[Cite as *State v. Huber,* 2015-Ohio-5301.]

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

STATE OF OHIO	:	
	:	Appellate Case No. 07-CA-88
Plaintiff-Appellee	:	
	:	Trial Court Case No. 06-CR-509
v.	:	
	:	(Criminal appeal from
JOSEPH HUBER	:	Common Pleas Court)
	:	
Defendant-Appellant	:	
	:	

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O P I N I O N

Rendered on the 17th day of December, 2015.

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HALL, J.

{¶ 1} This case is before us on defendant-appellant Joseph Huber's reopened direct appeal from his conviction and sentence on charges involving his possession of

various drugs in quantities that exceeded the statutory "bulk amount."

{¶ 2} Huber advances two assignments of error in his reopened appeal. First, he argues that his former appellate counsel provided ineffective assistance by failing to challenge the legal sufficiency of the evidence to support his drug convictions, three of which were enhanced due to the quantities of drugs involved. Second, he claims the enhanced drug convictions in fact were based on legally insufficient evidence because the State failed to prove the "bulk amounts" as required by statute.

{¶ 3} The record reflects that police caught Huber in March 2006 with a suitcase containing thousands of narcotic pain-reliever and analgesic tablets. As a result, he was convicted on multiple controlled-substance charges in two separate trials. The first trial in case number 06-CR-509 involved his possession of methadone, oxycodone, and acetaminophen with codeine. The second trial in case number 06-CR-674 involved his possession of fentanyl patches. The two trials resulted in separate appeals (the above-captioned appellate case number 07-CA-88 and also appellate case number 07-CA-122).

{¶ 4} In April 2009, this court affirmed the convictions in both cases. *See State v. Huber*, 2d Dist. Clark No. 07-CA-88, 2009-Ohio-1636, and *State v. Huber*, 2d Dist. Clark No. 07-CA-122, 2009-Ohio-1637. We later reopened Huber's appeal in the fentanyl-possession case and found legally insufficient evidence that he possessed the requisite "bulk amount" of fentanyl to support his second-degree felony conviction. *See State v. Huber*, 187 Ohio App.3d 697, 2010-Ohio-2919, 933 N.E.2d 345 (2d Dist.). We did find sufficient evidence, however, to prove that Huber possessed "some" amount of fentanyl, which was sufficient to support a fifth-degree felony conviction. As a result, we reversed and remanded the fentanyl case with instructions for the trial court to enter a finding of

guilt as a fifth-degree felony and to sentence Huber accordingly. *Id*.

{¶ 5} In the present case, which involved the other drugs, Huber sought federal habeas corpus relief. As relevant here, the U.S. Sixth Circuit Court of Appeals found that he had not procedurally defaulted on an ineffective assistance of counsel claim predicated on counsel's failure to challenge the sufficiency of the evidence where the State relied on a "pill count" to enhance the degree of his offenses. *Huber v. Timmerman-Cooper*, 6th Cir. No. 14-3158 (Feb. 25, 2015). The Sixth Circuit also opined that Huber's ineffective-assistance claim had merit. *Id*. It remanded, however, for the federal district court to decide that issue in the first instance. *Id*.

{¶ 6} On remand from the Sixth Circuit, a federal magistrate judge issued a June 1, 2015 report and recommendation opining that Huber had a viable ineffective assistance of appellate counsel claim predicated on counsel's failure to challenge the sufficiency of the evidence with regard to his possession of the requisite "bulk amount" of the drugs at issue. *Huber v. Tibbals*, S.D. Ohio No. 3:11-cv-008, 2015 WL 3472955, *7 (June 1, 2015). As a result, the magistrate recommended that a federal district court judge grant a conditional writ of habeas corpus. *Id*. A federal district court judge subsequently adopted the magistrate's report and recommendation and granted a conditional writ of habeas corpus on June 29, 2015. The district judge's order requires Huber's release from prison "unless the Second District Court of Appeals reopens his direct appeal and reaffirms his conviction not later than six months from the date of final judgment in this case." *Huber v. Warden, Chillicothe Correctional Inst*., S.D. Ohio No. 3:11-cv-008, 2015 WL 3952597, *1 (June 29, 2015). In response to the federal district court's ruling and a motion by the State, we reopened Huber's direct appeal on September 23, 2015 pursuant to App.R. 5(B),

which provides: “If a federal court grants a conditional writ of habeas corpus upon a claim that a defendant’s constitutional rights were violated during state appellate proceedings terminated by a final judgment, a motion filed by the defendant or on behalf of the state to reopen the appellate proceedings may be granted by leave of the court of appeals that entered the judgment.”

{¶ 7} As set forth above, the substantive issue raised in Huber’s two assignments of error is whether the State presented legally insufficient evidence to support enhanced drug convictions based on the quantities of drugs he possessed. In his October 22, 2015 amended appellate brief, Huber argues that the present case is analogous to his fentanyl-possession case.

{¶ 8} In the fentanyl case, Huber was convicted of a second-degree felony, which required proof that he possessed five times the “bulk amount” of fentanyl. We found insufficient evidence that he possessed this amount. We noted that the applicable statute defined “bulk amount” as either a certain weight in grams or “five times the maximum daily dose in the usual dose range” in a standard pharmaceutical reference manual. *Huber*, 2010-Ohio-2919, at ¶ 7. In the fentanyl case, the prosecutor sought to prove the bulk amount based solely on the “maximum daily dose.” *Id*. We noted that the “maximum daily dose” could be proven in three ways: (1) by stipulation, (2) by expert testimony about what the standard reference manual prescribes, or (3) by a properly-proven copy of the manual. *Id*. at ¶ 8. We concluded that the prosecutor failed to prove the “maximum daily dose” in any of these ways. *Id*. at ¶ 9. Therefore, we found legally insufficient evidence that Huber possessed even the “bulk amount” of fentanyl. *Id*. at ¶ 10.

{¶ 9} Here the State sought to prove the statutory “bulk amount” of the drugs at

issue by reference to a "pill count," rather than by proof of a certain weight in grams or by establishing a "maximum daily dose." Therefore, the present case is not identical to the fentanyl case. We note that appellate districts disagree on this bulk amount issue. In *State v. Hamlin*, 5th Dist. Stark No. 2002CA00162, 2003-Ohio-544, the testimony of a pharmacist from the Ohio State Board of Pharmacy was sufficient. In our case of *State v. Williams*, 2d Dist. Montgomery No. 8997, 1985 WL 8766, *1 (July 30 1985), the testimony of a crime-lab drug analyst was sufficient when he "mentioned," albeit indirectly, "an approved reference manual." However, in *State v. Cole*, 12th Dist. Warren No. CA2004-01-007, 2005-Ohio-2274, the appellate court found it sufficient that "the court determined the 'maximum daily dose' by referring to the 'United States Pharmacopeia,' one of the standard reference manuals specified in [the then-applicable version of] R.C. 2925.01(M)." *Id*. at ¶ 24.[1]

{¶ 10} Nevertheless, the federal Sixth Circuit Court of Appeals has found Huber's fentanyl case to be analogous to the present one. In the decision cited above, the circuit court reasoned:

> The state argues that, even if Huber's claim is not procedurally defaulted, it fails on the merits. Huber was charged with and convicted of possessing more than five but less than fifty times the "bulk amount" of methadone, oxycodone, and acetaminophen with codeine, defined in relevant part as "[a]n amount equal to or exceeding twenty grams or five

[1] The author is of the opinion that the testimony of Detective Woodruff, who was a narcotics detective for more than 10 years and who had received an advanced training certification from the DEA, would also have qualified as "expert testimony" if he had made some reference to an approved manual as the source of his information.

times the maximum daily dose in the usual dosage range specified in a standard pharmaceutical reference manual" or, for acetaminophen with codeine, as "one hundred twenty grams or thirty times the maximum daily dose." Ohio Rev. Code § 2925.01(D)(1)(d), (D)(1)(g)(2). Huber argues that appellate counsel should have argued that the state failed to provide sufficient evidence that he possessed the bulk amount of the drugs at issue—the same claim on which he obtained relief in *Huber II* [the fentanyl case].

In that case, Huber was convicted of possessing between five and fifty times the bulk amount of fentanyl. *Huber*, 933 N.E.2d at 345. The Ohio Court of Appeals reversed, explaining that, "as a question of fact, 'maximum daily dose' must be proved '(1) by stipulation, (2) by expert testimony as to what a standard pharmaceutical reference manual prescribes, or (3) by a properly proven copy of the manual itself.' " *Id.* at 346 (quoting *State v. Montgomery*, 479 N.E.2d 904, 907 (Ohio Ct. App. 1984)). Because there were no relevant stipulations, no copy of the manual was introduced, and no expert testimony was offered, the court found the "evidence insufficient to prove that Huber possessed even the 'bulk amount' of fentanyl." *Id*. at 347.

In this case, the state similarly relied on testimony from law enforcement officer Scott Woodruff to establish the number of pills that constituted the "bulk amount" for methadone, oxycodone, and acetaminophen with codeine. And, as in *Huber II*, Woodruff simply testified,

without saying how he knew, what pill quantities constituted the "bulk amount" of these substances. *As in Huber II, there was no stipulation, expert testimony, or reliance on the standard pharmaceutical reference manual to establish the "bulk amount" of these drugs. Consequently, the evidence was not sufficient to prove the maximum daily dose and bulk amount of the substances at issue. See id*. at 346-347.

On appeal, the state argues for the first time that it demonstrated the bulk amount in this case based on the weight of the drugs rather than the maximum daily dose standard. But Woodruff testified that the bulk amount of "pharmaceutical type drugs" was calculated based on "the number of tablets," not weight in grams, and in each instance he testified as to the number of tablets that constituted the bulk amount. There was no testimony presented as to the actual weight of the drugs, and the jury was never provided with the weights that constitute the bulk amount. When the jury asked the court during deliberations what the bulk amount was for each substance and how it was determined, the jury was referred to Woodruff's testimony. Outside the jury's presence, the trial court noted that, although there were "other ways of determining bulk amount," the number of tablets was "the only evidence before the jury as to bulk amount for those particular controlled substances." The prosecutor similarly stated that: "it was clear from the testimony of Detective Woodruff that the bulk amounts . . . were based on the number of tablets," not on "the weight and grams of these pills."

(Emphasis added.) *Huber v. Timmerman-Cooper*, at pgs. 3-5.

{¶ 11} In his subsequent ruling, the federal magistrate judge noted that a conviction based on legally insufficient evidence states a constitutional due-process claim. *Huber v. Tibbals*, at *1. The magistrate judge then stated that Huber was convicted and sentenced in this case for violations of R.C. 2925.11 for possessing: "(1) 100 forty mg tablets of Methadone, a second degree felony (Count One); (2) 267 five mg tablets of Oxycodone, a fifth degree felony (Count Three); (3) 615 five mg tablets of Oxycodone, a second degree felony (Count Five); and (4) 19[9]0 tablets of Acetaminophen, each containing 30 mg of codeine phosphate, a third degree felony (Count Six)." *Id*. at *3. After reviewing the trial testimony, the magistrate judge found that the State had attempted to prove the bulk by using doses or the number of tablets Huber possessed rather than the weight in grams of each drug that he possessed. *Id*. at *3 to *6. The magistrate judge noted too that attempting to calculate weight in grams based on the number of tablets possessed was problematic. For example, Huber possessed 100 tablets of methadone at 40 milligrams each, which is 4,000 milligrams or 4 grams. "However, the statutory bulk amount by weight is twenty grams, not four. Five times bulk by weight would be one hundred grams." *Id*. at *6. Since Huber only possessed 4 grams of methadone, he did not even possess the bulk amount. For the foregoing reasons, the magistrate judge held that Huber received ineffective assistance of appellate counsel based on counsel's failure to challenge the sufficiency of the evidence to support a finding regarding the "bulk amount" of the drugs at issue. *Id*. at *7. The magistrate judge also concluded, however, that "determination of whether the State adequately proved possession of five times bulk on the various drugs should be decided in the first instance by the Second District Court of

Appeals." *Id*. As noted above, a federal district judge adopted the magistrate's decision, thereby making it a final judgment of the court. *Huber v. Warden*, at *1.

{¶ 12} On appeal, the State now briefly suggests that it "sought to prove bulk amount * * * using the weight of the drugs standard[.]" (Appellee's brief at 9). This argument is contrary to the record. Although the record does contain some testimony about the weight of the various tablets, prosecution witness Scott Woodruff told the jury that the drugs at issue were "charged relating to the bulk amount, which would be the number of tablets." (Trial Tr. at 160). Later during its deliberations, the jury sent out a question regarding the bulk amount. (*Id*. at 274). In response to the question, the State advocated that "it would be inappropriate to send an answer about the weight and grams of these pills." (*Id*. at 279). The State argued that "[i]t was clear from the testimony of Detective Woodruff that the bulk amounts he based his charges on were based on the number of tablets that were found here." (*Id*.). The trial court apparently directed the jury to Woodruff's testimony about the number of tablets or pill count. (*Id*. at 280).

{¶ 13} It is clear to us that the federal district court and the U.S. Sixth Circuit Court of Appeals both believe the evidence is legally insufficient to sustain Huber's elevated convictions based on "bulk amounts" determined by reference to pill counts. The Sixth Circuit explicitly said so before deferring to the federal district court to make the initial determination. *See Huber v. Timmerman-Cooper*, at pg. 4 (finding that "the evidence was not sufficient to prove the * * * bulk amount of the substances at issue"). It is equally clear that neither federal court was persuaded by the State's seemingly-belated argument about establishing bulk amount by computing the weight in grams of the various drugs. Moreover, as the federal district court pointed out, the number of methadone tablets

Huber possessed would not exceed one times the bulk amount by weight, much less five times the bulk amount. We note too that trial testimony about the weight of other drugs was unclear. For example, Detective Woodruff referenced "codeine phosphate" tablets that were "300 milligrams/30 milligrams." (Trial Tr. at 164). Later, Woodruff referred to the tablets as containing acetaminophen and codeine phosphate and being "300/30 milligrams." (*Id*. at 190). This may mean that each tablet contained 300 milligrams of acetaminophen and 30 milligrams of codeine phosphate, resulting in an aggregate tablet weight of at least 330 milligrams. We cannot be sure, however, because the record lacks testimony elaborating on the issue. Without knowing the precise weight of each tablet, the total weight in grams cannot be determined.

{¶ 14} In any event, the State concedes in its appellate brief that "the only testimony regarding bulk amount was given without reference to any source for the information." (Appellee's brief at 10). As a result, the State appears to acknowledge that Huber's elevated drug convictions based on his possession of bulk amounts are not supported by legally sufficient evidence. Based on the record before us and the opinions of the two federal courts, we agree. As in Huber's fentanyl case, the remedy is to reverse his convictions on count one (possession of methadone in at least five times bulk amount), count five (possession of oxycodone in at least five times the bulk amount), and count six (possession of acetaminophen with codeine phosphate in at least five times the bulk amount) and to remand with instructions for the trial court to enter convictions on lesser-included offenses that do not require proof that he possessed more than the statutory bulk amount.[2] *See Huber*, 2010-Ohio-2919, at ¶ 10-11. Specifically, these convictions

[2] Huber also was convicted on count three for possessing oxycodone. That conviction

should be modified to aggravated drug possession under R.C. § 2925.11(C)(1)(a) for possession of methadone and oxycodone (fifth-degree felonies) and to a misdemeanor for possession of acetaminophen with codeine under R.C. § 2925.11(C)(2)(a). *See Huber v. Timmerman-Cooper*, at pg. 5.

{¶ 15} For the foregoing reasons, Huber's two assignments of error are sustained. Our prior judgment in this case is vacated. *See* App.R. 26(B)(9) ("If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment."). Huber's convictions on counts one, five, and six are reversed, and the cause is remanded to the trial court with instructions to enter findings of guilt on lesser-included offenses not requiring proof that Huber possessed at least the "bulk amount" and to sentence him accordingly.

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FAIN, J., and DONOVAN, J., concur.

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was only a fifth-degree felony, however, because the jury verdict lacked a finding regarding his possession of a bulk amount. (Doc. # 44). For purposes of sentencing, the trial court merged the fifth-degree felony conviction on count three into count five, which involved second-degree felony possession of oxycodone based on Huber's possession of at least five times the bulk amount. (Doc. #43, 48). Because the conviction on count three did not involve or require proof that Huber possessed more than the bulk amount, it is not based on legally insufficient evidence and need not be reversed.