

**IN THE COURT OF APPEALS OF OHIO  
SECOND APPELLATE DISTRICT  
GREENE COUNTY**

STATE OF OHIO	:	
	:	Appellate Case No. 08-CA-108
Plaintiff-Appellee	:	
	:	Trial Court Case No. 08-CR-604
v.	:	
	:	(Criminal Appeal from
JOSHUA R. MOULDER	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

.....

OPINION

Rendered on the 6<sup>th</sup> day of November, 2009.

.....

STEPHEN K. HALLER, Atty. Reg. #0009172, by ELIZABETH A. ELLIS, Atty. Reg. #0074332, Greene County Prosecutor's Office, 61 Greene Street, Xenia, Ohio 45385  
Attorneys for Plaintiff-Appellee

J. ALLEN WILMES, Atty. Reg. #0012093, 4428 North Dixie Drive, Dayton, Ohio 45414  
Attorney for Defendant-Appellant

.....

BROGAN, J.

{¶ 1} Joshua Moulder appeals from his conviction in the Greene County Common Pleas Court of possession of cocaine, possession of criminal tools, and tampering with evidence.

{¶ 2} In the early evening of August 22, 2008, Officer Joseph Pence of the

Fairborn Police Department observed Moulder operate his motor vehicle in excess of the speed limit. Pence arrested Moulder, patted him down and placed him in the back of his police cruiser in handcuffs. Pence then conducted an inventory of Moulder's car for ten to fifteen minutes. Pence then transported Moulder to the Fairborn City Jail. After arriving at the jail sally port, the jail garage door was closed.

Pence then took Moulder into the jail booking area and had him booked in. Pence then returned to his cruiser and began checking the interior of it as required by police protocol. Using a flashlight, Pence observed a small plastic bag on the rear floorboard apparently containing crack cocaine. Pence then field tested the substance in the bag and it tested positive for cocaine. Pence asked Moulder about his find but Moulder denied the crack cocaine was his. Pence testified that before he began his shift he carefully checked the backseat of his cruiser pursuant to his police department protocol and found nothing in the backseat area of his assigned cruiser. Pence testified Moulder was the first person placed in the cruiser after he began his shift.

{¶ 3} On cross-examination, Pence acknowledged he did not check the front seat because prisoners are not transported in the front seat of police cruisers. Pence acknowledged that he left Moulder in his vehicle for fifteen minutes before he arrested him, while he checked Moulder's license information and whether there were any warrants for his arrest. He did not observe Moulder throw anything out of the vehicle before he arrested him. He also admitted that while he is required to enter the fact of his pre-shift inspection on his cruiser computer, he forgot to do so that evening.

{¶ 4} Moulder argues that his convictions were against the manifest weight of the evidence. He argues that Pence left him alone in his car for ten or fifteen minutes while Pence returned to his cruiser to check Moulder's information. He argues if he had drugs he could have just thrown them out his car window while Pence was not paying attention to him. He also argues that Officer Pence did not find drugs on him at the time he was arrested. He also argues a previous prisoner could have hid the small baggie in a small seam in the vehicle. He argues that the jury lost its way in convicting him of the charges.

{¶ 5} The State argues that Officer Pence's testimony clearly established that Moulder committed the offenses for which he was indicted. Pence testified that Moulder was left unattended "in the back of his cruiser" for ten to fifteen minutes. Also, the rear seat of the cruiser was seamless and the seams below the seat where the seat mechanisms were located were extremely small. Pence also testified he did not thoroughly search Moulder before he placed him in the cruiser.

{¶ 6} The jury was in the best position to evaluate Officer Pence's testimony. They chose to believe him, and his testimony clearly supports the jury's verdict. There is no evidence the jury lost its way in arriving at its verdict on the possession of cocaine charge.

{¶ 7} Tampering with Evidence, in violation of R.C. 2921.12(A)(1) provides that "no person, knowing that an official proceeding or investigation is in progress or is about to be or likely to be instituted, shall alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidenced in such a proceeding or investigation." Moulder argues his tampering

with evidence conviction is against the manifest weight of the evidence. We agree. When Moulder allegedly dropped the cocaine on the floorboard of the cruiser, the only “investigation” that had taken place was his alleged speeding violation. The cocaine could not have been used in proving the speeding violation. The routine administrative processing or “booking” of Moulder into the jail cannot be considered an “investigation” in the sense contemplated by the statute. Sections of the Revised Code defining offenses shall be strictly construed in favor of the accused. See R.C. 2901.04. Thus, Moulder’s conviction for tampering with evidence is against the manifest weight of the evidence.

{¶ 8} The parties do not refer to the possession of criminal tools count in their appellate briefs. The prosecutor argued in his final argument that the State proved the “criminal tool” possessed by the defendant was the small plastic baggie he used to facilitate the possession of the cocaine. The jury could properly conclude that the plastic baggie containing the crack cocaine is a criminal tool. See *State v. Wilson* (1991), 77 Ohio App.3d 718. The first assignment of error is Sustained in part and Overruled in part.

{¶ 9} Appellant’s second assignment that his tampering with evidence conviction was based on insufficient evidence is Sustained. Appellant’s third assignment that the trial court’s sentence was disproportionate to the offenses he committed is moot since Moulder must be re-sentenced because of our resolution of the first and second assignments of error.

{¶ 10} The judgment of the trial court is Affirmed in part and Reversed in part and this matter is Remanded to the trial court for re-sentencing.

.....

DONOVAN, P.J., and FROELICH, J., concur.

Copies mailed to:

Stephen K. Haller  
Elizabeth A. Ellis  
J. Allen Wilmes  
Hon. Stephen Wolaver