[Cite as *State v. Torres*, 2009-Ohio-4600.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio — Court of Appeals No. H-08-023

Appellee — Trial Court No. CRI-2007-1053

v.

Carlos C. Torres, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: September 4, 2009

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney, for appellee.

Joseph P. Clarke, for appellant.

* * * * *

HANDWORK, P.J.

{¶ 1} This case is before the court on appeal from a judgment of the Huron County Court of Common Pleas. Appellant, Carlos Torres, was found guilty of violating R.C. 2925.11(A)(C)(3)(f), possession of marijuana in an amount equaling or exceeding

20,000 grams, a felony of the second degree. Appellant was sentenced to a mandatory eight years in prison. He asserts the following assignments of error:

{¶ 2} "Appellant was denied due process as guaranteed by the Fourteenth Amendment to the United States Constitution.

{¶ 3} "Appellant was denied effective assistance of counsel as guaranteed by Article One Sections 10 [sic] of [sic] the Constitution of the state of Ohio and the Sixth Amendment to the United States Constitution."

{¶ 4} On September 17, 2007, four crates stamped "COMP. COMPONETS [sic]" were dropped off at the freight dock of R & L Carriers ("R & L") in Phoenix, Arizona, for shipment to the R & L terminal in Norwalk, Ohio. Because it was a "dock pickup," being shipped to appellant, the manager of the Phoenix terminal suspected that they might contain illegal drugs. Therefore, he contacted the Phoenix Police Department, which took one of its drug sniffing dogs to the R & L terminal. The dog alerted to the presence of drugs in the crates.

{¶ 5} Subsequently, Gregory L. DeHart, who is employed by R & L, was contacted to effectuate a controlled delivery of the crates. The Norwalk Police Department was also informed of the shipment, which, in turn, contacted Captain Robert McLaughlin of the Huron County Sheriff's Office. McLaughlin is the sheriff's liaison with a ten county drug task force. McLaughlin arranged for the interception of any vehicle carrying the crates after they left the Norwalk R & L terminal. DeHart then went to Norwalk.

{¶ 6} On September 20, 2007, the crates arrived at the Norwalk terminal. James Larand is the manager of Norwalk R & L terminal. When the crates arrived, he had a tractor trailer take them to the local airport and followed them in another motor vehicle. At the airport, a second drug dog sniffed the crates and gave an alert that indicated that drugs were in the crates. A search warrant was obtained, the crates were opened, law enforcement officials "looked inside," saw green vegetation, and smelled "raw marijuana."

{¶ 7} In the meantime, the crates were returned to the R & L terminal in Norwalk. Larand called the telephone number provided at the time the crates were delivered to the Phoenix terminal, talked to a female, and notified her of the fact that these crates were ready to be picked up. Subsequently, appellant appeared at the dock, spoke with DeHart for a few minutes, and paid the $385 fee for the shipping of the crates.

{¶ 8} Detective James R. Fulton of the Norwalk Police Department was assigned to assist the sheriff's department during the delivery of the crates. He guarded the crates in the terminal while waiting for Torres to pick them up. Once the crates were taken outside to the dock, he also moved outside to the area where employees take their breaks. From there, he observed a black Chevrolet pickup truck containing two people drive up to the freight dock. The passenger, who was identified as appellant, got out of the truck, signed for the crates, and got back into the truck. The driver of the truck was John Nunley, who was also convicted of possession of marijuana in an amount more than 20,000 grams. An R & L employee loaded the crates into the bed of the pickup truck,

and it pulled away followed by a "tan colored" Dodge Durango with temporary license tags. The driver of that vehicle was later identified as Marcos Jaso. The vehicle was registered in the name of appellant's wife.

{¶ 9} After the crates were placed in the bed of the black truck, Detective Fulton called Captain McLaughlin, who picked up Fulton and followed the Durango and the truck into Milan, Ohio. At some point during the drive, the black truck and the Durango stopped. Appellant got out of the pickup truck and climbed into the passenger seat of the Durango. Law enforcement officers first stopped the Durango and then the black truck. When the crates were opened, they found seven packages in plastic wrap, which were surrounded by "blow-in," hardened insulation. Upon cutting open one of the packages, the officers discovered green leafy vegetable matter that appeared to be marijuana. The packages were turned over to the Ohio Bureau of Criminal Identification and Investigation ("BCI").

{¶ 10} Kenneth Ross, a forensic scientist, tested the vegetable matter, and, at appellant's trial, opined to a reasonable degree of scientific certainty that the contents of the packages were marijuana weighing a total of 72,871.3 grams. None of the marijuana itself was offered into evidence. In addition, Earl Gliem, a forensic scientist specializing in the field of finger and handprints, testified, to a reasonable degree of scientific certainty, that the fingerprint of appellant's right index finger was on one of the black garbage bags that encased the marijuana. A photocopy of these fingerprints were admitted into evidence.

{¶ 11} In his first assignment of error, appellant maintains that he was denied his right to due process as mandated under the Fourteenth Amendment to the United States Constitution because he was not "allowed to notify the jury that the State did not have the evidence necessary[1] to support a charge of the possession of marijuana in excess of 20,000 grams."

{¶ 12} Prior to the commencement of trial, the common pleas judge reminded the parties of the fact that a "large portion" of the marijuana in this case was "stolen" from the "sheriff's barn" during John Nunley's trial. He also stated that the parties to this cause agreed not to mention this fact during trial and that if it was inadvertently raised, the judge would give the jury a cautionary instruction.

{¶ 13} The Due Process Clause of the United States Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. *California v. Trombetta* (1984), 467 U.S. 479, 485. In the instant case, the fact that a large amount of the marijuana was stolen *after* it was tested and weighed does not establish a defense for appellant. Specifically, the fact that a portion of the seized marijuana disappeared would be relevant only up to the "material moment." *State v. Conley* (1971), 32 Ohio App.2d 54, 59-60. See, also, *State v. Harmon* (Mar. 2, 1993), 2d Dist. No. 2932; *State v. Gantzler* (July 11, 1991), 3d Dist. No. 3-90-35. The material moment for fungible evidence such as drugs is the time of analysis and weighing of the drugs because that

[1]It is unknown as to whether as a result of the disappearance of a large portion of the seized marijuana the remainder weighed more than or less than 20,000 grams.

analysis provides the basis for an expert's testimony at trial and makes the expert's testimony relevant to the case. *Conley*, supra; *Harmon*, supra; *Gantzler*; supra.

{¶ 14} Here, appellant neither asserted nor demonstrated that any of the marijuana was missing either before or at the material moment, i.e., its analysis and weighing. Therefore, the evidence offered at trial by means of expert testimony undisputedly proved, beyond a reasonable doubt, that appellant knowingly possessed, that is, had control over, see R.C. 2925.01(K), of over 20,000 grams of marijuana. Accordingly, appellant was not deprived of due process, and his first assignment of error is found not well-taken.

{¶ 15} In his second assignment of error, appellant alleges that he was deprived of effective assistance of trial counsel as guaranteed by the Sixth Amendment to the Constitution of the United States because (1) his attorney failed to request an independent weighing of the marijuana so that the jury could decide whether the prosecution proved, beyond a reasonable doubt, the elements of the charged offense; and (2) failed to object to the foundation of the testimony by Kenneth Ross because the "bulk" of the physical evidence, marijuana, was missing; and (3) failed to object to the foundation testimony of Earl Gliem because the state failed to produce and identify "the exact packaging from which the prints were lifted."

{¶ 16} In *Strickland v. Washington* (1984), 466 U.S. 668, 687, the United States Supreme Court set forth a two-part test to determine ineffective assistance of counsel. In order to demonstrate ineffective assistance of counsel, an accused must satisfy both

prongs. Id. First, the defendant must show that his trial counsel's performance was so deficient that the attorney was not functioning as the counsel guaranteed by the Sixth Amendment to the United States Constitution. Id. Second, he must establish that counsel's "deficient performance prejudiced the defense." Id. The failure to prove one prong of the Strickland test makes it unnecessary for a court to consider the other prong. *State v. Madrigal*, 87 Ohio St.3d 378, 389, 2000-Ohio-448, citing *Strickland v. Washington*, supra, at 697. In addition, in Ohio, a properly licensed attorney is presumed competent. *State v. Smith* (1985), 17 Ohio St.3d 98, 101, citing *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 301.

{¶ 17} To repeat, the material moment for determining the weight of the marijuana was when it was analyzed by Ross. Thus, trial counsel's performance was not deficient in failing to request an independent weighing of the marijuana or in failing to object to Ross's foundational testimony. The same is true of the packaging. In particular, it is undisputed that the chain of custody from the time that the marijuana and its packaging were delivered to the R & L terminal, seized by law enforcement officials, and transported to the BCI for analysis and weighing, was unbroken. Accordingly, appellant's second assignment of error is found not well-taken.

{¶ 18} The judgment of the Huron County Court of Common Pleas is affirmed. Appellant, Carlos Torres, is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, P.J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Richard W. Knepper, J. _____
CONCUR.
JUDGE

Judge Richard W. Knepper, retired, sitting by assignment of the Chief Justice of the Supreme Court of Ohio.