[Cite as *State v. Chandler*, 2011-Ohio-590.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
Nos. 93664 and 93665

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

WILLIAM CHANDLER

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED (NO. 93664)
AND
AFFIRMED (NO. 93665)

Criminal Appeals from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-505120 and CR-509920

BEFORE: Boyle, J., Rocco, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: February 10, 2011

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MARY J. BOYLE, J.:

{¶ 1} Defendant-appellant, William Chandler, appeals his convictions and sentence in two cases: Case No. CR-505120 and Case No. CR-509920. This court has consolidated the appeals. After reviewing the record and pertinent law, we affirm the judgment in Case No. CR-505120, but reverse and remand the judgment in Case No. CR-509920 solely for the

trial court to hold a new sentencing hearing at which the state must elect which allied offense it will pursue against Chandler.

Procedural History for Both Cases

{¶ 2} In November 2007, the grand jury indicted Chandler in Case No. CR-505120 on five counts: drug trafficking, in violation of R.C. 2925.03(A)(2); drug possession, in violation of R.C. 2925.11(A); carrying a concealed weapon, in violation of R.C. 2923.12(A)(2); having a weapon while under a disability, in violation of R.C. 2923.13(A)(3); and possessing criminal tools, in violation of R.C. 2923.24(A). The drug counts carried firearm and forfeiture specifications, and the remaining counts carried forfeiture specifications. Chandler pleaded not guilty to the charges.

{¶ 3} In March 2008, the grand jury indicted Chandler in Case No. CR-509920 on eight counts: three counts of drug possession, in violation of R.C. 2925.11(A); three counts of drug trafficking, in violation of R.C. 2925.03(A)(2); possessing criminal tools, in violation of R.C. 2923.24(A); and having a weapon while under a disability, in violation of R.C. 2923.13(A)(3). These drug charges also had firearm and forfeiture specifications attached, and the remaining counts carried forfeiture specifications. Chandler pleaded not guilty to the charges, and Case No. CR-509920 proceeded to a jury trial.

{¶ 4} After the state presented its case to the jury in Case No. CR-509920, the trial court granted Chandler's Crim.R. 29 motion as to all firearm specifications and forfeiture

specifications relating to a digital scale, a firearm, and ammunition, all found in the apartment during the search, but not relating to $590 found on Chandler's person. The trial court further granted Chandler's Crim.R. 29 motion with respect to Counts 2, 5, and 8 (all counts relating to PCP possession and trafficking, and having a weapon while under a disability).

{¶ 5} At the close of all the evidence, the jury found Chandler guilty of Count 1, drug possession (crack cocaine), Count 3, drug possession (marijuana), and Count 4, drug trafficking (crack cocaine), but not guilty of Count 6, drug trafficking (marijuana), and Count 7, possessing criminal tools. As for the remaining forfeiture specifications relating to the $590 found on Chandler's person during the search, the jury found that it was not subject to forfeiture.[1]

{¶ 6} On the day of sentencing in Case No. CR-509920, Chandler withdrew his former not guilty plea in Case No. CR-505120 and pleaded guilty to one count of drug trafficking, with a one-year firearm specification and a forfeiture specification, carrying a concealed weapon, with a forfeiture specification, and having a weapon while under a disability, with a forfeiture specification. One count of drug possession and possessing criminal tools were dismissed.

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[1]Although the jury found that the $590 *was not* subject to forfeiture, the trial court incorrectly stated in the journal entry that the jury found it *was* subject to forfeiture. We will address this issue later in the opinion as it relates to Chandler's arguments regarding sentencing in Case No. CR-509920.

{¶ 7} Immediately following the plea hearing, the trial court held a sentencing hearing for both cases. In Case No. CR-509920, the trial court sentenced Chandler to a total of five years in prison: five years on Counts 1 and 4, and three years on Count 3. The court then ordered that "counts to run concurrent with each other, and concurrent with Case CR-505120." Five years of postrelease control was also part of this sentence.

{¶ 8} In Case No. CR-505120, the trial court sentenced Chandler to a total of three years in prison: one year for the firearm specification, "to be served prior to and consecutive with" two years for drug trafficking, 18 months for carrying a concealed weapon, and two years for having a weapon while under a disability. The trial court then ordered that "counts to run concurrent with each other, and with Case CR-509920." The trial court further ordered that Chandler forfeit $1,238, $589, and a gun. Three years of postrelease control was also part of this sentence.

{¶ 9} Chandler appealed both cases, and this court consolidated the appeals. In Case No. CR-505120, he raises two assignments of error relating to his plea. In Case No. CR-509920, he raises nine assignments of error relating to his jury trial, conviction, and sentence.[2] We will address these nine assignments of error first, and then address his two arguments relating to his plea.

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[2]His brief indicates that he is only raising eight assignments of error, but it is actually nine. The assignments are misnumbered after the sixth assignment of error, which we have corrected to

I. Assignments of Error for Case No. CR-509920

{¶ 10} "[1.] There was insufficient evidence to convict the defendant of any of the crimes of conviction because a reasonable juror could not conclude beyond a reasonable doubt that the defendant possessed the drugs found on the balcony porch.

{¶ 11} "[2.] The verdict was against the manifest weight of the evidence.

{¶ 12} "[3.] The trial court plainly erred when it instructed the jury that the possession of a substance was established if the defendant were proven to have knowledge that the substance was located on premises over which a defendant had control.

{¶ 13} "[4.] The trial court abused its discretion when it failed to allow the defense to file a motion to suppress immediately after the defense learned that a Fourth Amendment violation had taken place.[3]

{¶ 14} "[5.] The trial court plainly erred when it permitted the state to introduce evidence of the suspected but uncharged drug transaction that occurred eight days prior to the offense date in the indictment.

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reflect the actual number.

[3]Chandler withdrew his fourth assignment of error before oral argument and thus, we will not address it.

{¶ 15} "[6.] Mr. Chandler was denied effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10, of the Ohio Constitution.

{¶ 16} "[7.] Counts one and four alleged allied offenses of similar import for which the defendant could only have been convicted of one offense.

{¶ 17} "[8.] The trial court denied Mr. Chandler due process of law when it sentenced him under the mistaken belief that the sentences in CR-50[9]920 and CR-505120 could be ordered to run concurrently.

{¶ 18} "[9.] The journal entry improperly orders forfeiture."

Jury Trial

{¶ 19} Detective John Hall testified that in March 2008, he received complaints about drug trafficking reportedly taking place out of a house located at East 89th Street in Cleveland. He explained that the house had four separate units, "two in the front, and two in the back," with a common entrance on the side. Because of the complaints, he began surveillance of the house. He said that he observed "moderate foot and vehicle activity," at the location, where people would come, go inside, stay for a short period, and then leave. This activity indicated that "there [was] a possibility that drugs were being sold."

{¶ 20} Based on his observations, Detective Hall arranged for a confidential reliable informant ("CRI") to purchase drugs at the location. The "controlled buy" took place on

March 18, 2008. Detective Hall testified that he observed the CRI approach a man (later identified to be Chandler) and "several other individuals" outside the home. Detective Hall then explained:

{¶ 21} "I observed the CRI and the defendant engage in a conversation. I wasn't privy to that conversation because I just couldn't hear it. The CRI and the defendant entered the common door, the inside of the house and walked up to the second floor. I also observed the defendant and the CRI enter an apartment upstairs in the front of the building. The reason I know that it was that particular apartment is because once the door opened, the light in the kitchen shined on the defendant and the CRI. I couldn't see them as individuals but I could see the silhouettes."

{¶ 22} Detective Hall then testified that the CRI "stayed in the house briefly and then exited through the same kitchen door, walked down the steps and exited from the common doorway on the side and returned directly" to Detective Hall with what appeared to be crack cocaine.

{¶ 23} Detective Hall stated that he continued to monitor the home after the controlled transaction. He observed Chandler "in the area of the arrest location conversing with unknown individuals." He also "observed people, individuals who would come up, converse with the defendant, and then leave shortly thereafter out of the area." Sometimes, "the defendant and these unknown individuals would go — again go inside the apartment

complex." Based on the "controlled buy," as well as continued surveillance of the area, Detective Hall obtained a search warrant on March 21, 2008, for the apartment in question.

{¶ 24} The search warrant was executed on March 26, 2008, by members of the SWAT team, Detective Hall, and other officers. Detective Hall explained how the police entered the apartment:

{¶ 25} "Upon arriving and exiting our vehicles, we walked up to the premises. We identified ourselves as police officers, informing anyone that could hear us that we were the police and we have a search warrant. Knocked on the common door. No answer, boom, SWAT breaks the door in. Proceeds upstairs, all of the time identifying themselves as police officers."

{¶ 26} Detective Hall further explained that "[d]etectives and uniformed officers took up positions and watched the activity that happened around the house." The officers "had the whole house surrounded *** watching for anybody that may come out, or assuring that no one else went in while SWAT was in there."

{¶ 27} Sergeant Michael Baker explained that when he was setting up the perimeter outside the house, he saw Chandler come onto the porch balcony. Sergeant Baker told Chandler to go back inside, and Chandler complied. He did not see Chandler do anything while he was on the porch.

{¶ 28} Once the SWAT team secured the premises, the other officers entered the apartment to execute the warrant. Chandler and several other individuals were present.

{¶ 29} The officers found and confiscated a digital scale in the bedroom, which later tested positive for marijuana and cocaine residue. They found a small amount of marijuana on the coffee table, later confirmed to be 1.15 grams of marijuana. They found 6.03 grams of PCP in the freezer, along with eye droppers and vials testing positive for PCP. They also found a "red purse type bag" on the porch balcony of the apartment. In the red purse was 363.22 grams of marijuana, wrapped in six smaller, "knotted" bags, and 67.56 grams of crack cocaine that was separated into two larger bags, with 37 individually wrapped smaller bags. The officers further found a semiautomatic gun in the bedroom, a "magazine" with bullets in it on the kitchen table, and $590 on Chandler's person.

{¶ 30} Detective Hall explained that several people were initially arrested with Chandler. But they were not charged because "[t]he only constant or common denominator that was there on all of the occasions, when [he] did the surveillance and whatnot was [Chandler]." Detective Hall said that he had seen Chandler at the location "initially at the sale, after the sale I did surveillance and again observed the defendant there, as well as several different males. And at the time of the execution of the search warrant, Mr. — the defendant was also there." Detective Hall had not previously seen the other men who were in the apartment when the search was executed.

{¶ 31} Detective Hall further testified that he learned from his investigation that Chandler lived at the apartment with his girlfriend, Rashonda Thomas. Detective Hall confiscated utility bills from the apartment addressed to Thomas.

{¶ 32} On cross-examination, Detective Hall explained that when he conducted the controlled drug transaction, he was the only officer involved. He further testified that he learned Thomas and Chandler were "girlfriend and boyfriend" through the owner of the house.

{¶ 33} The owner (landlord) of the house verified that Rashonda Thomas leased the apartment at issue. He said that he had frequently seen "a few gentlemen in and out of that place," including Chandler. On cross-examination, the owner admitted that he had only seen Chandler actually inside the apartment one time when he was there to repair something. The owner further explained that he only went to the complex two to three times per month.

{¶ 34} As we reviewed in the procedural history, the trial court granted Chandler's Crim.R. 29 motion as to the digital scale, the firearm, and ammunition, and further granted it with respect to all counts relating to the PCP and having a weapon while under a disability.

{¶ 35} Chandler presented two witnesses on his behalf, Earl Greer and Jamar McLemore. McLemore explained that on March 26, 2008, he picked up Greer, Chandler, and another friend, and drove them to the apartment on East 89th Street to watch the Cavs game. McLemore explained that a man named "Ren" lived at the apartment. McLemore

thought that Ren was not there when they arrived because he went "to make a beer run." McLemore said that he had been to Ren's apartment one other time with Chandler to play video games. McLemore also said that he took a small bag of marijuana to the apartment on the day of the search (this was the 1.15 grams of marijuana found on the coffee table).

{¶ 36} Greer testified that he did not know who lived at the East 89th Street apartment and no one told him. Greer agreed that it was odd that when they got there, no one was home and the television was on. Greer and McLemore testified that they had only been at the apartment for about 25 minutes when they heard a "boom." McLemore said that when he heard the "boom," he stood up and looked out "the front porch door." He said that Chandler cracked the porch door open and "stuck his neck out." The police then "kicked" the door to the apartment open a couple of seconds after the boom.

{¶ 37} McLemore said that Chandler lived on West 49th Street with his girlfriend, Kim. Greer testified that McLemore picked Chandler up at a house on West 49th Street. McLemore did not know anyone named Rashonda Thomas. Neither Greer nor McLemore had any prior convictions.

{¶ 38} We will address Chandler's fifth assignment of error first for ease of discussion because it deals with evidentiary issues.

Other-Acts Evidence

{¶ 39} In his fifth assignment of error, Chandler maintains that the trial court erred when it permitted the state to introduce evidence regarding the controlled drug transaction, claiming that it violated Evid.R. 404(B).

{¶ 40} The standard of review regarding the admissibility of any such evidence is abuse of discretion. *State v. Montgomery* (1991) 61 Ohio St.3d 410, 575 N.E.2d 167. But here, Chandler concedes he did not object to this evidence and thus, he argues that it amounted to plain error.

{¶ 41} Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. Plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions. *State v. Waddell*, 75 Ohio St.3d 163, 166, 1996-Ohio-100. Under the plain error doctrine, a trial court's decision will be reversed only in exceptional circumstances to prevent a miscarriage of justice. *State v. Cooperrider* (1983), 4 Ohio St.3d 226, 227, 448 N.E.2d 452.

{¶ 42} With regard to the admissibility of "other acts" evidence, it is well established that evidence tending to prove that the accused has committed other acts independent of the crime for which he is on trial is inadmissible to show that the defendant acted in conformity with his bad character. *State v. Treesh*, 90 Ohio St.3d 460, 482, 2001-Ohio-4, 739 N.E.2d 749. But Evid.R. 404(B) does provide that other-acts evidence

may be admissible when it is offered for some other purpose, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶ 43} Evid.R. 404(B) is in accord with R.C. 2945.59, which states that "[i]n any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant."

{¶ 44} Further, the prior act must be closely related in time and nature to the offense charged. *State v. Burson* (1974), 38 Ohio St.2d 157, 159, 311 N.E.2d 526. If the act is too distant in time or too removed in method or type, it has no probative value. *State v. Henderson* (1991), 76 Ohio App.3d 290, 294, 601 N.E.2d 596. And like all evidence, other-acts evidence is still subject to the limitations provided in Evid.R. 402 and 403; therefore, the proffered evidence must be relevant and its probative value must outweigh its potential for unfair prejudice. *State v. Gaines*, 8th Dist. No. 82301, 2003-Ohio-6855, ¶16.

{¶ 45} Chandler's position at trial, through his two witnesses and his closing argument, was (1) that he did not live at the apartment, nor was Rashonda Thomas — who leased the apartment — his girlfriend; (2) that he had just arrived at the apartment to watch a Cavs game about 20 minutes before the SWAT team entered; (3) that he did not know the drugs were on the porch of the apartment; and (4) that he only looked out onto the porch because he had heard the loud "boom" (of the SWAT team forcing entry into the common side door to the house) and was trying to figure out what caused it. Thus, Chandler directly placed his knowledge and intent — material elements in the case — at issue. The other-acts evidence of the controlled drug purchase was therefore admissible to counter Chandler's position. See *State v. Hagler* (Feb. 19, 1999), 2d Dist. No. 16814 (Evidence that defendant possessed marijuana was admissible to show defendant's knowledge or intent in possessing cocaine when defendant placed his intent at issue, arguing that he was merely an "innocent bystander.").

{¶ 46} Under Chandler's theory, he was an "innocent bystander" in the apartment, with no dominion or control over anything, including the drugs. Under the state's theory, Chandler used the apartment to routinely sell drugs out of it. Thus, Chandler's intent and knowledge were clearly at issue. The other-acts evidence — that eight days before the search, Chandler sold drugs to a CRI from the apartment — was relative and probative to

establishing that Chandler not only had access to the apartment, he had dominion and control over it (and thus, had dominion and control over the drugs on the porch).

{¶ 47} Accordingly, we find that the introduction of the other-acts evidence did not amount to error, plain or otherwise.

{¶ 48} Chandler's fifth assignment of error is overruled.

Sufficiency and Manifest Weight of the Evidence

{¶ 49} In his first and second assignments of error, Chandler argues that his convictions were not supported by sufficient evidence and that they were against the manifest weight of the evidence. He raises the same argument for both and thus, we will address them together.

{¶ 50} When an appellate court reviews a record upon a sufficiency challenge, "'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. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶77, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

{¶ 51} In reviewing a claim challenging the manifest weight of the evidence, "[t]he question to be answered is whether there is *substantial*

evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether 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." (Internal quotes and citations omitted.) *Leonard*, 104 Ohio St.3d at ¶81.

{¶ 52} "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (Cook, J., concurring).

{¶ 53} Chandler was convicted of three charges: possession of cocaine, possession of marijuana, and trafficking cocaine. In each of these convictions, Chandler challenges the element of possession. Specifically, he argues that there was no evidence that he "possessed" the red purse found on the front porch balcony where the marijuana and crack cocaine at issue were found. He maintains that "the evidence in this case did not even establish that [he] was a regular occupant of the apartment," let alone possessed the drugs. We disagree.

{¶ 54} R.C. 2925.01(K) defines possession as, "*** 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."

{¶ 55} Possession can be actual or constructive. *State v. Brown*, 8th Dist. No. 87932, 2007-Ohio-527, ¶7. Actual possession entails ownership or physical control, whereas constructive possession is defined as knowingly exercising dominion and control over an object, even though that object may not be within one's immediate physical possession. *State v. Hankerson* (1982), 70 Ohio St.2d 87, 91, 434 N.E.2d 1362. Here, since the drugs were not found on Chandler's person, the state had to prove that he constructively possessed them.

{¶ 56} The state may show constructive possession — that is dominion and control — of drugs solely by circumstantial evidence. *State v. Trembly* (2000), 137 Ohio App.3d 134, 141, 738 N.E.2d 93. Circumstantial evidence is defined as, "'[t]estimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the facts sought proved. ***'" *State v. Nicely* (1988), 39 Ohio St.3d 147, 150, 529 N.E.2d 1236, quoting Black's Law Dictionary (5th Ed. 1979) 221. Further, circumstantial evidence possesses the same probative value as direct evidence, being indistinguishable as the jury's fact-finding function is concerned. *Jenks*, supra, paragraph one of the syllabus.

{¶ 57} In *State v. Robinson*, 8th Dist. No. 90731, 2008-Ohio-5580, ¶86, this court explained:

{¶ 58} "Although the mere presence of a person at the residence in which contraband is discovered is not enough to support the element of possession, if the evidence demonstrates defendant was able to exercise dominion or control over the illegal objects, defendant can be convicted of possession. *State v. Wolery* (1976), 46 Ohio St.2d 316, 348 N.E.2d 351; *State v. Haynes* (1971), 25 Ohio St.2d 264, 267 N.E.2d 787. Moreover, where a sizable amount of readily usable drugs is in close proximity to a defendant, this constitutes circumstantial evidence to support the conclusion that the defendant was in constructive possession of the drugs. *State v. Benson* (Dec. 24, 1992), 8th Dist. No. 61545; *State v. Pruitt* (1984), 18 Ohio App.3d 50, 480 N.E.2d 499."

{¶ 59} In *Haynes*, a case Chandler cites in support of his position, the Ohio Supreme Court held that owning or leasing a property where contraband is found is insufficient by itself to establish possession, particularly when there are other co-tenants. Id. at 270. In *Haynes*, the defendant, his girlfriend, and three other people all rented the premises where the contraband was found. Additionally, there was uncontroverted testimony that Haynes had left the premises a week before the search following a fight with his girlfriend. The Court held that where defendant is not the only owner or lessee of the property and the contraband is found in an area regularly accessible to the other occupants, without other evidence, this is

insufficient to establish possession in the defendant. Id. There can be no inference of guilt for any specific tenant, because it would require speculation that the defendant was the tenant who constructively possessed the contraband. Id.

{¶ 60} But we find *Haynes* to be distinguishable from this case. In *Haynes*, the only evidence connecting the defendant to the drugs was that he was the lessee of the premises. Further, he was not only absent at the time of the search, he had not occupied the premises for a week prior to the search. But in this case, the state presented sufficient evidence — beyond mere speculation — to establish that Chandler had dominion and control over the drugs.

{¶ 61} The state presented evidence, through Detective Hall's testimony, that although Chandler did not lease the apartment, he lived there with his girlfriend, Rashonda Thomas, who was the lessee.[4] And although there were several other men found in the apartment when the search was executed, there was no other evidence connecting them to the apartment

[4]On cross-examination, however, Detective Hall stated that he learned that Chandler lived there with Thomas, his girlfriend, through the landlord. But the landlord did not testify that Chandler lived there, nor did he state that Chandler and Thomas were boyfriend and girlfriend. But the landlord was not asked those exact questions either. He merely testified that he had seen Chandler around the house ("in and out of that place") and specifically stated that he had seen Chandler inside the house one time. Thus, the landlord's testimony did not contradict Detective Hall's testimony.

or the drugs found on the porch, as there was connecting Chandler to the apartment and drugs.

{¶ 62} The evidence presented in this case, if believed, established that Chandler went onto the front porch of the apartment soon after the police arrived. We can deduce from several officers' testimony that when Sergeant Baker saw Chandler come out onto the porch, the SWAT team had already forcibly entered the common door, causing the loud "boom."[5] Although it is possible that Chandler merely went outside to determine what caused the boom, as he argued at trial, it is equally as probable that he went onto the porch to hide the drugs from the police. Since we must view the evidence in a light most favorable to the prosecution, this was sufficient evidence to establish that he was not only aware of the drugs being on the porch, he had dominion and control over them.

{¶ 63} Detective Hall also testified that eight days before the search, Chandler took a CRI into the apartment and sold him what appeared to be crack cocaine. After the controlled transaction, Detective Hall continued surveillance of the house before obtaining the warrant. Several days before the search, he observed Chandler hanging around outside of the house, and that he saw Chandler go inside the common door of the house with various

[5]Although not considered for purposes of a sufficiency analysis, Chandler's witness also testified that Chandler went to the porch door when he heard the loud boom.

people for brief periods of time, and then come back outside. Detective Hall said this activity indicated to him that drugs were being sold.

{¶ 64} Accordingly, we find the state met its burden of production and presented sufficient evidence, if believed, to establish that Chandler had dominion and control over the drugs and therefore, constructively possessed them.

{¶ 65} We further conclude that Chandler's convictions were not against the manifest weight of the evidence. After reviewing the entire record, weighing all of the evidence, and considering the credibility of witnesses, we find that this was not the exceptional case where 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." *Leonard*, 104 Ohio St.3d at ¶81.

{¶ 66} Chandler's first and second assignments of error are overruled.

Jury Instructions

{¶ 67} In his third assignment of error, Chandler argues that the trial court incorrectly instructed the jury on the meaning of possession. Chandler concedes that he did not object to this instruction at trial, but nonetheless maintains that it amounted to plain error.

{¶ 68} The trial court instructed the jury as follows (emphasis is Chandler's and is the language he is challenging):

{¶ 69} "Possession within the meaning of the law may be either actual or constructive. A person exercises actual possession when he knows he has the thing or substance on or

about his person. Constructive possession is also sufficient to prove possession. Possession may not be inferred from mere access to the thing or substance. However, a person constructively possesses a thing or substance when he knowingly exercises or is able to exercise dominion or control over the thing or substance, *or over the premises on which the thing or substance is found or concealed*, even though the thing or substance is not in his physical possession.

{¶ 70} "*Knowledge of illegal goods on one's property is sufficient to show constructive possession*. However, the mere fact that property is located within the premises under one's control does not, of itself, constitute constructive possession. It must also be shown that the person was conscious of the presence of the object."

{¶ 71} Chandler claims that the trial court erred because it went "beyond" the statutory definition of possession under R.C. 2925.01(K) (set forth in the previous assignment of error). In doing so, he maintains that the state was relieved on "the most crucial aspect" of the case, i.e., "proof of possession." We disagree.

{¶ 72} In *State v. Warren*, 8th Dist. No. 87726, 2006-Ohio-6415, the defendant argued that the jury instruction on possession was "flawed in that the trial court instructed that all that needed to be proved was that [the defendant] had the ability to control 'the premises.'" Id. at ¶28. The defendant further argued that "knowledge and physical access to contraband [were] not enough to establish possession," and "that the instruction effectively

established that the state was required only to prove dominion and control over the vehicle to establish possession." Id.

{¶ 73} This court explained, "[t]he trial court's instruction here substantially complies with that which this court has previously found permissible. See, e.g., *State v. Felder*, 8th Dist. No. 87453, 2006-Ohio-5332; *State v. Powell*, 8th Dist. No. 82054, 2003-Ohio-4936; *State v. Loper*, 8th Dist. Nos. 81297, 81400, 81878, 2003-Ohio-3213. Indeed, courts have recognized that constructive possession can be established by knowledge of an illegal substance or goods and the ability to exercise dominion or control over the substance or the premises on which the substance is found. See *State v. Hankerson* (1982), 70 Ohio St.2d 87; *Powell*, supra; *Loper*, supra." Id. at ¶29.

{¶ 74} Finally, as in *Warren*, the jury instructions here, "when read in their entirety, *** also established that possession may not be inferred solely from mere access to the substance through ownership or occupation of the property in which the substance is found." Id.

{¶ 75} Accordingly, Chandler's third assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 76} In his sixth assignment of error, Chandler maintains that his trial counsel was ineffective for three reasons. His first two reasons are that (1) his counsel was ineffective for failing to object to the jury instruction on possession, and (2) for failing to object to

evidence of the controlled drug transaction. We have already determined that the trial court did not err in both instances and thus, his counsel was not ineffective for failing to object to them. His third reason is that his counsel was ineffective for failing to file a motion to suppress.

{¶ 77} In *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, the Supreme Court of the United States set forth the two-pronged test for ineffective assistance of counsel. It requires that the defendant show (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. The first prong "requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. The second prong "requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable." Id.

{¶ 78} "To establish ineffective assistance of counsel for failure to file a motion to suppress, a defendant must prove that there was a basis to suppress the evidence in question." *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858, at ¶65. For the reasons set forth below, there was no basis to file a motion to suppress in this case and therefore, Chandler's trial counsel was not ineffective.

{¶ 79} Chandler argues that his trial counsel should have filed a pretrial motion to suppress based upon the reasons he set forth in his fourth assignment of error. This court did not address his fourth assignment of error because he withdrew it. But we will address the issue within the context of ineffective assistance of counsel.

{¶ 80} In his fourth assignment, Chandler argued that the trial court erred by not allowing his trial counsel to file a motion to suppress after voir dire had begun. Chandler claimed that the motion to suppress would have been granted because the warrant had not been executed within three days, as required by Crim.R. 41(C). That was his only argument relating to the motion to suppress and thus, that is the only issue we will address.

{¶ 81} According to Crim.R. 41(C), a search warrant "shall command the officer to search, within three days, the person or place named ***." But Crim.R. 45(A) provides:

{¶ 82} "In computing any period of time prescribed or allowed by these rules, by the local rules of any court, by order of court, or by any applicable statute, the date of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the end of the next day which is not Saturday, Sunday, or legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in computation."

{¶ 83} Crim.R. 45(A) applies to computing time for execution of search warrants under Crim.R. 41(C). See *State v. Coleman*, 8th Dist. No. 91058, 2009-Ohio-1611; *State v. Hill*, 2d Dist. No. 18875, 2001-Ohio-7079 (Crim.R. 45(A) "clearly and unambiguously applies" to time computation for search warrants).

{¶ 84} The record reveals that the warrant was issued on March 21, 2008 and executed on March 26, 2008. March 21, 2008, a Friday, would not be included in the time computation. Likewise, Saturday and Sunday, March 22 and 23, would also not be included since the total time allowed is less than seven days. Therefore, only Monday through Wednesday, March 24 through March 26, should be included in the calculation. As a result, the warrant was executed on the third day, which is within the requirement of the rule. Thus, Chandler's trial counsel was not ineffective for failing to file a motion to suppress.

{¶ 85} Chandler's sixth assignment of error is overruled.

Allied Offenses

{¶ 86} In his seventh assignment of error, Chandler argues that the trial court erred when it sentenced him for drug trafficking and drug possession since they are allied offenses. He argues the trial court should have merged them and only sentenced him for one. The state concedes this error and we agree. See *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181.

{¶ 87} The determination of Chandler's guilt for committing the allied offenses remains intact, both before and after the merger of the allied offenses for sentencing. See *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182. This court, however, is required to reverse the judgment of conviction and remand for a new sentencing hearing at which the state must elect which allied offense it will pursue against Chandler. Id., paragraphs one and two of the syllabus. Accordingly, Chandler's seventh assigned error is well taken and sustained.

Remaining Sentencing Issues

{¶ 88} In his final two arguments (what we have called his eighth and ninth assignments of error), Chandler raises other issues relating to sentencing. He first argues that the trial court intended for him to receive an aggregate sentence of five years, including the time he received in Case No. CR-505120. Although the state concedes this error, the record does not support Chandler's argument. From our reading of the sentencing entries in both cases, it appears that the trial court intended to give Chandler a total of six years in prison, including one year for the firearm specification he pleaded guilty to in Case No. CR-505120. And the trial court did not state anything at the combined sentencing hearing that would lead us to believe the trial court only intended Chandler to receive five years in prison. Nonetheless, since we are remanding this case for a new sentencing hearing in Case

No. CR-509920, this issue is moot since the trial court can sentence Chandler to less time if that is what it intended to do.

{¶ 89} We do, however, agree with Chandler, as did the state, that the trial court incorrectly stated in the sentencing entry for Case No. CR-509920 that the jury found Chandler guilty of the offenses *with the forfeiture specifications*. The jury actually found that the $590 *was not subject to forfeiture*.

II. Assignments of Error for Case No. CR-505120

{¶ 90} After Chandler was convicted in Case No. CR-509920, but before he was sentenced, he withdrew his former guilty plea in Case No. CR-505120, and pleaded guilty to three counts: drug trafficking, with a one-year firearm specification and a forfeiture specification; carrying a concealed weapon, with a forfeiture specification; and having a weapon while under a disability, with a forfeiture specification. He raises two assignments of error relating to this plea:

{¶ 91} "[1.] The trial court failed to adequately advise Mr. Chandler of the penalties attendant to his pleas of guilty.

{¶ 92} "[2.] The sentence must be vacated because the trial court failed to correctly advise the defendant regarding the consequences of postrelease control."

Crim.R. 11

{¶ 93} In his first assignment of error, Chandler argues that the trial court erred by not personally informing him of the maximum penalties he could receive by pleading guilty. We disagree.

{¶ 94} Crim.R. 11(C)(2)(a) provides in pertinent part that the court "shall not accept a plea of guilty or no contest without first addressing the defendant personally and *** [d]etermining that the defendant is making the plea voluntarily, with understanding of the nature of the charges and of the maximum penalty involved, and if applicable, that the defendant is not eligible for probation or for the imposition of community control sanctions at the sentencing hearing."

{¶ 95} The requirements of Crim.R. 11(C)(2)(a) are nonconstitutional and thus, this court reviews plea proceedings "to ensure substantial compliance" with this rule. *State v. Esner*, 8th Dist. No. 90740, 2008-Ohio-6654, ¶4. Where "substantial compliance" is required, if, under the totality of the circumstances, it is apparent the defendant subjectively understood the implications of his plea and the rights he was waiving, the plea should not be disturbed on appeal. *State v. Clark*, 119 Ohio St.3d 239, 2008-Ohio-3748, 893 N.E.2d 462, ¶31, citing *State v. Nero* (1990), 56 Ohio St.3d 106, 108, 564 N.E.2d 474. We note further that a defendant who challenges his plea on a nonconstitutional basis must show that he was prejudiced by the court's failure to substantially comply with the rule. *Clark* at ¶ 32, citing

Nero at 108. In order to show such prejudice, the defendant must show that he would not have otherwise entered into the plea. Id.

{¶ 96} At the plea hearing in Case No. CR-505120, the prosecutor explained the terms of the plea to the trial court, as well as the maximum penalty for each offense. The trial court then stated:

{¶ 97} "If the court were to sentence Mr. Chandler to prison today, and we're going to be doing sentencing on 509920 today as well as this case because 509920 contains charges that are felonies of the first degree, Mr. Chandler would be looking at postrelease control at the conclusion of his sentence of five years; and in the event he were to commit an additional felony while on postrelease control, he would be subject to additional incarceration up to one-half of the original sentence imposed; and because all these felonies involve drugs, he would also be subject to a mandatory driver's license suspension of six months to five years; is that correct?"

{¶ 98} The state replied that the court was correct and defense counsel agreed. Defense counsel then explained, "I've advised [Chandler] of the consequences of his plea and each one of his constitutional rights, your Honor. He indicates to me he understands his rights and the consequences and that his plea is forthcoming and voluntary." At that point, the trial court personally addressed Chandler and asked him if he "understood everything that the prosecutor and [his] attorney just said[,]" which Chandler replied that he did. The trial

court then addressed Chandler regarding the effects of the plea and the constitutional rights he was waiving by entering into a plea.

{¶ 99} This court has held that a court must personally "inform the defendant about critical constitutional rights before accepting a plea which waives those rights." *State v. Gibson* (1986), 34 Ohio App.3d 146, 147, 517 N.E.2d 990, citing *State v. Ballard* (1981), 66 Ohio St.2d 473, 423 N.E.2d 115, paragraph one of the syllabus. But with nonconstitutional matters, "the court may properly determine that the defendant understands those other matters from the totality of the circumstances, without informing him about them directly." *State v. Gibson* (1986), 34 Ohio App.3d 146, 147, 517 N.E.2d 990, citing *State v. Rainey* (1982), 3 Ohio App.3d 441, 442, 446 N.E.2d 188; *State v. Stewart* (1977), 51 Ohio St.2d 86, 93, 364 N.E.2d 1163. As long as the court satisfies "*itself* that the defendant knows the maximum penalty applicable to the offense involved." (Emphasis sic.) *Gibson* at 147, citing *State v. Wilson* (1978), 55 Ohio App.2d 64, 65-66, 379 N.E.2d 273; *State v. Telliard* (May 8, 1986), 8th Dist. No. 50417. See, also, *State v. Edwards* (Oct. 28, 1978), 8th Dist. No. 37783 (no error where prosecutor advised defendant about maximum penalty in open court, but court asked defendant if he understood what the prosecutor stated); *State v. Matthews* (Aug. 11, 1977), 8th Dist. No. 36327 (same).

{¶ 100} Here, the trial court asked Chandler if he understood everything his counsel and the prosecutor had stated, including the maximum penalties for each offense.

Chandler replied that he did. Thus, trial court satisfied itself that Chandler understood the maximum penalties involved with each offense. Chandler's first assignment of error regarding his plea is overruled.

{¶ 101} In his second assignment of error, Chandler maintains that the trial court erred in accepting his plea because it failed to fully and correctly explain the consequences of postrelease control.

{¶ 102} R.C. 2929.19(B)(3)(e) provides that if the trial court is imposing a prison term at the sentencing hearing, "the court shall notify the offender that if a period of supervision is imposed following the offender's release from prison, as described in division (B)(3)(c) or (d) of this section, and *if the offender violates that supervision* ***, the parole board may impose a prison term, as part of the sentence, of up to one-half of the stated prison term originally imposed on the offender." (Emphasis added to highlight the language Chandler claims the trial court erred in its colloquy with him.)

{¶ 103} Chandler is correct. At the plea hearing, the trial court informed Chandler that he "would be subject to additional incarceration up to one-half of the original sentence imposed" if *he committed a new felony* while under supervision, not *if he violated the terms of his postrelease control*.

{¶ 104} Nonetheless, we find that while the trial court did not substantially comply with Crim.R. 11, it did partially comply with the rule. See *State v. Stokes*, 8th Dist.

No. 93154, 2010-Ohio-3181, ¶9, citing *Clark* at ¶40. It advised Chandler that he would be subject to five years of postrelease control,[6] and informed him, albeit incorrectly, that there would be consequences if he violated the terms of his postrelease control. Thus, Chandler's plea should only be vacated if he shows that he suffered some prejudice by the court's partial compliance.

{¶ 105} Chandler has not presented any evidence or argument that he would not have entered into the plea agreement, and instead, would have insisted on going to trial if the trial court would have correctly told him the consequences of violating the terms of his postrelease control. Nor does this court find any prejudice apparent on the record. Simply put, Chandler has failed to provide any evidence that his understanding of the consequences of violating postrelease control affected his decision to plead guilty in any way. Without any evidence that "the plea would not otherwise have been made," Chandler has not met his burden of showing prejudice that would necessitate vacating his plea. See, e.g., *State v. Soltis*, 8th Dist. No. 92574, 2009-Ohio-6636, ¶22 (plea not vacated where appellant presented no

[6]Chandler was only subject to three years of discretionary postrelease control for two fourth-degree felonies and one third-degree felony in Case No. CR-505120. Chandler does not raise any argument regarding the trial court's statement as to the amount of postrelease control he would receive. But we note that the trial court informed him that he would be subject to five years of postrelease control at his plea hearing because he was also being sentenced that day for Case No. CR-509920, which did include five years of mandatory postrelease control. Nonetheless, the court's partial compliance at the plea hearing put Chandler on notice that he would be subject to postrelease control.

evidence nor argued that he would not have entered his plea if he had known of the consequences of violating postrelease control); *State v. Alfarano*, 1st Dist. No. C-061030, 2008-Ohio-3476 (no prejudice found and plea not vacated where appellant made no allegation he would not have pled guilty but for the trial court's erroneous advisement that he would be subject to three years of postrelease control, rather than the mandatory five years).

{¶ 106} Chandler's second assignment of error is overruled.

{¶ 107} Judgment in Case No. CR-505120 is affirmed. Judgment in Case No. CR-509920 is reversed and remanded solely for a new sentencing hearing at which the state must elect which allied offense it will pursue against Chandler.

It is ordered that appellant recover of 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. 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.

MARY J. BOYLE, JUDGE

KENNETH A. ROCCO, P.J., and
JAMES J. SWEENEY, J., CONCUR