

[Cite as *State v. Hill*, 2009-Ohio-2584.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 91643

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JASON HILL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART, AND
REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-503199

BEFORE: Gallagher, P.J., Rocco, J., and Kilbane, J.

RELEASED: June 4, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

SEAN C. GALLAGHER, P.J.:

{¶ 1} Defendant-appellant, Jason Hill, appeals his conviction from the Cuyahoga County Court of Common Pleas. For the reasons that follow, we affirm Hill's conviction for drug trafficking but reverse his conviction for trafficking in counterfeit controlled substance.

{¶ 2} On November 1, 2007, Det. Moran, from the Cleveland Police Narcotics Unit, was working undercover with a confidential reliable informant ("CRI") in the Slavic Village neighborhood of Cleveland. Det. Moran and the CRI were on foot attempting to purchase drugs while the take-down units patrolled the area.

{¶ 3} While walking, Det. Moran noticed Hill outside a store on E. 65th Street and Hosmer Avenue. As Det. Moran approached, Hill was joined by William Powell. Det. Moran made eye contact with Powell, and Powell nodded. Det. Moran testified that, in his experience, this exchange indicated a drug sale.

{¶ 4} Det. Moran and the CRI approached Hill and Powell. They began to walk together. Powell, Det. Moran, and the CRI crossed the street while Hill remained on the other side of the street. Hill then jogged across the street to join them. Det. Moran testified that Powell asked Hill if he had "it" at the house. Hill responded, "Yes, I have it at the house."

{¶ 5} Powell and Det. Moran then discussed the deal. During the exchange, Hill stood approximately five feet away. Det. Moran testified that Hill's "head was on a swivel." Hill was looking up and down the street, checking out the surroundings and the cars coming down the street.

{¶ 6} After the exchange, Det. Moran and the CRI walked one way while calling the take-down units, and Powell and Hill walked the other way. Powell and Hill were apprehended at a multi-family home on Hosmer Avenue. Hill's girlfriend gave the officers consent to search her place where they found an assault rifle and plastic baggies with cocaine residue.

{¶ 7} Hill was charged with one count of trafficking in counterfeit controlled substances, one count of drug trafficking, one count of possession of drugs with a one-year firearm specification, and one count of possession of criminal tools. Hill filed a motion to suppress, arguing that the search of his girlfriend's home was unconstitutional. The trial court denied Hill's motion after hearing.

{¶ 8} Hill waived a jury and was tried to the bench. He was found guilty of trafficking in counterfeit controlled substance and drug trafficking. Hill was found not guilty of possession of drugs with the one-year firearm specification, and possession of criminal tools. Hill appeals, advancing three assignments of error for our review. His first assignment of error states the following:

{¶ 9} “The trial court erred in denying appellant’s Criminal Rule 29 motion for acquittal as to count one when there was insufficient evidence to sustain a conviction of trafficking a counterfeit controlled substance.”

{¶ 10} Hill contends that the evidence was insufficient to sustain a conviction for trafficking in counterfeit controlled substance because there was no direct or circumstantial evidence that Hill knew the substance that Powell sold to Det. Moran was counterfeit.

{¶ 11} A challenge to the sufficiency of the evidence attacks the adequacy of the evidence presented. Whether the evidence is legally sufficient to sustain a conviction is a question of law. See *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. The relevant inquiry in a claim of insufficiency 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 proved beyond a reasonable doubt.” *State v. Leonard*, 104 Ohio St.3d 54, 67, 2004-Ohio-6235, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶ 12} Hill was convicted of violating R.C. 2925.37(D), which states that “[n]o person shall knowingly make, sell, offer to sell, or deliver any substance that he knows is a counterfeit controlled substance.” Hill was convicted as an aider and abettor under R.C. 2923.03(A)(2).

{¶ 13} In *State v. Mughni*, 33 Ohio St.3d 65, 514 N.E.2d 870, the Supreme Court of Ohio explained that in order to convict under R.C. 2925.37(B), the state

must prove that the defendant knew that the substance sold was counterfeit. See, also, *State v. Kimbrough*, Wash. App. No. 08CA18, 2008-Ohio-6690.

{¶ 14} In this case, there is no evidence, direct or circumstantial, that Hill knew the substance sold to Det. Moran was counterfeit. We find that the evidence is insufficient to sustain a conviction for trafficking in counterfeit controlled substance. Hill's first assignment of error is sustained.

{¶ 15} Hill's second assignment of error¹ is rendered moot by our decision in the first assignment of error.

{¶ 16} Hill's third assignment of error states the following:

{¶ 17} "The trial court erred in denying appellant's Criminal Rule 29 motion for acquittal as to count two when there was insufficient evidence to sustain a conviction for drug trafficking and the conviction was against the manifest weight of the evidence."

{¶ 18} As stated previously, when an appellate court reviews a record upon a sufficiency challenge, "the 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. Leonard*, 104 Ohio St.3d 54, 67, 2004-Ohio-6235, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

¹ Hill's second assignment of error is as follows: "The trial court erred in finding appellant guilty of trafficking a counterfeit controlled substance because it was against the manifest weight of the evidence."

{¶ 19} In reviewing a claim challenging the manifest weight of the evidence, the question to be answered is whether “there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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.” (Internal quotes and citations omitted.) *State v. Leonard*, 104 Ohio St.3d 54, 68, 2004-Ohio-6235.

{¶ 20} Hill was convicted of drug trafficking in violation of R.C. 2925.03(A)(1), which prohibits a person from knowingly selling or offering to sell a controlled substance. He was convicted for aiding and abetting under R.C. 2923.03(A)(2). Hill argues that he cannot be convicted of drug trafficking because no controlled substance was transferred.

{¶ 21} In *State v. Scott* (1982), 69 Ohio St.2d 439, 432 N.E.2d 798, syllabus, the Supreme Court of Ohio held as follows: “A person can ‘offer to sell a controlled substance’ in violation of R.C. 2925.03(A)(1) without transferring a controlled substance to the buyer.” See, also, *Mughni*, *supra* (reaffirming *Scott*). Therefore, Hill may be convicted of drug trafficking.

{¶ 22} Hill also contends that there is no evidence that Hill aided and abetted Powell in his offer to sell crack cocaine to Det. Moran.

{¶ 23} In *State v. Johnson*, 93 Ohio St.3d 240, 245-246, 2001-Ohio-1336, the Supreme Court of Ohio held that to support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the principal in the commission of the crime, and that the defendant shared the criminal intent of the principal. Such intent may be inferred from the circumstances surrounding the crime. “[A]iding and abetting may also be established by overt acts of assistance such as driving a getaway car or serving as a lookout.” *State v. Jackson*, Franklin App. No. 03AP-273, 2003-Ohio-5946, quoting *State v. Cartellone* (1981), 3 Ohio App.3d 145, 150, 444 N.E.2d 68; see, also, *State v. Trocodaro* (1973), 36 Ohio App.2d 1, 6, 301 N.E.2d 898. Further, “[b]ecause participants in a drug transaction are not likely to use either precise legal terms to define the transaction, or precise scientific terms to define the merchandise, whether an offer to sell a controlled substance has, in fact, been made depends upon the totality of the circumstances and the language used.” *State v. Patterson* (1982), 69 Ohio St.2d 445, 447, 432 N.E.2d 802, 803.

{¶ 24} In this case, Det. Moran testified that Hill and Powell were together before, during, and after the transaction. Hill and Powell exchanged words while they walked with Det. Moran and the CRI. Hill indicated that he had “it” at the house. During the exchange, Hill stood nearby and kept watch for Powell. Det. Moran testified that Hill’s head was “on a swivel” as he kept watch for Powell. After the

exchange, Hill and Powell walked together to the house where Hill stayed with his girlfriend.

{¶ 25} Hill did not merely stand by while Powell made the sale. He followed Powell to another location where the sale was made and kept watch while the exchange was completed. Hill actively supported, assisted, and cooperated with Powell by serving as a companion and lookout.

{¶ 26} After viewing the evidence in a light most favorable to the prosecution, we find that any rational trier of fact could have found the essential elements of complicity to commit drug trafficking proved beyond a reasonable doubt. In addition, we find that there is substantial evidence upon which a jury or judge could reasonably conclude that all the elements had been proved beyond a reasonable doubt. Accordingly, Hill's third assignment of error is overruled.

{¶ 27} The judgment of the trial court convicting Hill of complicity to commit drug trafficking is affirmed. The judgment of the trial court convicting Hill of complicity to traffic a counterfeit controlled substance is reversed. The case is remanded to the trial court for further proceedings consistent with this opinion.

It is ordered that appellant and appellee share 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 common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, PRESIDING JUDGE

KENNETH A. ROCCO, J., and
MARY EILEEN KILBANE, J., CONCUR