[Cite as *State v. Herron*, 2013-Ohio-2597.]

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

State of Ohio — Court of Appeals No. L-11-1160

Appellee — Trial Court No. CR0201002511

v.

Tyreece Herron — **DECISION AND JUDGMENT**

Appellant — Decided: June 21, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

John F. Potts, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas, which following a jury trial found appellant guilty of one count of aggravated possession of drugs, in violation of R.C. 2925.11(A), a felony of the third degree, and one count of aggravated trafficking in drugs, in violation of R.C. 2925.03(A)(2), a felony of

the second degree. Appellant was sentenced to four-year terms of incarceration on each of the convictions, to be served concurrently. For the reasons set forth below, the judgment of conviction is affirmed and the case is remanded for resentencing based upon appellant's convictions of two allied offenses of similar import.

{¶ 2} Appellant, Tyreece Herron, sets forth the following nine assignments of error:

> I. IT CONSTITUTED ERROR TO DENY DEFENDANT'S MOTION TO SUPPRESS.
>
> II. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THE BULK AMOUNT.
>
> III. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT THE OFFENSE CHARGED IN COUNT TWO WAS COMMITTED IN THE VICINITY OF A JUVENILE.
>
> IV. IT CONSTITUTED ERROR TO TREAT A STATUTORY EXEMPTION AS AN AFFIRMATIVE DEFENSE.
>
> V. IT CONSTITUTED ERROR TO ADMIT EVIDENCE OF DR. LINARES' INDICTMENT, THE REVOCATION OF DR. HALL'S MEDICAL LICENSE AND RELATED MATTERS.
>
> VI. DEFENDANT'S CONVICTION FOR AGGRAVATED TRAFFICKING WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE AND/OR WAS AGAINST THE MANIFEST [SIC].

VII. THE JURY INSTRUCTIONS AS A WHOLE WERE SO INCOMPLETE AND AFFIRMATIVELY MISLEADING AS TO CONSTITUTE PLAIN ERROR.

VIII. IT CONSTITUTED ERROR NOT TO MERGE THE CONVICTIONS ON COUNT ONE AND COUNT TWO AT SENTENCING.

IX. FAILURE TO OBJECT TO THE JURY CHARGE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

{¶ 3} The following undisputed facts are relevant to this appeal. On the evening of March 23, 2010, the Toledo Police Department Drug Unit had set up surveillance of a BP gas station and car wash located directly across the street from the Boys and Girls Club of Toledo in a known area of illegal drug activity located in central Toledo. This surveillance was set into motion in response to numerous citizen complaints of the illicit drug activity occurring at that location.

{¶ 4} In the course of conducting surveillance of the car wash area at the BP station from an unmarked vehicle, an undercover Toledo Police narcotics detective quickly observed highly suspicious activity centered around appellant's vehicle. The detective observed that although the vehicle was parked next to the car wash for a lengthy period of time, absolutely no car washing activities were occurring. In conjunction with this suspicious observation, the undercover detective likewise observed appellant repeatedly going back and forth between his parked vehicle and an adjacent parked

BMW. The detective observed that in the course of this rapid back and forth activity, both appellant and the people in the BMW were gesturing to one another in a suspicious fashion. In addition, appellant and the others were observed suspiciously moving their hands in and out of their pockets and holding their hands out.

{¶ 5} Based upon observing activity consistent with probable illegal drug transactions occurring at a location with a well-known history of illegal drug activity, the undercover detective who possessed significant professional experience in drug activity surveillance, investigation, and arrests concluded that he was witnessing unlawful drug transactions. Accordingly, he requested additional police backup and then initiated an investigatory stop of appellant's vehicle and the adjacent BMW. As officers approached appellant's vehicle in the course of the investigatory stop, they immediately smelled the distinct odor of marijuana. Appellant and his passenger were removed from the vehicle in order to conduct safety pat downs.

{¶ 6} Consistent with all of their earlier observations, upon searching appellant's vehicle, the officers recovered 113 oxycodone pills in an unmarked bottle and also recovered marijuana. In addition, appellant was in possession of $1,325 cash in various denominations and another oxycodone pill. Appellant's passenger was in possession of marijuana and a digital measuring scale.

{¶ 7} The parties ultimately stipulated that the total weight of all of the oxycodone pills in appellant's possession totaled 59.42 grams, approximately 3 times the statutory weight for bulk classification purposes. Appellant has claimed at various times

throughout the course of this matter that he received the oxycodone pills in conjunction with lawful medical prescriptions. However, the prescriptions were not produced. Regardless, the selling of such pills by appellant was unlawful.

{¶ 8} On August 20, 2010, appellant was indicted on two counts of aggravated possession of drugs and one count of aggravated trafficking in drugs in conjunction with the March 23, 2010 undercover surveillance, investigatory stop, and related arrests. Following the trial court's denial of appellant's motion to suppress, the matter proceeded to jury trial. Appellant was convicted on two of the three felony counts. Appellant was found guilty on one count of aggravated possession of oxycodone in a bulk amount, in violation of R.C. 2925.11(A), a felony of the third degree, and one count of aggravated trafficking in oxycodone in bulk amount in the vicinity of a juvenile, in violation of R.C. 2925.03(A)(2), a felony of the second degree. On June 2, 2011, appellant was sentenced to two 4-year terms of incarceration, to be served concurrently. This appeal ensued.

{¶ 9} In the first assignment of error, appellant asserts that the trial court erred in denying his motion to suppress. It is well-established that an investigatory stop is proper when the facts demonstrate that the officer possessed a reasonable articulable suspicion which, in conjunction with rational inferences, warranted a belief that criminal behavior is occurring or is imminent. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.E.2d 889 (1968).

{¶ 10} Appellant's contention that potential legitimate explanations could have conceivably existed to explain the observations of the undercover officers and that the

officers did not directly observe the oxycodone pills changing hands from their post across the street does not negate the propriety of the investigative stop.

{¶ 11} The record clearly reflects ample evidence constituting a reasonable articulable suspicion of criminal behavior. The record shows that while conducting undercover narcotics surveillance of a known drug location in the evening hours immediately adjacent to a heavily traveled interstate highway, the officers observed appellant parked next to a car wash, yet not engaging in any car washing activities. In conjunction with this, the officers likewise observed appellant suspiciously gesturing to the occupants of a BMW parked adjacent to appellant. The officers observed appellant going back and forth between his vehicle and the adjacent vehicle and simultaneously observed appellant and the other vehicle's occupants repeatedly moving their hands in and out of their pockets. In the course of a nearly quarter century of experience in drug investigations and arrests, the lead undercover detective has consistently found that such activity in a known drug location is highly reflective of probable illegal drug transactions.

{¶ 12} We find that the record of evidence clearly contains ample evidence in support of an objective articulable suspicion of illegal drug activity. The trial court properly denied appellant's motion to suppress. We find appellant's first assignment of error not well-taken.

{¶ 13} In appellant's second assignment of error, he asserts that there was insufficient evidence to establish the bulk amount element of the offenses of which he was convicted. R.C. 2925.01(D)(1)(d) establishes the bulk amount relevant to this case is

an amount equal to or exceeding 20 grams or five times the maximum daily dose in the usual dosage range.

{¶ 14} We find that the record establishes that the 113 oxycodone pills possessed by appellant at the time of the stop weighed 59.42 grams, nearly three times the statutory bulk weight. Despite appellant's assertion that physician testimony connected to bulk weight was not sufficiently detailed, we find the record plainly shows that bulk weight was separately proven through reports admitted into evidence regardless of testimony based arguments. In addition, although appellant contends that the trial court erred in not submitting jury instructions specifically setting out the definition of bulk amount, we find such arguments unpersuasive in a case in which the evidence objectively demonstrated an amount three times greater than the statutory amount. It simply was not a close or disputed call. It was objectively demonstrated. Consistent with these adverse facts, we note that appellant did not object to the jury instructions not including the definition of bulk amount.

{¶ 15} Wherefore, we find that the record of evidence indisputably established that appellant was in possession of a statutory bulk amount of oxycodone. We find that the trial court did not err in not giving jury instructions on the definition of bulk amount. We find appellant's second assignment of error not well-taken.

{¶ 16} In appellant's third assignment of error, he contends that there was not sufficient evidence establishing that the trafficking of drugs occurred in the vicinity of

juveniles. We find this assignment of error interesting given the nature of the precise location of this case.

{¶ 17} The record clearly reflects that the location of the activity underlying the instant case was in immediate proximity to the Boys and Girls Club of Toledo. More importantly, the record further reflects at the time of the events the club was open, operating, and numerous children were traveling back and forth across the street from the club to a McDonald's restaurant. The record reflects good weather visibility at the time of the events. We find that the record clearly possesses sufficient evidence demonstrating that one could reasonably conclude based on these facts and circumstances that the unlawful activity could have been observed by the nearby children, thereby constituting sufficient evidence in support of the conviction. We find appellant's third assignment of error not well-taken.

{¶ 18} In the fourth assignment of error, appellant asserts that the trial court erred in connection with the applicability of a "lawful prescription" as an affirmative defense to this case. The trial court instructed the jury, without objection, that appellant possessed the burden of proof of the affirmative defense of a lawful prescription.

{¶ 19} While appellant uniquely asserts that the state should be required to prove that appellant did not possess a lawful prescription for the oxycodone he was unlawfully selling, we are not convinced. Contrary to appellant's assertions, we note that the now disputed instruction to the jury by the trial court on the lawful prescription affirmative defense completely comported with the relevant Ohio jury instruction. More importantly,

we note that appellant's possession of a lawful prescription would nevertheless not negate appellant's criminal conduct in reselling on the streets any oxycodone that he conceivably secured through a lawful prescription. We find appellant's fourth assignment of error not well-taken.

{¶ 20} In appellant's fifth assignment of error, he asserts that the court erred in admitting evidence of the revocation of the medical license of the original physician who furnished oxycodone to appellant and the subsequent indictment of the physician who took over the patient clientele of the original physician.

{¶ 21} The record reflects that when the state inquired of the detective in this case regarding any knowledge of an investigation into the original physician, the objection by counsel for appellant was sustained and further questioning ceased. Subsequently, when the state was questioning the detective regarding the second physician whose prescription label was recovered from one of appellant's bottles, the detective testified that the physician was under investigation by the Drug Enforcement Agency ("DEA"). Counsel for appellant objected. The trial court denied the objection and permitted testimony that the second physician was the subject of DEA complaints. Notably, upon cross-examination, appellant himself conceded his awareness that the physician who furnished him the oxycodone prescription was facing legal difficulties.

{¶ 22} We find that the record in this matter shows that appellant was not prejudiced in any way in connection to the testimony related to the two physicians. With respect to the initial physician, counsel for appellant's objection was sustained and no

follow-up questioning occurred. With respect to the second physician, appellant was not convicted of the one offense that was in any way connected to that physician. More importantly, we find that the limited testimony related to these two physicians was proper given appellant's own direct testimony of obtaining oxycodone from the first physician and, upon that physician's loss of his medical license, obtaining oxycodone from the second physician, who was the physician to whom the clientele of the first physician was referred. We find appellant's fifth assignment of error not well-taken.

{¶ 23} In appellant's sixth assignment of error, he asserts that his aggravated trafficking conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. The applicable standard of review, set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), establishes that the relevant inquiry is whether, "after reviewing 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." In conjunction with this, with respect to manifest weight, the accompanying inquiry is whether in resolving conflicts in evidence, the trial court, "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. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶ 24} In applying these parameters to the instant case, we note that the record clearly reflects that appellant transported nearly 60 grams of oxycodone in an unmarked bottle to a known drug trafficking location. The record shows appellant had not been the

recipient of a valid prescription for oxycodone in over a year at the time of the incident. The record shows that appellant parked next to a car wash and did not wash his car. On the contrary, the record shows that appellant suspiciously gestured to an adjacent BMW, walked back and forth between the vehicles, and put his hands in and out of his pockets as did the BMW occupants. Not surprisingly, the record shows appellant was in possession of $1,325 cash in various denominations. The record shows that appellant and his passenger were both in possession of marijuana. The record shows that the passenger was also in possession of a digital measuring scale. Lastly, the record shows that this illegal drug activity was transpiring adjacent to the Boys and Girls Club of Toledo while it was operating and while children were walking back and forth across the street within visible sight of the illegal drug activity.

{¶ 25} We find that a rational trier of fact, viewing the record of evidence in a light most favorable to the prosecution, could find the elements of aggravated possession of oxycodone in bulk amount and aggravated trafficking of oxycodone in bulk amount in the vicinity of juveniles proven beyond a reasonable doubt. We find no compelling or persuasive evidence in the record in support of the notion that the trial court clearly lost its way and created a manifest miscarriage of justice in the disputed convictions. We find appellant's sixth assignment of error not well-taken.

{¶ 26} In appellant's seventh assignment of error, he predominantly reiterates disputes in connection to jury instructions that were raised in earlier assignments. In addition, appellant contends that a limiting instruction regarding appellant's prior felony

convictions should have been furnished. We note that no limiting instruction was requested. In conjunction, given the facts and circumstances of this case, involving bulk drug activity being engaged in across the street from the Boys and Girls Club of Toledo by a defendant with a significant prior felony history, it is more than plausible that trial counsel for appellant determined that further notation of or emphasis upon appellant's criminal history was not in the best interest of his client.

{¶ 27} While appellant goes to great lengths to subjectively challenge the propriety of various jury instructions, we note that the jury instructions were in complete conformity with standard Ohio jury instructions, and more importantly, the record is devoid of any objective or compelling evidence that appellant was materially prejudiced in any way in connection with the jury instructions. We find appellant's seventh assignment of error not well-taken.

{¶ 28} All parties concur with respect to appellant's eighth assignment of error, in which he contends that his two convictions constituted allied offenses of similar import and, therefore, should have been merged under one of the two counts for sentencing purposes. We find appellant's eighth assignment of error well-taken.

{¶ 29} In appellant's ninth assignment of error, he again challenges the propriety of the jury instructions in the context of ineffective assistance of counsel. Appellant maintains that the failure to object to the jury instructions should be construed as demonstrating that, but for that failure to object to the jury instructions, the outcome of the trial would have been different.

{¶ 30} It is well-established that claims of ineffective assistance of counsel are reviewed under the standard set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.E.2d 674 (1984). In order to prove ineffective assistance of counsel, appellant must demonstrate both that the performance of trial counsel was defective and must also establish that, but for that defect, the outcome would have been different. *Id.* at 687.

{¶ 31} In applying *Strickland* to the instant case, we find that the failure to object to jury instructions that have been determined to be appropriate and not prejudicial cannot conceivably be construed as having altered the outcome of the case. We find appellant's ninth assignment of error not well-taken.

{¶ 32} Wherefore, we find that substantial justice has been done in this matter. The judgment of conviction of the Lucas County Court of Common Pleas is hereby affirmed. The matter is reversed and remanded solely for resentencing of the allied offenses of similar import. Appellant and appellee are each ordered to pay one-half the costs of this appeal pursuant to App.R. 24.

Judgment affirmed in part
and reversed in part.

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