[Cite as *State v. Murphy*, 2010-Ohio-1422.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93093

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

STEVEN MURPHY

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-514459

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

RELEASED: April 1, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Thomas J. Kelly
Kelley and Kelley LLC
11221 Pearl Road
Strongsville, OH 44136

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Erica Barnhill
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 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), or a motion for consideration en banc with supporting brief, per Loc.App.R. 25.1(B)(2), is filed within ten 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. 2.2(A)(1).

CHRISTINE T. McMONAGLE, P.J.:

{¶ 1} Defendant-appellant Steven Murphy appeals from the trial court's judgment, rendered after a bench trial, finding him guilty of drug possession in violation of R.C. 2925.11(A). We reverse and remand this matter to the trial court with instructions to vacate the conviction.

I.

{¶ 2} One witness testified at trial. Cleveland police officer Jeff Weaver testified that at approximately 8:15 p.m. on August 5, 2008, he observed a silver pickup truck operating without a front license plate. He recognized the driver as someone he had arrested previously for possession of crack cocaine. Weaver testified that as soon as he turned on his overhead lights and siren to effectuate a traffic stop, he saw "a lot of movement from the driver and passenger," (later identified as Murphy), who was seated on the passenger side of the front seat. Weaver testified that "the driver appeared to pass something to the passenger," who then made a "very quick deliberate and heated remark to the driver." Weaver said the driver and passenger continued to pass something back and forth.

{¶ 3} When the vehicle stopped, Weaver saw Murphy make "a motion" toward the right side of the truck, and then immediately open the truck door and step out. Murphy returned to the vehicle upon Weaver's order and waited while Weaver arrested the driver. Weaver then asked Murphy to step out of the truck. When Murphy opened the door, Weaver saw two knotted

bags containing an off-white substance in the area between the door frame and the passenger seat where Murphy had been sitting. Weaver testified that the bags were found in the area where he had seen Murphy make a "motion" prior to the first time he exited the vehicle. Murphy told Weaver the substance was crack cocaine and, referring to the driver, stated, "That m-----f----- put that on me. He passed it to me because he said 'I can't be caught with this; hold it.'" The substance was later tested and found to be 1.85 grams of crack cocaine.

{¶ 4} Murphy was indicted on one count of drug trafficking in violation of R.C. 2925.03(A)(2) and one count of drug possession in violation of R.C. 2925.11(A). The trial court dismissed the drug trafficking charge, but found Murphy guilty of drug possession. The court sentenced him to time served and ordered him to pay court costs.[1]

II.

{¶ 5} In his first assignment of error, Murphy challenges the sufficiency of the evidence.

{¶ 6} The test for sufficiency requires a determination of whether the prosecution met its burden of production at trial. *State v. Bowden*, 8th Dist. No. 92266, 2009-Ohio-3598, ¶12. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational

[1]We note that pursuant to our decision in *State v. Eppinger*, 8th Dist. No. 92441, 2009-Ohio-5233, this sentence is contrary to law. However, since we are vacating the conviction, the issue is moot.

trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 7} Under R.C. 2925.11(A), "no person shall knowingly * * * possess * * * a controlled substance." "'Possess' or 'possession' means 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." R.C. 2925.01(K).

{¶ 8} Murphy argues that his conviction was based upon insufficient evidence because there was no evidence that he knowingly possessed or controlled the crack cocaine. We agree.

{¶ 9} The evidence was unrebutted that at the time of the stop, the driver of the vehicle attempted to pass the drugs off on Murphy, and that Murphy attempted to pass the drugs back to the driver. When he got out of the car, he told the arresting officer, "That m-----f----- put that on me." The drugs were found on the floor in the area between Murphy's seat and the door. The issue is simply whether Murphy's momentary *involuntary possession* when the drugs were forced on him by the driver was sufficient possession to constitute a violation of R.C. 2925.11(A). In *State v. Johnson* (Jan. 30, 1989), Clinton App. No. 88-02-002, the Twelfth District held in a per curiam opinion that evidence the defendant's possession of a firearm was "unwitting"

or "involuntary" constituted a complete defense to a charge that the defendant "knowingly" possessed firearms. Likewise here, all of the evidence, including the testimony of the police officer, indicates that Murphy's possession was involuntary.

{¶ 10} Accordingly, we find that the conviction was not supported by sufficient evidence. Appellant's first assignment of error is sustained; the second assignment of error is overruled as moot. See App.R. 12(A)(1)(c).

III.

{¶ 11} In his third assignment of error, Murphy contends that he was denied his constitutional right to effective assistance of counsel because counsel: (1) advised him to waive a jury trial; (2) stipulated to the nature and weight of the crack cocaine; and (3) pursued a line of questioning on cross-examination that elicited responses reiterating his place in the vehicle, his interaction with the driver, and the exchange of the object between them.

{¶ 12} An attorney is presumed to be competent and to perform his duties ethically and competently. *State v. Lytle* (1976), 48 Ohio St.2d 391, 396, 358 N.E.2d 623. Moreover, this court will not second-guess what could be considered a matter of trial strategy. *State v. Smith* (1985), 17 Ohio St.3d 98, 100, 477 N.E.2d 1128. To establish ineffective assistance of counsel, Murphy must show deficient performance, i.e., performance falling below an objective standard of reasonable representation, and prejudice, i.e., a reasonable

probability that but for counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Sanders*, 94 Ohio St.3d 150, 151, 2002-Ohio-350, 761 N.E.2d 18.

{¶ 13} Murphy has not met his burden. He has pointed to nothing in the record that would suggest that counsel's advice to waive a jury was incompetent, nor how the outcome of the trial would have been different but for the jury waiver. Similarly, he points to nothing that indicates that cross-examining the SIU analyst, instead of stipulating to the lab report, would have yielded a different result at trial. Finally, the scope of cross-examination is a matter of trial strategy and such debatable trial tactics do not establish ineffective assistance of counsel. *State v. Campbell*, 90 Ohio St.3d 320, 2000-Ohio-183, 738 N.E.2d 1178, ¶38.

{¶ 14} We find nothing in this record to indicate ineffective assistance of counsel and, in fact, recognize that trial counsel effectively persuaded the trial court to dismiss the drug trafficking count. Appellant's third assignment of error is overruled.

{¶ 15} Reversed and remanded with instructions to the trial court to vacate the conviction.

It is ordered that appellant recover from appellee 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.

CHRISTINE T. McMONAGLE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
JAMES J. SWEENEY, J., CONCUR