[Cite as *State v. Jackson*, 2010-Ohio-3500.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93079

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

ELVESTER JACKSON

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-518842

BEFORE: Sweeney, J., Kilbane, P.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: July 29, 2010

FOR APPELLANT

Elvester Jackson, Pro se
Inmate No. A563-602
Mansfield Correctional Institution
P.O. Box 788
Mansfield, Ohio 44901

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Daniel A. Cleary
Assistant Prosecuting Attorney
1200 Ontario Street
Cleveland, Ohio 44113

JAMES J. SWEENEY, J.:

{¶ 1} Defendant-appellant, Elvester Jackson ("defendant"), appeals, pro se, his drug trafficking convictions and accompanying 12-year prison sentence. After reviewing the facts of the case and pertinent law, we affirm.

{¶ 2} Defendant arranged a drug deal, which took place on April 2, 2008, between a man named "Twony" and a man named "De-Bo." Defendant had known De-Bo for years and defendant met Twony while they were both in prison.

Twony picked defendant up in Twony's car, and the two met De-Bo in the parking lot of a Sav-A-Lot store on the 6900 block of Detroit Avenue in Cleveland. Twony gave defendant money to buy between a quarter and a half ounce of crack cocaine. Defendant walked from Twony's car to De-Bo's car. De-Bo gave defendant the drugs and defendant gave De-Bo the money, then returned to Twony's car.

{¶ 3} For setting up the transaction, De-Bo gave defendant $20 and Twony gave defendant $70.[1] Defendant did not think he did anything wrong because he was "just middling the deals" to make money, and not personally providing the buy money or the drugs.

{¶ 4} Unbeknownst to defendant, Twony was working as an informant for the Northern Ohio Law Enforcement Task Force, and was wired with a video camera during the buy. Special Agent Edward Satterfield of the Federal Bureau of Investigation watched live video of the transaction on closed circuit television from a nearby surveillance vehicle. Detective Alvin Dancy of the Cuyahoga County Metropolitan Housing Authority Police Department observed the transaction with binoculars from an undercover vehicle.

{¶ 5} After the transaction, the officers recovered 11.11 grams of crack cocaine from Twony, wrapped in individual baggies, which typically indicates the drugs were prepared for resale.

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[1]According to defendant, Twony gave him $20 before the deal and another $50 after defendant gave Twony the drugs.

{¶ 6} On December 22, 2008, Agent Satterfield and Det. Dancy arrested defendant under a warrant for drug-related offenses. Defendant gave the authorities a statement about his participation in the events that took place on April 2, 2008. Agent Satterfield reduced defendant's statement to writing.

{¶ 7} Defendant was indicted for drug trafficking in violation of R.C. 2925.03(A)(1); drug trafficking in violation of R.C. 2925.03(A)(2); and drug possession in violation of R.C. 2925.11, all of which are second degree felonies. On March 5, 2009, following a bench trial, the court found defendant guilty on all three counts. On March 25, the court merged counts two and three, and sentenced defendant to two six-year terms in prison, to be served consecutively, for an aggregate sentence of 12 years in prison.

{¶ 8} Defendant appeals and raises four assignments of error for our review. The first two assignments of error are interrelated and will be addressed together.

{¶ 9} "I. Trial counsel substantially prejudiced appellant through his deficient performance when not motioning the court to sequester State witnesses from [being] in the courtroom while the other testified.

{¶ 10} "II. Trial counsel substantially prejudiced appellant through his deficient performance when not objecting to inadmissible testimony that significantly damaged appellant's defense."

{¶ 11} Defendant first argues that his counsel was ineffective by not requesting that Det. Dancy be excluded from the courtroom, pursuant to Evid.R.

615, during Agent Satterfield's testimony. Defendant next argues that his counsel was ineffective by failing to object to Det. Dancy's and Agent Satterfield's testimony about the oral statement defendant made to the officers, as well as Agent Satterfield's written report.

{¶ 12} To substantiate a claim of ineffective assistance of counsel, a defendant must demonstrate that (1) the performance of defense counsel was seriously flawed and deficient, and (2) the result of defendant's trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407. In *State v. Bradley*, the Ohio Supreme Court truncated this standard, holding that reviewing courts need not examine counsel's performance if the defendant fails to prove the second prong of prejudicial effect. *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. "The object of an ineffectiveness claim is not to grade counsel's performance." Id. at 143.

{¶ 13} In the instant case, Agent Satterfield was the first witness to testify for the State. Det. Dancy was in the courtroom for defendant's entire trial, and he heard Agent Satterfield's testimony. Pursuant to Evid.R. 615(A), "at the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses * * *." This rule is limited, however, by Evid.R. 615(B), which states in pertinent part that the separation from trial does

not apply to "(2) an officer or employee of a party that is not a natural person designated as its representative by its attorney * * *."

{¶ 14} Ohio courts have applied Evid.R. 615(B)(2) to law enforcement officers: "Therefore, in a criminal prosecution, a representative of the state, for example, a law enforcement officer, may assist the prosecutor during trial and may remain in the courtroom when a separation of the witnesses is ordered." *State v. Massie*, Ottawa App. No. OT-04-007, 2005-Ohio-1678, at ¶11. See, also, *City of Strongsville v. Pfister* (Nov. 19, 1992), Cuyahoga App. No. 63012.

{¶ 15} Defendant's second allegation of ineffective assistance of counsel concerns Agent Satterfield's and Det. Dancy's testimony about statements allegedly made by defendant after his arrest. According to the State, the officers read defendant his rights, and defendant waived them by signing a standard form and agreeing to speak with law enforcement without an attorney present. Agent Satterfield summarized defendant's statement in a typed report, which he used to recall the events during trial.

{¶ 16} Defendant, on the other hand, argues that he did not sign the statement and, although he was informed of his *Miranda* rights, he never waived them. Although unclear from defendant's brief, it appears that he denies making the statements contained in Agent Satterfield's report. Defendant further argues that this summary report confused the jury. To support his argument, defendant cites to Evid.R. 403(A), which states that "[a]lthough relevant, evidence is not

admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury."

{¶ 17} We first note that the instant case was not tried to a jury as defendant opted for a bench trial. The standard of review for admissibility of evidence is abuse of discretion. See *Peters v. Ohio State Lottery Comm*. (1992), 63 Ohio St.3d 296, 587 N.E.2d 290. In *State v. Edwards* (1976), 49 Ohio St.2d 31, 38, 358 N.E.2d 1051, the Ohio Supreme Court recognized a three-part test regarding the admissibility of an accused's statement made during a custodial interrogation: "(1) the accused, prior to any interrogation, was given the *Miranda* warnings; (2) at the receipt of the warnings, or thereafter, the accused made 'an express statement' that he desired to waive his *Miranda* constitutional rights; (3) the accused effected a voluntary, knowing, and intelligent waiver of those rights." (Citing *Miranda v. Arizona* (1960), 384 U.S. 436, 86 S.Ct. 1602, 16 L.E.2d 694.)

{¶ 18} We find nothing in the record to support defendant's argument that he did not sign the form or make the statement. Agent Satterfield testified that, prior to questioning him, defendant read aloud the following provision of the standard form: "I have read this statement of my rights and I understand what my rights are. At this time, I am willing to answer questions without a lawyer present." Agent Satterfield further stated that he and Det. Dancy watched defendant sign the form and date it December 22, 2008 at 1:18 p.m. After this, defendant gave his statement to the officers.

{¶ 19} Accordingly, we cannot say that defense counsel was ineffective in failing to move for a separation of witnesses and failing to object to the admissibility of defendant's statement to law enforcement officials. Defendant's first and second assignments of error are overruled.

{¶ 20} "III. Trial court violated appellant's constitutional right to due process when failing to conduct a voir dire hearing and when the trial court sentenced appellant to consecutive sentences for allied offenses."

{¶ 21} R.C. 2941.25(A) addresses allied offenses, and it states as follows: "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." In *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181, at ¶30, the Ohio Supreme Court held that "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."

{¶ 22} The *Cabrales* court further held that drug trafficking under R.C. 2925.03(A)(1) and drug possession under R.C. 2925.11(A) are not allied offenses.

{¶ 23} In the instant case, defendant was found guilty of and sentenced to six years in prison for drug trafficking in violation of R.C. 2925.03(A)(1). Defendant was also found guilty of drug trafficking in violation of R.C.

2925.03(A)(2) and drug possession in violation of R.C. 2925.11(A) — the court sentenced defendant to six years on each count and then merged these two convictions. The court ran the two six-year prison terms consecutively, for an aggregate sentence of 12 years in prison.

{¶ 24} Therefore, in sentencing defendant, the court followed *Cabrales* and did not impose consecutive sentences for allied offenses. Defendant's third assignment of error is overruled.

{¶ 25} "IV. Appellant's conviction is against the manifest weight of the evidence when the State failed to prove [its] case against appellant beyond any reasonable doubt when asserting and presenting before the court at trial that appellant was paid $50 out [of] $100 buy money whereat [sic] the confidential informant is supposed to have bought 11.11 grams of crack cocaine with only $50."

{¶ 26} The proper test for an appellate court reviewing a manifest weight of the evidence claim is as follows:

{¶ 27} "[T]he appellate court sits as the 'thirteenth juror' and, * * * reviewing the entire record, weighs * * * 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." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387, 678 N.E.2d 541. Determinations of witness

credibility are primarily left to the trier of facts. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212.

{¶ 28} In the instant case, there is evidence in the record that Twony was thoroughly searched prior to being wired by the task force and had no drugs or money on his person. Twony's vehicle was searched as well, and no contraband was found. The officers kept their eyes on Twony throughout the transaction. He never left his vehicle, and the only person to get in and out of the car was defendant. When defendant got back in Twony's car at the Sav-A-Lot parking lot, Twony gave defendant $50 for acting as the "middle" in the drug deal.

{¶ 29} Defendant's statement alleged that Twony gave him the buy money, and although defendant did not know the exact amount, he "recalled seeing hundreds of dollars." During trial, Agent Satterfield testified that he did not remember the exact amount of money the task force gave Twony. However, Det. Dancy testified that he "provided the source with $100 of task force funds buy money." This testimony is inconsistent with defendant's statement that the buy money consisted of "hundreds of dollars."

{¶ 30} Inconsistent evidence at trial does not entitle a defendant to a reversal of his or her convictions based on a manifest weight of the evidence argument. A trier of fact is free to believe all, none, or some of a witness's testimony. *State v. Antill* (1964), 176 Ohio St. 61, 197 N.E.2d 548. No evidence was presented at the trial court level regarding the street value of 11.11

grams of crack cocaine, nor was there evidence of how much money defendant handed to De-Bo. On appeal, defendant argues that to believe someone bought 11.11 grams of crack cocaine for $50 is "just preposterous"; however, his argument is unsupported by any evidence in the record.

{¶ 31} The video of the events taken from the recording equipment hidden on Twony was played during trial. Defendant is heard instructing his girlfriend to call De-Bo and tell him they are ready. Defendant is seen exiting Twony's car, and as defendant gets back in the car, a bag of packaged crack cocaine can be seen on the video in Twony's hand. Defendant then tells Twony to deal directly with defendant next time, and defendant will get Twony the "better stuff."

{¶ 32} Accordingly, we cannot say that the trier of fact lost its way and created a manifest miscarriage of justice. Defendant's convictions are not against the manifest weight of the evidence and his final assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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 Court of Common Pleas 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.

JAMES J. SWEENEY, JUDGE

MARY EILEEN KILBANE, P.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR