[Cite as *State v. Daniels,* 2015-Ohio-1002.]

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- MICHAEL K. DANIELS, JR. Defendant-Appellant	JUDGES: Hon. John W. Wise, P. J. Hon. Patricia A. Delaney, J. Hon. Craig R. Baldwin, J. Case No. 14 CA 49 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Court of Common Pleas, Case No. 13 CR 759D
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 16, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
BAMBI COUCH PAGE PROSECUTING ATTORNEY JOHN C.NIEFT ASSISTANT PROSECUTOR 38 South Front Street Mansfield, Ohio 44902	W. JOSEPH EDWARDS 341 South Third Street Suite 200 Columbus, Ohio 43215

Wise, P. J.

{¶1}. Appellant Michael K. Daniels, Jr. appeals his conviction, in the Richland County Court of Common Pleas, on felony counts of drug possession and drug trafficking. The relevant facts leading to this appeal are as follows.

{¶2}. On the late afternoon of November 5, 2013, the Mansfield Police Department received a 911 call regarding suspected drug selling activity near an apartment complex at 750 Maple Street. The caller gave information about three vehicles, including a silver Nissan. The caller also gave descriptions of five males in the vicinity. Tr. at 118-121. Officer Sarah Mosier-Napier was on K-9 road patrol with her police dog and responded to the call. She pulled into the parking lot of the apartment complex and saw a silver Nissan, occupied by two men. When she drove her cruiser up behind the vehicle, it pulled around and proceeded into an actual parking space. When Mosier-Napier further pulled up behind the Nissan, the driver, later identified as appellant, parked the vehicle, got out, and fled on foot. Tr. at 121-123. Appellant was observed by the officer as wearing a brown leather jacket and blue jeans. Tr. at 126.

{¶3}. Mosier-Napier radioed that appellant was fleeing and gave a description. In the meantime, the passenger, who did not run away, was found to have $1,700.00 in U.S. currency on his person.

{¶4}. Another Mansfield officer, Sergeant Brubaker, arrived shortly thereafter and began a foot chase after appellant. At about this point, Officer Nicole Gerhart arrived and joined the foot chase. She also witnessed appellant wearing a brown leather jacket. However, appellant was able to lose Brubaker and Gerhart. As the search

continued, more information about appellant's clothing and the direction he was heading were put out on the radio. Tr. at 138-150.

{¶5}. After the radio call, Officer Stephen Brane, responding in his cruiser, saw appellant run past him on Highland Avenue. This occurred at about 5:00 PM, while it was still daytime. Tr. at 150-151. Brane followed appellant in his cruiser into an alley. At this location, and about twenty to twenty-five feet in front of Brane, appellant attempted to remove his jacket and dropped a grey grocery store bag on the ground. Tr. at 151-152, 165, 177-178. Appellant eventually turned in the direction of a fenced area, and Brane was able to pull up and arrest him. Tr. at 151-153, 180. Appellant was searched and found to have $673.00 in currency on his person. Tr. at 153-157. Brane also went back and retrieved the dropped grocery bag. Inside the bag was found three baggies of suspected crack cocaine, which field-tested positive for drugs. Tr. at 160.

{¶6}. On December 6, 2013, the Richland County Grand Jury indicted appellant on one count of possession of cocaine (amount exceeding 100 grams), a felony of the first degree (R.C. 2925.11(A) and (C)(4)(f)) and one count of trafficking in cocaine (amount exceeding 100 grams), a felony of the first degree (R.C. 2925.03(A)(2) and (C)(4)(g)). Both counts were charged with a "major drug offender" specification and a forfeiture specification for $673.00 in seized U.S. currency connected with the aforesaid events.

{¶7}. Appellant entered pleas of not guilty to the above counts and specifications. The matter proceeded to a jury trial held on May 15 and 16, 2014. During the trial, the State presented testimony from four witnesses: three Mansfield police officers and a city lab technician. Appellant presented no witnesses in his defense.

{¶8}. The jury found appellant guilty on both counts, but rejected the forfeiture specifications. However, the trial court applied the major drug offender specifications. The two counts were found to be allied offenses. Based on the State's election, the trafficking count was merged into the possession count. The court thereupon sentenced appellant to a total of eleven years in prison, plus five years of post-release control.

{¶9}. On May 29, 2014, appellant filed a notice of appeal. He herein raises the following five Assignments of Error:

{¶10}. "I. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION.

{¶11}. "II. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE CONVICTION AND (SIC) WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶12}. "III. PLAIN ERROR OCCURS WHEN THE TRIAL COURT COMPELS THE PARTIES AND THE JURY TO RECITE AN OATH, I.E., THE PLEDGE OF ALLEGIENCE [SIC], THAT INVOKES A 'SUPREME BEING' CONTRA THE FIRST AMENDMENT AS WELL AS OTHER PORTIONS OF BOTH THE OHIO AND FEDERAL CONSTITUTIONS.

{¶13}. "IV. APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL WHEN THE TRIAL JUDGE COMPELS THE JURY TO RECITE A 'LOYALTY OATH' (THE PLEDGE OF ALLEGIANCE) TO THE GOVERNMENT IN VIOLATION OF THE DUE PROCESS CLAUSES OF THE OHIO AND FEDERAL CONSTITUTIONS.

{¶14}. "V. APPELLANT WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL CONTRA THE OHIO AND FEDERAL CONSTITUTIONS."

I.

{¶15}. In his First Assignment of Error, appellant argues his cocaine possession and trafficking convictions were not supported by sufficient evidence. We disagree.

{¶16}. In reviewing a claim of insufficient evidence, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶17}. Appellant's conviction for trafficking in cocaine was based on R.C. 2925.03(A)(2), which states in pertinent part: "No person shall knowingly *** [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance *** when the offender knows or has reasonable cause to believe that the controlled substance *** is intended for sale or resale by the offender or another person." R.C. 2925.03(C)(4)(g) states that a defendant is considered a "major drug offender" for amounts of cocaine equal to or exceeding 100 grams.

{¶18}. In addition, appellant's cocaine possession charge was based on R.C. 2925.11(A), which states: "No person shall knowingly obtain, possess, or use a controlled substance * * *." R.C. 2925.11(C)(4)(f) states that a defendant is considered a "major drug offender" for amounts of cocaine equal to or exceeding 100 grams.

{¶19}. We note at trial, the State and appellant stipulated that the drug recovered from the dropped bag was cocaine weighing 125.3 grams. *See* Tr. at 183. The focus of appellant's argument is on Officer Brane, who testified that he saw appellant drop the bag. Appellant emphasizes that Officer Brane did not see appellant actually carrying the bag before the drop by appellant was observed. However, the bag in question was in the middle of the alley, not far from where appellant was apprehended, and the bag at that time appeared wrinkled or "crumpled". *See* Tr. at 152-153, 157-158, 170, 174. Upon review of the record, we hold reasonable triers of fact, viewing the evidence before us in a light most favorable to the prosecution, could have found, beyond a reasonable doubt, that appellant had been carrying the bag of cocaine retrieved by the officer and had committed the crimes of possession and trafficking.

{¶20}. Appellant's First Assignment of Error is therefore overruled.

II.

{¶21}. In his Second Assignment of Error, appellant maintains his cocaine possession and trafficking convictions were against the manifest weight of the evidence. We disagree.

{¶22}. Our standard of review on a manifest weight challenge to a criminal conviction is stated as follows: “The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. *See also, State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. The

granting of a new trial “should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.” *Martin* at 175, 485 N.E.2d 717.

{¶23}. In support of his manifest weight claim in the case sub judice, appellant "incorporates by reference his argument set forth in Assignment of Error One." Appellant's Brief at 17. However, we have recognized that in Ohio, the legal concepts of sufficiency of the evidence and manifest weight of the evidence are both quantitatively and qualitatively different. *See State v. Gilbert*, 5th Dist. Ashland No. 09 COA 26, 2010-Ohio-2859, ¶ 11, citing *State v. Williams,* 4th Dist. Scioto No. 00CA2731, 2001-Ohio-2579 (additional citations omitted). Nonetheless, in the interest of justice, we hold upon review that the jury's decision did not create a manifest miscarriage of justice requiring appellant's convictions to be reversed and a new trial ordered.

{¶24}. Accordingly, appellant's Second Assignment of Error is overruled.

III.

{¶25}. In his Third Assignment of Error, appellant maintains the trial court committed plain error by inviting those present in the courtroom, including the jury pool, to recite the Pledge of Allegiance to the United States flag at the beginning of the proceedings.

{¶26}. Appellant couches his primary argument as a claim that the compulsory recitation of the Pledge of Allegiance, which includes the phrase "under God," resulted in a constitutional violation under the Establishment Clause of the First Amendment to the United States Constitution, which states: “Congress shall make no law respecting an establishment of religion * * *.” The Establishment Clause has been made applicable to

the States by the Fourteenth Amendment. *See Everson v. Bd. of Educ.,* 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

{¶27}. Appellant, relying on *Torcaso v. Watkins*, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961), urges that the government cannot force a person to profess a belief or a disbelief in any religion. Appellant also directs us, inter alia, to *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178 (1943), in which the United States Supreme Court held that a school could not expel students for refusing to comply with a requirement of reciting the Pledge of Allegiance, in the format used in that era.

{¶28}. The record in the case sub judice indicates the following occurred in the trial court before voir dire commenced:

{¶29}. "THE COURT: *** Because of the civic importance of what we're doing when we try to resolve criminal complaints I like to start each day with the Pledge of Allegiance. Would you stand and join me in the Pledge of Allegiance.

{¶30}. "THEREUPON, the Pledge of Allegiance was recited.

{¶31}. "THE COURT: Thank you, go ahead and be seated. ***."

{¶32}. Tr. at 5.

{¶33}. Also, on October 17, 2014, the parties to this appeal stipulated that the trial court had "invited everyone in the courtroom," including appellant, "to stand and say the Pledge of Allegiance," including the phrase "one nation under God." *See* Appellate Docket Number 24.

{¶34}. Appellant's First Amendment argument is faulty on several fronts. Most importantly, as the above portion of transcript demonstrates, appellant did not object to the trial court's use of the Pledge of Allegiance at the beginning of the day's events. It is

well-established that failure to raise objections to proceedings on constitutional grounds results in a waiver of such assignments of error. *In re Willis,* Coshocton App.No. 02CA15, 2002–Ohio–6795, ¶ 10, citing *State v. Awan* (1986), 22 Ohio St.3d 120, 489 N.E.2d 277. Furthermore, appellant does not clarify if the alleged Establishment Clause violation stems from *his* recitation of the Pledge of Allegiance, or the potential jurors' recitation, and even so, the limited record before us does not reveal who in the courtroom actually followed through and said the words of the Pledge. It is an appellant's duty to ensure that the record is properly preserved for review. *See State v. Hendershot*, 5th Dist. Licking No. 99CA102, 2001 WL 46235, citing *Rose Chevrolet, Inc. v. Adams* (1988), 36 Ohio St.3d 17, 19. Finally, even if the waiver doctrine did not apply herein, appellant provides no definitive case law holding that the use of "under God" in the Pledge of Allegiance, particularly when made part of a customary courtroom recitation, constitutes an impermissible State endorsement of monotheistic religion in violation of the Bill of Rights in the Constitution of the United States, and he further fails to articulate how an appellate reversal of his conviction would be the proper remedy for such an alleged constitutional violation. *Cf. Doe v. Acton-Boxborough Regional School Dist.,* 468 Mass. 64, 72, 8 N.E.3d 737 (2014), citing *Elk Grove Unified Sch. Dist. v. Newdow,* 542 U.S. 1, 6, 124 S.Ct. 2301, 159 L.Ed.2d 98 (2004) ("Although the words 'under God' undeniably have a religious tinge, courts that have considered the history of the pledge and the presence of those words have consistently concluded that the pledge, notwithstanding its reference to God, is a fundamentally patriotic exercise, not a religious one").

{¶35}. Finally, we find no merit in appellant's additional arguments in regard to the Free Exercise Clause, the Equal Protection Clause, and the "no religious test" provision of Article VI. Accordingly, appellant's Third Assignment of Error is overruled.

IV.

{¶36}. In his Fourth Assignment of Error, appellant argues the trial court deprived him of a fair trial by inviting those in the courtroom to recite the Pledge of Allegiance at the beginning of the proceedings. We disagree.

{¶37}. Appellant in this assigned error charges that the use of the Pledge of Allegiance was comparable to a requirement of a "loyalty oath" that unduly suggested to the jurors the credibility of government officials, in this instance the prosecutor and the testifying law enforcement officers.

{¶38}. This Court rejected a similar argument in *State v. Petty,* 5th Dist. Richland No. 2007CA00050, 2008-Ohio-5962, reversed on other grounds, 121 Ohio St.3d 607, in which we quoted the following from *United States v. Wonschik* (2004), 353 F.3d 1192, 1198–1199: "We recognize that trial judges, among their many other responsibilities, should take care not to create the impression that it is appropriate for the judge or the jury to favor the prosecution simply because the court and the prosecution are both institutions of the United States. *However, we do not think it reasonable to suppose that the jurors inferred from the Pledge of Allegiance a patriotic obligation to serve as a rubber stamp for the prosecution.* Rather, we believe the pledge represents, and evoked in the jurors' minds, a more enlightened patriotism, fidelity to which required them to uphold our nation's Constitution and laws by sitting as impartial finders of fact in the

matter before them. That is as likely to benefit a defendant as to prejudice him." *Id*. at ¶ 40, emphasis added.

{¶39}. We herein adhere to our holding in *Petty*. Appellant's Fourth Assignment of Error is overruled.

V.

{¶40}. In his Fifth Assignment of Error, appellant maintains he did not receive the effective assistance of counsel at trial. We disagree.

{¶41}. The two-part test for ineffective assistance of counsel in criminal cases is set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. A claim for ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to appellant. The second prong is whether the appellant was prejudiced by counsel's ineffectiveness. *Strickland, supra; State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373.

{¶42}. In determining whether counsel's representation fell below an objective standard of reasonableness, judicial scrutiny of counsel's performance must be highly deferential. *Bradley* at 142. Because of the difficulties inherent in determining whether effective assistance of counsel was rendered in any give case, a strong presumption exists counsel's conduct fell within the wide range of reasonable professional assistance. *Id.*

{¶43}. However, it is well-established that a reviewing court need not determine whether counsel's performance was deficient before examining the prejudice suffered

by the appellant as a result of the alleged deficiencies. *See Bradley* at 143, quoting *Strickland* at 697. Furthermore, "[a] defendant must demonstrate actual prejudice, and speculation regarding the prejudicial effects of counsel's performance will not establish ineffective assistance of counsel." *State v. Halsell,* 9th Dist. Summit No. 24464, 2009–Ohio–4166, ¶ 30, citing *State v. Downing,* 9th Dist. Summit No. 22012, 2004–Ohio–5952, ¶ 27. Actual prejudice means there is a reasonable probability that but for counsel's unprofessional errors, the outcome of the case would have been different. *See State v. Adams,* Licking App.No. 2005–CA–0024, 2005–Ohio–5211, ¶ 18.

{¶44}. Appellant essentially challenges his trial counsel's failure to object to the recitation of the Pledge of Allegiance. It has been aptly recognized that "[c]ompetent counsel may reasonably hesitate to object [to errors] in the jury's presence because objections may be considered bothersome by the jury and may tend to interrupt the flow of a trial." *State v. Rogers* (April 14, 1999), Summit App.No. 19176, 1999 WL 239100, citing *State v. Campbell* (1994), 69 Ohio St.3d 38, 53, 630 N.E.2d 339 (internal quotations omitted). A defense attorney might reasonably hesitate even more to make a questionable first impression on the jury pool by interjecting into the trial court's brief patriotic prelude when the proceedings have barely commenced. Moreover, in light of our previous analysis, we find no showing that appellant's trial counsel's performance prejudiced appellant's defense such that reversal would be warranted.

{¶45}. Accordingly, appellant's Fifth Assignment of Error is overruled.

{¶46}. For the foregoing reasons, the judgment of the Court of Common Pleas, Richland County, Ohio, is hereby affirmed.

By: Wise, P. J.

Delaney, J., and

Baldwin, J., concur.

JWW/d 02