

[Cite as *State v. James*, 2011-Ohio-1239.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95056

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JOHN JAMES

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-531100

BEFORE: Kilbane, A.J., Blackmon, J., and Sweeney, J.

RELEASED AND JOURNALIZED: March 17, 2011

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MARY EILEEN KILBANE, A.J.:

{¶ 1} Defendant-appellant, John James, appeals from his conviction for drug trafficking. For the reasons set forth below, we affirm.

{¶ 2} On August 14, 2009, Cleveland Police Detective Jeffrey Yasenchack executed an affidavit in support of a search warrant for premises located at 10209 Orleans Avenue. Detective Yasenchack averred that a confidential informant provided information that defendant was selling cocaine from this residence, and a controlled buy of crack cocaine was

made from there. Later that day, the police obtained a search warrant for the premises that was executed on August 19, 2009.

{¶ 3} Following the execution of the warrant, defendant was indicted for one count of drug possession, and one count of drug trafficking, both with one-year firearm specifications, and one count of possession of criminal tools. All three charges set forth specifications for the forfeiture of seven weapons, two scales, and \$80.

{¶ 4} Defendant pled not guilty. On February 22, 2010, he moved to obtain the identity of the State's informant and to suppress the evidence. The grounds set forth in support of the motion to suppress were that "the search warrant was not executed until fifteen days after the controlled purchase. [T]here was no indication that there was continued drug activity originating from the address and, therefore, no probable cause to believe any contraband or evidence of a crime would be found at the location."

{¶ 5} On March 1, 2010, the trial court held a hearing on the motion to suppress. Defendant complained that there was a substantial delay from the point at which the police learned of alleged criminal activity at the residence and the time that they obtained and executed the search warrant. He additionally complained that the warrant was not executed within the time limits set forth in Crim.R. 41 and Crim.R. 45. In opposition, the State asserted that the warrant was executed in a timely fashion since Saturdays and Sundays are to be excluded from the calculation of timeliness. The trial court denied the motion to suppress.

{¶ 6} Proceeding on the motion to reveal the identity of the confidential informant, defendant maintained that the identity had to be disclosed since no police officer witnessed the transaction between the informant and defendant. In opposition, the State argued that the offenses at issue stem from the search and not from the controlled drug buy. The trial court denied the motion to disclose the identity of the informant.

{¶ 7} Defendant waived his right to a jury trial and the matter proceeded to a bench trial later in the afternoon of March 1, 2010. At this time, the prosecuting attorney and counsel for defendant stipulated to the operability of a .38 special Smith & Wesson revolver and a Llama .45 caliber pistol recovered from defendant's home during execution of the search warrant. They also stipulated that a rock-like material recovered from the home weighed 2.73 grams and tested positive for cocaine.

{¶ 8} For its case-in-chief, the State presented testimony from Detectives Michelle Witherspoon and Frank Cusumano.

{¶ 9} Detective Witherspoon testified that she has worked in the narcotics unit for 11 years. She further stated that the unit received complaints of drug activity at the Orleans Avenue residence. On at least five days in August 2009, she and other members of the unit conducted surveillance of the home at the Orleans Avenue residence. Detective Witherspoon observed foot traffic at the residence and also observed defendant entering and exiting the home. The narcotics unit subsequently arranged a controlled drug buy using a confidential

informant (“CI”). During this controlled buy, Detective Witherspoon observed the informant enter the premises and meet with defendant.

{¶ 10} According to Detective Witherspoon, individuals who possess drugs for their personal consumption, as opposed to those who possess drugs for sale, tend to have smaller amounts, generally less than one gram, and also tend to have pipes or other items for smoking.

{¶ 11} Detective Witherspoon stated that the police obtained a warrant to search the premises on August 14, 2009, and was executed on August 19, 2009. The SWAT unit was requested to gain entry for the search warrant and secure the premises. Prior to their entry, the defendant exited the property and drove around the corner. The officers stopped the defendant’s vehicle, brought him back to the Orleans Avenue home, and according to Detective Witherspoon, she and Sergeant Carl Hartman and Detectives Cusumano and Vu Nguyen executed the search warrant. At this time, the officers found a white saucer¹ with two rocks of crack cocaine in a dining room cabinet. Two small scales, the size and type generally used to measure drugs, were found in a kitchen cabinet. A loaded .38 caliber Smith & Wesson revolver was found in a kitchen cabinet. A loaded .45 caliber Llama handgun was found in a second floor linen closet. A mag-90 semiautomatic AK with a 30-round magazine was found in the closet of a second floor bedroom. A .45 caliber automatic weapon with a

¹Residue on this saucer weighed .73 grams and tested positive for cocaine.

50-round drum was found in a northeast bedroom. A Mossberg 12 gauge shotgun was found in a closet on the first floor. A loaded Winchester 1300 .12 gauge double-action shotgun was found in a closet in the northeast bedroom closet. A .22 caliber Ruger was also found by Detective Nguyen during the course of execution of the search warrant.

{¶ 12} Detective Witherspoon additionally testified that while the officers prepared their inventory of the items located in the search, they spoke with defendant, who was seated in the kitchen. At this time, according to Detective Witherspoon, defendant stated that he had no money due to child support obligations, and he sold drugs in order to make a living.

{¶ 13} On cross-examination, Detective Witherspoon stated that during the controlled drug buy, she did not see the CI and defendant engage in a hand-to-hand transaction. She also acknowledged that at the time of the execution of the search warrant, defendant's mother and another man and woman were also present in the home. She further admitted that she did not provide defendant with his Miranda warnings, and that defendant told the officers that the weapons in the home belonged to his late father and grandfather.

{¶ 14} Detective Cusumano testified that during the controlled drug buy, the CI was fitted with a listening device, from which Cusumano heard the transaction. Detective Cusumano further testified that he was one of the officers who participated in the execution of the search warrant at the Orleans Avenue home. According to this witness, after the SWAT unit secured the premises, Detective Yasenchack read defendant his Miranda warnings, and the

defendant indicated that he understood them. Detective Cusumano next testified that defendant told the officers that another gun, the .22 Ruger, was beneath a cushion in the couch where defendant was sitting. Detective Cusumano further testified that individuals who sell drugs often possess weapons for protection. Finally, Detective Cusumano testified that he heard defendant state that he had been “making payments on his child support and that’s why he really didn’t have much in the way of drugs around[.]”

{¶ 15} On cross-examination, Detective Cusumano could not recall whether another man was also present with defendant in the home. In addition, this witness admitted that defendant told him that his father had collected weapons. Defendant stated that he had sold drugs in the past but that he no longer does so. Defendant was also offered an opportunity to work as a police informant but stated that he did not have any information about drug activity in the community. Finally, Detective Cusumano stated that defendant’s mother owns the subject premises, but the utilities are in defendant’s name.

{¶ 16} Defendant elected to present only one witness. His mother, Diane James, testified that she is the owner of the Orleans Avenue home. Her husband and children had lived there, but her husband died and the children moved away after they were grown. She now spends most of her time at the home of her friend, and defendant spends the majority of his time with his fiancée at her home.

{¶ 17} At approximately 8:30 p.m., on August 19, 2009, the officers called her and instructed her to come to the home and secure it. At this time, the house had been ransacked, and some items had been damaged. She did not see any drugs in the house, but noticed a number of weapons that had originally belonged to her late husband's father. According to this witness, defendant did not possess these weapons — they simply remained in the house after the death of her husband, and the defendant brought no additional weapons into the home. She stated that to her knowledge, her son does not sell drugs. She further stated that she used one of the scales recovered in this matter for weighing food.

{¶ 18} On cross-examination, she denied telling the officers that her son lives in the house alone. She admitted that the utility bills are in his name, but she maintained that it is her home and defendant is seldom there.

{¶ 19} Defendant was convicted of all charges and specifications. The State subsequently elected to have Count 1 merge into Count 2, and defendant was then sentenced to one year of imprisonment on Count 2, plus a consecutive one-year term for the firearm specification, and a suspended one-year term for Count 3. In addition, defendant was given up to three years of postrelease control and ordered to forfeit the seven weapons, two scales, and \$80.

{¶ 20} Defendant now appeals and assigns four errors for our review.

Assignment of Error One

“The trial court erred when it failed to grant the appellant’s motion to suppress the evidence.”

{¶ 21} Within this assignment of error, defendant contends that the trial court committed plain error in failing to suppress the evidence obtained from the residence because the search warrant issued in this matter was insufficient to establish probable cause that drugs would be found there and set forth stale information.

{¶ 22} With regard to procedure, we note that notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph three of the syllabus.

{¶ 23} We further note that appellate review of a decision on a motion to suppress evidence presents mixed questions of law and fact. *State v. McNamara* (1997), 124 Ohio App.3d 706, 710, 707 N.E.2d 539. A reviewing court must accept a trial court’s factual findings if they are supported by some competent, credible evidence. *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71. As a result, the appellate court must accept the trial court’s findings of fact if they are supported by competent, credible evidence. *Id.* Then, the appellate court must independently determine whether the facts satisfy the applicable legal standard pursuant to a de novo review and without giving deference to the conclusion of the trial court. *Id.*

{¶ 24} In *State v. George* (1989), 45 Ohio St.3d 325, 544 N.E.2d 640, paragraph two of the syllabus, the Supreme Court of Ohio set forth the standard for reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant as follows:

“In reviewing the sufficiency of probable cause in an affidavit submitted in support of a search warrant issued by a magistrate, neither a trial court nor an appellate court should substitute its judgment for that of the magistrate by conducting a de novo determination as to whether the affidavit contains sufficient probable cause upon which that court would issue the search warrant. Rather, the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed. In conducting any after-the-fact scrutiny of an affidavit submitted in support of a search warrant, trial and appellate courts should accord great deference to the magistrate’s determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant.”

{¶ 25} The *George* court further acknowledged:

“The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.” *Id.*, at paragraph one of the syllabus, quoting *Illinois v. Gates* (1983), 462 U.S. 213, 238-239, 103 S.Ct. 2317, 76 L.Ed.2d 527.

{¶ 26} In *Gates*, the court held that a search warrant based on a police officer’s affidavit is legally sufficient if the totality of the circumstances establishes a “fair probability that contraband or evidence of a crime will be found in a particular place.” *Gates* at 238.

{¶ 27} With regard to the issue of whether a warrant has become stale, we note that an affidavit in support of a search warrant must present timely information and include facts so

closely related to the time of issuing the warrant as to justify a finding of probable cause at that time. *State v. Hollis* (1991), 98 Ohio App.3d 549, 554, 649 N.E.2d 11, citing *State v. Jones* (1991), 72 Ohio App.3d 522, 526, 595 N.E.2d 485. There is no arbitrary time limit on how old information can be, but the alleged facts must justify the conclusion that the subject contraband is probably on the person or premises to be searched. Id.

{¶ 28} In this matter, the affidavit stated:

- “1. Affiant avers that within the past two weeks, a confidential informant (CI) provided information to affiant and members of his Unit that crack cocaine was being sold from within the above-described premises by a black male known as ‘John John.’**
- 2. Affiant avers that based upon the information provided by the CI, and through a check with the LEADS and Ohleg systems affiant was able to identify ‘John John’ as John James Jr. Affiant avers that he obtained a copy of John James Jr.’s Ohio Driver’s license picture * * * and showed it to the CI. Affiant avers that the CI confirmed that the male in this photo is the male known to CI as John James Jr.**
- 3. CI informed affiant that target sells crack cocaine and that the CI could make a controlled purchase. Based on this information, it was affiant’s intention to have CI arrange for a purchase of crack from target.**
- 4. Affiant avers that within the past seventy-two hours, the CI was searched for money, drugs, and contraband with negative results, and the CI was provided with CPD buy money, the serial numbers of which had been pre-recorded. CI was also fitted with audio/video recording device.**
- 5. Affiant avers with several detectives assisting in surveillance roles the CI was observed driving to the area of the above-described premises where CI met up with target. After a short greeting, the two males walked to the above-described premises at which time the CI entered**

10209 Orleans Ave. via the side door. After a short time CI exited this house, drove back to the pre-determined location[,] entered affiant's vehicle and handed over a quantity of crack cocaine. CI was searched for money, drugs, and contraband, with negative results. The recording device was recovered from CI.

6. Affiant avers that at all times during surveillance of CI, affiant observed no furtive movements or other suspicious activity and affiant never lost sight of CI on the way to the prearranged location.

* * *

8. Affiant avers that he field tested, using a NIK field test kit, the amount of suspected cocaine which did test positive for the presence of cocaine. * * *.”

{¶ 29} Considering the totality of the circumstances in this matter, we believe the information in the affidavit for the search warrant provided a substantial basis from which the issuing judge could conclude that there was probable cause to believe that evidence of drug possession and drug trafficking would be found at the Orleans Avenue residence. The affidavit contained information that the officers had learned from the CI that defendant sells drugs from the Orleans Avenue residence, and this connotes the concept of an ongoing operation of selling cocaine from that location. The affidavit also set forth information concerning the reliability of the controlled drug buy, and under circumstances that were corroborated through the listening device. The affidavit further indicated that the CI made a controlled purchase of a substance later determined to be cocaine. This evidence was sufficient to demonstrate to the issuing judge that there was a “fair probability” that

contraband or evidence of a crime as described in the affidavit would be found in that location.

Accord *State v. Turner*, Cuyahoga App. No. 92966, 2010-Ohio-1205 (information from a CI concerning defendant's drug sales out of his house, coupled with a controlled buy, was sufficient to establish that the issuing judge had a substantial basis for concluding that there was probable cause for the search).

{¶ 30} We further reject defendant's claim that the affidavit and search warrant became stale during the time period from the controlled buy to the execution of the search warrant.

{¶ 31} In *State v. Jones* (1991), 72 Ohio App.3d 522, 526, 595 N.E.2d 485, the court noted that although an affidavit for a search warrant must present timely information, there is no arbitrary time limit on how old information can be. Rather, the key consideration is whether the alleged facts must justify the conclusion that the subject contraband is probably on the person or premises to be searched. *Id.*

{¶ 32} In *State v. Coleman*, Cuyahoga App. No. 91058, 2009-Ohio-1611, this court rejected a staleness challenge premised upon a 72-hour delay from the informant's drug purchase to the signing of the search warrants. This court concluded that because the affidavit was based upon ongoing criminal activity, the short delay was insubstantial, and the affidavit still set forth probable cause to believe that there was a fair probability that contraband or evidence would be found. *Id.*, citing to *State v. Bailey*, Butler App. No. CA2002-03-057, 2003-Ohio-5280.

{¶ 33} The *Coleman* court also concluded that the lapse of eight days from the signing of the search warrant to its execution was insubstantial because the affidavit was also based on “ongoing criminal activity,” and there was a fair probability that contraband or evidence would be found. *Id.*, citing *State v. Proffit*, Fairfield App. No. 07CA36, 2008-Ohio-2912, at ¶20.

{¶ 34} In accordance with the foregoing, the trial court did not commit plain error in failing to suppress the evidence obtained in this matter. The affidavit contains sufficient probable cause and provided the issuing judge with a substantial basis for concluding that there was probable cause for the search. The search was not the result of stale information as the affidavit was based on ongoing criminal activity and there was evidence to support the conclusion that a fair probability existed that contraband and other evidence was presently located at the residence.

{¶ 35} This assignment of error is without merit and overruled.

Assignment of Error Two

“The trial court erred when it denied the appellant’s motion to disclose the identity of the informant which was material to the defense.”

{¶ 36} A trial court’s decision regarding the disclosure of a confidential informant’s identity will not be reversed on appeal absent an abuse of discretion. *State v. Bays*, 87 Ohio St.3d 15, 1999-Ohio-216, 716 N.E.2d 1126. An abuse of discretion means more than a mere error of law or judgment; it implies an attitude on the part of the trial court that is arbitrary,

unreasonable, or unconscionable. *State v. Feltner* (1983), 87 Ohio App.3d 279, 282, 622 N.E.2d 15, citing *State v. Adams* (1980), 62 Ohio St.2d 151, 404 N.E.2d 144.

{¶ 37} The defendant bears the burden of establishing the need for disclosure. *State v. Parsons* (1989), 64 Ohio App.3d 63, 580 N.E.2d 800. An informant's identity must be revealed to a criminal defendant where the informant's testimony is (1) vital to establishing an element of the crime, or (2) helpful or beneficial to the accused in the preparation of a defense. *Feltner*, citing *State v. Butler* (1984), 9 Ohio St.3d 156, 459 N.E.2d 536; *State v. Williams* (1983), 4 Ohio St.3d 74, 446 N.E.2d 779. Where the informant acts as a mere tipster and provides only initial, introductory information to the government agents rather than information concerning the crimes charged in the indictment, disclosure is not warranted. *Parsons*. Moreover, the mere possibility that the informant might somehow be of some assistance in preparing the case is not sufficient to satisfy the test that the testimony of the informant would be helpful or beneficial to the accused in preparing or making a defense to criminal charges. *Id.*

{¶ 38} In this matter, we find no abuse of discretion. The testimony of the CI is not vital to establishing any element of the crimes for which the defendant was charged. The CI participated in a controlled buy that was observed by a detective who then prepared a search warrant. Following the execution of that warrant, defendant was charged with drug possession and drug trafficking in connection with the drugs found during the search, and

possession of criminal tools in connection with the contraband found during the execution of the warrant. The drugs obtained from the CI during the controlled buy were not the subject of any charges herein, so his identity was not vital to establishing any element of the offenses and was not helpful or beneficial in the preparation of a defense. There was therefore no basis for disclosure of the identity of the informant, and we find no abuse of discretion.

{¶ 39} This assignment of error is without merit and overruled.

Assignment of Error Three

“The evidence was insufficient as a matter of law to support a finding beyond a reasonable doubt that appellant was guilty of drug trafficking.”

{¶ 40} Sufficiency is the legal standard that is applied to determine whether the case may go to the jury or whether the evidence is adequate to support the jury verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541. When reviewing the sufficiency of the evidence to support a criminal conviction,

“[a]n appellate court’s function * * * is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt. 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.

{¶ 41} Defendant maintains that the State failed to establish that he prepared for shipment, shipped, transported, delivered, prepared for distribution, or distributed a controlled

substance, as required under R.C. 2925.03(A)(2), because no other illegal substances were found in the home, there were no packaging materials, and no large sum of money, and the officers did not establish that the CI bought drugs from defendant. The evidence demonstrated that the quantity of drugs found was beyond that typically found for personal consumption. Further, the evidence demonstrated that defendant admitted to selling drugs during execution of the warrant, and scales, weapons, and money that were linked to drug trafficking were also recovered. 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.

{¶ 42} This assignment of error is therefore without merit and overruled.

Assignment of Error Four

“Appellant’s conviction for drug trafficking was against the manifest weight of the evidence.”

{¶ 43} In determining whether a conviction is against the manifest weight of the evidence, the appellate court sits as a “thirteenth juror” and disagrees with the factfinder’s resolution of the conflicting testimony. *State v. Thompkins*, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652. The reviewing court 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.” *Id.*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶ 44} The appellate court may not merely substitute its view for that of the jury, and reversal on manifest weight grounds is reserved for “the exceptional case in which the evidence weighs heavily against the conviction.” *Id.*, quoting *Martin*.

{¶ 45} Defendant contends that the trial court’s determination that he was in possession of the drugs, weapons, and other contraband found at the Orleans Avenue home is against the manifest weight of the evidence. We do not agree. Although defendant maintained that the home is his mother’s, and she is the owner of record, the evidence established that defendant was repeatedly seen coming and going from the residence, and he was observed leaving the premises just before execution of the warrant. The utility bills for the home, which accrue on a monthly basis, are also in his name. Further, although Diane James testified that the weapons originally belonged to her late father-in-law and were then kept by her late husband, the evidence demonstrated that the weapons were placed in easily accessible locations throughout both floors of the house and most were loaded. This is completely inconsistent with the contention that the weapons were simply collected by deceased members of the family. Therefore, after examining the

entire record, weighing the evidence and all reasonable inferences, we are unable to conclude that the jury clearly lost its way and created such a manifest miscarriage of justice in convicting defendant of the offenses.

{¶ 46} This assignment of error is without merit and overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant 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.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, ADMINISTRATIVE JUDGE

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