[Cite as *State v. Thompkins*, 2010-Ohio-151.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92575

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES L. THOMPKINS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED
IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-514366

BEFORE: Stewart, J., Gallagher, A.J., and Celebrezze, J.

RELEASED: January 21, 2010

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), 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).

MELODY J. STEWART, J.:

{¶ 1} Defendant-appellant, James Thompkins, appeals from his convictions on two counts of drug trafficking and one count of possession of drugs. The counts arose in connection with a staged drug buy. Thompkins complains that there is insufficient evidence to prove the essential elements of the charged offenses, the jury verdict is against the manifest weight of the evidence, and that the court should have merged the two offenses for purposes of sentencing. We find that the court erred by failing to merge the conviction for drug possession with his conviction for drug trafficking under R.C. 2925.03(A)(2), but otherwise affirm.

I

{¶ 2} Thompkins first argues that the state failed to offer sufficient evidence to show the essential elements of drug possession and drug trafficking. He claims there was no evidence that he actually possessed any drugs.

A

{¶ 3} When reviewing a claim that there is insufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to determine whether any rational 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, paragraph two of the syllabus.

B

{¶ 4} The state charged Thompkins with a single count of drug possession under R.C. 2925.11(A). That section states: "No person shall knowingly obtain, possess, or use a controlled substance."

{¶ 5} The state's evidence showed that the police had deployed an undercover narcotics detective and support units on Cleveland's west side in response to complaints about drug dealing. The undercover detective testified that he was driving an unmarked car in the subject area when codefendant Amanda Hach waved him over. He asked her if she had any "work," a street euphemism for drugs. Hach told the undercover detective to let her in the car because she knew where they could buy some drugs. They drove about 25 blocks until Hach saw Thompkins. He was on a bicycle, and Hach asked him in "drug parlance" if he could supply them with drugs. Thompkins nodded affirmatively and told the undercover detective to pull his car into an alley. Once the undercover detective did so, Thompkins approached the passenger window and asked what the officer and Hach needed. The officer asked for a "40 spot," indicating that he wished to purchase $40 of crack cocaine. Thompkins then spit something into his hand that the officer said looked like crack cocaine. Hach, however, exited the car claiming that Thompkins was attempting to sell them fake crack cocaine. Thompkins insisted "my stuff is good, it's not fake," but Hach adamantly

insisted that it was fake. Sensing that the situation might become aggravated, the officer had Hach reenter the car and they drove off. Support officers then moved in and arrested Thompkins. The police did not recover any drugs or money from Thompkins during the arrest.

{¶ 6} A rational trier of fact could find that the officer sufficiently described as crack cocaine the object spit from Thompkins's mouth to his hands. The officer's long experience in drug interdiction led him to believe that the object had a color similar to that of crack cocaine. Moreover, Thompkins himself asserted, in response to Hach, that his stuff is good, thus verifying that the object of the transaction was genuine. This evidence was sufficient to establish that Thompkins knowingly possessed a controlled substance.

C

{¶ 7} The state charged two separate counts of drug trafficking under R.C. 2925.03(A)(1) and (A)(2). To prove drug trafficking under R.C. 2925.03(A)(1), the state was required to show that Thompkins knowingly sold or offered to sell a controlled substance.

{¶ 8} A rational trier of fact could have found that Thompkins's acts constituted an offer to sell crack cocaine. When asked if he had any drugs for sale, Thompkins waved the officer and Hach to a side alley. He approached the occupants of the car and asked, "what do you need?" Upon learning that

they wanted a "40 spot," Thompkins spit an object from his mouth to his hand. When challenged on the authenticity of his crack cocaine, he insisted that his product was good. Evidence that Thompkins responded to a request to sell crack cocaine, produced what appeared to be rocks of crack cocaine, and then attested to the authenticity of the crack cocaine, was sufficient to show that he offered to sell crack cocaine for purposes of R.C. 2925.03(A)(1).

D

{¶ 9} Under R.C. 2925.03(A)(2) as charged in count 3, the state had to prove that Thompkins knowingly prepared crack cocaine for shipment or delivery with knowledge or having reason to know that the crack cocaine was intended for sale.

{¶ 10} Evidence of Thompkins's knowing preparation of the crack cocaine for shipment or delivery consisted of his act of carrying it in his mouth. The jury could have rationally concluded that Thompkins placed the crack cocaine in his mouth so as to avoid detection as he carried it and better enable him to swallow the drug in the event of being stopped by the police. Given the toxic nature of crack cocaine, *State v. Williams*, Cuyahoga App. No. 83574, 2004-Ohio-4476, at ¶23, the jury could infer that Thompkins risked this personal danger for no other purpose than to transport the crack cocaine for shipment or delivery.

II

{¶ 11} Thompkins's second assignment of error is that the jury's verdict is against the manifest weight of the evidence. He maintains that the police failed to recover any drugs or money from him and that, in any event, Hach claimed that the crack cocaine was not genuine, so the jury lost its way by finding him guilty.

{¶ 12} The manifest weight of the evidence standard of review requires us to review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact 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. Otten* (1986), 33 Ohio App.3d 339, 340. The use of the word "manifest" means that the trier of fact's decision must be plainly or obviously contrary to all of the evidence. This is a difficult burden for an appellant to overcome because the resolution of factual issues resides with the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. The trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶ 13} We reject Thompkins's argument that the jury lost its way by finding him guilty when the police failed to recover any drugs from him. The evidence showed that Thompkins had spit the crack cocaine from his mouth,

and the undercover detective testified that drug dealers commonly hold rocks of crack cocaine in their mouths so that they can swallow the evidence if approached by the police. It was plausible for the jury to assume that the failure to recover crack cocaine from Thompkins resulted from his act of swallowing the crack cocaine when apprehended by the police.

{¶ 14} We likewise reject Thompkins's assertions that the officer lacked credibility in light of Hach's claim that Thompkins had offered fake crack cocaine. While it is true that Hach's position in the car gave her the better view of what Thompkins held in his hand, the officer testified that he saw Thompkins holding something that had the same color as crack cocaine. The officer testified that he had personally made over 100 undercover drug buys, so the jury could reasonably have relied on this experience to find his testimony credible. In any event, even if the officer lacked Hach's view of the crack cocaine, he convincingly testified to Thompkins's repeated assertions that he only sold genuine crack cocaine. Thompkins offered nothing to contradict the officer's testimony. We therefore have no basis for finding that the jury's verdict is against the manifest weight of the evidence.

III

{¶ 15} For his third assignment of error, Thompkins complains that the court erred by failing to merge his convictions for drug possession and drug

trafficking in accordance with *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625.

{¶ 16} R.C. 2941.25 states:

{¶ 17} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶ 18} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them."

{¶ 19} When considering drug possession as an allied offense to drug traffficking under R.C. 2925.03(A), *Cabrales* made a clear distinction between drug trafficking under R.C. 2925.03(A)(1) and (2). The supreme court held that "possession under R.C. 2925.11(A) and trafficking under R.C. 2925.03(A)(1) are not allied offenses of similar import, because commission of one offense does not necessarily result in the commission of the other." Id. at ¶29. To be guilty of possession under R.C. 2925.11(A), the offender must "knowingly obtain, possess, or use a controlled substance." To be guilty of trafficking under R.C. 2925.03(A)(1), the offender must knowingly sell or offer

to sell a controlled substance. Trafficking under R.C. 2925.03(A)(1) requires an intent to sell, but the offender need not possess the controlled substance in order to offer to sell it. Conversely, possession requires no intent to sell. Id.

{¶ 20} On the other hand, the supreme court found the elements of drug possession under R.C. 2925.11(A) and drug trafficking under R.C. 2925.03(A)(2) sufficiently aligned that the commission of drug trafficking under R.C. 2925.03(A)(2) necessarily resulted in the commission of drug possession under R.C. 2925.11(A). It reached this conclusion by noting that:

{¶ 21} "To be guilty of trafficking under R.C. 2925.03(A)(2), the offender must knowingly prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance, knowing, or having reason to know, that the substance is intended for sale. In order to ship a controlled substance, deliver it, distribute it, or prepare it for shipping, etc., the offender must 'hav[e] control over' it. R.C. 2925.01(K) (defining 'possession'). Thus, trafficking in a controlled substance under R.C. 2925.03(A)(2) and possession of that same controlled substance under R.C. 2925.11(A) are allied offenses of similar import because commission of the first offense *necessarily* results in commission of the second." Id. at ¶30 (emphasis sic).

{¶ 22} We therefore sustain the third assignment of error and, in conformity with *Cabrales*, remand the case to the trial court with instructions

to merge the conviction for possession with the conviction for trafficking under R.C. 2925.03(A)(2) as charged in count 2 of the indictment.

{¶ 23} This cause is affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

It is ordered that the parties bear their own 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 Cuyahoga County Court of Common Pleas 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.

MELODY J. STEWART, JUDGE

SEAN C. GALLAGHER, A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR