[Cite as *State v. Lewis* , 2010-Ohio-130.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
PICKAWAY COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 09CA7
	:	
vs.	:	**Released: January 13, 2010**
	:	
MARK A. LEWIS,	:	DECISION AND JUDGMENT
	:	ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Lori Pritchard Clark, Circleville, Ohio, for Defendant-Appellant.

Judy C. Wolford, Pickaway County Prosecutor, and Matthew L. O'Leary, Pickaway County Assistant Prosecutor, Circleville, Ohio, for Plaintiff-Appellee.

McFarland, P.J.:

{¶1} Defendant-Appellant, Mark A. Lewis, appeals the decision of the Pickaway County Court of Common Pleas finding him guilty of possession of drugs and sentencing him to a one-year prison term. Appellant asserts there was error below in that: 1) the prosecution did not establish venue; 2) the trial court's sentence was contrary to law and an abuse of discretion; 3) he had ineffective assistance of counsel; and 4) the evidence was insufficient to support the verdict and the verdict was against the manifest weight of the evidence. For the reasons stated below, we overrule

each of Appellant's assignments of error and affirm the decision of the trial court.

I. Facts

{¶2} In July 2008, Sergeant Kevin Dillard of the Highway Patrol made a vehicle stop in Pickaway County Ohio. Sergeant Dillard made the stop because the license plate did not match the vehicle. At the time of the stop, Appellant was driving and a passenger was lying down in the back seat. Dillard immediately noticed a bottle of prescription pills in the front passenger seat, in plain view, approximately one foot away from Appellant. From his position outside the vehicle, Dillard could read the name printed on the bottle. The bottle contained Oxycodone and, after ascertaining the name on the bottle was neither Appellant's nor his passenger's, Dillard placed Appellant under arrest. Appellant was subsequently indicted on one count of possession of drugs under R.C. 2925.11, a fifth degree felony.

{¶3} The matter proceeded to trial and the jury found Appellant guilty. Immediately following the verdict, the trial court imposed a one-year prison term, the maximum available. Following the court's judgment entry, Appellant timely filed the current appeal.

II. Assignments of Error

I. THE STATE OF OHIO FAILED TO PROVED [sic] EACH AND EVERY ELEMENT OF THE CRIME CHARGED BEYOND A REASONABLE DOUBT, IN THAT THE STATE FAILED TO PRESENT ANY EVIDENCE TO SUPPORT THE ELEMENT OF VENUE. AS SUCH, THE GUILTY VERDICT WAS ENTERED AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF DUE PROCESS.

II. THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT AND ABUSED IT'S DISCRETION WHEN IT SENTENCED HIM TO THE MAXIMUM PRISON TERM WHICH WAS CLEARLY AND CONVINCINGLY CONTRARY TO LAW.

III. DEFENDANT WAS DENIED INEFFECTIVE [sic] ASSISTANCE OF COUNSEL DUE TO THE FACT THAT COUNSEL STIPULATED TO CERTAIN FINDINGS WITHOUT REQUIRING THE PRESENCE OF EXPERT WITNESSES, COUNSEL FAILED TO CROSS-EXAMINE THE STATE'S SOLE WITNESS, COUNSEL FAILED TO POINT OUT IN CLOSING STATEMENTS THAT THE STATE FAILED TO PRESENT EVIDENCE OF THE ELEMENT OF VENUE, AND COUNSEL FAILED TO PRESENT ANY ARGUMENT IN MITIGATION OF DEFENDANT'S SENTENCE.

IV. APPELLANT'S CONVICTIONS ARE NOT SUPPORTED BY SUFFICIENT EVIDENCE WHERE THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE THAT THE APPELLANT ACTED KNOWINGLY.

III. First Assignment of Error

{¶4} Appellant actually makes two distinct arguments within the body of his first assignment of error: 1) the State failed to present any evidence establishing venue; and 2) the determination that Appellant knowingly possessed drugs was against the manifest weight of the evidence.

We will address the manifest weight argument below, along with his fourth assignment of error. We now address his argument concerning venue.

{¶5} Though not a material element of a crime, unless waived by the defendant, venue must be proved beyond a reasonable doubt. *State v. Headley* (1983), 6 Ohio St.3d 475, 477, 453 N.E.2d 716; *State v. Elliott*, 4th Dist. No. 06CA2924, 2007-Ohio-2178, at ¶5. However, as long as it can be established by the particular facts and circumstances of the case, venue does not have to be proven in express terms. *Headley* at 477.

{¶6} The following testimony from Sergeant Dillard, the arresting officer, was the only evidence presented regarding venue:

{¶7} Q: "And where was the stop made?"

{¶8} A: "It was on State Route 104, approximately at mile post four, there's a road down there called Hickory Bend South of 22."

{¶9} In his brief, Appellant contends the State failed to elicit any testimony regarding venue. Appellant's argument seems to be that, because Dillard did not explicitly say the words "Pickaway County," venue was not established. We do not find the argument persuasive.

{¶10} As the State notes in its brief, Dillard's testimony regarding venue is actually more precise than it would have been had he simply stated that he stopped Appellant in Pickaway County. By giving the state route

and the corresponding mile marker where the stop took place, and by stating that the stop took place south of State Route 22 near Hickory Bend road, Dillard provided the jury with enough evidence to determine the location of Appellants' offense. See, *State v. Matz*, 5th Dist. No. 08COA021, 2009-Ohio-3048, at ¶16. Accordingly, the State produced enough evidence for the jury to conclude that venue was established beyond a reasonable doubt and Appellants' first assignment of error is overruled.

IV. Second Assignment of Error

{¶11} In his second assignment of error, Appellant argues the trial court's decision to impose the maximum sentence was contrary to law and an abuse of discretion. More specifically, he states the court did not undertake the necessary analysis required by R.C. 2929.11 and R.C. 2929.12. We begin with the appropriate standard of review.

{¶12} The Supreme Court of Ohio addressed the issue of post-*Foster* felony sentencing in *State v. Kalish*, 120 Ohio St.3d 23, 896 N.E.2d 124, 2008-Ohio-4912. Under *Kalish*, appellate courts are required to apply a two-step approach when reviewing felony sentences. "First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the

trial court's decision shall be reviewed under an abuse-of-discretion standard." *Kalish* at ¶4. "As to the first step, the *Kalish* court did not clearly specify what 'pertinent laws' we are to consider to ensure that the sentence 'clearly and convincingly' adheres to Ohio law. The only specific guideline is that the sentence must be within the statutory range * * *." *State v. Ross*, 4th Dist. No. 08CA872, 2009-Ohio-877, at ¶10.

{¶13} In the case sub judice, the court imposed a one-year prison term. Though one year is the maximum term allowed under statute, it is within the sentencing range for Appellant's offense. More pertinent to Appellant's specific argument, and directly contradicting it, the court expressly stated during sentencing that it had considered R.C. 2929.11 and 2929.12: "Well, based upon Mr. Lewis' prior record and all the factors set forth in 2929.11 and 2929.12, the court is of the opinion he obviously is not amenable to any type of community control sanctions * * *." Further, the court noted in it's judgment entry that it had considered "* * * the principles and purposes of sentencing under ORC Section 2929.11, and has balanced the seriousness and recidivism factors under ORC Section 2929.12."

{¶14} Post-*Foster*, trial court are no longer required to give reasons for imposing maximum, consecutive or more than the minimum sentences. Further, trial courts have full discretion to impose sentences within the

statutory range and to determine whether a sentence satisfies the overriding purposes of Ohio's sentencing statutes. Here, because the trial court stated that it considered the relevant sentencing factors and because it imposed a sentence within the sentencing range, we find the trial court complied with all applicable rules and statutes in imposing Appellant's sentence. As the first prong of the *Kalish* test is satisfied, we now turn to the second prong, whether the trial court abused its discretion.

{¶15} "An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Horner*, 4th Dist. No. 02CA5, 2003-Ohio-126, at ¶8, citing *State v. Herring*, 94 Ohio St.3d 246, 255, 2002-Ohio-796, 762 N.E.2d 940; *State v. Clark*, 71 Ohio St.3d 466, 470, 1994-Ohio-43, 644 N.E.2d 331; *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. When an appellate court applies this standard, it cannot substitute its judgment for that of the trial court. *State v. Jeffers*, 4th Dist. No. 08CA7, 2009-Ohio-1672, at ¶12.

{¶16} Nothing in the record below indicates the trial court abused its discretion in sentencing Appellant. He seems to argue the court did so simply because it passed sentence without the benefit of a pre-sentence investigation. However, a trial court is not required to order such a pre-

sentence report before it imposes sentence. See, e.g., *State v. Woodruff*, 4th Dist. No. 07CA2972, 2008-Ohio-967, at ¶2. As such, Appellant has no basis for asserting that the trial court's sentence was unreasonable, arbitrary or unconscionable. Because we find the trial court's imposition of a one-year sentence for possession of drugs was neither clearly and convincingly contrary to law nor an abuse of discretion, Appellant's second assignment of error is overruled.

V. Third Assignment of Error

{¶17} In his third assignment of error, Appellant states he had ineffective assistance of counsel in that trial counsel: 1) stipulated to laboratory results identifying the contents of the prescription bottle as Oxycodone; 2) failed to question cross-examine Sgt. Dillard; 3) failed to point out to the jury that venue had not been established; and 4) failed to present mitigating arguments during sentencing.

{¶18} In order to establish ineffective assistance of counsel, an appellant must show that counsel's representation was both deficient and prejudicial. *In re Sturm*, 4th Dist. No. 05CA35, 2006-Ohio-7101, at ¶77; *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052. Deficient representation means counsel's performance was below an objective standard of reasonableness. Id. To show prejudice, an appellant

must show it is reasonably probable that, except for the errors of his counsel, the proceeding's outcome would have been different. Id.

{¶19} We have stated that "[a] reviewing court when addressing an ineffective assistance of counsel claim, should not consider what, in hindsight, may have been a more appropriate course of action." *State v. Wright*, 4th Dist. No. 00CA39, 2001-Ohio-2473, at *22. Instead, reviewing courts must be highly deferential. Id. Further, "a reviewing court: 'must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id., citing *Strickland*.

{¶20} We find there is no evidence that the first two alleged incidences of ineffective assistance were anything other than sound trial strategy. Counsel may have decided to stipulate to the lab report simply because there was nothing to be gained in challenging it. Beyond stating that trial counsel should not have so stipulated, Appellant puts forth no arguments to the contrary. He provides no evidence, nor even makes the allegation, that the Oxycodone was anything other than what it was purported to be. Neither does he argue that there was any irregularity in the lab work or in the generation of the report. Failing to challenge a lab report

simply for the sake of challenging it does not constitute ineffective assistance of counsel.

{¶21} As to Appellant's contention that counsel was ineffective in failing to cross-examine the State's witness, Sgt. Dillard, we must be highly deferential toward such decisions. "The extent and scope of cross-examination clearly fall within the ambit of trial strategy, and debatable trial tactics do not establish ineffective assistance of counsel." *State v. Leonard*, 104 Ohio St.3d 54, 818 N.E.2d 229, 2004-Ohio-6235, at ¶146. Trial counsel may have concluded such cross-examination would be ineffective and only reinforce Dillard's credibility in the eyes of the jury. Appellant raises no specific examples of how he may have benefited by such cross-examination. His trial counsel may have legitimately determined that the better approach was to focus on the exculpatory evidence provided by his own witness rather than challenging the testimony of the arresting officer.

{¶22} Appellant's third and fourth alleged incidences of ineffective assistance are similarly unpersuasive. As previously discussed, the State provided adequate evidence to establish venue. As such, Appellant's claim that his counsel failed to argue on those grounds is baseless. Finally, contrary to Appellant's assertion that no argument was made in mitigation of

sentence, after the State recommended the maximum, Appellant's trial counsel stated the following:

{¶23} "I don't see the reason for a maximum sentence in this case, your honor. The obvious amendment would be six months[.] [B]ecause he's been to prison before I understand he's not going to get the minimum, but I think twelve months is excessive. We would ask for a sentencing of eight months."

{¶24} In a further attempt to mitigate the possible sentence, counsel went on to state that though Appellant admitted to using cocaine in the past, he had stopped doing so.

{¶25} In any event, none of the alleged instances of ineffective assistance, either individually or collectively, were prejudicial. To maintain his ineffective assistance of counsel argument, Appellant must demonstrate it was reasonably probable that, but for his trial counsel's errors, the jury's verdict or trial court's decision would have been otherwise. Appellant has failed to do so. As such, the assignment of error is overruled.

VI. Fourth Assignment of Error

{¶26} In his fourth assignment of error, Appellant alleges there was insufficient evidence to establish that he knowingly possessed the drugs in question. When reviewing the sufficiency of the evidence, an appellate

court examines the evidence admitted at trial to determine whether that evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. The test is one of legal adequacy, not rational persuasiveness. The relevant question is, after viewing the evidence in a light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. Id., citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781.

{¶27} This test raises a question of law and does not allow us to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Rather, the test "gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson* at 319. The issues of the weight given to the evidence and the credibility of witnesses are for the trier of fact. *State v. Thomas* (1982), 70 Ohio St.2d 79, 79-80, 434 N.E.2d 1356; *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus.

{¶28} Here, the jury heard the testimony of Sgt. Dillard that the bottle of prescription drugs was in plain view, sitting in the front passenger

seat of Appellant's car, only a foot away from him. The bottle was so apparent, in fact, that Dillard could read the name of the prescription from outside the vehicle. Dillard also testified that Appellant did not immediately pull over when he tried to initiate the stop. Instead, Appellant reached down and directed his attention toward the center of the front seat, where the bottle was located. Only then did he pull over. Dillard further testified that Appellant initially lied to him, stating that he was taking his passenger home from the hospital. Eventually, Appellant admitted that this was not the case and that the passenger had paid him $100 to transport him to a residence in Columbus and back.

{¶29} Appellant also initially told Dillard that the drugs in question belonged to his passenger. Then, after Dillard told him the name on the prescription bottle matched neither Appellant's nor the passenger's, Appellant stated that he didn't know who they belonged to. Dillard testified that "* * * when I told him the name, he just sat there, he's like I don't know. And then a couple of seconds passed, and then he stated that oh, I think that might be the guy that stays at this girl's house that I know, and he's bad off with cancer."

{¶30} In light of such evidence, and after viewing the evidence in a light most favorable to the prosecution, it was reasonable for the jury to find

that Appellant acted knowingly and that the essential elements of possession of drugs were proven beyond a reasonable doubt. As such, the jury's verdict was supported by sufficient evidence.

{¶31} Appellant also contends the jury's verdict was against the manifest weight of the evidence. "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. Sufficiency tests the adequacy of the evidence, while weight tests "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other[.]" *State v. Sudderth*, 4th Dist. No. 07CA38, 2008-Ohio-5115, at ¶27, quoting *Thompkins* at 387.

{¶32} "Even when sufficient evidence supports a verdict, we may conclude that the verdict is against the manifest weight of the evidence, because the test under the manifest weight standard is much broader than that for sufficiency of the evidence." *State v. Smith*, 4th Dist. No. 06CA7, 2007-Ohio-502 at ¶41. When determining whether a criminal conviction is against the manifest weight of the evidence, we "will not reverse a conviction where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all the elements of an offense have been

proven beyond a reasonable doubt." *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, paragraph two of the syllabus. See, also, *Smith* at ¶41. We "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial granted." *Smith* at ¶41, citing *State v. Garrow* (1995), 103 Ohio App.3d 368, 370-371, 659 N.E.2d 814; *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. However, "[o]n the trial of a case, * * * the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *DeHass* at paragraph one of the syllabus.

{¶33} In the case sub judice, Appellant presented possible exculpatory evidence through the testimony of Matthew Knauff. Knauff testified that, the day before Appellant's arrest, he borrowed the vehicle in question and ran an errand along with the lawful owner of the Oxycodone prescription. He further testified that this person sat in the front passenger seat, sifted through a bag of medication in the dark while searching for a debit card, and may have inadvertently allowed the prescription bottle to fall out of the bag. Though Knauff's testimony can obviously be viewed as

exculpatory, in and of itself, it is not enough for us to determine that the jury's decision was against the manifest weight of the evidence.

{¶34} Though we must necessarily consider both witness credibility and the weight of the evidence when doing a manifest weight analysis, those issues are primarily for the trier of fact. Unlike the jury, we are not in a position to observe body language, demeanor, voice inflection and other information conveyed by a witness during testimony. It is possible the jury determined that Knauff's testimony was less than credible while Dillard's was completely persuasive.

{¶35} More importantly, the veracity of Knauff's testimony and a finding that Appellant knowingly possessed the drugs are not mutually exclusive. Knauff did not testify that he saw the pill bottle fall out of the bag the night before Appellant's arrest, he simply stated that it was a possibility. Further, considering Dillard's testimony that the prescription bottle was readily apparent, that it was sitting on the front seat only a foot away from Appellant, and that Appellant immediately focused upon that area when the stop was initiated, such evidence strongly supports that Appellant knowingly possessed the drugs, whether or not the owner inadvertently dropped the bottle the night before.

{¶36} Accordingly, after reviewing the entire record and keeping in mind that determining witness credibility and weighing the evidence are issues primarily for the finder of fact, we find there was substantial evidence upon which the jury could reasonably conclude that Appellant knowingly possessed the drugs in question. As such, Appellant's final assignment of error is overruled.

VII. Conclusion

{¶37} In our view, Appellant fails to support any of his assignments of error. Here, the arresting officer testified as to the specific location of the arrest, the prosecution established venue and there is no basis for Appellant's first assignment of error. Because the trial court's sentence was neither contrary to law nor an abuse of discretion, Appellant's second assignment of error also fails. His third assignment of error is unwarranted because he is unable to show his trial counsel's representation was either deficient or prejudicial. Finally, because the evidence presented at trial was sufficient to support a guilty verdict, and that verdict was not against the manifest weight of the evidence, we overrule his fourth and final assignment of error. Accordingly, we affirm the decision of the court below.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of the Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Pickaway County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.
Exceptions.

Abele, J. and Kline, J.: Concur in Judgment and Opinion

For the Court,

BY: _____
Presiding Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.