS THE ACTUAL PERPETRATOR OF THE OFFENSE SO AS TO DISSUADE HIM FROM TESTIFYING ON BEHALF OF APPELLANT.
>
> [VI.] THE COURT DEMONSTRATED ACTUAL BIAS BY INCORRECTLY ASSERTING THE DEFENDANT WAS ON JUDICIAL RELEASE RATHER THAN COMMUNITY CONTROL AND APPELLANT WAS DENIED DUE PROCESS ON THE VIOLATION PROCEDURE.
>
> [VII.] THE COURT[']S SENTENCE WAS VINDICTIVE, EXCESSIVE AND NOT IN ACCORDANCE WITH THE LAW.

{¶10} Appellant's first and second assignments of error are interrelated and will be considered together. Under these assignments of error, appellant asserts that the evidence presented in support of his conviction for possession of cocaine was insufficient

[1] Appellant's "statement of errors" list a total of seven assignments of error. In appellant's brief, however, the assignments of error are incorrectly numbered I, II, IV, V, VI, VII, and VIII (i.e., omitting the number III). For ease of discussion, we have re-numbered, by way of brackets, the assignments of error to reflect seven assignments of error.

to survive appellant's Crim.R. 29 motion for acquittal, and that the verdict was against the manifest weight of the evidence.

{¶11} We initially note the applicable standards of review in considering sufficiency and manifest weight challenges. In *State v. Sexton,* 10th Dist. No. 01AP-398, 2002-Ohio-3617, ¶30-31, this court noted the distinction between those two standards as follows:

> To reverse a conviction because of insufficient evidence, we must determine as a matter of law, after viewing the evidence in a light most favorable to the prosecution, that a rational trier of fact could not have found the essential elements of the crime proved beyond a reasonable doubt. * * * Sufficiency is a test of adequacy, a question of law. * * * We will not disturb a jury's verdict unless we find that reasonable minds could not reach the conclusion the jury reached as the trier of fact. * * * We will neither resolve evidentiary conflicts in the defendant's favor nor substitute our assessment of the credibility of the witnesses for the assessment made by the jury. * * * A conviction based upon legally insufficient evidence amounts to a denial of due process, * * * and if we sustain appellant's insufficient evidence claim, the state will be barred from retrying appellant.
>
> A manifest weight argument, by contrast, requires us to engage in a limited weighing of the evidence to determine whether there is enough competent, credible evidence so as to permit reasonable minds to find guilt beyond a reasonable doubt and, thereby, to support the judgment of conviction. * * * Issues of witness credibility and concerning the weight to attach to specific testimony remain primarily within the province of the trier of fact, whose opportunity to make those determinations is superior to that of a reviewing court. * * * Nonetheless, we must review the entire record. With caution and deference to the role of the trier of fact, this court weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether, in resolving conflicts in the evidence, the jury, as the trier of facts, clearly lost its way, thereby creating such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should

> be exercised only in the exceptional case in which the evidence weighs heavily against a conviction.

(Citations omitted.)

{¶12} R.C. 2925.11(A), the statute under which appellant was convicted, provides: "No person shall knowingly obtain, possess, or use a controlled substance." Pursuant to R.C. 2901.22(B), "[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."

{¶13} In arguing that the evidence was insufficient to support the conviction, appellant contends in part that evidence was contaminated, and that the chain of custody was corrupted. Appellant notes that, at the end of the state's case, over objection of defense counsel, the state moved for admission of the lab report results. Defense counsel objected on the basis that "[t]he chain of custody seems to be confusing at best." (Tr., 127.) Counsel further argued: "I am not sure that the State has established a direct link that can be relied on between the collection of the evidence and the submission to the property room." (Tr., 127-28.) The trial court overruled the objection and admitted the scale and cocaine.

{¶14} Appellant argues that the introduction of State's Exhibit A (the lab report results) and Exhibit C (the white substance and digital scale) should have been denied. Appellant contends there was no testimony establishing where the baggie traveled to, and where the evidence was placed, prior to the time it entered the property room. Appellant further argues that the addition of the digital scale from an unknown source

required a Crim.R. 29 acquittal. According to appellant, cocaine on the scale could have mixed with the substance in the baggie.

{¶15} In general, "[t]he trial court has broad discretion in the admission and exclusion of evidence and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby [a reviewing] court should be slow to interfere." *State v. Hymore* (1967), 9 Ohio St.2d 122, 128.

{¶16} Evid.R. 901(A) states: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The "[c]hain of custody is a part of the authentication and identification mandate set forth in Evid.R. 901." *State v. Brown* (1995), 107 Ohio App.3d 194, 200. The state has the burden of establishing a proper chain of custody. Id. However, "[t]he state's burden * * * is not absolute since '[t]he state need only establish that it is reasonably certain that substitution, alteration or tampering did not occur.' " Id., quoting *State v. Blevins* (1987), 36 Ohio App.3d 147, 150. Accordingly, "even if a chain of custody is broken, it goes to the weight afforded the evidence, not its admissibility." *Brown* at 200.

{¶17} In the present case, Officer Hurley testified that, at the time he arrived at the scene of the traffic stop, he was told by Officer Canter to "[s]tay here and keep everybody out of this area here." (Tr., 106.) Officer Hurley secured the scene until the other officers returned, and he stated that no one else was in the area of the contraband at this time. Officer Hurley testified that, upon arriving back at the scene, Officer Nguyen approached the dumpster, "where he bent down and * * * pulled out a * * * clear cellophane bag which had a white substance inside of it." (Tr., 107.) After the officers conducted a field test,

Officer Hurley "was given control of the baggie and informed to take it to the property room." (Tr., 108.) Officer Hurley testified that he completed a property slip, as well as a lab request form, and turned the items in to the property room. He described the standard procedure by which the property room clerk handles a property slip and assigns a specific property number. Officer Hurley identified State's Exhibit C as the contraband he took from the scene of the traffic stop to the property room, and he identified State's Exhibit A as the laboratory report with results indicating: "Content, cocaine base; weight, 3.25 grams; control, Schedule II." (Tr., 115.)

{¶18} Officer Nguyen testified that the digital scale was obtained through an inventory search of the vehicle. He further stated: "In my line of work, if there's a scale, it's used to weigh out drugs, so it's sent to the property room." (Tr., 95). He explained that no one was charged with possessing the scale because "[i]t wasn't on anybody. It was in the vehicle." (Tr., 95.)

{¶19} Here, the record indicates that the officers testified as to why the scale was submitted to the property room. Further, the lab report indicated that residue on the electronic scale was examined but that "the quantity was not sufficient for analysis." (Tr., 115.) Other than appellant's suggestion that residue on the scale could have been mixed with the contraband in the baggie, the record contains no indication that such activity occurred. Further, as noted above, breaks in the chain of custody go to the weight, rather than admissibility, of the evidence. *State v. Tolliver*, 10th Dist. 02AP-811, 2004-Ohio-1603, ¶93. Upon review, we find that the state presented evidence establishing, to a reasonable certainty, that none of the items transported to the property room had been altered, substituted, or tampered with. Accordingly, the trial court did not abuse its

discretion in determining that there was a sufficient foundation for admission of the exhibits at issue.

{¶20} Appellant also argues there was no reasonable identification of appellant. Appellant contends that the police witnesses gave almost no detail as to the means used to identify appellant.

{¶21} The evidence indicates that two police officers making a vehicle stop on April 19, 2009 both identified appellant as a passenger of the vehicle based upon previous encounters. After the officers made a decision to impound the vehicle, the occupants were informed they were free to leave. The officers then received a dispatch reporting a shooting. The officers left the scene of the vehicle stop, but returned a short time later and observed the three individuals still in the area of the vehicle. Both officers observed appellant toss a white object near a dumpster; after one of the officers told him to stop, appellant fled the area. Following an unsuccessful pursuit, the officers returned to the area of the dumpster and discovered a baggie containing a white substance. Subsequent testing revealed a positive test result for 3.25 grams of cocaine.

{¶22} With respect to the issue of identification, Officer Canter testified he had come in contact with appellant on three or four other occasions prior to this date, including one encounter "within the previous week." (Tr., 19.) Officer Nguyen recognized two of the individuals, including appellant, "from patrolling the area and from previous contact." (Tr., 67.) Officer Nguyen and his partner had made a traffic stop involving appellant a "few days earlier" at East 8th Street and Grant Avenue (Tr., 67.) Upon review of the record, and construing the evidence most strongly in favor of the prosecution, there was

sufficient evidence in this case to support the jury's verdict finding appellant guilty of possession.

{¶23} As to appellant's manifest weight challenge, the weight to be given the evidence and the credibility of the witnesses are matters primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. In the present case, we find that the trier of fact could have reasonably credited the identification testimony of the officers, and we conclude that the jury did not lose its way and create a manifest miscarriage of justice by finding appellant guilty of possession of a controlled substance.

{¶24} Based upon the foregoing, appellant's first and second assignments of error are without merit and are overruled.

{¶25} Under the third assignment of error, appellant asserts that this matter should be remanded for a new trial because of ineffective assistance of counsel. Appellant argues that the central issue in this case was whether the officers, in the brief time they observed someone throw an object toward a dumpster, knew that the suspect was appellant. Appellant contends that defense counsel did not fairly test the credibility of the witnesses, arguing it is unlikely Officer Canter observed anyone throw an object toward a dumpster if he waited for the other officer to return to the scene before checking the dumpster. Appellant further argues that counsel made no effort to locate and bring in the occupants of the vehicle, and that no effort was made to obtain the police report of the traffic stop.

{¶26} In order to warrant reversal of a conviction for ineffective assistance of counsel, a defendant must demonstrate, "first, that counsel's performance was deficient

and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial." *State v. Foust,* 105 Ohio St.3d 137, 2004-Ohio-7006, ¶75, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶27} As to appellant's claim that trial counsel should have tested the credibility of the witnesses, the record indicates that counsel cross-examined both Officers Canter and Nguyen regarding their testimony that appellant threw an object underneath a dumpster. Those officers were also questioned with respect to the circumstances surrounding Officer Nguyen's return to the scene after chasing the suspect. Based upon the record presented, appellant has not demonstrated prejudice as a result of counsel's cross-examination of these witnesses.

{¶28} Appellant also argues that counsel's performance was deficient in not fully investigating the case, including counsel's failure to locate the occupants of the car. In response, the state argues that there is no basis to conclude what the testimony of these individuals would have been had they been called to testify, and thus it is pure speculation to conclude that the result of appellant's trial would have been different. We agree with the state that, absent any indication from the record that such testimony would have been helpful to the defense, appellant cannot demonstrate ineffective assistance of counsel. See *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶121 (counsel's decision not to call witness not ineffective assistance of counsel where it was "totally speculative" whether witness would have provided favorable evidence).

{¶29} Appellant further contends that trial counsel should have obtained the police report and LEADS sheet from the traffic stop. That evidence, however, is not part of the

record on appeal and, thus, this court cannot determine on direct appeal whether counsel was ineffective. *State v. Williams,* 10th Dist. No. 08AP-719, 2009-Ohio-3237, ¶32 (because appellant's claim that counsel was ineffective for failing to introduce police reports relies upon evidence outside the record, "it is impossible to discern whether counsel was ineffective"); *State v. Smith,* 1st Dist. No. C-080607, 2009-Ohio-3258, ¶13 (because claim of ineffective assistance of counsel for failing to obtain copy of police report was based on matters outside record, court could not consider claim on direct appeal).

{¶30} Appellant argues that counsel was ineffective in failing to object to State's Exhibit B, a U-10 police report, from being introduced into evidence. As noted by the state, however, while the transcript index indicates the exhibit was admitted, a review of the record, including the page number (129) cited in the index, does not show that State's Exhibit B was actually admitted. Rather, the record indicates that the only exhibits admitted were State's Exhibits A, C, and P-1. Accordingly, appellant cannot demonstrate prejudice.

{¶31} Finally, appellant contends that his counsel was ineffective in failing to object to the introduction of the digital scale, and to Officer Nguyen's testimony about the use of such items. We have previously noted the evidence in support of appellant's conviction, including testimony that the officers observed appellant throw an object under a dumpster and flee the area on foot when ordered to stop. In light of the totality of the other evidence presented, even if we found counsel's performance deficient in failing to object to the admission of the scale, or to the single remark of the officer, appellant cannot show that he would have been acquitted had counsel successfully challenged this

evidence. See *State v. Ruark,* 10th Dist. No. 10AP-50, 2011-Ohio-2225, ¶50 (defense counsel not ineffective for failing to object to admission of drug-related evidence where "no probability that the jury would have acquitted appellant had the evidence not been admitted").

{¶32} Finding that trial counsel's performance was either not deficient or did not result in prejudice, appellant's third assignment of error is overruled.

{¶33} Under the fourth assignment of error, appellant argues that perjury by Officer Canter denied him due process. Appellant points to a statement by the prosecutor during closing argument that "the first officer that testified was not as diligent or dedicated as the other officers in this case." (Tr., 138.) Appellant argues that the instant case appears to be one in which the prosecution did not believe the testimony of its own witness.

{¶34} In response, the state does not deny that there were inconsistencies in the testimony of the officers, but argues there has been no showing of perjury by Officer Canter. We agree.

{¶35} At trial, Officer Nguyen testified that he was the individual who reached down and picked up the bag under the dumpster following the officer's unsuccessful attempt to pursue the suspect on foot. Officer Nguyen's account was corroborated by Officer Hurley, who stated that he observed Officer Nguyen pull out a bag with a white substance near the dumpster. In contrast, when asked who actually reached under the dumpster, Officer Canter testified: "I believe I'm the one that picked it up." (Tr., 31.) When asked on cross-examination whether he was the officer who found the bag, Officer Canter responded: "I believe so, yeah." (Tr., 50.) He indicated to defense counsel,

however, that if counsel would provide him with a copy of the U-10 police report "I can give you the details on that." (Tr., 50.) On re-direct examination, Officer Canter stated that he routinely writes approximately 10-15 such police reports on a weekly basis.

{¶36} Perjury has been defined as "the words of one who 'willfully and corruptedly' stated facts which he knew were not true." *State v. Willis* (Feb. 13, 1973), 10th Dist. No. 72AP-330. Arguably, the testimony of Officer Canter in the instant case placed at issue the officer's credibility, including whether his memory was faulty with respect to some of the events (a fact reflected by the statement of the prosecutor during closing argument and cited by appellant above). We note that defense counsel cross-examined witnesses as to the purported inconsistencies; these inconsistencies, however, in the absence of other record evidence, do not warrant the conclusion that perjury was committed at trial. Based upon the record presented, appellant has not demonstrated a deprivation of due process based upon purported perjured testimony.

{¶37} Appellant's fourth assignment of error is overruled.

{¶38} Under the fifth assignment of error, appellant contends it was error for the trial court to, sua sponte, appoint counsel for a defense witness in an effort to dissuade him from testifying. Appellant notes that, during trial, after being advised that he might be prosecuted, a potential witness indicated he would invoke his Fifth Amendment rights, and therefore this individual never testified on appellant's behalf.

{¶39} By way of background, following the presentation of the state's case-in-chief, defense counsel indicated to the court that appellant "has informed me that a witness that was unknown to me prior to this afternoon * * * is present and would like to offer testimony on behalf of" appellant. (Tr., 131.) When the trial court inquired as to

whether defense counsel had the opportunity to determine the nature of the potential testimony, counsel responded: "Your honor, I have been able to interview him briefly in the outside conference room, and it is my impression that his testimony would * * * in essence remove, if believed, remove guilt from my client and would potentially involve himself in the possession of these * * * drugs." (Tr., 131.)

{¶40} The state objected on the basis of "lack of timeliness on this pursuant to the rules of discovery." (Tr., 132.) Given the potential of exculpatory testimony, the trial court determined that the state's concerns could be addressed during cross-examination. The trial court, however, noted concern that "if somebody is going to take responsibility for the possession of cocaine, they are, in fact, going to be incriminating themselves." (Tr., 132.) The court therefore appointed an attorney to "explain to this potential witness his constitutional rights about not being able to be forced to testify to incriminate himself and see if he does still wish to go forward and provide testimony in the matter." (Tr., 132-33.)

{¶41} Following a short recess, the attorney who spoke with the potential witness related that: "[A]fter explaining to him his rights, he has * * * made a decision that there is no reason for him to testify, and any testimony he would give would be simply to exercise his rights under the Fifth Amendment." (Tr., 133-34.) At that point, defense counsel stated: "I believe when he says that he would plead the Fifth, that he would. And with that said, we wouldn't be offering him as a witness." (Tr., 134.)

{¶42} In general, " '[t]he Fifth Amendment privilege against self-incrimination protects a witness from answering a question which might incriminate him if it is determined *in the sound discretion of the trial court* that there is a reasonable basis for the witness [to] apprehend that a direct answer would incriminate him.' " *State v. Poole,* 185

Ohio App.3d 38, 2009-Ohio-5634, ¶20 (emphasis sic), quoting *State v. Cummings* (Nov. 5, 1990), 5th Dist. No. 89-CA-45. Courts have recognized that it is "within the discretion of the court to warn a witness about the possibility of incriminating herself * * * just so long as the court does not abuse that discretion by so actively encouraging a witness' silence that advice becomes intimidation." *State v. Abdelhaq* (Nov. 24, 1999), 8th Dist. No. 74534, citing *United States v. Arthur* (C.A.6, 1991), 949 F.2d 211. Further, "[b]adgering a witness is a violation of due process." *Poole* at ¶21.

{¶43} In the present case, the record does not show that the trial court badgered or actively encouraged the silence of a potential witness. Rather, after expressing concern that the witness might incriminate himself, the court exercised its discretion in making this individual aware, through discussions with an attorney, of his constitutional rights. Appellant has not shown an abuse of discretion, and the fifth assignment of error is overruled.

{¶44} Appellant's sixth and seventh assignments of error will be addressed together. Under these assignments of error, appellant challenges the trial court's handling of the revocation proceedings, and contends that the sentences imposed were excessive. With regard to the first issue, appellant contends that the record is unclear whether notice, an opportunity to be heard, or a bipartite hearing was provided with respect to the probation revocation.

{¶45} As noted under the facts, appellant entered a guilty plea in August 2008 to one count of aggravated robbery in case No. 06CR-1010. At that time, the trial court sentenced appellant to five years of community control, and the court informed appellant that he would be sentenced to a prison term of seven years if he violated the terms of the

community control. In October 2009, the state filed a request for revocation of probation. The state subsequently filed an amended request for revocation, alleging that appellant (1) failed to obtain his GED, (2) failed to pay his court costs, (3) had been indicted for possession of drugs on August 26, 2009 in case No. 09CR-5147, and (4) had been charged on January 25, 2009 with three counts of domestic violence, three counts of assault, and one count of aggravated menacing.

{¶46} Following the jury verdict on April 8, 2010, the trial court inquired of defense counsel as to a preference for a sentencing date, and counsel requested "at least a couple of weeks for sentencing," citing the "probation matter" that appellant "also has to address." (Tr., 175.) The trial court continued sentencing until May 12, 2010.

{¶47} On that date (May 12, 2010), the matter came before the court for sentencing in case No. 09CR-5147, and for determination of the probation revocation request in case No. 06CR-1010. The trial court noted on the record, based upon appellant's finding of guilt in case No. 09CR-5147, "there are grounds for revocation from the violations on the 2006 case" (case No. 06CR-1010). Defense counsel acknowledged that the conviction for possession "would be a basis for revocation." (Tr., 177-78.) After permitting defense counsel and appellant an opportunity to address the court, the trial court sentenced appellant to a sentence of 17 months in case No. 09CR-5147, and the court ordered "the judicial release in 06CR-1010 revoked," and the remainder of that sentence to be imposed. (Tr., 184.)

{¶48} The next day, May 13, 2010, the trial court noted that appellant "actually had been granted community control" (rather than judicial release). The court further noted that, at the time community control sanctions were imposed, the court "did indicate

that if he was found to be in violation and the Court revoked the community control sanctions that a sentence of seven years would be imposed on the case." (Tr., 186-87.) The court permitted appellant the opportunity to speak, and then imposed a sentence of seven years in case No. 06CR-1010. The court further ordered the 17-month sentence in case No. 09CR-5147 to be served consecutive to the sentence in case No. 06CR-1010.

{¶49} Upon review of the proceedings, as reflected above, appellant has not demonstrated lack of notice or an opportunity to be heard arising out of the probation revocation. Further, while appellant argues that the court gave no factual basis of the revocation, it is clear from the transcript of proceedings that appellant's conviction for possession of cocaine served as the basis for the revocation. As also noted, defense counsel acknowledged that "the conviction * * * would be a basis for revocation." (Tr., 178.) Here, the trial court's statements were sufficient to inform appellant of the reason his probation was revoked, and appellant has not shown a deprivation of due process with respect to the revocation of his community control sanctions.

{¶50} Appellant also argues that the trial court's sentence was vindictive, excessive, and not in accordance with law. Specifically, appellant argues that the trial court appeared to have hostility toward him when, upon conviction, the court announced that appellant was on judicial release, and that it was revoking his release and sentencing him to a seven-year term. The trial court subsequently determined, however, that appellant was on community control, and the court filed a revocation entry. Appellant argues that the fact he had been on community control for a substantial period of time and was reasonably compliant did not justify a lengthy sentence of seven years on the aggravated robbery conviction.

{¶51} In *State v. Allen,* 10th Dist. No. 10AP-487, 2011-Ohio-1757, ¶19-21, this court discussed the standard of review in considering a trial court's decision on felony sentencing as follows:

> In *State v. Burton*, 10th Dist. No. 06AP-690, 2007-Ohio-1941, ¶19, this court held that, pursuant to R.C. 2953.08(G), we review whether clear and convincing evidence establishes that a felony sentence is contrary to law. A sentence is contrary to law when the trial court failed to apply the appropriate statutory guidelines. *Burton* at ¶19.
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> After *Burton*, however, in a plurality opinion, the Supreme Court of Ohio established a two-step procedure for reviewing a felony sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912. The first step is to "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Kalish* at ¶4. The second step requires that the trial court's decision also be reviewed under an abuse of discretion standard. Id. An abuse of discretion connotes more than an error of law or judgment; it entails a decision that is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.
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> As a plurality opinion, *Kalish* has limited precedential value. *State v. Franklin*, 182 Ohio App.3d 410, 2009-Ohio-2664, ¶8. Additionally, since *Kalish*, this court has continued to rely on *Burton* and only applied the contrary-to-law standard of review. *Franklin* at ¶8, citing *State v. Burkes*, 10th Dist. No. 08AP-830, 2009-Ohio-2276; *State v. O'Keefe*, 10th Dist. No. 08AP-724, 2009-Ohio-1563; *State v. Hayes*, 10th Dist. No. 08AP-233, 2009-Ohio-1100.

{¶52} The state argues that the record does not support appellant's claim of bias on the basis of the court's mistaken belief appellant had been granted judicial release. We agree. While the record shows that the court was initially under the impression that appellant was on judicial release, the court noted during the May 13, 2010 sentencing hearing that appellant "actually had been granted community control on this felony of the

first degree, and apparently counsel didn't catch that either." (Tr., 186-87.) The court further noted that, at the time appellant was initially placed on community control, "the Court did indicate that if he was found to be in violation and the Court revoked the community control sanctions that a sentence of seven years would be imposed on the case." (Tr., 187.) The record further indicates that the trial court considered defense counsel's arguments in support of mitigation, including counsel's argument that appellant "was doing well on probation up until this offense." (Tr., 179.) The trial court disagreed with counsel's assessment, citing appellant's failure to obtain his GED and "the fact that he's committed yet another drug offense." (Tr., 180.)

{¶53} Thus, the court explained at the sentencing hearing its disagreement with defense counsel's mitigation arguments, and the court cited the fact that appellant had been previously advised that a seven-year term would be imposed upon a violation of community control sanctions. Further, the trial court's sentencing entries explicitly state that the court considered the purposes and principles of sentencing under R.C. 2929.11, the factors set forth in R.C. 2929.12, as well as the factors and applicable provisions of R.C. 2929.13 and 2929.14. This court has previously held that such a statement "supports the conclusion that the trial court considered the requisite statutory factors prior to sentencing appellant." *State v. Sharp,* 10th Dist. No. 05AP-809, 2006-Ohio-3448, ¶6. Finally, the sentences in both cases were within the statutory range for the offenses. Here, appellant has failed to demonstrate that the sentences imposed were contrary to law or constituted an abuse of discretion.

{¶54} Accordingly, the sixth and seventh assignments of error are without merit and are overruled.

{¶55} Based upon the foregoing, appellant's seven assignments of error are overruled, and the judgments of the Franklin County Court of Common Pleas are hereby affirmed.

Judgments affirmed.

SADLER and TYACK, JJ., concur.

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