[Cite as *State v. Bradley*, 2015-Ohio-5421.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102727

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

LARRY BRADLEY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED IN PART,
REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-590429-A

BEFORE: E.T. Gallagher, J., Celebrezze, A.J., and E.A. Gallagher, J.

RELEASED AND JOURNALIZED: December 24, 2015

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EILEEN T. GALLAGHER, J.:

{¶1} Defendant-appellant, Larry J. Bradley ("Bradley"), appeals his convictions and sentence. He raises the following assignments of error for our review:

> 1. The trial court erred in allowing a conviction on Counts 3 and 4 when a conviction was not supported by sufficient evidence.
>
> 2. The trial court erred in allowing a conviction on Counts 6, 7, 8, 9, and 11 when a conviction was against the manifest weight of the evidence.
>
> 3. The trial court erred in imposing postrelease control.
>
> 4. The trial court erred when it did not merge allied offenses of similar import.

{¶2} After careful review of the record and relevant case law, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Procedural and Factual History

{¶3} In October 2014, Bradley was named in a 12-count indictment charging him with two counts of felonious assault in violation of R.C. 2903.11(A)(2), with notice of prior conviction and repeat violent offender specifications (Counts 1 and 2); two counts of failure to comply with the order of a police officer in violation of R.C. 2921.331(B) (Counts 3 and 4);[1] one count of grand theft in violation of R.C. 2913.02(A)(1) (Count 5); one count of drug trafficking in violation of R.C. 2925.03(A)(1) (Count 6); three counts

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[1] Count 3, a felony of the third degree, contains a furthermore specification that the operation of the motor vehicle caused a substantial risk of serious physical harm to persons or property; Count 4, a felony of the fourth degree, contains a furthermore specification that he was fleeing immediately after the commission of a felony.

of drug trafficking in violation of R.C. 2925.03(A)(2) (Counts 7, 9, and 11); and three counts of drug possession in violation of R.C. 2925.11(A) (Counts 8, 10, and 12).

{¶4} At Bradley's jury trial, Detective Lawrence Smith of the Cleveland Police Department testified that he received information from a confidential informant (the "CI") that Bradley was selling drugs near West 117th Street in Cleveland, Ohio. Based on this information, Cleveland police organized a "buy-bust operation."

{¶5} In furtherance of the operation, the CI contacted Bradley to purchase crack cocaine. Det. Smith testified that when the CI arrived to Bradley's location, Bradley and a man, later identified as Wayne Brown, got into the CI's vehicle. The CI then drove around the block and parked in a nearby convenient store parking lot. The CI testified that while he was driving to the convenient store, he purchased crack cocaine from Bradley in exchange for the $40 provided to him by the Cleveland police.

{¶6} Thereafter, the CI got out of his vehicle and gave a signal to the monitoring officers that the drug transaction was completed. At that time, multiple police units surrounded the CI's vehicle with their lights and sirens activated.

{¶7} According to Det. Smith, "the passenger of the vehicle, which is Mr. Bradley, jumped from the passenger seat to the driver's seat, threw the car into reverse, and just jammed the gas to go backwards, almost striking Detective [John] Lally. The back passenger, Mr. Brown, attempted to jump out of the vehicle. While doing so, he was struck by the back door." Det. Smith testified that, pursuant to police protocol, the

officers did not actively pursue Bradley in their patrol vehicles because Bradley's vehicle was being monitored by a police helicopter.

{¶8} Bradley continued to flee from officers without his headlights on despite the fact that this incident occurred at night. Bradley also ran through numerous red lights and stop signs while he was being monitored by the police helicopter. Ultimately, Bradley parked the vehicle and attempted to flee on foot. Officers arrived on location within seconds, and Bradley was arrested without incident.

{¶9} Upon his arrest, Detective Robert Norman patted Bradley down and discovered two individually packaged rocks of crack cocaine and one package of heroin inside his pants pocket. Det. Norman testified that although the drugs were individually packaged, they were stored together inside one large baggie. In addition, Det. Norman recovered a cell phone and $242, which included the marked money used by the CI to purchase crack cocaine from Bradley. Subsequently, the CI provided Det. Lally with the drugs he purchased from Bradley during the drug transaction. Det. Norman testified that the packaging of the crack cocaine sold to the CI was consistent with the packaging of the crack cocaine and heroin discovered on Bradley at the time of his arrest.

{¶10} Following the state's case, the trial court dismissed Count 5 pursuant to Crim.R. 29. At the conclusion of trial, Bradley was found guilty of both counts of failure to comply with the order of a police officer (Counts 3 and 4), each count of drug trafficking (Counts 6, 7, 9, and 11), and each count of drug possession (Counts 8, 10, and 12). The jury found Bradley not guilty of the remaining counts.

{¶11} At sentencing, the trial court merged Counts 3 and 4. The state elected to proceed with sentencing on Count 3, and the trial court imposed a three-year term of imprisonment. With respect to Counts 6 through 12, the court determined that the charges were not allied offenses subject to merger. The trial court imposed a 12-month sentence on each count, to run concurrently to each other but consecutive to Count 3, for an aggregate four-year sentence.

{¶12} Bradley now appeals from his convictions and sentence.

II. Law and Analysis

A. Sufficiency of the Evidence

{¶13} In his first assignment of error, Bradley argues his convictions for failing to comply with the order of a police officer, as charged in Counts 3 and 4 of the indictment, were not supported by sufficient evidence.

{¶14} When reviewing a challenge of the sufficiency of the evidence, a reviewing court examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. "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." *Id.*

{¶15} A sufficiency challenge requires us to review the record to determine whether the state presented evidence on each of the elements of the offense. *State v.*

Martin, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). A reviewing court is not to assess "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997).

{¶16} Bradley was found guilty of failing to comply with the order of a police officer in violation of R.C. 2921.331(B), which provides, "[n]o person shall operate a motor vehicle so as willfully to elude or flee a police officer after receiving a visible or audible signal from a police officer to bring the person's motor vehicle to a stop."

{¶17} In challenging the evidence supporting his failure to comply convictions, Bradley argues the state failed to prove that he was "operating his motor vehicle at the time he received a visible or audible signal from a police officer to bring his motor vehicle to a stop." Bradley submits that the plain language of the statute mandates that, for a violation to occur, "the vehicle must be both in operation and moving when the police issue a visible or audible signal to the driver to bring the vehicle to a stop."

{¶18} We disagree with Bradley's narrow interpretation of R.C. 2921.331(B) and find that the circumstances of this case are analogous to the facts addressed by this court in *State v. Williams*, 8th Dist. Cuyahoga No. 92227, 2009-Ohio-4031. In *Williams*, this court held that there was sufficient evidence to support the defendant's failure to comply conviction under R.C. 2921.331(B) where 1) police detectives identified themselves as the police and told defendant not to start his parked car, 2) defendant looked right at one

of them and drove in reverse and, 3) after crashing, defendant attempted to flee on foot. *Id*. at ¶ 19.

{¶19} As in *Williams*, Bradley was sitting in the CI's vehicle after the drug transaction was completed when several unmarked patrol vehicles pulled behind the CI's vehicle with their flashing lights and sirens activated. For purposes of R.C. 2921.331(B), a police officer makes a visible or audible signal to stop by activating his flashing lights and sirens when following a vehicle. *State v. Garrard*, 170 Ohio App.3d 487, 2007-Ohio-1244, 867 N.E.2d 887, ¶ 29 (10th Dist). Despite these visible and audible signs to remain stopped, the record reflects that Bradley got into the driver's seat of the CI's vehicle, put the vehicle in reverse, and fled from the police until he eventually stopped the vehicle and was arrested while attempting to flee from the police on foot.

{¶20} In our view, this evidence is sufficient to establish beyond a reasonable doubt that Bradley operated a motor vehicle to willfully elude or flee a police officer after receiving a visible or audible signal from police to bring his vehicle to a stop. Further, we note that even if this court were to adopt Bradley's interpretation of R.C. 2921.331(B), Bradley disregards the fact that by "throwing the car in reverse" while the police were behind his vehicle with their overhead lights and sirens activated, he was "operating" a moving vehicle at the time he was receiving a audible and visible signal to bring the vehicle to a stop.

{¶21} Accordingly, Bradley's failure to comply convictions are supported by sufficient evidence. Bradley's first assignment of error is overruled.

B. Manifest Weight of the Evidence

{¶22} In his second assignment of error, Bradley argues his drug trafficking convictions are against the manifest weight of the evidence.

{¶23} In contrast to sufficiency, "weight of the evidence involves the inclination of the greater amount of credible evidence." *Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541. While "sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, * * * weight of the evidence addresses the evidence's effect of inducing belief." *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, citing *Thompkins* at 386-387. The reviewing court must consider all the evidence in the record, the reasonable inferences, and the credibility of the witnesses to determine "'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.'" *Thompkins* at 387, quoting *Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717.

{¶24} We are mindful that the weight to be given the evidence, and the credibility of the witnesses are matters primarily for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact has the authority to "believe or disbelieve any witness or accept part of what a witness says and reject the rest." *State v Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964). "The choice between credible witnesses and their conflicting testimony rests solely with the

finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan*, 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986).

{¶25} Bradley was convicted of one count of drug trafficking in violation of R.C. 2925.03(A)(1) and three counts of drug trafficking in violation of R.C. 2925.03(A)(2). Each count correlated to the separately packaged quantities of crack cocaine and heroin. R.C. 2925.03(A) states:

> No person shall knowingly do any of the following:
>
> (1) Sell or offer to sell a controlled substance or a controlled substance analog;
>
> (2) Prepare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance or a controlled substance analog, when the offender knows or has reasonable cause to believe that the controlled substance or a controlled substance analog is intended for sale or resale by the offender or another person.

{¶26} In challenging the weight of the evidence supporting his trafficking convictions, Bradley argues that the CI was not a credible witness. Bradley contends that the CI's testimony must be called into question where he admitted at trial that his involvement in this case was motivated by his agreement with the police to avoid prosecution for drug possession in exchange for his cooperation in the buy-bust operation. Bradley further argues that the cocaine found on his person "was small and more indicative of personal use than drug trafficking."

{¶27} After careful review of the record, we find this is not the exceptional case where Bradley's conviction must be reversed. While Bradley correctly notes that the police did not personally witness the drug transaction take place, the CI testified that he purchased crack cocaine from Bradley in exchange for the $40 provided to him by the Cleveland police. Further, the CI's testimony was

consistent with that of Det. Norman who testified that the marked money was found in Bradley's possession and that the CI provided Det. Lally with the crack cocaine he had purchased from Bradley.

{¶28} Although Bradley challenges the credibility of the CI, the jury, as the trier of fact, was in the best position to weigh the credibility of the witnesses and was free to give substantial weight to the CI's testimony despite the circumstances that led to his involvement in this matter. Defense counsel cross-examined the CI at length about his self-interests in this case, and the jury was instructed to consider the interests or biases a witness may have when evaluating his or her credibility. Thus, the jury was presented with the relevant information necessary for assessing the CI's credibility and clearly found his testimony concerning the drug transaction to be trustworthy.

{¶29} Moreover, we find credible evidence to support the jury's determination that the drugs discovered in Bradley's possession were intended for sale and were not for Bradley's own personal use. Det. Norman testified that the drugs sold to the CI were packaged in the same manner as the drugs discovered in Bradley's possession. Given the circumstances of the events leading to Bradley's arrest, we find that there was credible evidence for the jury to conclude that the drugs found in Bradley's possession were prepared for distribution.

{¶30} Deferring to the jury, as we must, we are unable to conclude that Bradley's drug trafficking convictions were against the manifest weight of the evidence. Bradley's second assignment of error is overruled.

C. Imposition of Postrelease Control

{¶31} In his third assignment of error, Bradley argues that trial court erred in imposing postrelease control.

{¶32} Pursuant to R.C. 2967.28(C), Bradley was subject to a period of postrelease control of "up to three years." At sentencing, the trial court correctly instructed Bradley that he would be placed on a period of postrelease control for "up to three years upon the completion of the sentences for [his] actions" in Cuyahoga C.P. No. CR-14-590429. However, the sentencing journal entry states that Bradley's three-year period of postrelease control is "mandatory" under R.C. 2967.28.

{¶33} The state concedes that the sentencing journal entry does not reflect the trial court's statements at the sentencing hearing but argues that the clerical error can be corrected by a nunc pro tunc entry. We agree. The Ohio Supreme Court has held that the trial court is authorized to correct a mistake in the sentencing entry by nunc pro tunc entry without holding a new sentencing hearing when a defendant is notified of the proper term of postrelease control at the sentencing hearing and the error is merely clerical in nature. *State ex rel. Womack v. Marsh*, 128 Ohio St.3d 303, 2011-Ohio-229, 943 N.E.2d 1010, ¶ 14. Because Bradley was notified of the proper term of postrelease control at his sentencing hearing and the error was merely clerical in nature, we remand this case for the purposes of correcting the sentencing journal entry by nunc pro tunc entry to reflect what actually occurred at sentencing.

{¶34} Accordingly, Bradley's third assignment of error is sustained.

D. Allied Offenses

{¶35} In his fourth assignment of error, Bradley argues the trial court erred when it did not merge allied offenses of similar import.

{¶36} R.C. 2941.25 codifies the protections of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution, prohibiting multiple punishments for the same offense. R.C. 2941.25 states:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶37} The Ohio Supreme Court identified the proper analysis courts should apply in determining whether the offenses merge or whether the defendant may be convicted of separate offenses under R.C. 2941.25(B):

> A trial court and the reviewing court on appeal when considering whether there are allied offenses that merge into a single conviction under R.C. 2941.25(A) must first take into account the conduct of the defendant. In other words, how were the offenses committed? If any of the following is true, the offenses cannot merge and the defendant may be convicted and sentenced for multiple offenses: (1) the offenses are dissimilar in import or significance — in other words, each offense caused separate, identifiable harm, (2) the offenses were committed separately, and (3) the offenses were committed with separate animus or motivation.
>
> At its heart, the allied-offense analysis is dependent upon the facts of a case because R.C. 2941.25 focuses on the defendant's conduct. The evidence at trial or during

> a plea or sentencing hearing will reveal whether the offenses have similar import. When a defendant's conduct victimizes more than one person, the harm for each person is separate and distinct, and therefore, the defendant can be convicted of multiple counts. Also, a defendant's conduct that constitutes two or more offenses against a single victim can support multiple convictions if the harm that results from each offense is separate and identifiable from the harm of the other offense. We therefore hold that two or more offenses of dissimilar import exist within the meaning of R.C. 2941.25(B) when the defendant's conduct constitutes offenses involving separate victims or if the harm that results from each offense is separate and identifiable.

State v. Ruff, 143 Ohio St.3d 144, 2015-Ohio-995, 34 N.E.3d 892, ¶ 25-26.

{¶38} As stated, Bradley was found guilty of drug trafficking in violation of R.C. 2925.03(A)(1), three counts of drug trafficking in violation of R.C. 2925.03(A)(2), and three counts of drug possession in violation of R.C. 2925.11(A).

{¶39} Pursuant to the standard set forth in *Ruff*, Bradley concedes that his trafficking and possession convictions for heroin (Counts 11 and 12) do not merge with his trafficking and possession convictions for cocaine (Counts 6, 7, 8, 9, and 10). *See State v. Graves*, 12th Dist. Clermont No. CA2015-03-022, 2015-Ohio-3936, ¶ 44 (applying *Ruff* to the trafficking of two different types of drugs.). However, Bradley contends that his trafficking and possession convictions, which correlate to the separately packaged drugs found in his possession, are allied offenses of similar import.

{¶40} Before addressing Bradley's arguments relating to the merger of his trafficking and possession convictions, we note that Bradley's drug trafficking conviction under R.C. 2925.03(A)(1), as charged in Count 6, does not merge with his drug trafficking convictions under R.C. 2925.03(A)(2), as charged in Counts 7, 9, and 11. R.C. 2925.03(A)(1) prohibits the sale of controlled substances, whereas R.C.

2925.03(A)(2) prohibits various acts committed with the intent to sell a controlled substance. Because Bradley's act of selling cocaine to the CI during the buy-bust operation was committed separately from the "preparation" or "transportation" of cocaine and heroin with the intent to sell, Count 6 does not merge with the remaining trafficking counts. Thus, the trial court did not err in imposing a sentence on Count 6.

{¶41} Turning to Bradley's arguments relating to Counts 7 through 12, we agree with Bradley that his possession offenses were committed with the same animus or motivation as his R.C. 2925.03(A)(2) trafficking offenses, i.e. the intent to sell.

{¶42} Prior to the development of the standard set forth in *Ruff*, the Ohio Supreme Court held that drug trafficking in violation of R.C. 2925.03(A)(2) is an allied offense with drug possession in violation of R.C. 2925.11(A). *State v. Cabrales*, 118 Ohio St.3d 54, 2008-Ohio-1625, 886 N.E.2d 181. The *Cabrales* court reasoned that "[t]rafficking 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 under R.C. 2941.25(A), because commission of the first offense necessarily results in commission of the second." *Id*. at paragraph two of the syllabus. We recognize that the rationale set forth in *Cabrales* relied on case law that has since been rendered obsolete. Nevertheless, we find that the conclusion reached by the Ohio Supreme Court in *Cabrales* survives the application of *Ruff*. Significantly, the same cocaine and heroin found in Bradley's pants pocket at the time of his arrest formed the basis for each trafficking and possession offense charged in Counts 7 through 12. In our view, the trafficking and

possession offenses are similar in import, were committed with the same animus, and were not committed separately. *See State v. Colburne*, 9th Dist. Summit No. 27553, 2015-Ohio-4348, ¶ 14 (state conceded similar argument.). Accordingly, we find the trial court erred in sentencing Bradley on each count of possession and R.C. 2925.03(A)(2) trafficking.

{¶43} Furthermore, we find that Bradley's convictions for trafficking cocaine in violation of R.C. 2925.03(A)(2), as charged in Counts 7 and 9, must merge. As stated, Counts 7 and 9 correlated to the two separate quantities of crack cocaine found on Bradley at the time of his arrest. Although separately packaged, the cocaine found in Bradley's possession was stored together, inside one large baggie. Under these circumstances, we are unable to conclude that the trial court was entitled to sentence Bradley separately for each of the individually packaged cocaine rocks, which collectively weighed less than one gram. The subject drugs were being transported at the same time and were discovered in the same location. For these same reasons, Counts 8 and 10, which charged Bradley with possession of cocaine, must also merge together.

{¶44} Based on the foregoing, we find the trial court erred by failing to merge certain counts at sentencing. In total, the trial court was entitled to sentence Bradley separately on three of the seven drug offenses charged in Counts 6, 7, 8, 9, 10, 11, and 12. First, the trial court was entitled to sentence Bradley separately for violating R.C. 2925.03(A)(1). Additionally, the trial court was entitled to sentence Bradley separately for the offenses involving heroin and the offenses involving cocaine. On remand, the

state must elect whether to pursue sentencing on Bradley's R.C. 2925.03(A)(2) trafficking offenses or the possession offenses as charged in Counts 7 and 8, Counts 9 and 10, and Counts 11 and 12. Once the state elects which offense to pursue sentencing on, it must then decide, with respect to the offenses involving cocaine, which individual count of trafficking or possession to pursue for the purposes of sentencing. For example, if the state elects to pursue sentencing on Bradley's R.C. 2925.03(A)(2) trafficking offenses, the trial court may sentence Bradley on Count 11 for his trafficking of heroin, but the state must elect whether to pursue a sentence on either Count 7 or Count 9 for Bradley's trafficking of cocaine.

{¶45} Accordingly, Bradley's fourth assignment of error is sustained.

III. Conclusion

{¶46} Bradley's convictions are supported by sufficient evidence and are not against the manifest weight of the evidence. However, the sentencing journal entry incorrectly states that Bradley's period of postrelease control is mandatory. This error shall be corrected by a nunc pro tunc entry to accurately reflect what the trial court imposed at the sentencing hearing. In addition, the trial court erred by failing to merge certain allied offenses of similar import.

{¶47} Judgment affirmed in part, reversed in part and remanded for the state to elect which of the offenses it wishes to pursue for sentencing, and for the trial court to issue a nunc pro tunc entry to reflect the trial court's imposition of postrelease control at the sentencing hearing.

It is ordered that appellee and appellant share the 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. 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.

EILEEN T. GALLAGHER, JUDGE

FRANK D. CELEBREZZE, JR., A.J., and
EILEEN A. GALLAGHER, J., CONCUR