[Cite as *State v. Cave*, 2015-Ohio-2233.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 13CA3575
v.	:	DECISION AND
BARRY J. CAVE,	:	JUDGMENT ENTRY
Defendant-Appellant.	:	RELEASED 06/02/2015

APPEARANCES:

Timothy Young, Ohio Public Defender, and Terrence K. Scott, Assistant Ohio Public Defender, Columbus, Ohio, for Appellant.

Mark E. Kuhn, Scioto County Prosecuting Attorney, and Pat Apel, Scioto County Assistant Prosecuting Attorney, Portsmouth, Ohio, for Appellee.

Hoover, P.J.

{¶ 1} Defendant-appellant, Barry J. Cave, appeals from the judgment of the Scioto County Common Pleas Court convicting him, after trial by jury, of five counts of trafficking in cocaine and one count of possession of criminal tools. For the reasons discussed in this opinion, we affirm in part, reverse in part, and remand to the trial court for proceedings consistent with this opinion.

I. FACTS

{¶ 2} On March 15, 2013, appellant was indicted on four counts of trafficking in cocaine in violation of R.C. 2925.03(A)(1), a fifth-degree felony (Counts Two, Three, Four, and Five); one count of trafficking in cocaine over 100 grams in violation of R.C. 2925.03(A), a first-degree felony, with an accompanying major drug offender specification (Count One); and one count of

possessing criminal tools (a cell phone) in violation of R.C. 2923.24(A)/(C), a fifth-degree felony (Count Six). The indictment also sought forfeiture of $3,330, which appellant allegedly owned or possessed as a result of a felony drug offense or that appellant intended to use in the commission of a felony drug offense. Counts Two, Three, Four, and Five arose from a series of "controlled buys", in which a confidential police informant allegedly purchased crack cocaine from the appellant at his house at 714 Brown Street, Portsmouth, Ohio. Counts One, Six, and the forfeiture specification arose after appellant's house was searched by law enforcement and a large quantity of crack cocaine, money, a cell phone, and drug paraphernalia were seized from the house.

{¶ 3} Appellant pleaded not guilty to the charges and a jury trial was held on September 3 and 4, 2013. The confidential police informant did not testify at trial. However, Sergeant Joshua Justice of the Southern Ohio Drug Task Force testified, without objection from counsel, that on or about January 29, 2013, the informant stated, "they could buy crack cocaine off of Barry Cave." [Tr. at 35.] According to Justice, the informant had agreed through the prosecutor's office to work off a misdemeanor charge in exchange for giving up a drug dealer. Sergeant Justice also testified that "this informant had gave us some estimates of how much dope they had seen with Barry Cave * * *." [Tr. at 38.] Based on this information, the investigating officers decided to use the informant in a series of controlled buys. Sergeant Justice indicated that the informant, under his direction, contacted appellant via appellant's cellular phone on February 5, 2013, and ordered from appellant a half a gram of crack cocaine for $50. Sergeant Justice listened to the phone call and testified that he recognized appellant's voice.

{¶ 4} The State also utilized Sergeant Justice to introduce four recordings of the controlled buys. Sergeant Justice had procured the recordings by equipping the informant with an

audio/video recording device. The jury heard and watched the four recordings; however, the court did not admit the recordings into evidence. The recordings, therefore, are not a part of the appellate record. We do have available, however, a transcript of the audio portions of the recordings. Sergeant Justice also provided a narration of the recordings, over the objections of defense counsel, while the recordings were played for the jury.

{¶ 5} The first controlled buy occurred on February 5, 2013, following the informant's phone call to appellant. Sergeant Justice testified that in addition to wiring the informant with the recording device, he also provided the informant with a marked bill. The informant was also searched prior to the drug buy. While the recording apparently displayed a 6:14 p.m. recording time, Sergeant Justice clarified that the buy actually occurred at 5:09 p.m. While we cannot actually see the recording, appellant agrees that the recording revealed him cutting a small portion of crack cocaine, placing it in a bag, and then giving the bag to the informant in exchange for cash. Stanton Wheasler, a forensic scientist with the Ohio Bureau of Criminal Identification and Investigation ("BCI&I") testified that he weighed the contents of the bag and determined that the contents contained 0.5 grams of cocaine.

{¶ 6} The second controlled buy occurred on February 7, 2013. The informant was wired with the recording device, given a marked bill, and searched prior to the buy. An officer purportedly appeared at the beginning of the recording and stated the date as February 7, 2013, and the time as 9:47 p.m. The recording time-stamp, however, apparently displayed a time of 11:20 p.m. The recording demonstrated appellant handling and bagging crack cocaine and giving the bag to the informant in exchange for money. Wheasler testified that he later determined the bag contained 0.2 grams of crack cocaine.

{¶ 7} The third controlled buy occurred on February 11, 2013. The informant was given marked bills to make the purchase, wired with a recording device, and was searched prior to the buy. An officer appeared on the recording noting the date as February 11, 2013, and the time as 5:01 p.m. The recording, however, displayed a date of November 18, 2009, and a time of 1:24 a.m. The recording of this particular controlled buy does not show a drug exchange for money. Sergeant Justice testified, however, that when the informant returned from the residence he or she turned over a bag containing a white substance. Sergeant Justice also indicated that he recognized the appellant's voice on the recording. Wheasler testified that the contents of the bag were later determined to contain 0.3 grams of crack cocaine.

{¶ 8} According to Sergeant Justice, the fourth controlled buy occurred on February 20, 2013, at 11:34 a.m. However, the date and time displayed on the video was apparently November 26, 2009, at around 8:00 p.m. The informant was searched prior to the drug buy, wired with a recording device, and given a $50 marked bill. The video showed appellant smoking crack cocaine, exchanging crack cocaine for money, and also handling a large quantity of crack cocaine. Wheasler confirmed that the substance exchanged in the buy contained 0.5 grams of crack cocaine.

{¶ 9} On the same day as the fourth controlled buy, Sergeant Justice secured a no-knock search warrant for the residence at 714 Brown Street, Portsmouth, Ohio. When executing the search warrant a total of five people were located in the residence, including three women, the appellant, and the appellant's brother. Officers also located over 100 grams of crack cocaine, cash (including the $50 marked bill used in the earlier drug buy), a cell phone, and drug paraphernalia in the home. According to Justice, the occupants of the home were handcuffed,

placed in the living room, and Mirandized. In response to a question from officers, appellant stated that the drugs and cash belonged to him.

{¶ 10} In addition to Sergeant Justice's testimony, the four recordings of the controlled buys, and Wheasler's testimony, the State also introduced the following evidence: the testimony of three other investigating officers, two maps, approximately 30 photographs, one cell phone, packages of crack cocaine, one ring box, one monitor, two bundles of cash, several BCI&I reports, one coat, and one inventory sheet. However, none of the exhibits were formally offered or admitted into evidence.[1]

{¶ 11} Ultimately, the jury returned guilty verdicts on all charges. However, the jury was precluded from deliberating on the forfeiture specification, which was eventually decided by the trial court at sentencing. On Count One, appellant was sentenced to a mandatory eleven-year term of imprisonment. On Counts Two, Three, Four, and Five, appellant was sentenced to a ten-month term of imprisonment on each count, with all sentences to run consecutively to each other but concurrent to Count One. On Count Six, appellant was sentenced to a 10-month term of imprisonment, also ordered to run concurrent to Count One. Thus, appellant received an aggregate prison sentence of eleven years. Additionally, appellant's license was suspended for one year; and the money seized during the execution of the search warrant was ordered forfeited to the State[2]. It is from the judgment of conviction and sentence that appellant now appeals.

II. ASSIGNMENTS OF ERROR

{¶ 12} Appellant assigns the following errors for our review:

First Assignment of Error:

[1] The appellate record does contain, however, copies of the maps, photographs, BCI&I reports, and inventory sheet.
[2] We note that the judgment entry states that $3,350 is to be forfeited. However, the indictment sought forfeiture of $3,330, and the trial court announced forfeiture of $3,330 at the sentencing hearing.

> The trial court violated Barry Cave's rights to due process and a fair trial when, in the absence of sufficient evidence, Mr. Cave was convicted of Count 4, trafficking in drugs. Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article I of the Ohio Constitution. (March 15, 2013, Indictment; Ex. 41; September 3, 2013 Tr. pp. 55, 56; Video Tr. of Ex. 41, pp. 10-13.)

Second Assignment of Error:

> Barry Cave's Sixth Amendment right to confrontation was violated when the State introduced an unavailable witness's testimonial hearsay statements though [sic] an investigating officer. Sixth Amendment to the United States Constitution; Section 10, Article I of the Ohio Constitution; *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.E.2d 177 (2004); *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989); *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009); (Ex. 41; September 3, 2013, Tr. p. 35.)

Third Assignment of Error:

> Barry Cave was denied the effective assistance of counsel at his trial, to which he was entitled under the Sixth and Fourteenth Amendments. Mr. Cave's counsel failed to object to Sgt. Justice's testimony about statements that an unavailable witness made to him during the course of his investigation. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.E[d].2d 177 (2004); (September 3, 2013, Tr. pp. 35, 38.)

Fourth Assignment of Error:

> The trial court committed reversible error when it failed to allow a forfeiture specification determination to be performed by the jury, in contravention of R.C. 2981.04. (March 15, 2013, Indictment; September 3, 2013, Tr. p. 174.)

III. LAW AND ANALYSIS

A. Assignment of Error I

{¶ 13} In his first assignment of error, appellant contends that the State failed to produce sufficient evidence to sustain his conviction for trafficking in cocaine under Count Four of the indictment, i.e., for the controlled buy that occurred on February 11, 2013/the third controlled buy. Specifically, appellant contends that the recording played at trial does not actually show him exchanging drugs for money or that he was even present during the incident. Appellant also

argues that the date and time displayed on the recording does not match the date and time of the alleged offense. Finally, appellant contends that the audio portion/transcript of the recording does not support a charge for trafficking in drugs.

{¶ 14} "When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt." *State v. Davis,* 4th Dist. Ross No. 12CA3336, 2013–Ohio–1504, ¶ 12. "The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt." *Id.,* citing *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Therefore, when we review a sufficiency of the evidence claim in a criminal case, we review the evidence in a light most favorable to the prosecution. *State v. Hill,* 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996); *State v. Grant,* 67 Ohio St.3d 465, 477, 620 N.E.2d 50 (1993). A reviewing court will not overturn a conviction on a sufficiency of the evidence claim unless reasonable minds could not reach the conclusion the trier of fact did. *State v. Tibbetts,* 92 Ohio St.3d 146, 162, 749 N.E.2d 226 (2001); *State v. Treesh,* 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001).

{¶ 15} With regard to Count Four, appellant was convicted of trafficking in cocaine under R.C. 2925.03(A)(1). R.C. 2925.03(A)(1) provides as follows:

> No person shall knowingly * * * [s]ell or offer to sell a controlled substance or a controlled substance analog[.]

{¶ 16} Here, we believe there was sufficient evidence to sustain a conviction for trafficking in cocaine. While the actual drug exchange for money is not visible in the February

11 recording, Sergeant Justice testified that he recognized appellant's voice on the recording. Moreover, and contrary to appellant's arguments, Sergeant Justice did testify that appellant could be seen on the video, albeit momentarily. [*See* Tr. at 56, 81.] Sergeant Justice also testified that the informant was searched prior to entering appellant's home, and that officers watched the informant enter the home and return with crack cocaine. The audio portion of the recording also contains conversations about money; in particular the informant indicates that they have $60, instead of the usual $50 that was used in the other controlled buys, and asks for change. [*See* Tr. at 62; Tr. of controlled buys at 11.] Twice in the conversation, the informant addresses one of the individuals present in the home as "Barry". [Tr. of controlled buys at 10, 12.] These facts when viewed in a light most favorable to the prosecution, along with the additional evidence that the appellant had been selling the informant crack cocaine at his house on other occasions, would allow a reasonable trier of fact to conclude that the appellant had sold the informant crack cocaine on February 11.

{¶ 17} Appellant also contends that his conviction under Count Four should be overturned for insufficient evidence because the recording's time stamp does not match the date and time at which the offense allegedly occurred.

{¶ 18} " 'In a criminal charge the exact date and time are immaterial unless in the nature of the offense exactness of time is essential. It is sufficient to prove the alleged offense at or about the time charged.' " *State v. S.S.*, 10th Dist. Franklin No. 13AP-1060, 2014 WL 6851969, ¶ 39 (Dec. 4, 2014), quoting *Tesca v. State*, 108 Ohio St. 287, 140 N.E. 629 (1923), paragraph one of the syllabus. "Where the precise date and time of a violation of the statute are not essential elements of the crime, an indictment need not allege a specific date of the offense." *Id.*, citing *State v. Sellards*, 17 Ohio St.3d 169, 171–72, 478 N.E.2d 781 (1985). " 'The General

Assembly, in declaring what shall be sufficient in an indictment, provided, among other things, that it shall be sufficient if it can be understood that the offense was committed at some time prior to the time of the filing of the indictment.' " *Id*., quoting *Sellards* at 171, citing R.C. 2941.03(E). "Proof of the offense on or about the alleged date is sufficient to support a conviction even where evidence as to the exact date of the offense is in conflict." *Id*., citing *State v. Cochran,* 10th Dist. Franklin No. 11AP–408, 2012–Ohio–5899, ¶ 82, citing *State v. Dingus,* 26 Ohio App.2d 131, 137, 269 N.E.2d 923 (4th Dist.1970). "The exact date is not essential to the validity of the conviction and the failure to prove that is of no consequence." *Id*., citing *Cochran* at ¶ 82. "The state's only responsibility is to present proof that the offenses alleged in the indictment occurred reasonably within the time frame alleged." *Id*., citing *Sellards* at 171; *Cochran* at ¶ 82; *State v. Barnhart,* 7th Dist. Jefferson No. 09JE15, 2010–Ohio–3282, ¶ 50.

{¶ 19} At trial, Sergeant Justice acknowledged and explained the discrepancy between the date alleged in the indictment and the time-stamp on the recording. Specifically, Sergeant Justice explained that when a recorder goes dead, the date reverts back to the date when the recorder was purchased. [Tr. at 44, 80.] He further explained that because the recorders are "covert and hidden" there is no way of checking the date and time until the recording is downloaded. [Tr. at 80.] Thus, it is common practice for the investigatory officer to state the date and time at the beginning of the recording, to correct the possibility of a time and date discrepancy. [Tr. at 44, 80.] Sergeant Justice also verified that the date and time was inaccurate on the February 11 recording because the recorder went dead after its prior use. [Tr. at 56.] However, at the beginning of the recording played for the jury, Sergeant Justice states: "Time 5:01 p.m., Monday February 11th * * * recorder to confidential informant * * *." Given these

facts, the jury could infer that the incident occurred reasonably within the time frame alleged in the indictment; and appellant's argument is without merit.

{¶ 20} We conclude that there was substantial evidence upon which the jury could have reasonably concluded that all the essential elements of the crime charged had been proven beyond a reasonable doubt. Accordingly, we overrule appellant's first assignment of error.

B. Assignment of Error II

{¶ 21} In his second assignment of error, appellant contends that Sergeant Justice's testimony concerning information from the confidential informant was "testimonial hearsay," the admission of which constituted a violation of his Sixth Amendment right to confront witnesses against him. In particular, appellant takes issue with Sergeant Justice's testimony that the informant told him that "they could buy cocaine off of Barry Cave" and "this informant gave us some estimates of how much dope they had seen with Barry Cave * * *." Appellant argues that those statements "allowed the jury to draw incorrect conclusions regarding [his] involvement in the charged offenses." [Brief at 11.] The State, on the other hand, argues that Sergeant Justice's testimony concerning the out-of-court statements of the confidential informant was not entered into evidence to prove the truth of the matter asserted; but rather to explain Sergeant Justice's subsequent actions and to provide factual context on how the appellant became the subject of a law enforcement investigation.

{¶ 22} As an initial matter, we note that the appellant did not make specific objections at trial in order to properly preserve this issue for appeal. Failure to object to an alleged error waives all but plain error. *State v. Keely*, 4th Dist. Washington No. 11CA5, 2012-Ohio-3564, ¶ 28. "Notice of Crim.R. 52(B) plain error must be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id.*, citing *State*

v. Rohrbaugh, 126 Ohio St.3d 421, 2010-Ohio-3286, 934 N.E.2d 920, ¶ 16; *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus. "To find plain error, we must be able to say that, but for the alleged error, the outcome of trial clearly would have been otherwise." *Id*., citing *State v. McCausland*, 124 Ohio St.3d 8, 2009-Ohio-5933, 918 N.E.2d 507, ¶ 15; *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, ¶ 50.

{¶ 23} The Sixth Amendment to the United States Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." Likewise, Section 10, Article I of the Ohio Constitution provides, "[i]n any trial, in any court, the party accused shall be allowed * * * to meet the witnesses face to face." The Supreme Court of the United States has held that evidence that is "testimonial hearsay" offends a defendant's Sixth Amendment right to confrontation and is not admissible. *Crawford v. Washington*, 541 U.S. 36, 51, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004); *see also State v. Kelly*, 179 Ohio App.3d 666, 2008-Ohio-6598, 903 N.E.2d 365, ¶ 12 (7th Dist.) ("Federal and state appellate courts examining this holding [*Crawford*] have explained that it only deals with hearsay; it does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. When statements are offered to show context, they are not being offered for the truth of the matter asserted and, thus, do not violate *Crawford*." (Citations omitted.)).

{¶ 24} There is no dispute in this case that the statements at issue were testimonial. Thus, the only issue is whether the statements constitute hearsay. 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). "To constitute hearsay, two elements are needed. First, there must be an out-of-court statement. Second, the statement must be offered to prove the

truth of the matter asserted. If either element is not present, the statement is not 'hearsay.' " *State v. Maurer*, 15 Ohio St.3d 239, 262, 473 N.E.2d 768 (1984).

{¶ 25} Recently, the Supreme Court of Ohio clarified that the Confrontation Clause " 'does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' " *State v. Ricks*, 136 Ohio St.3d 356, 2013-Ohio-3712, 995 N.E.2d 1181, ¶ 18, quoting *Crawford* at 59, 124 S.Ct. 1354, 158 L.Ed.2d 177, fn. 9. The Court expounded that extrajudicial statements made by out-of-court declarants offered to explain the subsequent investigative conduct of law enforcement is generally admissible, because the statements are not offered to prove the truth of the matter asserted. *Id*. at ¶ 20, citing *State v. Thomas*, 61 Ohio St.2d 223, 232, 400 N.E.2d 401 (1980). The Court did, however, recognize that the admission of out-of-court statements to explain officer conduct in an investigation carries with it the potential for abuse, and thus established certain conditions that must be met prior to admitting such statements. Specifically, the Court held that:

> [I]n order for testimony offered to explain police conduct to be admissible as nonhearsay, the conduct to be explained should be relevant, equivocal, and contemporaneous with the statements; the probative value of statements must not be substantially outweighed by the danger of unfair prejudice; and the statements cannot connect the accused with the crime charged.

Id. at ¶ 27.

{¶ 26} Applying the *Ricks'* test to the case sub judice, we conclude that the statements meet the first part of the test. First, the fact that the statements explain why Sergeant Justice began an investigation of appellant is relevant. Second, the conduct was equivocal; that is, without the statements it would be unclear why police had set up the controlled buys in the first

place. Finally, the police's investigation of appellant was contemporaneous with the confidential informant's statements.

{¶ 27} Moving to the second part of the test, however, we conclude that even though the statements explain police conduct, they are also highly prejudicial and tie the appellant to the crime. The out-of-court statements definitively label appellant as a drug trafficker, the same crime that appellant was charged with in five of the six counts of the indictment. Thus, the testimony encouraged the jury, intentionally or not, to misuse the content of the out-of-court statements for its truth. That is, the jury could have interpreted the confidential informant's statement that "they could buy cocaine off of Barry Cave" as a statement tying appellant to the charged offenses, rather than as evidence to explain why the police had begun an investigation of appellant.

{¶ 28} Accordingly, we conclude that Sergeant Justice's testimony relating the out-of-court statements of the confidential informant constituted hearsay. The statements were offered to prove the truth of the matter asserted rather than to explain police conduct. And because the statements were testimonial, the admission of the statements violated appellant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution.

{¶ 29} Nevertheless, because we are conducting a plain error review, we must next determine whether the admission of the statements clearly affected the outcome of trial.

{¶ 30} In this case, we determine that the outcome of the trial would not have been different absent evidence of the informant's statements. Particularly damaging to appellant was the recordings and testimony concerning the controlled buys. Some of the recordings clearly show appellant handling and exchanging drugs for money. This evidence, coupled with the

evidence obtained during execution of the search warrant was more than sufficient to support the jury's verdict. Accordingly, we overrule appellant's second assignment of error.

C. Assignment of Error III

{¶ 31} In his third assignment of error, appellant contends that he received ineffective assistance of counsel from his trial attorney because the attorney failed to object to the admittance of testimonial hearsay which violated appellant's constitutional rights.

{¶ 32} Criminal defendants have a right to counsel, including a right to the effective assistance from counsel. *McMann v. Richardson,* 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970), fn. 14; *State v. Stout,* 4th Dist. Gallia No. 07CA5, 2008–Ohio–1366, ¶ 21. To establish constitutionally ineffective assistance of counsel, a criminal defendant must show (1) that his counsel's performance was deficient and (2) that the deficient performance prejudiced the defense and deprived him of a fair trial. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Issa,* 93 Ohio St.3d 49, 67, 752 N.E .2d 904 (2001); *State v. Goff,* 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). "In order to show deficient performance, the defendant must prove that counsel's performance fell below an objective level of reasonable representation. To show prejudice, the defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Conway,* 109 Ohio St.3d 412, 2006–Ohio–2815, 848 N.E.2d 810, ¶ 95. "Failure to establish either element is fatal to the claim." *State v. Jones,* 4th Dist. Scioto No. 06CA3116, 2008–Ohio–968, ¶ 14.

{¶ 33} "When considering whether trial counsel's representation amounts to deficient performance, 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " *State v. Walters,* 4th Dist. Washington Nos.

13CA33, 13CA36, 2014–Ohio–4966, ¶ 23, quoting *Strickland* at 689. "Thus, 'the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.' " *Id.*, quoting *Strickland* at 689. " 'A properly licensed attorney is presumed to execute his duties in an ethical and competent manner.' " *Id.*, quoting *State v. Taylor*, 4th Dist. Washington No. 07CA1, 2008–Ohio–482, ¶ 10. "Therefore, a defendant bears the burden to show ineffectiveness by demonstrating that counsel's errors were so serious that he or she failed to function as the counsel guaranteed by the Sixth Amendment." *Id.*

{¶ 34} Appellant's argument that his counsel was ineffective is predicated on counsel's failure to object to the admission of the confidential informant's statements as testimonial hearsay. Since we have concluded that the outcome of the trial would not have been different even absent evidence of the informant's statements, this argument is without merit. Accordingly, appellant's third assignment of error is overruled.

D. Assignment of Error IV

{¶ 35} In his fourth assignment of error, appellant contends that the trial court erred when it failed to allow the forfeiture specification determination to be performed by the jury in contravention of R.C. 2981.04(B). Specifically, appellant contends that absent his permission, the trial court did not have the authority under the criminal forfeiture specification statute, R.C. 2981.04(B), to order forfeiture, and in doing so the trial court usurped the function of the jury. Appellant contends that given such error, we should vacate the order of forfeiture.

{¶ 36} The State concedes that the trial court did not follow the procedures set forth in R.C. 2981.04. However, it contends that the matter should be remanded to the trial court for proceedings in compliance with R.C. 2981.04.

{¶ 37} R.C. Chapter 2981 permits "[a] law enforcement officer [to] seize property that the officer has probable cause to believe is property subject to forfeiture." R.C. 2981.03(A)(2). "Property subject to forfeiture" is defined to include "contraband", "proceeds", and "instrumentalities" involved in the commission of a felony. *See* R.C. 2981.01(B)(13) and R.C. 2981.02(A).

{¶ 38} A prosecuting attorney may choose to pursue forfeiture of seized property in a criminal proceeding under R.C. 2981.04, a civil proceeding under R.C. 2981.05, or both. R.C. 2981.03(F). Criminal forfeiture is initiated by including in the charging instrument a specification of the type described in R.C. 2941.1417, or by providing the defendant with prompt notice, in conformity with Crim.R. 7(E), that the property is subject to forfeiture. R.C. 2981.04(A)(1)-(2). In the case sub judice, the State sought criminal forfeiture of the money seized by including a specification in the indictment.

{¶ 39} In a criminal forfeiture proceeding, where the specification was included in the charging instrument and the defendant pleads guilty to or is convicted of an offense, "*the trier of fact* shall determine whether the person's property shall be forfeited." (Emphasis added.) R.C. 2981.04(B); *see also* R.C. 2941.1417(B) ("The trier of fact shall determine whether the property is subject to forfeiture."). However, "[i]f the trier of fact is a jury, on the offender's * * * motion, the court shall make the determination of whether the property shall be forfeited." R.C. 2981.04(B). Before the final forfeiture adjudication, the State or a political subdivision holds "provisional title to property subject to forfeiture," permitting the State or political subdivision to seize, hold, and protect the property. "Title to the property vests with the [S]tate or political subdivision when *the trier of fact* renders a final forfeiture verdict or order under section 2981.04 or 2981.05 * * *." (Emphasis added.) R.C. 2981.03(A)(1).

{¶ 40} "Forfeitures are not favored in law and equity, and forfeiture statutes must be interpreted strictly against the [S]tate." *State v. Luong*, 2012-Ohio-4519, 977 N.E.2d 1075, ¶ 44 (12th Dist.), citing *State v. King*, 12th Dist. Fayette No. CA2008–10–035, 2009-Ohio-2812, ¶ 12. "Moreover, forfeitures implicate a defendant's constitutional right to be free from excessive fines, and therefore a trial court's failure to comply with the mandates of the forfeiture statute clearly affects a defendant's substantial rights." *Id*., citing *State v. Hill*, 70 Ohio St.3d 25, 33, 635 N.E.2d 1248 (1994), and Crim.R. 52.

{¶ 41} Here, the indictment properly charged the forfeiture specification with the drug trafficking charges. However, after evidence was taken, the trial court failed to instruct the jury on the law relating to the specification; and the jury did not make a separate finding on the specification. Moreover, it does not appear from the record that the appellant or his counsel moved the trial court to make a determination on the forfeiture issue. Thus, because the jury did not make a determination concerning the forfeiture specification, and because the matter was not, by motion, committed to the judge, the trial court erred in ordering forfeiture in this case. Appellant's fourth assignment of error is well taken and is sustained.

{¶ 42} Furthermore, because the trier of fact has long since been discharged in this case, we remand this matter to the trial court so that the forfeiture award can be vacated and the funds ordered returned to the appellant. *See State v. Taylor*, 2012-Ohio-3890, 974 N.E.2d 175, ¶ 60 (11th Dist.) (vacating forfeiture of money seized in drug trafficking case due to trial court's non-compliance with statutory requirements).

IV. CONCLUSION

{¶ 43} Appellant's assignments of error one through three are overruled. However, for the reasons stated above, appellant's fourth assignment of error is sustained. Accordingly, the

September 10, 2013 judgment entry is hereby reversed in part and affirmed in part. This matter shall be remanded to the trial court in order to vacate the $3,350 forfeiture award and to order the return of the funds to the appellant or appellant's designated representative.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART,
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED for proceedings consistent with this opinion. Appellant and Appellee shall split the 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 Scioto 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 the proceedings in that court. If a stay is continued by this entry, it will terminate at the earliest 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 the 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.

Harsha, J. and McFarland, A.J.: Concur in Judgment and Opinion.

For the Court

By:_____
Marie Hoover, Presiding Judge

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.