

[Cite as *State v. Delaney*, 2004-Ohio-4158.]

**IN THE COURT OF APPEALS
THIRD APPELLATE DISTRICT
UNION COUNTY**

STATE OF OHIO

PLAINTIFF-APPELLEE

CASE NO. 14-04-10

v.

THOMAS W. DELANEY

OPINION

DEFENDANT-APPELLANT

**CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas
Court**

JUDGMENT: Judgment Reversed and Cause Remanded

DATE OF JUDGMENT ENTRY: August 9, 2004

ATTORNEYS:

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BRYANT, J.

{¶1} Defendant-appellant Thomas W. Delaney (“Delaney”) brings this appeal from the judgment of the Court of Common Pleas of Union County.

{¶2} On August 20, 2003, the Union County Sheriff’s Department executed a search warrant at Lot 46, New Dover Trailer Court in Union County, Ohio. At the residence, Detective Mike Justice (“Justice”) observed three people in the rear of the home. Justice informed the people that he had a search warrant for the premises and requested that they move into the living room. The three people started walking down the hall to the living room. While walking, Delaney, who was immediately ahead of Justice, reached into his sock and removed something in plastic and dropped it to the floor. Justice saw Delaney do this and immediately stopped him. Lying on the floor, approximately one foot away from Delaney, was the item Delaney had dropped. Upon inspection it appeared to be a cellophane wrapper containing a “rock-like substance.” This substance was analyzed by the Bureau of Criminal Investigation and Identification and found to be .53 grams of crack cocaine.

{¶3} On October 28, 2003, Delaney was indicted on one count of possession of cocaine, a fifth degree felony, and tampering with evidence, a third degree felony. A jury trial was commenced on February 26, 2004. The jury returned a verdict on both counts. The trial court then sentenced Delaney to

eleven months in prison on the possession charge and five years in prison on the tampering with evidence charge. The trial court ordered that the sentences be served consecutively to each other. Delaney appeals from this judgment and raises the following assignments of error.

The denial of [Delaney's] rule 29 motion for acquittal and later conviction was against the substantive weight of the evidence.

The finding that [Delaney] was guilty of tampering with evidence was against the manifest weight of the evidence.

The court erred when it sentenced [Delaney] to a maximum consecutive sentence for tampering with evidence.

{¶4} In the first assignment of error, Delaney claims that the trial court should have granted his motion for acquittal. In support of the argument, Delaney claims that the State failed to prove that the criminal acts occurred in Union County, Ohio. However, Justice testified that all of the events occurred while he was executing a search warrant at a residence in Union County. That testimony is sufficient to establish venue.

{¶5} Delaney also claims that the evidence was insufficient to prove that he tampered with evidence. The offense of tampering with evidence is set forth in R.C. 2921.12.

(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

(1) Alter, destroy, conceal, or remove any record, document, or thing with purpose to impair its value or availability as evidence in such proceeding or investigation.

R.C. 2921.12. The State argued that Delaney is guilty of this offense because he removed it from his person in an attempt to disassociate himself from the drugs. However, the police were conducting an investigation of the premises, not the person of Delaney. The search warrant did not extend to the people in the residence. Justice testified that he only found the drugs because he saw Delaney take them out of his sock and drop them in plain view on the floor. No attempt was made to conceal the drugs, to alter the nature of the drugs, or to restrict their availability. To the contrary, by removing the drugs from his sock and dropping them to the floor right in front of Justice, Delaney insured that the drugs would be found. If he had done nothing, there is no evidence to indicate that the drugs would have been found as no search of his person would have been performed.

{¶6} The State argues that although Delaney did not attempt to destroy or conceal the evidence, he is still guilty because he removed it. However, to be guilty of tampering with evidence by removing it, one must logically remove it from the area to be searched. Delaney did not do any such thing. He removed it from his person, which was not subject to a search at that time, and moved the object into an area that was subject to search.

{¶7} Even if this court could believe that Delaney was attempting to alter the nature of the evidence or conceal the evidence, he would have to have some measure of success in order to be guilty of the completion of the offense. In this case, Delaney's actions were done in full view of Justice. When all of the actions occur within full view of law enforcement officials, and the defendant knows that the officers are there, the evidence is insufficient to prove tampering with evidence. *State v. Henderson*, 9th App. No. 02CA008052, 2003-Ohio-1470, at ¶56-57. Justice saw all of Delaney's actions and testified that he immediately found the drugs. Justice also testified that Delaney had not attempted to conceal, destroy, or alter the drugs. Delaney had just dropped the cellophane wrapper to the floor. The wrapper was lying in plain view on the carpet where Delaney had dropped it. Thus, at most, Delaney could be found guilty of the attempt to tamper with evidence for removing it from his person. The State chose not to ask for an attempt instruction. Thus, the evidence is insufficient to prove that Delaney had tampered with evidence. The first assignment of error is sustained.

{¶8} The second assignment of error is that the conviction for tampering with evidence is against the manifest weight of the evidence. Since the evidence was found to be insufficient to support the conviction, we need not address the manifest weight of the evidence.

{¶9} The final assignment of error is that the trial court erred in sentencing Delaney to the maximum sentence for the tampering with evidence and for ordering it to be served consecutively to the possession charge. This court notes that the trial court found Delaney's offenses to be part of an organized criminal activity. This court has previously held that by definition, a minor drug possession offense that is a felony of the fifth degree standing alone does not qualify as organized criminal activity under the statutory definition. *State v. Woodruff*, 3rd App. No. 14-04-07, 2004-Ohio-3547.

{¶10} Additionally, the maximum consecutive sentences are supposed to be reserved for those who have committed the worst forms of the offense. There is absolutely no evidence to support a finding that merely dropping a cellophane wrapped package of cocaine to the ground in full view of an officer and without any attempt to alter, destroy, or conceal the evidence, can be the worst form of the offense. Thus, this court would sustain the third assignment of error. However, since we have reversed the conviction for tampering with evidence, the only charge remaining is the drug possession charge. Delaney did not receive the maximum sentence on this offense. No error was raised as to the sentence for the possession of drugs. Therefore, we need not address it.

Case No. 14-04-10

{¶11} The judgment of the Court of Common Pleas of Union County is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed
and cause remanded.

CUPP and ROGERS, JJ., concur.