[Cite as *State v. Walker*, 2010-Ohio-329.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-02-002
	:	O P I N I O N
- vs -		2/1/2010
	:	
GREGORY R. WALKER,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 08-CRI-00180

David B. Bender, Fayette County Prosecuting Attorney, Kristina M. Rooker, 110 East Court Street, Washington C.H., OH 43160, for plaintiff-appellee

Jay A. Adams, 424 Patterson Road, Dayton, OH 45419, for defendant-appellant

YOUNG, P.J.

{¶1} Defendant-appellant, Gregory R. Walker, appeals his conviction and sentence from the Fayette County Court of Common Pleas for possession of crack cocaine. We affirm appellant's conviction and sentence.

{¶2} On August 15, 2008, Sergeant Doug Coe of the Fayette County Sheriff's Office received information from a confidential informant that narcotics were going to be transported into Fayette County from the Dayton area. The informant told

Sergeant Coe the narcotics were going to be delivered to a location in a parking lot between the Lion's Den and the old Dollar Motel. The record indicates the informant was the driver of the vehicle carrying the illegal drugs, and appellant was the passenger in the vehicle. The informant provided the sergeant with a description of the vehicle, a gray Hyundai, and maintained contact with Sergeant Coe while he was transporting the narcotics from Dayton to Fayette County. He also informed the sergeant when the vehicle would arrive at the designated location.

{¶3} As a result of receiving this information, Sergeant Coe set up surveillance with other officers in the "meet location" disclosed by the informant. Sometime after 5:00 p.m. on August 15, 2008, one of the officers observed a driver of a gray Hyundai turning off of U.S. 35 and approaching the parking lot across from the Lion's Den. The vehicle's driver turned in front of Sergeant Coe's unmarked vehicle to enter the parking lot, and the driver backed the vehicle into a parking space of a gravel lot near an apartment building. Although Sergeant Coe's pickup truck was unmarked, it was equipped with sirens, lights, and radios.

{¶4} As the driver backed the vehicle into the parking space, Sergeant Coe drove his vehicle into the same lot and approached the suspicious vehicle "head on." While approaching the vehicle, Sergeant Coe observed appellant slide a black item from his lap area to his left.

{¶5} Sergeant Coe, who was wearing a "raid vest" with a four-inch square Sheriff's patch, then exited his truck, walked to the passenger side of the vehicle where appellant was sitting, removed appellant from the vehicle, laid him down in a prone position on the gravel lot, and secured him.

{¶6} After Sergeant Coe and his fellow officers removed and secured both

the driver and appellant, Sergeant Coe asked Sergeant Jay Hicks, the K-9 handler for the Fayette County Sheriff's Office, to run his K-9 around the suspicious vehicle in which appellant was a passenger. The K-9 indicated on the passenger side of the vehicle and the door seam at the back of the front passenger door. After the K-9 indicated on the vehicle, Sergeant Coe and his fellow officers began to search the vehicle and found a black bag lying on the console between the two front seats of the vehicle. Inside the black bag the sergeant found two plastic bags containing off-white colored rocks. The BCI&I report later indicated that one of the bags contained 212 grams of crack cocaine and the other contained 227.6 grams of crack cocaine.

{¶7} At trial, Sergeant Coe testified that he observed no other black items in the front of the vehicle and believed that bag to be the item he saw appellant sliding off his lap and onto the console as he approached the vehicle. He also testified that in his training as a police officer, he determined that the bag contained no surface from which he would be able to obtain fingerprints.

{¶8} On August 22, 2008, a grand jury indicted appellant on one count of possession of illegal drugs in violation of R.C. 2925.11(C)(4)(f), a felony in the first degree. The indictment included a major drug offender specification, as defined in R.C. 2941.1410.

{¶9} Trial counsel for appellant subsequently filed a motion to suppress, a motion for disclosure of the confidential informant, and a motion for an independent fingerprint analysis. The trial court overruled all motions.

{¶10} On January 11, 2009, a jury convicted appellant as charged. Shortly thereafter, the trial court imposed a sentence of 12 years, which included a mandatory ten-year sentence pursuant to the drug possession charge and a

consecutive two-year prison term based upon the major drug offender specification. From his conviction and sentence, appellant timely appeals, asserting three assignments of error.

{¶11} Assignment of Error No. 1:

{¶12} "THE VERDICT OF THE JURY WITH RESPECT TO COUNT ONE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶13} Appellant first argues his conviction for possession of illegal drugs was against the manifest weight of the evidence. He asserts that the state failed to prove beyond a reasonable doubt that appellant knowingly possessed the crack cocaine.

{¶14} When reviewing the manifest weight of the evidence to determine whether reversal is warranted, the court reviews 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 jury clearly lost its way and created such a manifest miscarriage of justice that the court must reverse the conviction and order a new trial. *State v. Thompkins*, 78 Ohio St.3d. 380, 387, 1997-Ohio-52. A court should only exercise its discretionary power to grant a new trial in the exceptional case where the evidence weighs heavily against the conviction. Id. When reviewing the evidence, an appellate court must be mindful that the original trier of fact was in the best position to judge the credibility of witnesses and the weight to be given to the evidence. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶15} Pursuant to R.C. 2925.11(A), "[n]o person shall knowingly obtain, possess, or use a controlled substance." R.C. 2901.22(B) defines "knowingly" as follows: "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." Further, R.C. 2925.01(K) provides that "'possess' or 'possession' means having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." *State v. Resnick*, Butler App. No. CA2006-05-118, 2007-Ohio-3717, ¶29.

{¶16} It is well-established under Ohio law that possession may be either actual or constructive. *State v. Contreras*, Butler App. No. CA2004-07-181, 2006-Ohio-1894, ¶21. Constructive possession exists when one is conscious of the presence of the object and able to exercise dominion and control over it, even if it is not within one's immediate physical possession. Id., citing *State v. Gaefe,* Clinton App. No. CA2001-11-043, 2002-Ohio 4995, at ¶9; Dominion and control can be proven by circumstantial evidence alone. Id., citing *Gaefe*; *State v. Wyche,* Franklin App. No. 05AP-649, 2006-Ohio-1531, ¶18. The discovery of readily accessible drugs in close proximity to a person constitutes circumstantial evidence that the person was in constructive possession of the drugs. *Wyche.*

{¶17} In this case, the state presented evidence that Sergeant Coe observed appellant slide a black item from his lap to his left while sitting in the passenger seat of the vehicle. Sergeant Coe testified that when he and his fellow officers searched the car, they found no other black items in the front seat, except for the black bag on the center console containing 439.6 grams of crack cocaine. Although appellant claims he had no knowledge of the contents of the bag, the state presented testimony that he moved the bag to his left, from which the jury could infer he was

attempting to distance himself from the bag upon the sight of officers approaching.

{¶18} In reviewing the entire record and weighing the evidence and all reasonable inferences, we cannot determine that the jury clearly lost its way and created a manifest miscarriage of justice that would cause us to reverse the conviction. Appellant's first assignment of error is overruled.

{¶19} Assignment of Error No. 2:

{¶20} "APPELLANT RESPECTFULLY SUBMITS THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED TO HIM BY THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION."

{¶21} Appellant argues he was denied effective assistance of counsel because trial counsel failed to call the confidential informant as a witness at appellant's trial.

{¶22} In order to establish ineffective assistance of counsel, appellant must show that his trial counsel's performance was both deficient and prejudicial. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 693, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 142. Specifically, appellant must show that his counsel's performance "fell below an objective standard of reasonableness," and that there is a reasonable probability that but for his counsel's deficient performance, the outcome of the trial would have been different. *Strickland* at 688, 693-694. There is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional conduct;" as a result, a reviewing court's "judicial scrutiny of counsel's performance must be highly deferential." Id. at 689.

{¶23} A reviewing court is not permitted to use the benefit of hindsight to second-guess the strategies of trial counsel. *State v. Hoop,* Brown App. No.

CA2004-02-003, 2005-Ohio-1407, ¶20. A criminal defendant must overcome a presumption that his counsel's actions or inactions "might be considered sound trial strategy." *Strickland* at 689. Even debatable trial strategies and tactics do not constitute ineffective assistance of counsel. *Hoop* at ¶20. Further, "it is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Bradley,* at 142.

{¶24} The record demonstrates that prior to trial, trial counsel filed with the court both a motion for disclosure of the confidential informant and a motion for production of informant at trial. The trial court overruled both motions and found that there had been no showing that such disclosure would be helpful or beneficial to any defense or vital to establishing any element of the offense charged. Despite these rulings, trial counsel issued a subpoena and order to convey for the person counsel believed to be the informant in the case. The record reflects that the subpoena was issued, and the individual was conveyed from the Fayette County Jail and was available as a witness at trial. Trial counsel, however, elected not to call the witness during trial.

{¶25} "[C]ounsel's decision whether to call a witness falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, ¶125, quoting *State v. Treesh*, 90 Ohio St.3d 460, 490, 2001-Ohio-4. See, also, *State v. Hanna,* 95 Ohio St.3d 285, 2002-Ohio-2221, ¶118. In addition, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." Id., quoting *Strickland,* 466 U.S. at 690. The record reflects that appellant's trial counsel investigated the issue and made an informed, conscious choice between strategic

options. Based upon the record, we find appellant's second assignment of error without merit.

{¶26} Assignment of Error No. 3:

{¶27} "DEFENDANT RESPECTFULLY SUBMITS THAT THE SENTENCE ENHANCEMENT AS A MAJOR DRUG OFFENDER WAS ERRONEOUS AS A MATTER OF LAW."

{¶28} Appellant argues the trial court erred in imposing a two-year sentence enhancement pursuant to the major drug offender ("MDO") specification. Appellant asserts that under *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, and its progeny, the Ohio Supreme Court has ruled that the MDO specification sentence enhancements are unconstitutional in allowing judicial fact-finding absent a jury to increase the punishment of certain offenders.

{¶29} Pursuant to the Ohio Supreme Court's holding in *Foster*, judicial fact-finding is not required before the imposition of additional penalties for MDO specifications. Id., at paragraph six of the syllabus; *State v. Hunter*, 123 Ohio St.3d 164, 2009-Ohio-4147. As emphasized in *State v. Mathis*, 109 Ohio St.3d 54, 2006-Ohio-855, *Foster* excised the requirement that the court make findings of fact before imposing penalty enhancements for major drug offenders. Id. at ¶26; *Hunter* at ¶26. The rulings in *Foster* and *Mathis* did not preclude a trial court from imposing enhanced penalties for the major drug offender specification, and the decisions after *Foster* do not indicate the specification no longer exists. See *Hunter* at ¶27. See also *State v. Hooks*, Butler App. Nos. CA2004-02-047, CA2004-02-050, CA2004-02-051, 2006-Ohio-1272, ¶8.

{¶30} In this case, the jury made a special finding that appellant possessed

an amount of crack cocaine that equaled or exceeded 100 grams, which is the amount necessary to label appellant as a major drug offender. R.C. 2925.11(C)(4)(f). This enabled the trial court to sentence appellant to an enhanced penalty of two years based on the MDO specification.

{¶31} Therefore, the trial court did not err in sentencing appellant to an enhancement based on the finding that appellant is a major drug offender. Appellant's argument that *Foster* eliminated the MDO specification is without merit, and his third assignment of error is overruled.

{¶32} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.