[Cite as *State v. Cranford*, 2011-Ohio-384.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	**:**	
Plaintiff-Appellee	**:**	**C.A. CASE NO. 23055**
vs.	**:**	**T.C. CASE NO. 08CRB2471**
JEFFREY CRANFORD	**:**	**(Criminal Appeal from Municipal Court)**
Defendant-Appellant	**:**	

. . . . . .

O P I N I O N

Rendered on the 28th day of January, 2011.

. . . . . .

John J. Danish, City Attorney; Stephanie L. Cook, Chief Prosecutor; Troy B. Daniels, Atty. Reg. No.0084957; Andrew D. Sexton, Atty. Reg. No. 0070892, Asst. City Prosecutors, 335 W. Third Street, Rm. 372, Dayton, OH 45402
Attorneys for Plaintiff-Appellee

Bryan K. Penick, Atty. Reg. No.0071489, 371 West First Street, Suite 200, Dayton, OH 45402
Attorney for Defendant-Appellant

. . . . . .

GRADY, P.J.:

{¶ 1} Defendant, Jeffrey V. Cranford, Sr., was charged by complaint filed in The Dayton Municipal Court with a violation of R.C. 2925.13(B). The complaint further specified that the

offense of permitting drug abuse occurred on or about February 22, 2008, at 422 Blackwood Avenue, in Dayton; that Defendant Cranford was the owner, occupant, or lessee of those premises, or had custody, control, or supervision of the premises; and that he permitted it to be used by another person, Lindsey (sic) Burgess, to commit the felony drug offenses of possession of cocaine and possession of heroin.

{¶ 2} R.C. 2925.13(A) is a first degree misdemeanor. The charge against Defendant was tried to the court on August 28, 2008. The court found Defendant guilty and imposed a ninety day jail term, with credit for three days served and the remaining eighty-seven days suspended. Defendant filed a notice of appeal from the court's judgment of conviction.

{¶ 3} Dayton Police Officers Thomas Schloss and Jon Zimmerman testified at Defendant's trial that on February 26, 2008, at 5:25 p.m., they were dispatched to 422 Blackwood Avenue in Dayton, on a citizen complaint that Defendant Cranford was selling drugs from that location. When they arrived, Officer Zimmerman went to the rear of the house and Officer Schloss went to the front door.

{¶ 4} Officer Schloss testified that when he knocked on the door, Defendant looked through a window in the door and said, "hold on a minute." Defendant then ran to a rear area of the house. When Officer Schloss looked through another window he saw another

man and a woman sitting in the living room. A red digital scale was on a coffee table in the room. When Defendant Cranford returned to the room he picked up the scale and handed it to the other man.

{¶ 5} Defendant returned to the front door and opened it. Officer Schloss testified that he asked Defendant whether the house was his residence, and that Defendant answered "yes." (T. 10). Defendant then opened the door further and allowed Officer Schloss and Officer Zimmerman, who by then had joined him, inside.

{¶ 6} Both officers testified that Defendant was told that the officers had come on a complaint of drug activity at Defendant's residence. Officer Schloss asked for permission "to look around for any signs of drug(s) or drug activity coming from the residence." (T. 11). Officer Schloss testified that Defendant gave a verbal consent to check the premises.

{¶ 7} Officer Zimmerman left the living room to inspect the back rooms of the house. Officer Schloss retrieved the digital scales from the other man in the room. Officer Schloss testified that he field-tested white residue on the scales which tested positive for cocaine. That result was later confirmed by a laboratory test.

{¶ 8} Officer Zimmerman recovered a pill bottle containing suspected crack cocaine from a back bedroom that Defendant said was his son's bedroom. When the pill bottle tested positive for

cocaine, Defendant was presented a written consent to search form that allowed officers to conduct "a complete search of the premises/vehicle (at 422 Blackwood Avenue) for drugs, contraband, possessory interests and drug paraphernalia." (T. 37). Defendant signed the consent form.

{¶ 9} When asked what further search he performed following Defendant's written consent, Officer Zimmerman testified:

{¶ 10} "A. I initially went back to the bedroom where I had found the bottle of crack cocaine. Didn't observe anything in there out of the usual. I then went into another bedroom where Miss Burgess's purse was located. It contained her identification, which she was lying about her initial identification, and her ID, social security card, three hypodermic syringes, a pen, and a blue tourniquet were located inside her purse.

{¶ 11} "Also it appeared Mr. Cranford was running a boot joint type stand out of his bedroom. Inside of his closet was a very large and extensive collection of like flavored wraps for smoking marijuana. There was a couple pieces of chore boy, which is commonly used for packing crack pipes, extensive amounts of odds and ends of where somebody might have purchased from a store to go on about their day. I then located a firearm inside of the

back bedroom. Mr. Cranford stated that it was his, however at the time I don't know why, but I didn't take it and I left it inside of the residence.

{¶ 12} "Q. And that was in a separate bedroom from the one you initially searched based on verbal consent, correct?

{¶ 13} "A. That's correct.

{¶ 14} "Q. Did Mr. Cranford indicate who's (sic) bedroom you were in at this point?

{¶ 15} "A. Where I located --

{¶ 16} "Q. The gun and the other paraphernalia?

{¶ 17} "A. He said it was his.

{¶ 18} "Q. And it appeared to be used as a bedroom in addition to the other things that you suggested?

{¶ 19} "A. That's correct." (T. 38-39).

{¶ 20} Officer Schloss testified that "a silver spoon with heroin residue on it" (T. 20) was also found in Lyndsey Burgess's purse, and that she was arrested for drug possession. Officer Schloss

{¶ 21} further testified that tests subsequently performed by the Miami Valley Regional Crime Laboratory confirmed that the syringes and metal spoon found in Burgess's purse contained heroin.

{¶ 22} A further search of the residence produced cocaine

residue on a plate and a gel cap containing suspected heroin. A search of Defendant's person yielded three thousand dollars in cash. Officer Schloss testified that Defendant denied selling drugs, and said instead "that he has people who come over that do drugs, but he does not sell drugs," and that when asked whether "it's fair to say that you knew that drugs were being used in your residence, [Defendant] said yes." (T. 19). Officer Schloss testified on cross-examination that he did not see any drugs in use in the house.

{¶ 23} Officer Zimmerman testified that following Defendant's arrest the officers engaged in standard nuisance abatement procedures, which allow persons who engage in criminal activities

{¶ 24} to be "trespassed off" real property where the criminal conduct occurred. Officer Zimmerman confirmed that the residence address Defendant gave officers for that purpose was the same location, 422 Blackwood Avenue.

{¶ 25} Defendant disputed the officers' testimony. Defendant testified that 422 Blackwood Avenue is his son's residence, not his, and that he was there only to pick up his young grandson. Defendant testified that he resides at 3426 East Fifth Street. Defendant insisted that he never told officers that he lives on the premises. Defendant also testified that he did not see any drug activity in the house.

{¶ 26} Defendant conceded that he gave officers his consent to search the premises. However, he testified that he believed they merely intended to search for other persons when he gave an oral consent to search. Defendant testified that he believed the written consent he signed pertained to a nuisance abatement issue. Defendant timely appealed to this court.

FIRST ASSIGNMENT OF ERROR

{¶ 27} "APPELLANT'S RULE 29 MOTIONS SHOULD HAVE BEEN GRANTED."

SECOND ASSIGNMENT OF ERROR

{¶ 28} "APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 29} In these related assignments of error, Defendant argues that the trial court erred in overruling his Crim.R. 29 motions for acquittal because the evidence presented was legally insufficient to sustain his conviction for permitting drug abuse, and because his conviction is against the manifest weight of the evidence.

{¶ 30} When considering a Crim.R. 29 motion for acquittal, the trial court must construe the evidence in a light most favorable to the State and determine whether reasonable minds could reach different conclusions on whether the evidence proves each element of the offense charged beyond a reasonable doubt. ***State v. Bridgeman*** **(1978), 55 Ohio St.2d 261. The motion will be granted**

only when reasonable minds could only conclude that the evidence fails to prove all of the elements of the offense. *State v. Miles* (1996), 114 Ohio App.3d 738.

{¶ 31} A Crim.R. 29 motion challenges the legal sufficiency of the evidence. A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins,* (1997), 78 Ohio St.3d 380. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

{¶ 32} "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."

{¶ 33} Defendant was found guilty of permitting drug abuse in violation of R.C. 2925.13(B), which provides:

{¶ 34} "No person who is the owner, lessee, or occupant, or who has custody, control, or supervision, of premises or real estate, including vacant land, shall knowingly permit the premises or real estate, including vacant land, to be used for commission of a felony drug abuse offense by another person."

{¶ 35} "Knowingly" is defined in R.C. 2901.22(B):

{¶ 36} "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."

{¶ 37} Both officers testified that Defendant said the premises at 422 Blackwood Avenue was his residence. Officer Zimmerman testified that Defendant said that one of the bedrooms in the house was his and that drug paraphernalia found inside a closet in the room belonged to him. That evidence, if believed, is sufficient to prove that Defendant was at least an occupant of the premises at 422 Blackwood Avenue.

{¶ 38} At oral argument of this appeal, Defendant contended that his conviction for the charge alleged in the complaint is against the manifest weight of the evidence because that evidence fails to demonstrate that he knew of the contents of Lyndsey Burgess's purse. We agree that there is no direct evidence of

that matter. However, a fact or matter in issue may also be proved through circumstantial evidence. Circumstantial evidence is proof of certain facts and circumstances in a given case, from which the trier of facts may infer other, connected facts which usually and reasonably follow according to the common experience of mankind. *State v. Duganitz* (1991), 76 Ohio App.3d 363. "Circumstantial evidence and direct evidence inherently possess the same probative value." *Jenks*, 61 Ohio St.3d at 272.

{¶ 39} In the bedroom that Defendant said was his, Officer Zimmerman found a purse belonging to Lyndsey Burgess, inside which were syringes and a spoon containing heroin, and a tourniquet. Officers also found cocaine, crack cocaine, and drug paraphernalia elsewhere in the house. Possession of cocaine and heroin are felony drug offenses: R.C. 2925.11, 2925.01(G), (H).

{¶ 40} Officer Schloss testified that Defendant, though he denied selling drugs, admitted that other people come to the house to "do drugs," and that he knew drugs were being used in his residence. The court could reasonably infer that those other persons committed felony drug offenses on the premises, and that Defendant knowingly permitted that to happen, which is sufficient to prove the violation of R.C. 2925.13(B) of which Defendant was convicted. The court could also infer, from the contents of the purse belonging to Lyndsey Burgess found in Defendant's bedroom,

that Lyndsey Burgess was one of those persons and that Defendant knowingly permitted her to use the premises for commission of a felony drug offense, possession of heroin.

{¶ 41} Defendant additionally argues that his conviction is against the manifest weight of the evidence. A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

{¶ 42} "The court, 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 jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Accord: *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52.

{¶ 43} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. In *State v. Lawson* (August 22, 1997), Montgomery App. No. 16288, we observed:

{¶ 44} "Because the factfinder . . . has the opportunity to

see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness."

{¶ 45} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. ***State v. Bradley*** **(Oct. 24, 1997), Champaign App. No. 97-CA-03.**

{¶ 46} We have concluded that the evidence presented in this case, including Defendant's statements to police, was sufficient to prove that he was an occupant of the residence at 422 Blackwood Avenue and/or had custody, control, or supervision of that premises, and that he knowingly permitted Lyndsey Burgess to use the residence to commit felony drug abuse offenses. A weight of the evidence argument challenges the believability of evidence which is sufficient to convict, when weighed against other, contradictory evidence. The credibility of the witnesses and the weight to be given to their testimony were matters for the trier

of facts, the trial court here, to determine. *DeHass*. The trial court did not lose its way in this case simply because it chose to believe the testimony of the police officers, rather than Defendant, which it had a right to do. *Id*.

{¶ 47} Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trier of facts lost its way in choosing to believe the State's witnesses, or that a manifest miscarriage of justice has occurred. Defendant's conviction is not against the manifest weight of the evidence.

{¶ 48} Defendant's first and second assignments of error are overruled.

THIRD ASSIGNMENT OF ERROR

{¶ 49} "APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL."

{¶ 50} Defendant argues that he was deprived of the effective assistance of counsel at trial because counsel (1) failed to file a motion to suppress the evidence, and (2) vouched for the credibility of the police officers who testified while making a Crim.R. 29 motion for acquittal.

{¶ 51} In order to demonstrate ineffective assistance of trial counsel, Defendant must demonstrate that counsel's performance was deficient and fell below an objective standard of reasonable

representation, and that Defendant was prejudiced by counsel's performance; that there is a reasonable probability that but for counsel's unprofessional errors, the result of Defendant's trial or proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136.

Failure to File Motion To Suppress

{¶ 52} Defendant argues that his trial counsel performed in a deficient manner by failing to file a motion to suppress the evidence police obtained during their warrantless search of Defendant's residence. A review of this record reveals that counsel did file a pretrial motion to suppress the evidence on March 6, 2008, challenging the warrantless search of Defendant's residence. Counsel, however, subsequently withdrew that motion before the court had ruled upon it.

{¶ 53} Both Officer Schloss and Officer Zimmerman testified that Defendant orally consented to their initial search of his residence, and then after the officers discovered cocaine they presented a written consent to search form to Defendant which he reviewed and signed prior to their further search of Defendant's residence. Consent is a well recognized exception to the Fourth Amendment's warrant requirement because it constitutes a decision by a citizen not to assert his Fourth Amendment rights.

Schneckloth v. Bustamonte (1973), 412 U.S. 218, 93 S.Ct. 2041, 37 L.Ed.2d 854. In view of Defendant's consent to the search of his residence by Officers Schloss and Zimmerman, there is no reasonable possibility that a motion to suppress, had one been filed, would have succeeded. Counsel does not perform deficiently by failing to file a motion that has no reasonable chance of success. *State v. Ratliff*, Montgomery App. No. 19684, 2003-Ohio-6905; *State v. Garrett* (1991), 76 Ohio App.3d 57. Ineffective assistance of counsel has not been demonstrated.

Vouching for Credibility of Police Officers

{¶ 54} After the State rested, defense counsel moved for a verdict of acquittal pursuant to Crim.R. 29. Counsel began by stating:

{¶ 55} "Ms. Schafer: I believe that everything that the officers said here today is probably true. I know these officers to be good, honest officers, and in fact they have been to my house and helped me personally, so I want to start with that.

{¶ 56} "But that being said, everything if they are saying is true, does not prove the crime charged. State has failed to make its case, in that it has not shown that Mr. Cranford was the owner, lessee, or occupant or in the custody, control, or supervision of the premises." (T. 47).

{¶ 57} Defendant argues that these comments by his counsel

constitute ineffective assistance of counsel because (1) counsel vouched for the credibility of the State's only two witnesses, Officers Schloss and Zimmerman, in a case where the credibility of the officers was key to the issue of consent and Defendant's testimony contradicts the testimony of the officers on that and several other points, and (2) counsel's comments demonstrate a conflict of interest on the part of defense counsel that adversely affected her performance in representing Defendant.

{¶ 58} Viewed in the context in which it was made, defense counsel's statement that "everything the officers said here today is probably true" is merely consistent with the standard that Crim.R. 29 imposes: that the evidence presented by the State must be construed in a light most favorable to the State. *Bridgeman; Jenks*. In that respect, no deficient performance is demonstrated.

{¶ 59} Defendant argues that counsel's statement was nevertheless both improper and prejudicial, because it necessarily undercut Defendant's subsequent testimony contradicting the officers and permitted finding of guilt. We are likewise troubled by counsel's gaffe. However, *Strickland* requires a finding that but for counsel's unprofessional errors, there is a reasonable probability that the outcome of the trial would be different. We are unable to make that finding.

{¶ 60} Had this remark been made in front of a jury, a claim

of prejudice would be stronger. It was, instead, made in a bench trial proceeding, and was made with reference to a Crim.R. 29 motion. We are confident that the court when sitting in judgment was able to consider counsel's statement for that limited purpose, and not in relation to the broader issue of guilt or innocence. Furthermore, the State's evidence strongly preponderated in favor of the finding of guilt which the court made. We therefore cannot find the prejudice prong of *Strickland* satisfied.

Conflict of Interest

{¶ 61} In certain cases, such as where defense counsel has an actual conflict of interest, the standard used to determine the existence of ineffective assistance of counsel is different. In those cases, where counsel has breached his duty of loyalty to his client and his duty to avoid conflicts of interest, the defendant is not required to show that he or she has been prejudiced by counsel's deficient performance. *Strickland*. Rather, prejudice is presumed if the defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance. *Id.*, at 692, quoting *Cuyler v. Sullivan* (1980), 446 U.S. 335, 350, 100 S.Ct. 1708, 64 L.Ed.2d 333.

{¶ 62} In *Cuyler*, the Supreme Court described a conflict of interest as a "struggle to serve two masters." *Id.*, at 349. The

possibility of a conflict of interest exists when counsel has a reason to further or serve interests that are different from those of his client. An actual conflict of interest exists when counsel is actively representing, furthering, or serving those other interests (that are different from those of his client).

{¶ 63} This record fails to demonstrate that Defendant's trial counsel was furthering anyone's interest other than Defendant's. We have already concluded that the comments counsel made during her Crim.R. 29 motion for acquittal that the police officer's testimony in this case was probably true, was argument consistent with the legal standard applicable to Crim.R. 29 motions and insufficiency of the evidence claims, and does not constitute deficient performance. Furthermore, the mere fact that counsel was personally acquainted with the two police officers who testified against Defendant in this case does not demonstrate that counsel had any reason to further their interests, much less that she actually did so in this case. To the contrary, an examination of counsel's Crim.R. 29 motion in its entirety clearly demonstrates that counsel did not actively represent or further any interests other than those of Defendant.

{¶ 64} Additionally, in rendering its guilty verdict the trial court explained why it found the testimony of the police officers in this case to be credible: they had no axe to grind in this

case and their testimony corroborates each other. The court did not state that counsel's statements during her Crim.R. 29 motion for acquittal, weighed in favor of or was understood as an admission that the officers were credible. As we previously noted, the likely meaning of counsel's statement was simply that she was acknowledging the legal standard by which Crim.R. 29 motions and insufficiency of the evidence claims are judged. No actual conflict of interest on the part of the defense counsel has been demonstrated. Ineffective assistance of counsel has not been shown.

{¶ 65} Defendant's third assignment of error is overruled. The judgment of the trial court will be affirmed.

FAIN, J. And FROELICH, J., concur.

Copies mailed to:

Troy B. Daniels, Esq.
Andrew D. Sexton, Esq.
Bryan K. Penick, Esq.
Hon. Deirdre Logan