

[Cite as *State v. Smith*, 2009-Ohio-5010.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92561

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LLOYD SMITH

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-506097

BEFORE: Blackmon, J., Kilbane, P.J., and Jones, J.

RELEASED: September 24, 2009

JOURNALIZED:
ATTORNEY FOR APPELLANT

Ruth Fischbein-Cohen
3552 Severn Road
Suite 613
Cleveland Heights, Ohio 44118

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

By: Brian D. Kraft
Assistant County Prosecutor
8th Floor Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

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).

PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant Lloyd Smith appeals his conviction for theft and assigns the following errors for our review:

“I. Counsel was ineffective in that he did not move the court to dismiss since the arrest and ensuing charges were absent probable cause.”

“II. The verdict of guilty was not based on facts proven beyond a reasonable doubt. The evidence lacked sufficiency.”

{¶ 2} Having reviewed the record and relevant law, we affirm Smith’s conviction. The apposite facts follow.

Facts

{¶ 3} The Cuyahoga County Grand Jury charged Smith with two counts of theft for stealing two large plastic containers filled with prescription medicine from Rite Aid. The court later dismissed one of the charges.

{¶ 4} The evidence indicated that on December 20, 2007, Smith was at the Rite Aid store located at 2323 Broadview Road in Cleveland, Ohio. Although Smith was not an employee of the store, his sister who worked at the store requested his help to unload a delivery truck. The deliveries consisted of various items including several large plastic containers (“totes”) of prescription medicine.

{¶ 5} Upon arriving at the store the next morning, store employee, Larry Groff, noticed that there was damage to the rear door of the store. He informed the pharmacy manager, Ronald Garba, of the damage. Garba had recently ordered eight totes of prescription medicine for the pharmacy, which was to be delivered on December 20, 2007. He noted that he only received six of the eight totes. Garba notified the appropriate store authorities of the damage to the back door and missing totes.

{¶ 6} Mike Esterak, a loss prevention officer for Rite Aid, was assigned to investigate the matter. He watched the video surveillance of the back storage room. The video showed employees and Smith placing the delivered items into a large storage room. The video clearly showed that eight pharmacy totes, which are red in color, were delivered and placed in the storage room. After all the employees left the room, Smith is seen hurriedly grabbing two of the totes in both arms and running out the back door. The value of the missing pharmaceuticals as detailed in the invoices was \$8,487. Esterak contacted the police, who after viewing the video and speaking to Smith's sister, arrested Smith and his sister.

{¶ 7} The jury found Smith guilty of theft. The trial court sentenced him to nine months in prison with three years of postrelease control. He was also ordered to pay restitution in the amount of \$8,400 to Rite Aid.

Ineffective Assistance of Counsel

{¶ 8} In his first assigned error, Smith contends his counsel was ineffective for failing to move to dismiss the charge because he was arrested without an arrest warrant and probable cause did not support his arrest. We disagree.

{¶ 9} We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington*.¹ Under *Strickland*, a reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the lawyer's deficient performance.² To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the

¹(1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052.

²*State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph one of syllabus.

proceedings would have been different.³ Judicial scrutiny of a lawyer’s performance must be highly deferential.⁴

{¶ 10} We conclude counsel was not ineffective because probable cause supported the arrest. “Probable cause for a warrantless arrest requires that the arresting officer, at the time of the arrest, possess sufficient information that would cause a reasonable and prudent person to believe that a criminal offense has been or is being committed.”⁵ In determining whether probable cause existed, we examine the totality of facts and circumstances surrounding the arrest.⁶

{¶ 11} In the instant matter, prior to Smith’s arrest, the officers reviewed the video, which clearly depicts Smith taking the two totes and running out the back door. The officers also spoke to Smith’s sister. Based on these circumstances, where the video explicitly shows Smith stealing the tote and his sister confirmed his identity, the officers possessed sufficient

³Id. at paragraph two of syllabus.

⁴*State v. Sallie*, 81 Ohio St.3d 673, 674, 1998-Ohio-343.

⁵*State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, at ¶ 39, citing to *Gerstein v. Pugh* (1975), 420 U.S. 103, 111-112, 95 S.Ct. 854, 43 L.Ed.2d 54; *Beck v. Ohio* (1964), 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142.

⁶*State v. Elmore*, *supra*; *State v. Homan* (2000), 89 Ohio St.3d 421, 427, 2000-Ohio-212.

information that would cause a reasonable and prudent person to believe that a criminal offense had been committed.

{¶ 12} Smith argues that in spite of the incriminating video, the officers should have questioned other suspects prior to arresting him. However, based on the video, Smith and his sister were the only suspects. There was no other evidence indicating that anyone else took the totes. Accordingly, we conclude counsel was not ineffective for failing to request dismissal based on lack of probable cause to arrest. Smith’s first assigned error is overruled.

Insufficient Evidence

{¶ 13} In his second assigned error, Smith argues the evidence was insufficient to support his conviction for theft. We disagree.

{¶ 14} The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman*⁷ as follows:

“Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as

⁷(1978), 55 Ohio St.2d 261, syllabus.

to whether each material element of a crime has been proved beyond a reasonable doubt.”⁸

{¶ 15} *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks*,⁹ in which the Ohio Supreme Court held:

“An appellate court’s function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. 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. (*Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)”

{¶ 16} We conclude there was sufficient evidence to support Smith’s conviction. Smith contends the video did not show him committing a theft.

⁸See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23; *State v. Davis* (1988), 49 Ohio App.3d 109, 113.

This is incredulous giving the fact he is seen on the video hurriedly grabbing the totes in his arms after the room was cleared of employees and running out the back door. There was no reason for Smith to remove the totes. Mike Esterak testified that the invoices indicated the missing totes contained medicine with a value of \$8,487. This evidence supported Smith's theft conviction.

{¶ 17} Smith also contends the evidence was insufficient because Smith was a convenient scape goat for the missing evidence because he was not a Rite Aid employee; the damage to the back door was never investigated; and because the truck driver, pharmacy manager, and shift supervisor were also likely suspects. These contentions, however, do not go to the sufficiency of the evidence, but the manifest weight of the evidence.

{¶ 18} In *State v. Wilson*,¹⁰ the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

“The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In *Thompkins*, the court distinguished

⁹(1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

¹⁰113 Ohio St.3d 382, 2007-Ohio-2202.

between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive -- the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v.*

***Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d**

652.”

{¶ 19} However, an appellate court may not merely substitute its view for that of the jury, but must find that “the jury, in resolving conflicts in the evidence, clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.”¹¹ Accordingly, reversal on manifest weight grounds is reserved for “the exceptional case in which the evidence weighs heavily against the conviction.”¹²

{¶ 20} The evidence did not indicate that Smith was named as the perpetrator based on the fact he was a convenient scape goat. The video shows Smith taking the totes and running out the back door. Simply because the totes were never found does not dispel the fact that Smith is seen taking the totes. It is not surprising the video does not depict Smith placing the totes in his car, because there was no security camera in the parking lot. Because of the video evidence, there was no reason to suspect the pharmacy manager, shift supervisor, or truck driver of the theft.

¹¹*State v. Thompkins*, supra at 387.

¹²*Id.*

{¶ 21} Smith also suggests that the damage to the back door indicates that someone else was responsible for the theft. However, the video does not show that the person attempting to break in was successful. Moreover, it is not implausible to conclude that Smith, seeing the value of the items he stole, attempted to come back and take the rest of the totes. Accordingly, Smith's second assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J., and
LARRY A. JONES, J., CONCUR