[Cite as *State v. Martin*, 2009-Ohio-5223.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92236

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOJWAN MARTIN

DEFENDANT-APPELLANT

JUDGMENT:
CONVICTION AFFIRMED;
REMANDED FOR RESENTENCING

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-486927

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

RELEASED: October 1, 2009

JOURNALIZED:

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LARRY A. JONES, J.:

{¶ 1} Appellant-defendant, Jojwan Martin ("Martin") appeals the decision of the lower court. Having reviewed the arguments of the parties and the pertinent law, we affirm.

STATEMENT OF THE CASE AND THE FACTS

{¶ 2} On October 11, 2006, the grand jury returned a three-count indictment against Martin in Case No. CR-486927. Martin was charged with: (1) drug trafficking, in violation of R.C. 2925.03, alleging that Martin knowingly prepared for shipment, shipped, transported, delivered, prepared for distribution or distributed crack cocaine in an amount equal to or exceeding ten grams but less than 25 grams, knowing or having reasonable cause to believe the drug was intended for sale, a felony of the second degree; (2) drug possession, in violation of R.C. 2925.11, alleging that Martin knowingly obtained, possessed or used a controlled substance, crack cocaine, in an amount equal to or exceeding ten grams but less than 25 grams, a felony of the second degree; and (3) possessing criminal tools, in violation of R.C. 2923.24, a felony of the fifth degree. Martin was arraigned on December 27, 2006, at which time he pled "Not guilty." Martin retained counsel who subsequently filed a motion to withdraw because he did not receive full payment. The trial court then declared Martin indigent and assigned a second attorney to the case. Martin's second attorney filed numerous motions, including standard requests for discovery. Pre-trials were held, and on January 10, 2008, appellee responded to Martin's requests for discovery in writing. On

May 20, 2008, the case proceeded to a trial by jury. At the close of appellee's case in chief, the trial court granted Martin's Crim.R. 29 motion as to Count 3; however, on May 23, 2008, the remaining two counts resulted in a mistrial due to a hung jury.

{¶ 3} On May 27, 2008, Martin's second attorney also filed a motion to withdraw as counsel. The court granted the motion on that same day. Further, the trial court assigned a public defender to represent Martin, and on August 11, 2008, the case proceeded to a trial by jury for the second time. On August 12, 2008, the jury delivered guilty verdicts with respect to Counts 1 and 2. The court then proceeded to sentence Martin to two years in prison on Count 1 and three years in prison on Count 2. The sentences were ordered to run concurrent to each other but consecutive to Martin's conviction of murder with firearm specifications in a different case, CR-490688. On October 14, 2008, Martin filed his motion for leave to file a delayed appeal.

{¶ 4} According to the record, on April 19, 2006, Officer William Mokshefsky, a Cleveland police officer and his partner, Officer Michael Schroeder, were finishing their shift at approximately 3:00 a.m. when they heard automatic gunfire. Officer Mokshefsky observed a car driven by Martin being riddled with gunfire. Martin and another male fled the vehicle and exclaimed that they were shot. Officer Mokshefsky and his partner also observed a van with automatic gunfire coming from it speeding by. Officer Mokshefsky noticed that blood was coming from Martin's neck. Martin stated that he was going to die. The police

called for backup and medical assistance. Officer Mokshefsky stated that he and his partner were later contacted by Huron Hospital in East Cleveland and informed that drugs had been recovered from Martin.

Assignments of Error

{¶ 5} Appellant assigns three assignments of error on appeal:

{¶ 6} "[1.] The evidence was insufficient as a matter of law to support a finding beyond a reasonable doubt that appellant was guilty of possession of drugs and drug trafficking.

{¶ 7} "[2.] Appellant's convictions for possession of drugs and drug trafficking were against the manifest weight of the evidence.

{¶ 8} "[3.] Appellant was denied his right to effective assistance of counsel guaranteed by Article I, Section 10 of the Ohio Constitution and the Sixth and Fourteenth Amendment to the United States Constitution when trial counsel failed to object to the cell phone being presented to the jury."

LEGAL ANALYSIS

Drug Possession and Drug Trafficking

{¶ 9} Due to the substantial interrelation between appellant's first and second assignments of error, we shall address them together. "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. With respect to sufficiency of the evidence, 'sufficiency' is a term of art, meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence

is legally sufficient to support the jury verdict as a matter of law. * * * In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. In addition, a conviction based on legally insufficient evidence constitutes a denial of due process." *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 10} "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may, nevertheless, conclude that the judgment is against the weight of the evidence. Weight of the evidence concerns the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jurors that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, their verdict shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*. 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 fact finder's resolution of the conflicting testimony." Id.

{¶ 11} As to a claim that a judgment is against the manifest weight of the evidence, the court, 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 jury 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. *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717. The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

{¶ 12} Martin was convicted of drug trafficking, in violation of R.C. 2925.03 and drug possession, in violation of R.C. 2925.11. R.C. 2925.03, trafficking offenses, provides the following:

> "(A) No person shall knowingly do any of the following:
>
> "(1) Sell or offer to sell a controlled substance;
>
> "(2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, when the offender knows or has reasonable cause to believe that the controlled substance is intended for sale or resale by the offender or another person."

{¶ 13} R.C. 2925.11, drug possession offenses, provides the following in pertinent part: "(A) No person shall knowingly obtain, possess, or use a controlled substance."

{¶ 14} Martin argues that the cell phone and drugs were equally accessible to more than one person, and therefore he should not be found guilty of these crimes. However, a review of the record demonstrates that the only individuals with access to the items, besides Martin, were police officers and paramedics and

their access only lasted for a period of minutes. The evidence established that no one, except for police and paramedics, were near Martin as he was being attended to after being shot.

{¶ 15} Officer Mokshefsky saw Martin wearing a jacket at the scene and EMT Kavouras testified that Martin's clothing was not removed by the paramedics until Martin was in the EMS wagon. Moreover, Kavouras testified that all belongings of a patient are, without failure, entrusted to hospital personnel or the security officer, who was Officer Carroscia in this instance. Kavouras further explained that the EMS wagon is always cleaned out after each run, so that there is no way that the jacket was a leftover from a previous service run.

{¶ 16} Officer Mokshefsky further established that the other person fleeing the vehicle with Martin was not near Martin after the shooting stopped and was treated and transported by an entirely different EMS team. In addition, a cell phone depicting Martin's image flashing large amounts of cash was found with Martin's belongings, along with the crack cocaine, further establishing that Martin owned, or at least possessed the jacket, and was involved in drug dealing at 3:00 a.m. in an area that the police classified as suffering from intense drug and gang crime.[1]

{¶ 17} In sum, the state presented four witnesses at trial: Officer Mokshefsky of the Cleveland Police; Nicholas Kavouras of Cleveland EMS, Officer Carroscia

[1]Tr. 843-44.

of the East Cleveland Police; and Krystal Sills of the Cleveland Police Scientific Investigation Unit. The state also admitted three exhibits into evidence: a bag containing crack cocaine packaged for resale; a cell phone recovered from Martin, with numerous digital photographs in it; and a laboratory report establishing that state's exhibit one is actually crack cocaine.

{¶ 18} Accordingly, we find the evidence legally sufficient to sustain the trial court's convictions for possession of drugs and drug trafficking. In addition, when the evidence is viewed in a light most favorable to the state, we find that all essential elements of appellant's convictions were proven beyond a reasonable doubt. Moreover, nothing in the record demonstrates that the trial court lost its way in convicting appellant.

{¶ 19} Accordingly, appellant's first and second assignments of error are overruled.

Ineffective Assistance of Counsel

{¶ 20} Appellant argues in his third assignment of error that he was denied effective assistance of counsel. In order to successfully assert ineffective assistance of counsel under the Sixth Amendment, the dual prongs of the test set forth in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, must be satisfied. A defendant must show not only that the attorney made errors so serious that he was not functioning as "counsel," as guaranteed by the Sixth Amendment, but also that the deficient performance was so serious as to deprive him of a fair and reliable trial. Id. at 687.

{¶ 21} The Ohio Supreme Court set forth a similar two-part test:

> "First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness." *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373.

{¶ 22} In reviewing a claim of ineffective assistance of counsel, it must be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164. "Judicial scrutiny of counsel's performance must be highly deferential * * *," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance * * *." *Strickland*, supra, at 689.

{¶ 23} A review of the evidence demonstrates that Martin failed to show that defense counsel's errors were so serious that he was not functioning as "counsel," as guaranteed by the Sixth Amendment. Moreover, Martin failed to show that trial counsel's alleged deficient performance, failing to object to the introduction of the cellular phone, was so serious that it deprived him of a fair and reliable trial.

{¶ 24} A cell phone and crack cocaine were found in Martin's belongings. There were digital photographs of money and Martin stored in the phone. The digital photographs of Martin tended to establish that the phone belonged to him, and arguably, that the jacket and crack cocaine also belonged to him. This made the photographs and cell phone relevant, admissible evidence. This is especially

true because of defense counsel's theory that the jacket and drugs did not belong to Martin.

{¶ 25} Moreover, the image and glorification of money, along with the large amounts of cash, are relevant to the charge of drug trafficking, especially when the testimony established that Martin was in possession of crack cocaine with an estimated value of $2,000.00. The fact that the possession of criminal tools charge was dismissed via defendant's Crim.R. 29 motion is irrelevant. The cell phone and photographs are still relevant, admissible evidence, even if they are not criminal tools.

{¶ 26} In addition, Officer Mokshefsky testified at trial that when he went to retrieve the drug evidence from the hospital he was given a cell phone by an East Cleveland police officer. Officer Mokshefsky testified that he saw a picture of Martin with a large amount of cash on the cellular phone display. Officer Mokshefsky further testified that because the phone was locked he was not able to retrieve any other additional information from the phone. The cell phone was then given to the jury to view along with the picture of Martin. Defense counsel did not object to the cell phone being passed from juror to juror to view the photograph on the cell phone display.[2]

{¶ 27} Accordingly, we find that defense counsel's failure to object to the introduction of the cell phone and photographs did not prejudice Martin. Martin

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[2]Tr. 870.

was not prejudiced through an unreliable or fundamentally unfair outcome of the proceeding. There was significant additional information presented by the state at trial that clearly established Martin's guilt beyond a reasonable doubt.

{¶ 28} Martin failed to show that the result of the trial would have been different had his trial counsel objected. We find nothing in the record to demonstrate ineffective assistance of counsel on the part of appellant's trial counsel. The conduct in this case did not constitute a substantial violation of any of defense counsel's essential duties to the client. Furthermore, we find that the record demonstrates that appellant was not prejudiced by counsel.

{¶ 29} Appellant's third assignment of error is overruled.

Allied Offenses of Similar Import

{¶ 30} Under Crim.R. 52, plain errors or defects affecting substantial rights in a criminal case may be raised sua sponte even though not brought to the court's attention. Errors that were not raised in the trial court may be urged for the first time on appeal but only if they constitute plain error of such a nature as to deprive the defendant of a fair trial and cause a miscarriage of justice. *State v. Williams*, 79 Ohio St.3d 1, 1997-Ohio-407.

{¶ 31} Under the rule, the court is not per se required to notice plain error that was not raised in the trial court. The error will be noticed only if it was so egregious as to undermine the fairness of the guilt-determining process,[3] or it is

[3]*State v. Swanson* (1984), 16 Ohio App.3d 375.

clear that, but for the error, the result in the trial court would have been different and disregarding the error would result in a miscarriage of justice.[4]

{¶ 32} Here, sua sponte, this court notes plain error on the part of the trial court. A review of the record shows that the lower court separately sentenced Martin for allied offenses of similar import. In *State v. Cabrales,* 118 Ohio St.3d 54, 886 N.E.2d 181, 2008-Ohio-1625, the Ohio Supreme Court held that possession of drugs in violation of R.C. 2925.11(A) and trafficking in the same drugs in violation of R.C. 2925.03(A)(2) were allied offenses of similar import. Consequently, the trial court could have convicted Martin of only one of these offenses. Instead, the trial court convicted Martin of both offenses and sentenced him to a total of three years in prison.

{¶ 33} The trial court sentenced Martin to two years in prison on Count 1, drug trafficking, and three years in prison on Count 2, drug possession, with the sentences to run concurrent to each other, but consecutive to Martin's conviction of murder with firearm specifications in a different case, CR-490688.

{¶ 34} Accordingly, we sua sponte set aside the multiple sentences imposed for the allied offenses of drug possession and drug trafficking, and remand this case for the trial court to impose sentence on either possession of cocaine in violation of R.C. 2925.11(A) or trafficking in cocaine in violation of R.C. 2925.03(A)(2).

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[4]*State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044.

{¶ 35} Judgment affirmed and case remanded for the limited purpose of re-sentencing.

It is ordered that appellant and appellee split the 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

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

LARRY A. JONES, JUDGE

CHRISTINE T. MCMONAGLE, P.J., and
PATRICIA A. BLACKMON, J., CONCUR