

[Cite as *State v. Bolden*, 2010-Ohio-5761.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92331

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARK BOLDEN

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-513472

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

RELEASED AND JOURNALIZED: November 24, 2010

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COLLEEN CONWAY COONEY, J.:

{¶ 1} Defendant-appellant, Mark Bolden (“Bolden”), appeals his convictions for drug trafficking and possession of criminal tools. We find merit to the appeal and reverse.

{¶ 2} In July 2008, Bolden was indicted on six counts of drug trafficking in violation of R.C. 2925.03(A)(1), which included schoolyard and forfeiture specifications; two counts of possession of drugs in violation of

R.C. 2925.03(A)(2), which also included schoolyard and forfeiture specifications; and one count of possession of criminal tools. The case proceeded to trial at which Bolden’s counsel objected to the State’s use of its three peremptory challenges to strike three African Americans from the jury venire. The trial court overruled the objections, and the following evidence was presented.

{¶ 3} In November 2007, after Cleveland police received complaints of drug activity on and around East 118th Street, several detectives began surveillance on a house on East 118th Street, which was owned by Bolden. Detective Robert McKay, who led the investigation, testified that during the approximately one-month investigation he noticed a pattern of activity wherein codefendants Calina Acree Cayson (“Cayson”) and Chester Brown (“Brown”) would arrive at Bolden’s house daily between 8:00 and 9:00 a.m. They would remain inside Bolden’s house for approximately an hour to an hour and one-half, at which point Brown would exit the house and drive Bolden’s Pontiac Grand Prix around the neighborhood making brief stops.¹ Cayson drove the car in the afternoon, also making brief stops in the neighborhood.

¹ Detective Farid Alim testified that he determined Bolden was the owner of this car by running the license plates through LEADS, a law enforcement database containing vehicle registration information.

{¶ 4} The detectives followed Brown and Cayson and observed them routinely making hand-to-hand transactions with individuals on street corners. Detective McKay testified that he also observed Bolden making hand-to-hand transactions in the late evening. Detective McKay testified that these frequent stops for hand-to-hand transactions are indicative of drug trafficking.

{¶ 5} Bolden was rarely seen driving his car. However, the few times detectives saw Bolden in the car, they observed that the car's temporary tags had been removed and regular license plates had been placed on the vehicle.

{¶ 6} The detectives also noticed that Brown and Cayson stopped at another house located in the 3500 block of East 118th Street several times throughout the day and occasionally overnight. The detectives concluded that this second house was a "stash house" where the defendants stored their drugs. The detectives testified that having such a "stash house" is a common practice in the drug trade and is used to separate themselves from the contraband to make it more difficult for police to find.

{¶ 7} After several weeks of surveillance, the police arranged a controlled purchase, or "buy bust," with a confidential reliable informant ("CRI"). The CRI called Bolden's cell phone and arranged to purchase heroin at the corner of Martin Luther King Boulevard ("MLK") and Dove Avenue.

Brown met the CRI at that location, and the CRI purchased three bags of heroin, which was less than he had ordered. After the exchange, Detective McKay and Detective Farid Alim (“Alim”) followed Brown to Bolden’s residence where he picked up Cayson and then drove to the “stash house.” Meanwhile the CRI received a phone call from Brown who arranged to meet the CRI at the corner of MLK and Dove to sell the remaining bags of heroin. Accordingly, the CRI met Brown at that location and purchased seven more bags of heroin. It was undisputed that the intersection of MLK and Dove Avenue is within 1,000 feet of John Adams High School.

{¶ 8} After this “buy bust,” the Detectives sought and obtained a search warrant to search Bolden’s house located at 3312 East 118th Street. The detectives who executed the search warrant on December 4, 2007 had difficulty entering the house because it was barricaded from the inside. Nevertheless, the detectives managed to enter and search the home in Bolden’s presence and did not find any heroin or contraband. Suspecting the drugs were in the “stash house,” the detectives intentionally discussed, in Bolden’s presence, their plan to search the “stash house” in hopes that, after they left, Bolden would contact Brown and/or Cayson to clear out the house before the detectives arrived.

{¶ 9} When police arrived at the “stash house,” they saw Brown walking down the driveway toward Bolden’s Grand Prix, where Cayson was waiting. When he saw the police, Brown ran away, tossing a backpack to the ground. The police pursued him on foot and eventually arrested him. When they searched the backpack they found a plastic bag containing seven bundles of heroin, hundreds of empty heroin packages, a digital scale, several hundred yellow wax bags, blue heroin wrappers, a measuring spoon, and rubber bands. The police arrested Brown and Cayson and subsequently drove to Bolden’s house where he was also arrested.

{¶ 10} At the close of the State’s case, Bolden moved for acquittal pursuant to Crim.R. 29. After the court denied the motion for acquittal, the jury found Bolden guilty of five counts of drug trafficking and one count of possession of criminal tools. Bolden was sentenced to two years in prison. He raises five assignments of error on appeal.

Sufficiency of the Evidence

{¶ 11} In the first assignment of error, Bolden argues the guilty verdicts should be reversed because they were not supported by sufficient evidence. We agree.

{¶ 12} A challenge to the sufficiency of the evidence supporting a conviction requires a court to determine whether the State has met its burden

of production at trial. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 678 N.E.2d 541. On review for sufficiency, courts are to assess not whether the State's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction. *Id.* 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 13} The jury found Bolden guilty of five counts of drug trafficking in violation of R.C. 2925.03, which provides, in pertinent part:

“(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.”

{¶ 14} Bolden argues there was no evidence linking him to the sale of heroin on November 27, 2007, the date of the “buy bust” with the CRI as alleged in the indictment. Bolden also argues that because the police did not find any contraband in his home on December 4, 2007, there is no evidence that Bolden was engaged in drug trafficking.

{¶ 15} The State's theory of the case was that Bolden worked together with Cayson and Brown in an elaborate drug trafficking operation. The State relies on Detective McKay's testimony that during the month-long surveillance, he saw Bolden making hand-to-hand transactions and picking up suspected shipments of heroin as evidence of Bolden's participation in the scheme. The State also argues there was plenty of circumstantial evidence linking him to the crimes. The State notes that Brown and Cayson came to Bolden's house daily before making what appeared to be drug transactions. Detective McKay testified that drug dealers often store contraband in a separate "stash house" to make it harder for police to find. Brown and Cayson were often seen going to what appeared to be the "stash house" several times a day.

{¶ 16} The State also noted that Bolden rarely drove his own car and whenever he drove his car, the temporary tags that had been on the vehicle were replaced with regular license plates belonging to another individual. The CRI called Bolden's cell phone to arrange the buy. Detective McKay testified that when police executed the search warrant at Bolden's house, the door was barricaded on the inside. He further explained that the inside of Bolden's house was finely decorated with high-end furniture and several plasma TVs, which was highly unusual in that neighborhood. The State

argues that while one of these facts by itself would be insufficient to link Bolden to the crimes, when viewed in their entirety, these facts prove that Bolden engaged in drug trafficking. We disagree. We do not find sufficient evidence in the record linking Bolden to any of the crimes alleged in the indictments. McKay’s testimony that he witnessed Bolden make hand-to-hand transactions in the evenings does not prove he was selling drugs. If the police had searched him when they observed these transactions, there might have been direct evidence of drug dealing. However, without evidence that Bolden was actually trading drugs, this testimony does not establish proof of drug-dealing.

{¶ 17} Similarly, Brown and Cayson’s daily visits to Bolden’s house do not prove that Bolden sold any drugs. The police found absolutely no contraband in Bolden’s house when they executed the search warrant. There is also no evidence linking Bolden to the “stash house.” There was no testimony that anyone ever saw Bolden at the “stash house” or that he owned the “stash house.” Although the CRI called Bolden’s cell phone to arrange the purchase, there is no evidence that the CRI spoke with Bolden. Detective McKay testified that he heard a male voice on the phone but there is no evidence that it was Bolden’s voice. Although drug trafficking may be “sufficiently supported by circumstantial evidence” in some cases, see, *State v.*

Freeman, Cuyahoga App. No. 91842, 2009-Ohio-5218, ¶14, we find the circumstantial evidence in this case too tenuous and, therefore, insufficient to sustain Bolden's convictions.

{¶ 18} Accordingly, the first assignment of error is sustained.

{¶ 19} Having determined that there was insufficient evidence to support Bolden's convictions, the remaining assignments of error, which also challenge the validity of the convictions, are moot.

Judgment reversed. Case remanded to the lower court to vacate the convictions and discharge Bolden.

It is ordered that appellant recover of said 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.

COLLEEN CONWAY COONEY, JUDGE

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