[Cite as *State v. Moffett*, 2012-Ohio-1107.]

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

State of Ohio — Court of Appeals No. S-10-056

Appellee — Trial Court No. 10 CR 751

v.

Shan N. Moffett — **DECISION AND JUDGMENT**

Appellant — Decided: March 16, 2012

* * * * *

Alistair J.D. Thursby, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Shan N. Moffett, appeals the October 6, 2010 judgment of the Sandusky County Court of Common Pleas which, following a jury trial convicting him of possession of crack cocaine and tampering with evidence, sentenced him to a total of four years of imprisonment. For the reasons set forth herein, we affirm.

{¶ 2} The relevant facts are as follows. On July 16, 2010, appellant was indicted on one count of possession of crack cocaine, in violation of R.C. 2925.11(A) and (C)(4)(b), a fourth degree felony and tampering with evidence, in violation of R.C. 2921.12(A)(1), a third degree felony. The charges stem from the April 13, 2010 execution of a search warrant. Appellant entered not guilty pleas to the charges.

{¶ 3} A jury trial commenced on October 5, 2010, and the following evidence was presented. Fremont Police Detective Tony Emrich testified that on April 13, 2010, in Bellevue, Sandusky County, Ohio, he and his partner, Detective O'Connell, along with officers from the Fremont and Bellevue Police Departments, executed a search warrant. They entered the home and found a woman upstairs and a man downstairs. At the back of the property was a motor home.

{¶ 4} When Detective Emrich arrived at the motor home appellant was outside being placed in handcuffs. Emrich and another officer began a search of the motor home. Emrich stated that the motor home was an old model and had no water service. Detective Emrich stated that when he looked in the bathroom he noticed that the toilet seat was wet and that there was water on the floor. Emrich then pushed open the valve to the septic tank and observed what appeared to be a plastic baggie of white "powderish" substance. He retrieved the baggie with a hanger. Emrich testified that he then took the flashlight, looked down the hole and observed a second baggie which he fished out. Suspecting that there was a third baggie, the officers drained the septic tank; no other baggies were found. Detective Emrich identified the baggies in court and testified that they were

sealed and delivered to the Ohio Bureau of Criminal Identification and Investigation ("BCI") for forensic testing.

{¶ 5} Detective Emrich admitted that he did not observe appellant in possession of the baggies and that he did not know how long the baggies had been in the septic tank. Emrich also acknowledged that the door to the mobile home had "shock lock rounds" caused by a device to gain entry into a residence. Emrich admitted that the Bellevue Police Department caused the damage when trying to execute a prior search warrant.

{¶ 6} Fremont Police Detective Roger Oddo testified next. Oddo stated that on April 13, 2010, he was assisting with the search of the Bellevue residence. Oddo was called to the motor home where he observed two plastic baggies with a white substance inside the toilet. He and Detective Emrich fished out the baggies with a coat hanger. Detective Oddo also admitted that he never observed appellant in physical possession of the baggies; he did not see him flush the baggies down the toilet.

{¶ 7} Fremont Police Detective Sean O'Connell testified that he obtained the search warrant based on the information of a confidential informant. O'Connell stated that they first approached and secured the residence. Once he realized that appellant was not in the home he proceeded to the motor home. O'Connell testified that although he knocked and announced himself, there was no verbal response but he heard a "commotion" coming from inside. After approximately two minutes, appellant opened the door and was secured. O'Connell admitted that he did not see appellant in possession

of the baggies. Detective O'Connell testified that the motor home was registered to appellant and had been at that location for approximately two months prior to the search.

{¶ 8} BCI forensic scientist Scott Dobranski testified that he conducted testing on the substance recovered from the motor home toilet. Dobranski testified that the substance was crack cocaine and that the net weight of the substance was 2.7 grams.

{¶ 9} Following the conclusion of the trial and deliberations, the jury found appellant guilty of the two counts in the indictment. The court immediately sentenced appellant to 17 months in prison for possession of crack cocaine and four years of imprisonment for tampering with evidence. The court ordered the sentences to be served concurrently. This appeal followed.

{¶ 10} Appellant now raises the following assignments of error for our review:

1. The conviction not sufficiently supported by credible evidence was against the manifest weight of the evidence.

2. Trial counsel was ineffective which prejudiced defendant/ appellant's right to a fair trial as guaranteed by the U.S. and Ohio Constitutions.

{¶ 11} In appellant's first assignment of error he argues that his convictions for possession of crack cocaine and tampering with evidence are not supported by sufficient evidence and are against the weight of the evidence. Sufficiency of the evidence and manifest weight of the evidence are quantitatively and qualitatively different legal concepts. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

Sufficiency of the evidence is purely a question of law. *Id.* Under this standard of adequacy, a court must consider whether the evidence was sufficient to support the conviction as a matter of law. *Id.* The proper analysis 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. Williams*, 74 Ohio St.3d 569, 576, 660 N.E.2d 724 (1996), quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 12} In contrast, a manifest weight challenge questions whether the state has met its burden of persuasion. *Thompkins* at 387. In making this determination, the court of appeals sits as a "thirteenth juror" and, after

> '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 [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 ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' *Id.*, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶ 13} Appellant was found guilty of one count of possession of crack cocaine and one count of tampering with evidence. Appellant contends that because the state failed to show that he knowingly "possessed" the cocaine, R.C. 2925.11, his convictions must fail.

Specifically, appellant argues that his mere proximity to the drugs was not sufficient to establish "constructive possession."

{¶ 14} The term "possession" is defined in R.C. 2925.01(K) as "having control over a thing or substance, but may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the thing or substance is found." Possession may be constructive or actual. Constructive possession is shown when a person "knowingly exercises dominion and control over an object, even though that object may not be within his immediate physical possession." *State v. Hankerson*, 70 Ohio St.2d 87, 434 N.E.2d 1362 (1982), syllabus. While close proximity to contraband is insufficient alone to prove constructive possession, it can be used as circumstantial evidence to establish constructive possession. *State v. Chapman*, 73 Ohio App.3d 132, 138, 596 N.E.2d 612 (3d Dist.1992). Constructive possession can be inferred from a totality of the circumstances. *State v. Norman*, 10th Dist. No. 03AP-298, 2003-Ohio-7038, ¶ 31.

{¶ 15} Looking at the evidence in a light most favorable to the state, we find that there was legally sufficient circumstantial evidence to demonstrate that appellant possessed the cocaine and tampered with evidence. First, a search warrant was executed on the residence based upon the information of a confidential informant. Detective O'Connell testified that once he realized that appellant was not in the residence he went to the motor home. O'Connell further stated that he knocked on the door and announced his presence; appellant did not open the door for two minutes and O'Connell heard a lot

of "commotion" coming from inside. The officer was unable to open the door on his own. Appellant was the licensed owner of the motor home and no other individuals were present.

{¶ 16} Detective Emrich testified that he conducted a search of the motor home; he searched that bathroom first because, in his experience, it is the easiest place to dispose of contraband. Emrich noticed a container of water next to the toilet and water on the toilet seat and floor. When the valve was opened, the crack cocaine was seen in the septic tank floating on top of the sludge.

{¶ 17} We further find that appellant's convictions were not against the manifest weight of the evidence. After reviewing the entire record and weighing the evidence and considering the credibility of the witnesses, we cannot say that the jury lost its way or created a manifest injustice. *Thompkins,* 78 Ohio St.3d at 387. Accordingly, appellant's first assignment of error is not well-taken.

{¶ 18} In his second assignment of error, appellant asserts that he was denied the effective assistance of trial counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must prove two elements: "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Proof of prejudice requires a showing "that there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694; *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989), paragraph three of the syllabus. Further, debatable strategic and tactical decisions may not form the basis of a claim for ineffective assistance of counsel. *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (1995).

{¶ 19} In his assignment of error, appellant argues that counsel's failure to timely attempt to withdraw due to the breakdown of communication and counsel's failure to fully cross-examine officers regarding the shock lock rounds on the motor home door compromised his right to a fair trial. Regarding the shock lock rounds, appellant argues that the damaged condition of the door could have allowed others access to the motor home.

{¶ 20} On the morning of trial, appellant's counsel filed a motion to withdraw as counsel. Counsel explained that appellant had filed his own motion the day before. Counsel indicated that there had been a total lack of communication and that appellant had not cooperated with preparing for trial. Appellant was questioned and stated that he did cooperate. After questioning counsel and appellant the court denied the motion finding that if appellant was unhappy with counsel he could have hired different counsel long before the day of trial.

{¶ 21} During the trial, counsel effectively cross-examined each witness about the relevant issue in the case, whether appellant possessed the crack cocaine. Counsel did question Detective Emrich about the shock lock rounds.

{¶ 22} Based on the foregoing, we find that appellant was not denied constitutionally effective counsel. Appellant's second assignment of error is not well-taken.

{¶ 23} On consideration whereof, we find that appellant was not prejudiced or prevented from having a fair trial and the judgment of the Sandusky County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J.
CONCUR. _____
JUDGE