[Cite as *State v. Spicer*, 2009-Ohio-6173.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-02-036
	:	O P I N I O N
- vs -		11/23/2009
	:	
JAZIEAL D. SPICER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM HAMILTON MUNICIPAL COURT
Case No. 08CRB05724-A

Mark K. Dudley, 345 High Street, 7th Floor, Hamilton, Ohio 45011, for plaintiff-appellee

Patrick E. McKnight, P.O. Box 621, Monroe, Ohio 45050-0621, for defendant-appellant

HENDRICKSON, J.

{¶1} Defendant-appellant, Jazieal D. Spicer, appeals from his conviction in the Hamilton Municipal Court for one count of possession of drug paraphernalia. We reverse and appellant is discharged.

{¶2} On October 4, 2008, Officer Casey Johnson of the city of Hamilton Police Department stopped appellant for a minor traffic violation. Thereafter, while standing outside appellant's vehicle, Officer Johnson saw a digital scale on the rear floorboard that was covered "all over" by a "white powdery substance." Appellant was then

arrested and charged with one count of possession of drug paraphernalia. Following a bench trial, appellant was found guilty, sentenced to serve ten days in jail, all of which were suspended, placed on community control for a period of two years, and ordered to pay $230 in fines and court costs.

{¶3} Appellant now appeals his conviction, raising one assignment of error.

{¶4} "THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT BY FAILING TO GRANT APPELLANT'S MOTION FOR ACQUITTAL."

{¶5} In his sole assignment of error, appellant argues that the trial court erred by denying his Crim.R. 29 motion for acquittal because the state failed to prove that the digital scale located behind the front seat of his vehicle was used for weighing or measuring a controlled substance.

{¶6} We begin by noting that plaintiff-appellee, State of Ohio/City of Hamilton, did not file an appellate brief in this matter. As we have stated previously, and while we understand the budgetary constraints that the city of Hamilton may now be facing, this court may accept appellant's statement of facts and issues as correct and reverse the judgment if his brief reasonably appears to sustain such action. App.R. 18(C); see *State v. Ritchie*, Butler App. No. CA2008-12-304, 2009-Ohio-5280, ¶3, fn. 1; *State v. Campbell*, Butler App. No. CA2007-12-313, 2008-Ohio-5542, ¶2, fn. 1; *State v. Myers* (1997), 119 Ohio App.3d 642, 645; see, also, *State v. Caynor*, 142 Ohio App.3d 424, 426, 428-429, 2001-Ohio-3298. In turn, after a thorough review of the record, which includes the trial transcript, we find appellant's conviction for possession of drug paraphernalia was not supported by sufficient evidence.

{¶7} Our review of a trial court's decision denying a Crim.R. 29 motion for acquittal, which is used to test the adequacy of the evidence presented at trial, is governed by the same standard as that used for determining whether a verdict is

supported by sufficient evidence. *State v. Terry*, Fayette App. No. CA2001-07-012, 2002-Ohio-4378, ¶9; *State v. Haney,* Clermont App. No. CA2005-07-068, 2006-Ohio-3899, ¶14. Whether the evidence presented is legally sufficient to sustain a verdict is a question of law. *State v. Rodriguez*, Butler App. No. CA2008-07-162, 2009-Ohio-4460, ¶60, citing *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. In reviewing the sufficiency of the evidence supporting a criminal conviction, an appellate court examines the evidence to determine whether such evidence, if believed, would support a conviction. *State v. Carroll,* Clermont App. Nos. CA2007-02-030, CA2007-03-041, 2007-Ohio-7075, ¶117. By examining the evidence in a light most favorable to the prosecution, the court must determine whether "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id. Proof beyond a reasonable doubt is "proof of such character that an ordinary person would be willing to rely and act upon it in the most important of his own affairs." R.C. 2901.05(D).

{¶8} Appellant was charged with possession of drug paraphernalia in violation of R.C. 2925.14(C)(1), a fourth-degree misdemeanor. As defined by R.C. 2925.14(A), drug paraphernalia includes, among other things, "[a] scale or balance for weighing or measuring a *controlled substance*." (Emphasis added.) Cocaine is classified as a Schedule II controlled substance. See R.C. 3719.41.

{¶9} As the lone witness at trial, Officer Johnson testified that he pulled appellant over for "some traffic violations" during the "daylight hours" of October 4, 2008. Officer Johnson, who had been involved with some drug related arrests in the past, then testified, over appellant's objection, that while he stood outside appellant's vehicle he saw a "digital scale [on] the rear floorboard" that was covered "all over" by a "white powdery substance," which, according to him, the scale "did *appear* to have crack

cocaine or powder cocaine on it at some point." (Emphasis added.) When asked about his past experience in making arrests for "digital scales as drug paraphernalia," Officer Johnson testified that "[j]ust the digital scale is drug paraphernalia."[1]

{¶10} After a thorough review of the record, including the trial transcript itself, we find that the state failed to present sufficient evidence to support appellant's conviction for possession of drug paraphernalia. As noted above, and although Officer Johnson testified that the substance found on the digital scale "*appear[ed* to be] crack cocaine or powder cocaine," he never testified as to his experience and familiarity with the drug, and conceded that chalk dust and talcum powder also *appear* white and powdery.[2] See R.C. 2925.14(B)(4) (requiring a court to consider the "existence of any residue of a *controlled substance* on the equipment" in determining if the equipment constitutes drug paraphernalia). In addition, Officer Johnson's testimony revealed that appellant never made any statements regarding the digital scale, and that the vehicle did not contain any "packaging," "large sums of money," or "anything else" that is normally associated with drug activity. See R.C. 2925.14(B)(1)-(2), (11).

{¶11} In turn, based on the facts and circumstances of this case, we find the state failed to provide sufficient evidence to prove *beyond a reasonable doubt* that the digital scale had been used by appellant in conjunction with a controlled substance, and therefore, the state failed to prove that appellant was in possession of drug paraphernalia. See *Newburgh Heights v. Moran*, Cuyahoga App. No. 84316, 2005-

1. Officer Johnson did testify that he conducted a "field test" on the scales to determine the nature of the substance found on the digital scale. However, after learning that the state failed to provide the test results to appellant during discovery, the trial court sustained appellant's objection and stated that it was "not considering into evidence any test results."

2. Officer Johnson's testimony simply revealed that he was employed as a police officer on October 4, 2008, he "had experience with digital scales in the course of [his] business as a police officer," he "had been involved in drug related arrests," and that he had "arrested people for possession of drug abuse instruments or scales" previously.

Ohio-2610, ¶15 (finding officer's testimony, standing alone, not sufficient evidence to prove beyond a reasonable doubt that defendant possessed drug paraphernalia); see, also, *City of Bowling Green v. Castle*, Wood App. No. WD-97-056, 1998 WL 102140, at *3-*4. Mere possession of a digital scale, without more, is not a criminal offense. Accordingly, as the state failed to prove beyond a reasonable doubt that appellant was in possession of drug paraphernalia, his sole assignment of error is sustained.

{¶12} Judgment reversed and appellant discharged.

BRESSLER, P.J., and POWELL, J., concur.