[Cite as *State v. Smoot,* 2015-Ohio-2717.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26297
	:	
v.	:	T.C. NO. 13CR3120/1
	:	
JAMES SMOOT	:	(Criminal appeal from
	:	Common Pleas Court)
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the ___30th___ day of ____June____, 2015.

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DONOVAN, J.

{¶ 1} This matter is before the Court on the Notice of Appeal of James Smoot, filed June 27, 2014. Smoot appeals from his judgment entry of conviction, following a jury trial, on one count of engaging in a pattern of corrupt activity, in violation of R.C. 2923.32(A), a felony of the first degree (count one); one count of possession of heroin

(100 unit doses but < 500 unit doses), in violation of R.C. 2925.11(A), a felony of the second degree (count two); one count of trafficking in heroin (100 unit doses but < 500 unit doses), in violation of R.C. 2925.03(A)(1), a felony of the second degree (count three); one count of possession of cocaine (less than 5 grams), in violation of R.C. 2925.11(A), a felony of the fifth degree (count four); one count of trafficking in cocaine (less than 5 grams), in violation of R.C. 2925.03(A)(1), a felony of the fifth degree (count five); one count of possession of heroin (10 unit doses but < 50 unit doses) in violation of R.C. 2925.11(A), a felony of the fourth degree (count six); trafficking in heroin (10 unit doses but < 50 unit doses), in violation of R.C. 2925.03(A)(1), a felony of the fourth degree (count seven); one count of possession of cocaine (less than five grams), in violation of R.C. 2925.11(A), a felony of the fifth degree (count eight); and one count of trafficking in cocaine (less than 5 grams), in violation of R.C. 2925.03(A)(1), a felony of the fifth degree (count nine). Smoot was sentenced to seven years on count one; counts two and three merged, the state elected to proceed to sentencing on count three, and Smoot received an eight-year sentence; counts four and five merged, the state elected to proceed to sentencing on count five, and the court imposed a sentence of 12 months; counts six and seven merged, the State elected to proceed to sentencing on count seven, and the court imposed a sentence of 18 months; and counts eight and nine merged, the State elected to proceed to sentencing on count nine, and the court imposed a sentence of 12 months, for a total concurrent sentence of 8 mandatory years.

{¶ 2} Smoot, along with Savina Ellen Johnson, was initially indicted, on October 10, 2013, on 13 counts, but he was eventually found not guilty on two additional counts of possession of heroin, and two counts of trafficking in heroin. Smoot pled not guilty on

October 15, 2013, and on December 10, 2013, he filed a motion to suppress statements he made in the course of a traffic stop. The trial court overruled his motion after a hearing. At the hearing, Deputy Brian Shiverdecker of the Montgomery County Sheriff's Office ("MCSO") testified that he is assigned to the COP unit (Community Oriented Policing), and that he responds to neighborhood complaints regarding criminal activity that are reported on the drug hotline. He stated that on September 25, 2013, while in uniform and in a marked cruiser, he conducted a traffic stop on a vehicle driven by Smoot. Shiverdecker stated that "Smoot was in a vehicle that was observed by one of our unmarked vehicles. They had contacted us to respond to the area. By the time we were able to get to the area, they no longer had the vehicle in sight." Shiverdecker testified that as he proceeded south on Keowee Street, he "saw the vehicle they had described heading north on Keowee." Shiverdecker testifed, as "soon as the vehicle passed me, I observed the vehicle make an abrupt lane change from the inside lane to the outside lane, failing to signal his lane change 100 feet prior," in violation of R.C. 4511.39. Shiverdecker stated that he turned around and stopped Smoot in the area of 1932 Monument Avenue.

{¶ 3} Shiverdecker stated that he "made contact with the driver who was identified as Mr. Smoot. Upon making contact with Mr. Smoot, I advised him of the reason for the stop and asked for identification. Mr. Smoot advised that he did not have any identification. Due to Mr. Smoot not having any identification, I had Mr. Smoot step from the vehicle." Shiverdecker testified that he "conducted an outer garment patdown of him. Upon conducting the pat down, I felt a foreign object in his buttocks area. He stated that it was a baggie of marijuana. Shortly after stating that it was baggie of marijuana, he

reached down into the back of his pants and removed one baggie of marijuana. He handed the baggie of marijuana over to me." Shiverdecker further testified, while "walking him back to my patrol vehicle for the traffic citation, confirming his identification and now a possible possession of marijuana charge, I asked him if there was anything else in the vehicle. He stated that other than the marijuana that he had on his person, there's nothing in the car except for his money" located in the center console. Siverdecker stated that he asked Smoot in a conversational tone of voice if he could search his vehicle, and that Smoot consented to the search without threats or promises. Shiverdecker stated that Smoot made the statement about his money while outside of his cruiser, and that he was not in handcuffs or under arrest at the time. Shiverdecker stated that he intended to detain Smoot long enough to issue the misdemeanor citation and then allow him to leave. He testified that he retrieved money from the vehicle, and that due "to the ongoing investigation with our R.A.N.G.E. detectives, I contacted the case detective, Detective "O.", and advised him that I had located a baggie of marijuana on Mr. Smoot and a large sum of money in the center console of the vehicle." After speaking to O., Shiverdecker stated that the marijuana and money were seized, Smoot was issued a citation for the turn signal violation and lack of a driver's license, and that Smoot "was allowed to park the car for a valid driver." Shiverdecker testified that his cruiser had a flat tire, and that in the course of fixing the tire, he observed a female arrive on the scene and drive away with Smoot in his vehicle.

{¶ 4} On cross-examination, Shiverdecker testified that his shift began at noon, and at that time he "logged on and was advised by the detectives that day of a vehicle that had been involved in their investigation was over on the east side of Dayton." (sic)

Shiverdecker stated that he observed the traffic violation in his left side mirror. He stated that after he turned around, Smoot's vehicle turned right on Monument Avenue. Shiverdecker stated that he activated his lights to initiate the stop. He stated that he ran the plates and determined that the vehicle was a rental car. Shiverdecker stated that his cruiser was equipped with a camera that began recording both audio and video when he activated his lights. When asked if the recording is "still around," Shiverdecker replied, "I can only assume that it is. It's on the Arbitrator system." Shiverdecker stated that the recording "just automatically downloads to a server wirelessly." He stated that he has not viewed the recording. Shiverdecker stated that he did not draw his weapon as he approached Smoot's vehicle. He stated that Smoot was doing nothing that caused him to fear for his safety. Shiverdecker stated that he wore a microphone on his body, and that he could have used it to call in the stop via radio, but that he did not do so. The following exchange occurred:

Q. What did you do instead?

A. I had him step from the vehicle.

Q. And that was to do what?

A. Pat him down, make sure he had no weapons and secure him until an actual picture of his face could be pulled up.

Q. * * * You said what about the face?

A. Till an actual picture of his face off the identifiers that he would provide could be pulled up and his identity could be confirmed.

* * *

Q. * * * Now, the driver of the car complied with your wishes, got out

of the car?

A. Yes, he did.

Q. Now and your intention at that point in time is to stick him in your cruiser?

A. Correct.

Q. Put him in your cruiser?

A. In the back seat.

Q. You don't put people in the back seat of your cruiser unless you pat them down, do you?

A. Correct.

Q. I mean that's just - -

A. Officer safety.

Q. That's officer safety 101, right?

A. Yes.

Q. And he's agreeable to this whole thing?

A. Yes.

Q. And this is to issue a minor misdemeanor; is that right?

A. It would have been a traffic violation at that point.

Q. And you don't say anything to this driver about oh, I know this car; it's part of an ongoing investigation or anything?

A. No, I did not.

Q. Did you know what the nature of the ongoing investigation was?

A. I knew it was a drug investigation.

Q. Involving sales and distribution maybe of controlled substances?

A. Yes.

Q. And at the time that you made this stop, were you aware of some recent developments in that investigation as it relates to a buy that supposedly happened?

A. I believe he has bought or he had sold prior that day.

Q. That's the information you had.

A. Yes.

Q. * * * So you knew that when you were stopping this car and when you were asking him to get out of the car?

A. Yes.

Q. And when you were asking him what was in the car?

A. Well, at the time, I knew that the individual that was supposed to be driving that vehicle was supposed to be Mr. Smoot. But at the time that I was talking to him, I hadn't identified him yet.

Q. He had not given you his name?

A. * * * He may have provided his last name but I had no definitive proof that he was actually who he said he was.

{¶ 5} Regarding the marijuana, Shiverdecker testified that Smoot "began to take it out right after telling me that it was marijuana and said, 'Here.' And handed it to me." Regarding the money in the vehicle, Shiverdecker testified that Smoot "may have implied that it was his girl's money possibly for rent or possibly for the rental of the vehicle."

When he returned to his cruiser to contact O., Shiverdecker stated that he did not question Smoot. Shiverdecker stated that once Smoot was in the cruiser, he was unable to leave because the doors automatically lock. Shiverdecker stated that there is audio recording inside his cruiser but not video. He stated that another deputy also responded to the scene in the course of the stop.

{¶ 6} In overruling Smoot's motion to suppress, the court determined in part as follows:

> * * *
>
> As noted, Mr. Smoot only requests any statements made to Deputy Shiverdecker be suppressed. This, however, does implicate the stop of Mr. Smoot's vehicle because, at least arguably, if the detention was illegal, any statements made during the course of such an illegal detention are subject to suppression. The stop, however, was not illegal. O.R.C. § 4511.39 provides that a driver must continuously signal his intention to turn or move left or right on a highway "during not less than the last one hundred feet traveled * * *" before making the turn or moving from right or left on the roadway. If a police officer has probable cause [to believe] that a driver has committed a traffic violation, the officer may lawfully initiate a traffic stop even if the officer has other investigative motives for the traffic stop. *Wren v. United States*, 517 U.S. 806, 116 S.Ct. 1769 (1996); *Dayton v. Erickson*, 76 Ohio St.3d 3, 1996-Ohio-431, 665 N.E.2d 1091 (1996). In this case, Deputy Shiverdecker, though he admittedly had other investigative concerns, possessed probable cause that Mr. Smoot had violated O.R.C. §

4511.39. The stop, therefore, was constitutionally permissible and has no affect upon whether Mr. Smoot's statements are subject to suppression.

The next, and dispositive issue, is whether any statements Mr. Smoot made were in response to custodial interrogation. Questions posed by a police officer to a suspect require *Miranda* warnings when the questions amount to custodial interrogation. *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 1682 (1980). An individual is in custody for purposes of *Miranda* when the person "is placed under formal arrest or [his] freedom of action is restrained to a degree associated with a formal arrest." *State v. Hardy*, 2011-Ohio-241 at ¶ 35 (2d Dist.) A seizure that is the equivalent of an arrest requires an intent to arrest, the seizure is accomplished pursuant to police authority, the seizure involves actual or constructive detention, and the suspect understands he has been arrested. *State v. Hardy* at ¶ 35 citing *State v. Taylor*, 106 Ohio App.2d 741, 667 N.E.2d 60 (2nd Dist., 1996). Typically, a traffic stop, even one motivated in part by another investigative agenda, does not create a custodial interrogation. *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138 (1984); *State v. Martin*, 2002-Ohio-2621 (2nd Dist.)

It is arguable that in this case the non-custodial traffic stop was transformed into a custodial situation when Deputy Shiverdecker, upon feeling the bulge during the pat down, asked Mr. Smoot about the bulge. This question, asked in a public setting with the involvement of only one officer (Deputy Shiverdecker), did not convert what was a non-custodial

> encounter into a custodial situation. *State v. Martin, supra, State v. Hardy, supra.* Further, Deputy Shiverdecker's follow-up question concerning anything in Mr. Smoot's vehicle did not change the non-custodial nature of the encounter. As such, Deputy Shiverdecker did not have to inform Mr. Smoot of his *Miranda* rights before asking the question about the bulge Deputy Shiverdecker felt or about what else was in Mr. Smoot's vehicle. There is, in short, no basis upon which to suppress Mr. Smoot's statements to Deputy Shiverdecker.
>
> It is, finally, noted that Mr. Smoot's motion does not attack Mr. Smoot's consent to search his vehicle. This issue, therefore, does not, and will not, be discussed. (sic)

{¶ 7} On March 25, 2014, Smoot filed a second motion to suppress all evidence seized from his person and vehicle. At the start of the hearing on the second motion, the trial court noted that counsel for Smoot indicated to him before the hearing that he had been advised that the recording made by the cruiser camera of Smoot's traffic stop had been automatically deleted. The court instructed the prosecutor to ascertain whether or not the recording had been copied and stored elsewhere.

{¶ 8} The prosecutor then indicated to the court that the State would stand on the testimony provided by Deputy Shiverdecker at the initial suppression hearing. Smoot testified in the second hearing that in the course of the traffic stop, Shiverdecker approached the driver's side door and "just basically said about (sic) some gas being stolen off Third Street and I fit the description." He stated that Shiverdecker did not ask him for identification or for any identifying information. According to Smoot,

Shiverdecker asked him to get out of his car and placed him in handcuffs behind his back. Smoot stated that Shiverdecker patted him down and placed him in his cruiser. Smoot testified that the car he was driving belonged to his father. Once in the cruiser, Smoot stated that he and Shiverdecker "had a conversation in the car about the gas being stolen and the reason why he was pulling me over for the incident and pretty much that was it." Smoot stated that Shiverdecker said nothing about a failure to signal a lane change. He stated that Shiverdecker "asked me did I have anything in the car and I just told him it was my girl's money." Smoot stated that Shiverdecker did not ask to search the car and that he did not consent to a search of the car. Smoot testified that Shiverdecker "opened up the doors, the trunk, pretty much looked through the car."

{¶ 9} According to Smoot, Shiverdecker "came back to the cruiser and said he found some money. I told him who the money was then. (sic) He proceeded to come to the back door and he opened up the back door and he asked me, he felt something behind my butt and I told him it was some weed, which is marijuana." Smoot testified that the marijuana was in his back pocket, and that he let Shiverdecker have it. Smoot stated that Shiverdecker "slammed the door and cussed. Pretty much went back to the car and searched some more." He stated that another deputy arrived and that the deputy and Shiverdecker spoke outside the cruiser. Smoot testified that Shiverdecker then returned to the cruiser and "said that he was taking the weed and the money. And I asked him why he was taking the money because I told him who it was." According to Smoot, "I asked him, well, since he was taking the money, how do she go about getting the money and he told me that he takes it. She got to call down to the Safety Building to get it. I even asked him why he was taking it when I just told him it wasn't mine." Smoot

stated that he did not have a valid driver's license, and that Shiverdecker allowed him to drive away at the conclusion of the stop. On cross-examination, Smoot stated that his father's car is a rental.

{¶ 10} On May 1, 2014, the trial court issued an Entry indicating that the second motion was overruled for the reasons set forth on the record on April 30, 2014. On that date, the court noted that it reaffirmed the facts as set forth in its written decision on Smoot's first motion to suppress and incorporated them into the instant decision. The court initially considered the constitutionality of the search of Smoot's vehicle, noting that Smoot denied granting consent. The court then specifically indicated that it found Shiverdecker's testimony to be credible, and citing *State v.* Sears, 2d Dist. Montgomery No. 20849, 2005-Ohio-3880, ¶ 37-38, the court determined that the search was permissible because Smoot voluntarily consented.

{¶ 11} The court next considered the seizure of the currency from within the vehicle, noting that Shiverdecker learned from O. that Smoot recently committed a drug transaction. The court found that Shiverdecker had probable cause to conclude that the currency was evidence of the earlier drug transaction and subject to seizure. Regarding the seizure of the marijuana, the court noted that Shiverdecker failed to articulate his rationale for conducting the pat down of Smoot, and that he lacked a reasonable and articulable suspicion that Smoot was armed and dangerous. The court concluded that the marijuana was subject to suppression.

{¶ 12} On June 2, 2014, Smoot filed a Motion to Dismiss, asserting that the trial court "should dismiss the case due to the officer's failure to preserve the digital recording of Defendant's stop." According to Smoot, "this digital recording showed that he was not

stopped for violating the law, and that he should not have been removed from his vehicle and searched." On June 4, 2014, the State filed a motion in limine asking the court "to prevent [Smoot] from seeking to introduce testimony regarding the Montgomery County Sheriff's Office failure to retain the cruiser camera footage for longer than the Office's retention policy."

{¶ 13} On June 4, 2014 the court issued a decision overruling Smoot's Motion to Dismiss, following a hearing that occurred on the same day. At the hearing, Robert Brunner testified that he is an IT specialist for the MCSO. He stated that a majority of the sheriff's deputies' cruisers are equipped with a recording system "that records audio and video relative to any sort of trigger in the vehicle to initiate a recording. And that video is then off loaded onto a server back at the building once the car returns, and it's an automatic process to do that." Brunner testified that "[a]nytime the vehicle comes in proximity to any of our sheriff's office buildings, either headquarters downtown or * * * our three posts around town, the computer automatically connects to a WI-FI connection, the software sees that connection and automatically begins offloading the video to the server." Brunner stated that the server is "in our primary data center which is in the basement of the jail downtown."

{¶ 14} Brunner testified that when a deputy "presses the button to stop recording a video, he's prompted on the screen on his computer to classify it; either a traffic stop or officer initiated contact. We have a list of classifications." Brunner stated that traffic stop videos are stored for 45 days pursuant to MCSO policy. Brunner stated that absent a request from defense counsel or the prosecutor, traffic stop videos are not stored beyond the 45 days, and "the system automatically purges the video. The video is deleted and

all of the data associated with the video such as the triggers or any metadata is also cleared out of the record. At that point, the disc space on the server is rewritten with new files." Brunner stated that the "deputies actually do not even have privileges enough to export and save a video. Only sergeants and above rank have that."

{¶ 15} On cross-examination, Brunner stated that if a deputy fails to classify a video, the server is programmed to save the video for 90 days. He further indicated that some cruisers have older DVD systems with "a 30-day rotation of discs in them." Brunner stated that the cruiser operated by Shiverdecker had the newer equipment, but that he does not know if the video from Smoot's traffic stop was classified or not by Shiverdecker. In response to questions from the court, Brunner indicated that there is no mechanism to retrieve recordings that have been deleted, and that there is no mechanism to determine if anyone viewed the video during the period that it was retained, or if it was exported.

{¶ 16} O. testified that he is a R.A.N.G.E. Task Force detective with the MCSO. He testified that Shiverdecker stopped Smoot at his direction. O. stated that he determined that "there was no evidentiary value for the actual video" of the stop. O. stated that Shiverdecker classified the video as a traffic stop. He stated that neither the State nor defense counsel requested the video within the 45 day retention period. On cross-examination, O. testified that he did not review the video of the traffic stop.

{¶ 17} Robert Haller testified that he is employed with Northrup Grumman as a software developer. The trial court designated Haller an expert in the area of information technology. Haller testified that he was contacted about examining the MCSO's records to determine the existence or nonexistence of Smoot's traffic stop video. He stated that he

was to meet with two IT people at the MCSO, but that one of the people was in an accident and the meeting was cancelled. The court arranged for Haller and Brunner to meet the following morning and continued the hearing to the following day. At that time, Haller testified that he evaluated O.'s "PC profile," and his "hard drive, storage," and that he was unable to retrieve the video of Smoot's traffic stop.

{¶ 18} In overruling Smoot's motion to dismiss, the court determined in part as follows:

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> * * * In this case, the video at issue cannot reasonably be characterized as materially exculpatory. Its evidentiary value is, at best, marginal. That is, given the overall facts of the case, assuming the video revealed information which would have triggered an order suppressing the cash seized by Detective Shiverdecker, the suppression would not have * * * prevented the State from going forward on any of the indicted charge[s].
>
> The video, accordingly, can only be seen as potentially helpful, the issue, therefore, is whether the Defendant, Mr. Smoot, has established that the video's destruction was accomplished in bad faith. This Mr. Smoot has failed to do. I find the testimony of Detective [O.] and Mr. Brunner to be credible and thus believable. The video, since it was tagged as a traffic stop by Detective Shiverdecker, was deleted after 45 days.
>
> Detective [O.] * * * could have taken steps to preserve the video, but given its content, the seizure of the cash, which I believe is buy money provided by the range task force, and it's rather a tangential relationship to

> the overall investigation, decided such preservation was not necessary.
>
> One can argue that the better practice, and perhaps the practice that would have been more consistent with the Department's policy, would have been to preserve the video, but it certainly cannot be said the decision to tag the video as a traffic matter, which decision was made by Deputy Shiverdecker or Detective [O.'s] decision not to tag the video so that it would be preserved beyond 45 days, was an action that was undertaken in bad faith, therefore, Mr. Smoot's motion must and will be overruled.

{¶ 19} At the trial of the matter herein, O. testified that the R.A.N.G.E. Task Force is "a regional narcotic organized crime unit that investigates guns, drugs, vice, and organized crime." O. stated he works "in an undercover capacity purchasing narcotics and other covert operations." O. stated that his investigation of Smoot began after an informant, who was arrested for possession of narcotics, informed him that he obtained narcotics from another individual whom he knew as "Rabbit." O. testified that the informant gave him the phone number he used to contact Rabbit. O. stated that he also obtained a physical description of Rabbit from the informant. He stated that he ran Rabbit's phone number through "Accurint" and determined that it belonged to Smoot. O. stated that he then went into "Ohio Law Enforcement Gateway" and "Justice Web" and obtained a photograph of Smoot, which he showed to the informant. The informant confirmed that the photograph depicted the person he knew as Rabbit, according to O.

{¶ 20} O. testified that after confirming Smoot's identity, he "then set up a time which the informant could come in and introduce me into the organization by making a phone call and a purchase of narcotics." O. stated that on September 17, 2013, he met

the informant and initially searched his person for drugs, paraphernalia and money. He stated that a monitor was placed in his vehicle so that other officers could listen to the transaction for the safety of O. and the informant. O. testified that a call was placed to Smoot asking to purchase $80.00 of heroin, and that the call was recorded. He identified a CD with the audio of the recorded phone call which was played for the jury. O. stated that "we record [calls] to memorialize or document that we called and we spoke to somebody and * * * for the purposes of evidence." He stated that recording the calls "also assists me in the future if I can compare voices on phones, be it jail calls with my buy calls, * * *. It helps me to say is this the same guy that I was talking to or does it sound like the same guy."

{¶ 21} O. testified that the informant told Smoot that he wanted an "80 boy," and that "boy" is a street term for heroin. According to O.'s testimony, in the course of the phone call, Smoot directed the informant to proceed to a location and to "call another phone number to make contact with another individual to have that order delivered." O. testified that he directed other officers to proceed to the location as well since often "the bad guys will have counter surveillance and it's just for our safety." After a portion of the audio was played for the jury, the following exchange occurred:

> Q. So at this point you're having a conversation with the confidential informant? Correct?
>
> A. Correct.
>
> Q. And what are you discussing with him?
>
> A. Is that the same voice matched to the person that he knew as Rabbit in previous phone calls and he was indicating, yeah. Sounds like the same

guy.

{¶ 22} O. stated that after reaching the location, the informant placed the second call and "indicated that he was told to call this person by Rabbit and he wanted 80 on boy." O. testified that as a result of that call, Savina Johnson arrived and "parked in front of our vehicle and then made the transaction exchange of eight caps of heroin for $80" with the informant alongside O.'s car. O. stated that the transaction was recorded with "a handheld electronic and audio and video camera." O. identified a disk of the recording as State's Exhibit 1, which was played for the jury, and he identified the eight capsules of heroin that he obtained from the informant after the transaction as Exhibit 2. Exhibit 1 was admitted into evidence. O. testified that he gave the informant the $80.00 to give to Johnson, and that the serial numbers of the bills were recorded. O. testified that he and the informant left the area, that he searched the informant again to make sure that O. had everything that was purchased, and that he released the informant.

{¶ 23} O. testified that a second transaction occurred on September 23, 2013, after he called Johnson directly, "bypassing Mr. Smoot." O. stated that he asked "to purchase a quantity of heroin from her and waited for her direction" to a location for the delivery. Audio of the second transaction was recorded and played for the jury (Exhibit 1). The audio reflects that O. initially advised Johnson on the phone that he had obtained her number "from Rabbit last week." When O. arrived at the designated location, he called Johnson again and when she arrived with the drugs, he advised her that he "met you through Tom last week," and she replied, "Yeah, Tommy!" In the course of the transaction, O. asked how much he could purchase at one time, and the audio reflects that she replied in part, "if you become a regular you get hooked up." She further stated

that "our caps" are "more fatter than other people's." When O. stated that he would like to be able to buy "200- 300 at a time," Johnson indicated in part that she would have "to talk to Rabbit."

{¶ 24} The following exchange occurred at trial:

Q. Did - - did Ms. Johnson say, * * * "my caps are fatter"?

A. No. She indicated, "our."

Q. * * * And who did she say she'd have to check with in order to give you a - - if you became a regular and get you a better deal?

A. Rabbit.

Q. * * * And as a result of that transaction, did you purchase drugs from Ms. Johnson?

A. I did.

O. identified the 10 capsules of heroin that he purchased from Johnson on September 23, 2013 as Exhibit 3. He testified that the serial numbers on the money he used to buy the heroin were recorded.

{¶ 25} O. testified that he subsequently "received a call from Savina Johnson who said, I talked to * * * Rabbit, and you should get a call from him here in a little bit." O. said five or ten minutes later he received a call from a man who "identified himself as Mr. Smoot and spoke with him about purchasing [a] large quantity." O. stated that on September 25, 2013, he called Smoot "on the originally furnished number * * *" and asked to buy $350.00 of heroin and cocaine. O. stated that he was again directed to a specific location, and upon his arrival, he parked in the parking lot of Advanced Auto Care. O. testified that he observed "a white Chevy Impala rental car pull up behind me and it was

being driven by Savina Johnson." He stated that he purchased eight capsules of heroin and 35 capsules of cocaine, which he identified at trial as Exhibits 4 and 5 respectively. O. stated that he recorded the serial numbers of the money that he gave to Johnson.

{¶ 26} O. testified that after the transaction, he provided a vehicle description and license tag number to his surveillance units and asked them to follow Johnson. According to O., Johnson proceeded to an Internet Café on North Dixie Highway, and she went inside. O. stated that Smoot then exited the Internet Café, and that he left the area in the Impala. O. stated that he had "surveillance units follow the white vehicle and I requested a marked car with a uniformed officer to obtain additional probable cause; make a traffic stop and ID the driver." O. identified the currency that was retrieved from Smoot's vehicle and given to him following the traffic stop. He stated that "$320 of the $350 cash that I used from R.A.N.G.E. buy funds" was recovered from the vehicle.

{¶ 27} According to O., the "next step was, again, increasing our purchase; trying to up the quantity in which we were going to buy and I was contacted by Mr. Smoot via text from his 5-8-0 number, indicating that he had fire, or a high quantity of heroin," which is also known as "raw." O. testified as follows regarding a buy that occurred on September 30, 2013:

> Made some phone calls and discussed making a larger purchase with Mr. Smoot; indicated to him that I had $700 that I could * * * spend. And during one of the conversations, he advised me that if I spend a thousand dollars, he'd put a pretty package together for me. So I told him I could go to an ATM, get a few hundred more dollars and then I would meet him.

> So we agreed upon a thousand dollar purchase of heroin/cocaine. He also indicated that he had some morphine that he would throw in there.

{¶ 28} O. stated that the transaction was recorded, and the video was shown to the jury (Exhibit 1). O. stated that he met both Smoot and Johnson at the Speedway on North Dixie Drive. He stated that Johnson was driving the Impala with Smoot in the passenger seat, and that he was driving a van. O. stated that Johnson pulled beside him, and he testified as follows:

> When they pulled up beside me, right next to me, I looked down into the vehicle. I identified Mr. Smoot; reached down; leaned out the windows. You can see and I shook his hand; introduced myself and we had a very brief conversation.
>
> In doing so, I was able to see down into the vehicle * * * into his hands and he produced a large bag containing the narcotics that * * * I later purchased.
>
> He then handed the narcotics to Savina and Savina placed them in her purse; exited the vehicle; walked around the car and came to me. I exchanged a thousand dollars with her for the heroin and cocaine.

O. identified the heroin that he purchased from Smoot and Johnson as Exhibit 6 and cocaine he purchased as Exhibit 7, and he identified Smoot in the courtroom. Further video was played for the jury, and O. testified that as the Impala "backed out behind me, they yelled out the window asking * * * how much cash I gave them. I advised them, again, it was a thousand."

{¶ 29} O. further testified that after Smoot was in custody, he "listened to his jail

calls on Pay-Tel, which I have access to; compared his voice with the - - the recordings that I had taken during the bu[ys] and such and identified the voice as being the same person." O. stated that a stop of the vehicle was conducted shortly after the buy, pursuant to a search warrant, and officers "recovered the $1,000 in R.A.N.G.E. buy funds." He identified the currency recovered and the search warrant signed by him. He stated that the search warrant was also for 148 Basswood, Johnson's home. O. stated the surveillance units observed Smoot and Johnson "going in and out of [Johnson's] home on Basswood. There is mail and inside the Impala were his belongings and paperwork."

{¶ 30} Shiverdecker again testified regarding the sequence of events of the traffic stop. He stated that he retrieved $565.00 from the vehicle, and that it was in his custody and control until he gave it to O.. He stated that the stop occurred at approximately 2:00 p.m.

{¶ 31} Finally, Todd Yoak testified that he is a forensic chemist with the Miami Valley Regional Crime Laboratory. Yoak testified that he evaluated the narcotics obtained herein in the controlled buys between September 17 and September 30, 2013. He identified his lab report and stated that State's Exhibits 2, 3, 4, and 6 contained heroin inside the capsules, and that State's Exhibits 5 and 7 contained cocaine to a reasonable degree of scientific certainty.

{¶ 32} At the conclusion of the evidence, Smoot moved for a directed verdict pursuant to Crim.R. 29 on all counts, and the court overruled the motion but noted that it "did take me a longer time to review and ponder Count I," engaging in a pattern of corrupt activity. The court noted that "in addition to other elements, there has to be the

establishment that there was the existence of an enterprise and in order to establish an enterprise, the State must establish that there was an ongoing association with some sort of framework, formal or informal, for carrying out its objective." The court further noted that the "various members and associates of the association function as a continuing unit to achieve a common purpose and the association had a structure separate and apart or distinct from the alleged pattern of corrupt activity." The court determined in part as follows:

> * * * And it appears that the case law in the State of Ohio is all over the map on that particular element; on that particular part of the - - of the evidence needed to establish an enterprise.
>
> The 2nd District, in a couple of cases, have commented upon that subject, including the case of State versus Franklin, 2011-Ohio-6802. * * * and at Paragraph 97 of that decision, * * * the decision states,
>
> "Regarding the last part of the inquiry, the Supreme Court reiterated its holding in Turkette that "the existence of an enterprise is a separate element that must be proved." The Court stressed as it had in Turkette that "the existence of an enterprise is an element distinct from the pattern of racketeering activity and 'proof of one does not necessarily establish the other.'"
>
> And - - and the reason for that is - - is that the enterprise element cannot be established by the pattern of racketeering to the jury. If that were possible, the pattern of corrupt activity and the enterprise would be one element, not two. And quite honestly, I have some concern about that

particular element as it relates to this case, but when reviewing the evidence in the way that I must, I come to the conclusion that there is sufficient evidence of a structure independent from the corrupt activity, in this case the sale of the drugs, that would allow this to go the jury. That structure being presented by * * * the testimony from Detective [O.] * * * which established, at least arguably, that Mr. Smoot was the head of this structural organization and that he dictated to Savina Johnson how the operation was to be run.

And so there was * * * that structure, if you will, that is separate and distinct from the actual drug buys that occurred and, therefore, even though I think * * * it's a somewhat close call and one that is certainly unsettled * * * in the State of Ohio, I'm going to overrule the motion for acquittal under Rule 29, based upon that evidence that there is evidence of a structure based upon what Savina Johnson said to Detective [O.] about having to get permission from Rabbit to do certain things and the fact that Detective [O.] had conversations with Mr. Smoot, who then had Ms. Johnson carry out that which was talked about between Detective [O.] and Mr. Smoot.

{¶ 33} Smoot asserts four assignments of error herein. His first assigned error is as follows:

THE TRIAL COURT ERRED IN DENYING THE MOTIONS TO SUPPRESS.

{¶ 34} According to Smoot, "there was nothing in the record that demonstrated a fear for officer safety or in any other way would have justified a pat-down of appellant. * *

*. The officer did not have a reasonable belief that Defendant was carrying any weapons and was therefore, not subject to a protective pat down for officer safety." Smoot further asserts that "when observing the facts of this case * * * the questioning of Mr. Smoot should not have been permitted without Miranda once he was seized and/or effectively arrested and further, that there was no basis for the search of the vehicle of appellant; especially in light of the testimony that he did not give consent to search."

{¶ 35} The State responds that Smoot was not in custody or arrested and accordingly not entitled to *Miranda* warnings in the course of the traffic stop. The State asserts that Smoot was simply detained until Shiverdecker could issue him a citation. According to the State, we must defer to the trial court's assessment of Shiverdecker's credibility and conclude that Smoot voluntarily consented to the search of his car. The State asserts that it "disagrees with the court's finding that the pat-down was unlawful and, therefore, that Smoot's consent was preceded by any illegal action." The State asserts that the matter herein is controlled by *State v. Evans*, 67 Ohio St.3d 405, 618 N.E.2d 162 (1993). The State asserts that "even if this Court finds that the pat-down was unlawful, it did not taint or coerce Smoot's consent. It is important to note that Smoot's consent was not given during the course of an illegal detention." According to the State, the "pat-down was sufficiently independent of the consent as to not have any effect on the voluntariness of * * * Smoot's consent." Finally, the State asserts that even if we conclude that the consent was tainted by the pat-down, any error is harmless because "[O.] provided the jury with overwhelming direct evidence of the transaction through his firsthand observations of what occurred. Based on that evidence, the jury was able to find Counts 6, 7, 8, and 9 established beyond a reasonable doubt, even without evidence

that buy money was subsequently located in the white Chevy Impala." We note that Counts six through nine involve the offenses that occurred on September 25, 2013.

{¶ 36} As this Court has previously noted:

> In ruling on a motion to suppress, "the trial court assumes the role of the trier of fact, and, as such, is in the best position to resolve questions of fact and evaluate the credibility of the witnesses." *State v. Retherford*, 93 Ohio App.3d 586, 592, 639 N.E.2d 498 (2d Dist.1994), citing *State v. Clay*, 34 Ohio St.2d 250, 298 N.E.2d 137 (1972). Accordingly, when we review suppression decisions, "we are bound to accept the trial court's findings of fact if they are supported by competent, credible evidence. Accepting those facts as true, we must independently determine as a matter of law, without deference to the trial court's conclusion, whether they meet the applicable legal standard." *Id.; State v. Shipp*, 2d Dist. Montgomery No. 24933, 2012–Ohio–6189, ¶ 11.

State v. Mobley, 2d Dist. Montgomery No. 26044, 2014-Ohio-4410, ¶ 11.

{¶ 37} As this Court further noted in *Mobley*:

> The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). "A police officer may lawfully stop a vehicle if he has a reasonable articulable suspicion that the motorist has engaged in criminal activity[,] including a minor traffic violation." *State v. Buckner*, 2d Dist. Montgomery No. 21892, 2007–Ohio–4329, ¶ 8. Once a lawful stop has been made, the police may require the driver and any

> passengers to exit the vehicle pending completion of the traffic stop. *Pennsylvania v. Mimms*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977); *Maryland v. Wilson*, 519 U.S. 408, 117 S.Ct. 882, 137 L.Ed.2d 41 (1997); *State v. Evans*, 67 Ohio St.3d 405, 408, 618 N.E.2d 162 (1993). "What is now referred to as a '*Mimms* order' was viewed by the [U.S. Supreme] court as an incremental intrusion into the driver's personal liberty which, when balanced against the officer's interest in protection against unexpected assault by the driver and against accidental injury from passing traffic, is reasonable under the Fourth Amendment." *Evans* at 406; *State v. Trammer*, 8th Dist. Cuyahoga No. 85456, 2005–Ohio–3852, ¶ 14. Where there is a lawful basis for the stop, ordering an occupant out of the car is proper, even if the officers are not prompted by a reasonable, articulable suspicion of criminal activity. *Evans* at 408; see also *State v. Broaddus*, 2d Dist. Montgomery No. 23525, 2010–Ohio–490, ¶ 18.

Mobley, ¶ 13.

{¶ 38} Deferring to the trial court's determination that Shiverdecker's testimony was credible, we agree with the trial court that the stop was lawful due to Smoot's failure to properly signal a lane change, in violation of R.C. 4511.39. While Shiverdecker, who was alone at the time he approached the vehicle, stated that Smoot did nothing to cause him to fear for his safety, and that he intended to place him in his cruiser merely to verify his identity, he further testified that he knew at the time of the stop that the driver of the vehicle was the subject of an ongoing drug trafficking investigation, and that he was aware that Smoot had recently completed a drug transaction that day.

{¶ 39} As Shiverdecker and Smoot walked toward the cruiser, after the pat down[1] was concluded, Shiverdecker asked Smoot if he had anything else in the vehicle, and Smoot stated that there was currency in the car. We cannot agree with Smoot that he was effectively arrested when he made the statement regarding the currency. As this Court noted in *State v. Martin*, 2d Dist. Montgomery No. 19186, 2002-Ohio-2621, quoting *Berkemer v. McCarty,* 468 U.S. 420, 437-39, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), upon which the trial court correctly relied:

* * * The Supreme Court explained:

> Two features of an ordinary traffic stop mitigate the danger that a person questioned will be induced "to speak where he would not otherwise do so freely[.]" First, detention of a motorist pursuant to a traffic stop is presumptively temporary and brief. The vast majority of roadside detentions last only a few minutes. A motorist's expectations, when he sees a policeman's light flashing behind him, are that he will be obligated to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may be given a citation, but that in the end he most likely will be allowed to continue on his way. In this respect, questioning incident to an ordinary traffic stop is quite different from station house interrogation, which frequently is prolonged, and in which the detainee often is aware that questioning will continue until he provides his interrogators the answers they seek.
>
> Second, circumstances associated with the typical traffic stop are

[1]Absent a cross-appeal by the State, we shall not address the suggestion that the trial court erred in granting suppression of the marijuana.

> not such that the motorist feels completely at the mercy of the police. To be sure, the aura of authority surrounding an armed, uniformed officer and the knowledge that the officer has some discretion in deciding whether to issue a citation, in combination, exert some pressure on the detainee to respond to questions. But other aspects of the situation substantially offset these forces. Perhaps most importantly, the typical traffic stop is public, at least to some degree. Passersby, on foot or in other cars, witness the interaction of officer and motorist. This exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the motorist's fear that, if he does not cooperate, he will be subjected to abuse. The fact that the detained motorist typically is confronted by only one or at most two policeman further mutes his sense of vulnerability. In short, the atmosphere surrounding an ordinary traffic stop is substantially less "police dominated" than that surrounding the kinds of interrogation at issue in *Miranda*, itself, and in the subsequent cases in which we have applied *Miranda*.

Martin at ¶s 30-32.

{¶ 40} This Court in *Martin* further noted that in "*Stansburg v. California* (1994), 51[1] U.S. 318, the Supreme Court held that the 'initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogatory officer or the person being questioned.' " *Id*. at ¶ 33.

{¶ 41} We conclude that, since Shiverdecker's question regarding the contents of

Smoot's vehicle was asked in the course of a temporary and brief traffic stop, in public, outside of his cruiser, after Shiverdecker advised Smoot that he intended to merely issue a citation after ascertaining his identity, that Smoot was not in custody or "effectively arrested" as he asserts. Accordingly, the trial court did not err in overruling Smoot's request to suppress his statement regarding the currency.

{¶ 42} Smoot next asserts that he did not consent to the search of his vehicle. As this Court noted in *State v. Sears*, 2d Dist. Montgomery No. 20849, 2005-Ohio-3880, ¶ 37:

> Whether consent is in fact voluntary or the product of duress or coercion, either express or implied, is a question of fact to be determined from the totality of the facts and circumstances. *Schneckloth v. Bustamonte* (1973), 412 U.S. 218, 93 S.Ct. 2014, 36 L.Ed.2d 854. Knowledge of the right to refuse consent is not a prerequisite to establishing voluntary consent, but is a relevant factor to be taken into account. Consent to a search that is obtained by threats or force, or granted only in submission to a claim of lawful authority, is invalid. *Id*. Such "lawful authority" is an express or implied false claim by police that they can immediately proceed to make the search in any event. *Bumper v. North Carolina*. [391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797 (1968).]

{¶ 43} Again, we note that the trial court specifically found Shiverdecker to be credible, and we defer to the trial court's assessment of credibility. Shiverdecker testified that he asked Smoot for permission to search his car after Smoot indicated the car contained currency, and that he did so in a conversational tone of voice without threats or

promises, and we accordingly conclude that Smoot provided valid consent for the search of his vehicle. Finally, as the trial court concluded, Shiverdecker had probable cause to believe the cash in the vehicle was buy money from the ongoing investigation or, in other words, evidence of criminal activity subject to seizure.

{¶ 44} For the foregoing reasons, we conclude that the trial court correctly overruled Smoot's motions to suppress his statement regarding the currency, that he consented to the search of his vehicle, and that the currency contained in his vehicle was subject to seizure as evidence of criminal activity. Smoot's first assigned error is overruled.

{¶ 45} Smoot's second assigned error is as follows:

THE TRIAL COURT ERRED IN DENYING THE MOTION TO DISMISS.

{¶ 46} Smoot asserts that the traffic stop video should have been preserved. He asserts that "it is disingenuous for the Deputy and/or the Detective to state and for the State of Ohio to argue that the video of the traffic stop in this case was not material or relevant to the investigation." Smoot argues that "it is equally troubling that, given the ongoing nature of the investigation in this case that this incident was labeled as a 'traffic stop' and that the evidence was subsequently purged after 45 days without being burned to a disc for later viewing." Smoot asserts that the trial court's failure to grant the motion to dismiss "resulted in error and prejudice to the appellant warranting reversal."

{¶ 47} The State responds that "the failure to preserve potentially useful evidence does not constitute a denial of due process of law unless a criminal defendant can demonstrate bad faith." The State argues as follows:

* * * Even assuming, *arguendo*, that the video required the court to grant the

> motions to suppress, the court's suppression of evidence (marijuana, Smoot's statements about the marijuana and the money in the car, and the actual cash found in the car) would not have prevented the State from prosecuting him for and convicting him of trafficking in cocaine and heroin on September 17th, 23rd, 25th, and 30, 2013 and engaging in a pattern of corrupt activity.

{¶ 48} The State further argues that "Smoot did not demonstrate that Deputy Shiverdecker acted in bad faith when he classified the recording as a traffic stop – despite that Det. [O.] was conducting a drug investigation, the reason for the stop was Deputy Shiverdecker's observation of a traffic violation, and Smoot was cited for that violation." Finally, the State asserts that "Smoot utterly failed to prove that the State in bad faith destroyed the video in a calculated effort to circumvent the disclosure requirements."

{¶ 49} As this Court has previously noted:

> Under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, the state must disclose material evidence favorable to the defendant. *Brady v. Maryland* (1963), 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215; *State v. Yarbrough*, 104 Ohio St.3d 1, 12-13, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 69. Evidence is material within the meaning of *Brady* only if there exists a reasonable probability that the result would have been different had the evidence been disclosed to the defendant. *Yarbrough*, 104 Ohio St.3d at 12-13, 817 N.E.2d 845. The Due Process Clause further protects a criminal defendant from being convicted where the state has failed to preserve materially exculpatory evidence or

> destroys in bad faith potentially useful evidence. *State v. Bolden*, Montgomery App. No. 19943, 2004-Ohio-2315, at ¶ 51; *State v. Franklin*, Montgomery App. No. 19041, 2002-Ohio-2370. In order to be materially exculpatory, "evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Franklin*, supra, quoting [*California v.*] *Trombetta*, 467 U.S. [479, 489, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)]. When evidence is only potentially exculpatory, the destruction of such evidence does not violate due process unless the police acted in bad faith. *Id*. "The term 'bad faith' generally implies something more than bad judgment or negligence. 'It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.'" *Franklin*, supra, quoting *State v. Buhrman* (Sept.12, 1997), Greene App. No. 96CA 145.

State v. Smith, 2d Dist. Montgomery No. 20247, 2005-Ohio-1374, ¶ 7.

{¶ 50} We agree with the trial court's determination that the video cannot be characterized as materially exculpatory since, even if the currency retrieved from Smoot's vehicle were suppressed based upon the contents of the video, the State would still be able to prosecute Smoot on the indicted charges. In other words, we cannot conclude that the result herein would have been different if the video had been disclosed to Smoot. Further, we agree with the trial court that Smoot failed to demonstrate that the State acted

in bad faith. The court credited and believed the testimony of O. and Brunner; O. stated that Shiverdecker tagged the video as a traffic stop, and Brunner stated that the video would be automatically deleted after 45 days pursuant to MCSO policy. Since bad faith is not demonstrated, Smoot's second assigned error is overruled.

{¶ 51} Smoot's third assignment of error is as follows:

> APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE OHIO AND UNITED STATES CONSTITUTIONS.

{¶ 52} As this Court has previously noted:

> We evaluate ineffective assistance of counsel arguments in light of the two prong analysis set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674. Trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. See *id*. at 2064-65. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *See id*. at 2064. Hindsight is not permitted to distort the assessment of what was reasonable in light of counsel's perspective at the time, and a debatable decision concerning trial strategy cannot form the basis of a finding of ineffective assistance of counsel. *See id*. at 2065.

State v. Parker, 2d Dist. Montgomery No. 18926, 2002-Ohio-3920, ¶ 47.

{¶ 53} Smoot initially asserts that O. "was permitted to testify as to statements regarding alleged drug activities which were indicated to the detective by a confidential informant as well as alleged alias of appellant." He directs our attention to the portion of the transcript where O. described how he became involved in the investigation of Smoot, namely that an informant provided information that the informant had obtained narcotics from a person known as Rabbit, whose phone number the informant provided to O. O. then obtained Smoot's identity from phone and other records, obtained a photograph of Smoot, and confirmed with the informant that Smoot and Rabbit were the same individual.

{¶ 54} Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). In *Parker*, this Court noted, as the State asserts, that a "declarant's out of court statements are admissible to explain the actions of a witness to whom the statement was made. *State v. Thomas* (1980), 61 Ohio St.2d 223, 232, 400 N.E.2d 401, 15 O.O.3d 234. If a statement is not offered to prove the truth of the matter asserted then it does not constitute hearsay." *Parker*, ¶ 50.

{¶ 55} We agree with the State that O.'s testimony regarding the information the informant provided regarding Smoot and O.'s subsequent actions was adduced to explain the basis for O.'s conduct as he developed his investigation of Smoot, and not to prove that Smoot sold narcotics. Accordingly, defense counsel's performance did not fall below an objective standard of reasonableness in failing to object to O.'s testimony, nor would an objection have altered the outcome herein.

{¶ 56} Smoot next asserts that defense counsel was ineffective in failing to object

to O.'s assertion that in the course of his investigation, he "set up a time which the informant could come in and introduce me into the organization by making a phone call and a purchase of narcotics." According to Smoot, "Count one of this case required the State of Ohio to prove an enterprise or organization. Allowing the prosecution to present this phrasing through a witness gave the impression of an actual organization being in existence when in fact there was no evidence in the record at that point that an organization or enterprise existed." According to Smoot, failure "to object on the grounds of 'facts not in evidence' foundation or more prejudicial than probative under Ohio Rules of Evidence 403 was below the standard of care that was due and owing to appellant." Even if we conclude that defense counsel's performance was deficient based upon his failure to object to O.'s testimony about "the organization," we cannot conclude that an objection would have altered the outcome of the trial, given the subsequent testimony by O. regarding the controlled buys involving both Smoot and Johnson, as further discussed in Smoot's fourth assigned error.

{¶ 57} Smoot next asserts that "a large part of the testimony that was offered in this case was offered by and through the detective indicating that he held telephone conversations with appellant." Smoot argues that "the telephone number and/or records of a cell phone provider plan was [n]ever connected to appellant." According to Smoot, "there was nothing that ever indicated on the record any authentication of the fact that appellant was actually the person on the other end of the phone allegedly making the purported telephone calls." Smoot argues that "failure to object to this evidence which was not properly authenticated, presented without foundation and hearsay was ineffective and resulted in prejudice."

{¶ 58} Evid.R.901(A) provides that 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." As this Court has previously noted:

> "Telephone conversations are admitted where the identity of the parties' is 'satisfactorily explained.'" *State v. Williams* (1979), 64 Ohio App.2d 271, 274, 413 N.E.2d 1212. "Testimony as to a telephone call is admissible where there is a reasonable showing, through testimony or other evidence, that the witness placed or received a call as alleged, plus some indication of the identity of the person spoken to. 'There is no fixed identification requirement for all calls.' * * * 'Each case has its own set of facts.'" *State v. Vrona* (1988), 47 Ohio App.3d 145, 149, 547 N.E.2d 1189 (citations omitted). "Circumstantial evidence, as well as direct, may be used to show authenticity. *Williams*, supra, 64 Ohio App.2d 274. Moreover, the threshold standard for authenticating evidence pursuant to Evid.R. 901(A) is low, and 'does not require conclusive proof of authenticity, but only sufficient foundational evidence for the trier of fact to conclude that * * * [the evidence] is what its proponent claims it to be.' *State v. Easter* (1991), 75 Ohio App.3d 22, 25, 598 N.E.2d 845." *State v. Young*, Montgomery App.No. 18874, 2002-Ohio-1815.

State v. Carr-Poindexter, 2d Dist. Montgomery No. 20197, 2005-Ohio-1571, ¶ 24.

{¶ 59} We conclude that Smoot's identity as the person to whom the informant and O. spoke on the phone was satisfactorily established. O. described how he matched

the number provided by the informant as belonging to Rabbit to phone records to determine that Rabbit and Smoot are the same person. He identified an audio recording that he made of the recorded drug buys. In the course of the audio on September 17, 2013, O. recited Smoot's phone number that the informant had provided, and the informant called that number. After speaking to Smoot, the informant identified the voice he heard in the call as that of Rabbit, and O. so testified. In the phone call that occurred prior to the September 25, 2013 drug transaction, O. testified that Smoot identified himself as "Mr. Smoot," and O. testified that he came to recognize Smoot's voice in the course of their phone calls, prior to meeting him in person. For the foregoing reasons, we cannot conclude that defense counsel's failure to object to O.'s testimony regarding his phone calls with Smoot fell below an objective standard of reasonableness.

{¶ 60} Smoot next asserts that O. "was permitted to testify that Johnson supposedly made calls to [Smoot] and vice versa regarding alleged drug deals." As the State asserts, O. did not testify that Johnson made calls to Smoot and that Smoot made calls to Johnson. On the pages of the transcript to which Smoot directs our attention, O. testified regarding the drug transaction that occurred on September 17, 2013, namely that the informant contacted Smoot, Smoot directed him to a location and told him to call the number Smoot provided, O. and the informant proceeded to the location and placed the second call, after which Johnson appeared and completed the drug transaction. Smoot mischaracterizes the record, and ineffective assistance is not demonstrated.

{¶ 61} Finally, Smoot asserts that the State "was permitted to refer to appellant as James 'Rabbit' Smoot in the questioning of the detective." Smoot asserts that there was "no evidence, which was not hearsay, that ever indicated that this was in fact an alias of

Mr. Smoot." He argues, "allowing this testimony to be presented by and through the questioning of the prosecution, gave credibility to this alleged alias being legitimate without any foundation or proof and relying solely on hearsay through police reports which were not produced and alleged statements made by a confidential informant who did not testify."

{¶ 62} As noted above, O. initially learned that Rabbit was Smoot's alias in the course of his investigation after talking to the informant. We have no basis to conclude that defense counsel's failure to object to O. referring to Smoot as "James Rabbit Smoot" in the course of his subsequent testimony fell below an objective standard of reasonableness such that the outcome of the trial would have been otherwise had defense counsel objected.

{¶ 63} Since ineffective assistance of counsel is not demonstrated, Smoot's third assigned error is overruled.

{¶ 64} Smoot's fourth assignment of error is as follows:

> THE TRIAL COURT ERRED IN DENYING THE CRIMINAL RULE 29 MOTION AND THE VERDICT IS NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE.

{¶ 65} According to Smoot, "there is no evidence that the 'structure' of the crimes in this case allegedly committed by appellant and Johnson went beyond the alleged crimes of possession and trafficking. At best, in this case, there is evidence that supports that appellant and Johnson were involved in the illegal sale of narcotics." According to Smoot, "there was no separate and distinct act other than the predicate crimes alleged, at best." Smoot asserts that there is insufficient evidence to support his

conviction on counts one, six, seven, eight, nine, twelve and thirteen of the indictment. He asserts that the "only evidence which could reasonably [be] offered in this case is that appellant was eventually found to be in possession of currency that was located in a vehicle." Smoot asserts that "this is insufficient to demonstrate trafficking or possession; especially in light of the lack of foundation and hearsay evidence as set forth herein."

{¶ 66} As this Court has previously noted:

> When reviewing the denial of a Crim.R. 29(A) motion, an appellate court applies the same standard as is used to review a sufficiency of the evidence claim. (Citation omitted.) *State v. Thaler,* 2d Dist. Montgomery No. 22578, 2008–Ohio–5525, ¶ 14. "A sufficiency of the evidence argument disputes 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. Wilson*, 2d Dist. Montgomery No. 22581, 2009-Ohio-525, ¶ 10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541 (1997). When reviewing whether the State has presented sufficient evidence to support a conviction, the relevant inquiry is whether any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997). A guilty verdict will not be disturbed on appeal unless "reasonable minds could not reach the conclusion reached by the trier-of-fact." *Id*.

State v. Parker, 2d Dist. Montgomery No. 24406, 2012-Ohio-839, ¶ 32.

{¶ 67} Regarding count one in the indictment, R.C. 2923.32(A)(1) provides: "No person employed by, or associated with, any enterprise shall conduct or participate in, directly or indirectly, the affairs of the enterprise through a pattern of corrupt activity * * *." An enterprise "includes any individual, sole proprietorship, partnership, limited partnership, corporation, trust, union, government agency, or other legal entity, or any organization, association, or group of persons associated in fact although not a legal entity. 'Enterprise' includes illicit as well as licit enterprises." R.C. 2923.31(C). Corrupt activity "means engaging in, attempting to engage in, conspiring to engage in, or soliciting, coercing, or intimidating another person to engage in" any of the offenses set forth in R.C. 2923.31(I)(2), which include any violation of R.C. 2925.11 that is a felony of the first, second, third or fourth degree. R.C. 2923.31(I)(2)(c). A pattern of corrupt activity "means two or more incidents of corrupt activity, whether or not there has been a prior conviction, that are related to the affairs of the same enterprise, are not isolated, and are not so closely related to each other and connected in time and place that they constitute a single event." R.C. 2923.31(E). Finally, "* * * the last of the incidents forming the pattern shall occur within six years after the commission of any prior incident forming the pattern * * *." *Id*.

{¶ 68} Smoot relies upon *State v. Christian*, 2d Dist. Montgomery No. 25256, 2014-Ohio-2672[2], ¶ 74, in which this Court noted as follows:

> We have relied on the Federal RICO Act, 18 U.S.C. 1962, and cases interpreting it, in interpreting R.C. 2923.32. In so doing, we have concluded that, in order to establish the "enterprise" discussed in the

[2] *Christian* has been accepted for review by the Supreme Court of Ohio. *State v. Christian*, 140 Ohio St.3d 1466, 2014-Ohio-4629, 18 N.E.3d 445.

definition of engaging in a pattern of corrupt activity, there must be some evidence of "(1) an ongoing organization, formal or informal; (2) with associates that function as a continuing unit; and (3) with a structure separate and apart, or distinct, from the pattern of corrupt activity." *State v. Beverly,* 2d Dist. Clark No. 2011 CA 64, 2013-Ohio-1365, ¶ 26, citing *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981)[]; *State v. Franklin*, 2d Dist. Montgomery Nos. 24011 and 24012, 2011-Ohio-6802, ¶ 91, citing *Turkette*. In *Beverly*, we further observed:

> Expanding upon its holding in *Turkette*, the United State[s] Supreme Court in *Boyle v. United States*, 556 U.S. 938, 129 S.Ct. 2237, 173 L.Ed 2d 1265 (2009) * * * "reiterated its holding in *Turkette* that 'the existence of an enterprise is a separate element that must be proved.' Id. [at 2244]. The Court stressed, as it had in *Turkette*, that 'the existence of an enterprise is an element distinct from the pattern of racketeering activity and proof of one does not necessarily establish the other.'" *Id*. at 2245, quoting *Turkette*, 452 U.S. at 583. * * *

{¶ 69} This Court in *Christian* further determined as follows:

The requirement that the organization be separate and apart is highlighted by *State v. Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603, which held that a pattern of engaging in corrupt activity "must include both a relationship and continuous activity, as well as proof of the

> existence of an enterprise. Thus, the conduct required to commit a RICO violation is independent of the conduct required to commit the underlying predicate offenses." (Citations omitted). *Id*. at ¶ 13. Because the statute's purpose is to impose cumulative liability for the criminal enterprise, the predicate offenses do not merge with a conviction for engaging in a pattern of corrupt activity, and the court may impose an additional penalty for that offense, i.e. the sanction is for the distinct organizational entity and its "independent" conduct. *Id*. at ¶ 14. The concurring opinion emphasized that Ohio's RICO statute is an offense of dissimilar import from the underlying predicate offenses. *Id*. at ¶ 221, ¶ 26 (Lanzinger, J. concurring). The predicate offenses involve specific statutory criminal violations while the RICO statute was promulgated to "deal with the unlawful activities of those engaged in organized crime." *Id*. at ¶ 24.

Id., ¶ 78.

{¶ 70} The State directs our attention to *State v. Beverly*, Slip Opinion No. 2015-Ohio-219, in which the Supreme Court of Ohio reversed this Court's decision in *Beverly*, upon which this Court in *Christian* in part relied. According to the State, "the same evidence can be used to establish both the existence of an enterprise and the associated pattern of corrupt activity." The Ohio Supreme Court in *Beverly* determined as follows:

> In *Miranda*, we held that "a RICO offense does not merge with its predicate offenses for purposes of sentencing." *Id*. at ¶ 3. Today, we conclude, in essence, that a "pattern of corrupt activity" does not merge with

the concept of "enterprise."

There is no question that a RICO conviction depends on the state being able to "prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity.'" *United States v. Turkette* * * *. *See Miranda* at ¶ 13. The question in this case is whether the same evidence can be used to prove both the existence of an enterprise and the associated pattern of corrupt activity. We conclude that it can and, therefore, also conclude that the state is not required to prove that the defendants were associated with an organization having an existence as an entity or structure separate and distinct from the pattern of activity in which it engages.

Nothing in R.C. Chapter 2923 implicitly or explicitly states that an enterprise and a pattern of corrupt activity must be proven with separate evidence. The definition of "enterprise" is remarkably open-ended. * * *.

The statutory scheme does not indicate how the existence of an enterprise is to be proved, though various decisions of Ohio courts * * * have provided insight. It is easy to prove the existence of certain enterprises, especially those with licit purposes: there is a document memorializing the creation of a partnership or corporation, etc. But * * * in most cases involving a RICO-type conviction, the existence of an enterprise is more difficult to establish because the enterprise is entirely an "association in fact," i.e., a de facto enterprise. * * *. An association-in-fact enterprise has been defined as "a group of persons associated together for a common

purpose of engaging in a course of conduct." * * *.

The Supreme Court stated that "the existence of an enterprise is an element distinct from the pattern of racketeering activity and 'proof of one does not necessarily establish the other.'" *Boyle* at 947, 129 S.Ct. 2237, quoting *Turkette* at 583, 101 S.Ct. 2524. *See Miranda*, 138 Ohio St.3d 184, 2014-Ohio-451, 5 N.E.3d 603, ¶ 13. We agree with this conclusion, that proof of one essential element does not "necessarily" prove another. But we emphasize that, logically, evidence that proves one of the elements can sometimes prove the other, even though it doesn't necessarily do so. The court in *Boyle* accentuated this point when it stated that "the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise 'may in particular cases coalesce.'" *Id.,* quoting *Turkette* at 583 * * *. In so stating, the court expressly rejected the notion that the "the existence of an enterprise may never be inferred from the evidence showing that persons associated with the enterprise engaged in a pattern of racketeering activity * * *." *Id*.

The court in *Boyle* concluded that the following jury instruction was not error: "the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure." *Boyle*, 556 U.S. at 951, * * *. The penultimate sentence of the *Boyle* opinion essentially answered the question before us when it stated that "proof of a pattern of racketeering activity may be sufficient in a particular case to permit a jury to infer the existence of an

association-in-fact enterprise." *Id*.

Beverly, ¶ 6-11.

{¶ 71} The record reflects that O. testified the informant contacted Smoot to purchase heroin in an amount of $80.00 on September 17, 2013, and that Smoot provided a second number for the informant to call upon reaching the location designated by Smoot to accept delivery of the heroin. After the informant called the second number, Johnson appeared at the designated location with the amount of heroin that the informant intended to buy. On September 23, 2013, O. called Johnson directly on the number provided by Smoot, and he then proceeded to the designated location. Once at the location, he again called Johnson to let her know he arrived. When Johnson arrived with the drugs, O. asked her how much he could purchase at a time, and the recording reflects that she stated that "if you become a regular you get hooked up." She advised O. that "our caps" are "more fatter" than the competition. When O. indicated that he would like to purchase "200-300 at a time," Johnson stated that she would have "to talk to Rabbit." She further told O. to "call ahead and let us know what you want." Subsequently, O. received a call from Johnson who indicated that Smoot would contact him, Smoot did so, identifying himself as Mr. Smoot, and a third transaction occurred on September 25, 2013. Finally, on September 30, 2013, Smoot and Johnson were both present for the transaction, and Smoot handed the drugs to Johnson, who again delivered them to O.

{¶ 72} Pursuant to *Beverly*, we conclude that the enterprise element of R.C. 2923.32(A)(1) may be inferred from the above evidence showing that Smoot and Johnson engaged in a pattern of corrupt activity, namely drug trafficking, for a common purpose. In other words, the evidence of Smoot's and Johnson's activities in selling

narcotics to O. is sufficient to permit the jury to infer the existence of Smoot's and Johnson's association-in-fact enterprise.

{¶ 73} We further conclude that the trial court correctly determined, consistent with *Franklin*, that there was sufficient evidence of a structure independent of Smoot's and Johnson's conduct of trafficking in drugs, based upon the evidence that Johnson acted at Smoot's direction when delivering the narcotics, that she deferred to his decision-making authority when O. asked about purchasing a large quantity of drugs, and that she referred to "our caps" and advised O. to "let us know" what he wanted to purchase. For the foregoing reasons, and construing the evidence most strongly in favor of the State, we conclude that the trial court properly overruled Smoot's Crim.R. 29 motion, and that Smoot's conviction on Count I, engaging in a pattern of corrupt activity, is supported by sufficient evidence.

{¶ 74} Regarding the offenses in counts six through nine, namely the possession and trafficking offenses based upon the heroin and cocaine exchanged on September 25, 2013, we initially note that in his brief Smoot acknowledges that "there is evidence that supports that appellant and Johnson were involved in the illegal sale of narcotics."

{¶ 75} R.C. 2925.11(A) prohibits a person from "knowingly * * * possessing drugs," and R.C. 2925.03(A)(1) provides that no "person shall knowingly * * * [s]ell or offer to sell a controlled substance * * *." "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist." R.C. 2901.22(B). "'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." R.C. 2925.01(K).

{¶ 76} While Smoot asserts that he was only found to be in possession of currency on September 25, 2013, as this Court has previously noted, control "can be actual or constructive. A person has actual control over a thing that he can at the moment control and has constructive control over a thing that he cannot immediately control but has the ability to control. The person has actual possession over the former thing and constructive possession over the latter thing." *State v. Curry*, 2d Dist. Montgomery No. 25384, 2013-Ohio-5454, ¶ 17. "The possession of drugs can be actual or constructive. * * *." *Id*. As this Court further noted in *Curry*:

> To constructively possess drugs, a person must be able to exercise " 'dominion and control' " over them, " 'even if [they] [were] not within his immediate physical possession.' " [*State v. Dillard*, 173 Ohio App.3d 373, 2007-Ohio-5651, 878 N.E.2d 694, ¶ 53 (2d Dist.)], quoting *State v. Mabry*, 2d Dist. Montgomery No. 21569, 2007-Ohio-1895, ¶ 18. Constructive possession may be inferred from "the surrounding facts and circumstances, including the defendant's actions." *State v. Pilgrim*, 184 Ohio App.3d 675, 2009-Ohio-5357, 922 N.E.2d 248, ¶ 28 (10th Dist.) * * *.

Curry, ¶ 18.

{¶ 77} As discussed above, between September 23, 2013 and September 25, 2013, O. received a call from a man who identified himself as "Mr. Smoot," and the men discussed the purchase of a large amount of drugs. O. then called Smoot on the number originally provided by the informant, and he then proceeded to the location chosen by

Smoot, where Johnson arrived with the amount of drugs O. requested. Officers followed Johnson to an Internet Café, and then they followed the same vehicle driven by Smoot, which was stopped by Shiverdecker. Construing the evidence most strongly in favor of the State, we conclude that the trial court properly overruled Smoot's Crim.R. 29 motion as to counts six through nine, and that his conviction on those counts is supported by sufficient evidence that Smoot constructively possessed the drugs that Johnson delivered on September 25, 2013, since he exercised dominion and control over them while they were in Johnson's possession, and that he accordingly knowingly sold them to O..

{¶ 78} Finally, we note that Smoot was not convicted on counts 12 and 13 of the indictment. Since Smoot's fourth assignment of error lacks merit, it is overruled.

{¶ 79} The judgment of the trial court is affirmed.

. . . . . .

FAIN, J. and HALL, J ., concur.

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