[Cite as *State v. Hall*, 2016-Ohio-698.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102789

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

STEPHON A. HALL

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART;
REVERSED AND VACATED IN PART

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-14-589749-F

BEFORE: S. Gallagher, J., Jones, A.J., and Celebrezze, J.

RELEASED AND JOURNALIZED: February 25, 2016

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SEAN C. GALLAGHER, J.:

{¶1} Stephon Hall appeals his conviction for trafficking in cocaine, heroin, and marijuana. The trial court sentenced Hall to seven years of prison on the trafficking in heroin count. On the other counts, the court imposed one-year terms of imprisonment each, to be served concurrently to each other and to the seven-year term of imprisonment. In Hall's timely appeal, the crux of his claim focuses on the sufficiency of the evidence. We find some merit to Hall's appeal.

{¶2} In March 2014, Hall drove his girlfriend's Jeep Cherokee to the home of Hall's acquaintance, Rasheed Tutt. Unbeknownst to Hall, the suspected drug house was under surveillance in the anticipation of police officers executing a search warrant in the premises. A confidential informant had notified police officers that a heroin dealer lived at the address and dealt the narcotic through a runner named Josh Miller. The dealer's partner in crime, Rasheed Tutt, also lived at the address. Pictures in the home confirmed that Hall and Rasheed were socially acquainted.

{¶3} About 20 minutes after Hall's arrival, police raided the house and detained the occupants. Hall and several other individuals, including Cecil Alexander, were arrested based on the subsequent search of the interior of the home and the warranted search of Hall's Jeep. Inside the home, as relevant to the current appeal, officers found separate stashes of cocaine (weighing 5-10 grams), heroin (weighing 50-250 grams), and marijuana (weighing less than 200 grams). The cocaine was found in the upstairs of the house, the heroin in the kitchen above the cabinets, and less than 200 grams of marijuana

in the living room where police officers found Hall, alone. A canine alerted officers to the potential narcotics in Hall's Jeep, which was towed pending the issuance of a search warrant based on the canine's reaction to the driver's front door. A significant amount of marijuana was then discovered in a medical bag in the trunk of the Jeep, along with several papers belonging to Hall and $800 in cash.

{¶4} Officers valued the 400 grams of marijuana in the Jeep to be worth between $3,000 and $7,000 on the street. Hall also had over $1,000 cash on him at the time of arrest. According to the officer surveilling the house, Hall drove to and entered the house alone. The defense's witness, Alexander, disagreed. He claimed the marijuana found in the Jeep belonged to him and not Hall, and that both he and Hall arrived together. Alexander testified to buying the half-pound of marijuana for $250 and only for "personal consumption."

{¶5} Hall was convicted of four crimes: trafficking cocaine, heroin, and marijuana — two separate offenses for less than 200 grams of marijuana found in the living room and 400 grams found in the Jeep. Hall timely appealed his conviction.

I. Sufficiency of the Evidence

{¶6} For the sake of simplicity, the cocaine and heroin counts and both marijuana counts will be addressed separately.

Cocaine and Heroin

{¶7} The only assignment of error with respect to the cocaine and heroin convictions that we need to address is whether the convictions for the trafficking in

cocaine and heroin were supported by sufficient evidence. We find neither of those two convictions were. The state failed to introduce any evidence supporting its theory that Hall was either complicit in trafficking heroin and cocaine or exerted constructive possession of those two narcotics to support an inference of trafficking. The state's case on those narcotics was impermissibly built upon proving guilt by association.

{¶8} A claim of insufficient evidence raises the question whether the evidence is legally sufficient to support the verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. In reviewing a sufficiency challenge, "[t]he 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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. There was no direct evidence that Hall trafficked or possessed the cocaine or heroin. Accordingly, the state's theory was that Hall aided and abetted the occupants in their drug dealing pursuit, or constructively possessed the cocaine and heroin to support an inference of trafficking, which was found in other areas of the house.

{¶9} Under the complicity statutes, "no person acting with the kind of culpability required for the commission of an offense, shall * * * [a]id or abet another in committing the offense." R.C. 2923.03(A)(2). In order to support a conviction for complicity by aiding and abetting pursuant to R.C. 2923.03(A)(2), "the evidence must show that the defendant supported, assisted, encouraged, cooperated with, advised, or incited the

principal in the commission of the crime, and that the defendant shared the criminal intent of the principal." *State v. Johnson*, 93 Ohio St.3d 240, 2001-Ohio-1336, 754 N.E.2d 796, syllabus. Although an aider or abettor's shared criminal intent may be inferred from the circumstances surrounding the crime, mere association with the principal offenders or presence at the scene of the crime alone is insufficient to establish complicity. *State v. Sims*, 10 Ohio App.3d 56, 58, 460 N.E.2d 672 (8th Dist.1983).

{¶10} In this case, there is no evidence that Hall frequented the premises or trafficked in any other drug besides marijuana. The original warrant to search the house was issued based on the conduct of the occupants — Tutt, Miller, and Tutt's partner — trafficking in heroin. The confidential informant did not provide any evidence that Hall participated in the drug-house activities. Further, the surveillance only included information relating to the 20 minutes or so preceding the officers' execution of the search warrant. During that time, Hall was only seen entering the premises. No officer witnessed Hall engaging in any criminal activity. And finally, none of the forensic evidence connected Hall to the cocaine or heroin, both of which were found in other areas of the house. The forensic evidence demonstrated that the occupants of the home handled the cocaine and heroin. There was no evidence that Hall aided and abetted the trafficking in cocaine and heroin crimes.

{¶11} In *Sims*, this court concluded a defendant cannot be an aider or abettor unless

> he knowingly does something which he ought not to do, or omits to do something he ought to do, which assists or tends in some way to affect the

> doing of the thing which the law forbids; in order to aid or abet, whether by words, acts, encouragement, support or presence, there must be something more than a failure to object unless one is under a legal duty to object.

Id. at 59. The defendant in *Sims* was a passenger in a stolen vehicle as the driver was stopped by police officers who suspected the theft from the punched-out trunk lock. There was a complete lack of any evidence that the defendant knowingly furthered the theft or retention of the stolen vehicle. Further, the defendant did not have constructive possession of any tools (the stolen license plate, the screwdriver found on the dashboard, or the automobile itself) to support the inference that he actively aided and abetted the theft or retention of stolen property. *Id.*

{¶12} The current case is analogous. The only evidence connecting Hall to the home was his presence and the pictures. There was no dispute that Hall was socially acquainted with Tutt, but such friendship does not establish the requisite intent to aid and abet in a crime just through mere presence and companionship. Merely associating with drug dealers and being present in the house at the time of their arrest is insufficient to sustain a complicity in drug trafficking charge. The state needs to demonstrate some involvement in the enterprise. *Sims*, 10 Ohio App.3d 56, 58, 460 N.E.2d 672 (8th Dist.1983). For instance, in *State v. Johnson*, 93 Ohio St.3d 240, 754 N.E.2d 796 (2001), the Ohio Supreme Court held that the fact that all the occupants of a vehicle were gang members was sufficient to demonstrate complicity when the defendant, for all intents and purposes, was merely present in a vehicle as the others sought out the victim. *Id.* at 244.

Thus, the occupants were not merely socially acquainted, there was a shared criminal background, along with their companionship. *Id*.

{¶13} In this case, there is no evidence of any criminal association between Hall and the occupants of the drug house to support an inference that Hall aided and abetted trafficking in the particular cocaine or heroin seized through the warrant. The state's proof, the pictures, depicted images of Hall and the others at social venues, engaging in social activities. None depicted any criminal behavior, much less evidence supporting the particular allegations. There simply was a lack of evidence of any prior criminal association. Even if we consider Hall's role as a trafficker of marijuana, none of the evidence connected the two, ostensibly separate, drug enterprises.

{¶14} Finally with respect to the cocaine and heroin, the state did not demonstrate that Hall had constructive possession of the cocaine and heroin found in other rooms of the house, in order to support the inference he trafficked in cocaine and heroin. Although the others in the home took responsibility for the cocaine and heroin, it is commonly understood that two or more persons may have joint possession of the same object. *State v. Wilson*, 8th Dist. Cuyahoga No. 102231, 2015-Ohio-4979, ¶ 20, citing *State v. Wharton*, 4th Dist. Ross No. 09CA3132, 2010-Ohio-4775; *State v. Mann*, 93 Ohio App.3d 301, 308, 638 N.E.2d 585 (8th Dist.1993).

{¶15} Possession can either be constructive or actual. *Wilson* at ¶ 10, citing *State v. Brown*, 8th Dist. Cuyahoga No. 87932, 2007-Ohio-527, ¶ 7. "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*, 70 Ohio St.2d 87, 91, 434 N.E.2d 1362 (1982). For example, in *Wilson*, constructive possession was demonstrated by the fact that the narcotics were found hidden in the light fixture of a hotel room occupied by multiple males, including the defendant. *Id.* at ¶ 13. When officers knocked on the door, the occupants jointly waited for over a minute before opening the door of the confined space. During that time, the officers heard the toilet being flushed. *Id.* The investigation revealed the defendant's DNA, among that of others, on the bags holding the narcotics. *Id.* at ¶ 15. Because of the defendant's proximity to the narcotics, in light of the limited space afforded by a single hotel room, and the DNA evidence linking him to the bags of narcotics, the court concluded that the conviction was based on sufficient evidence. *Id.* at ¶ 32.

{¶16} In this case, proximity and forensic evidence are missing. There is no forensic or other evidence demonstrating that Hall handled the cocaine or heroin at any point in time. Further, the state was unable to proffer any evidence that Hall was in close proximity to the narcotics other than the fact he was in the house where the narcotics were found. Unlike in *Wilson*, however, Hall was found in a house with multiple rooms. The cocaine and heroin were discovered in different rooms from where Hall was first detained, and there is no evidence, let alone any suggestion, that Hall was in the kitchen and upstairs bathroom at any point in time.

{¶17} Even if Hall were in the other rooms, access to illicit narcotics alone is not sufficient to demonstrate the requisite dominion and control. *See State v. Haynes*, 25

Ohio St.2d 264, 270, 267 N.E.2d 787 (1971) (mere ownership of or tenancy in a premises where narcotics are found is insufficient in and of itself to demonstrate possession when other persons occupy the property). In this case, not only is the evidence of Hall's proximity or access to the narcotics missing, but there is no other evidence suggesting that he constructively possessed the cocaine and heroin.

{¶18} In light of the facts of this case, we must sustain Hall's assignment of error and reverse his convictions for trafficking cocaine and heroin. The state failed to meet its burden to prove beyond a reasonable doubt that Hall aided and abetted in the cocaine or heroin trafficking crimes.

Marijuana

{¶19} Contrary to the above analysis, there was sufficient evidence to substantiate the two trafficking in marijuana charges, which were based on the less than 200 grams found in the living room of the house and the 400 grams found in Hall's Jeep. As already mentioned, a claim challenging the sufficiency of the evidence ignores the credibility of witnesses and reviews the evidence in a light most favorable to the state. *Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). Accordingly, we need not consider the fact that Hall's codefendant attempted to inculpate himself for the marijuana in the Jeep. The weight of that evidence was best resolved by the jury.

{¶20} In this case, reviewing the evidence in the light most favorable to the state, the surveillance officer saw Hall enter the house alone 20 minutes prior to the execution of the search warrant. The marijuana found in Hall's Jeep was contained in a bag, along

with other personal items identifying Hall as a possessor of the bag. The marijuana in the house was found in the same room where Hall was apprehended. Further, it should be noted that the search warrant was based on some evidence that the owners of the home trafficked in heroin, not marijuana, supporting the reasonable inference that Hall brought the marijuana into the home. Finally, inside the medical bag, along with the marijuana, there were several smaller bags indicating the large quantity of drugs was meant for distribution. As such, Hall's convictions for two counts of trafficking in marijuana are not against the sufficiency of the evidence.

{¶21} We must therefore consider Hall's remaining assignments of error, which challenge (1) the state's line of questioning to Hall's girlfriend and to Alexander about Hall's prior federal drug trafficking conviction, (2) the trial court's denial of Hall's motion for a new trial based on newly discovered evidence, and (3) the trial court's denial of Hall's motion to suppress. Hall also challenged the jury instruction on aiding and abetting; however, that instruction was only relevant to the trafficking in cocaine and heroin convictions. There was circumstantial evidence demonstrating that Hall was the principal actor with respect to trafficking in marijuana. In light of our resolution regarding the cocaine and heroin charges, the assignment of error challenging the aiding and abetting instruction is moot.

II. Prior Bad Acts

{¶22} Hall disagrees with the state having been allowed to question witnesses about Hall's federal trafficking conviction, claiming such evidence was precluded by

Evid.R. 404(B). At trial, however, the defense argued that Hall was on supervision for the federal charges and, therefore, would not associate himself with known drug dealers. During defense counsel's examination of the girlfriend and Alexander, the fact of Hall's federal supervision was mentioned several times. The state elicited the details of his prior conviction in the ensuing cross-examinations. The defense unquestionably "opened the door" to the state's line of questioning, and we need not consider the implications of Evid.R. 404(B). *State v. Greer*, 39 Ohio St.3d 236, 243, 530 N.E.2d 382 (1988); *State v. Moore*, 8th Dist. Cuyahoga No. 80416, 2003-Ohio-1154, ¶ 23.

{¶23} This, of course, leads straight to the question of whether Hall's trial counsel was ineffective for "opening the door" to the state's admission of Hall's prior conviction. In order to substantiate a claim of ineffective assistance of counsel, the appellant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant so as to deprive him of a fair trial. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 98, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Judicial scrutiny of defense counsel's performance must be highly deferential. *Strickland* at 689. The defendant has the burden of proving his counsel rendered ineffective assistance. *State v. Perez*, 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 223.

{¶24} Hall claims that his counsel was deficient because the evidence would not have been admitted but for his counsel's actions. In other words, based on Hall's

arguments, his counsel's performance is per se ineffective because the testimony was inadmissible.

{¶25} The mere fact, however, that defense counsel opened to the door to otherwise inadmissible evidence does not lead to the conclusion that counsel's performance was deficient or that the deficient performance deprived the defendant of a fair trial. *See, e.g., Cleveland v. Amoroso*, 8th Dist. Cuyahoga No. 100983, 2015-Ohio-95, ¶ 19; *State v. Contreras*, 8th Dist. Cuyahoga No. 89728, 2008-Ohio-1413, ¶ 25; *State v. Petit*, 12th Dist. Butler No. CA2009-03-084, 2009-Ohio-6925, ¶ 40. There are tactical reasons to allow inadmissible evidence into the record, and even if counsel's deficient performance is demonstrated for pursuing an ill-advised tactic, the defendant still needs to demonstrate prejudice beyond the mere introduction of otherwise inadmissible evidence. Both prongs must be demonstrated based on the particular facts of the case. Hall's sole contention that his counsel provided ineffective assistance must be overruled.

III. Motion to Suppress

{¶26} Hall next argues that his arrest was without probable cause, and therefore, the evidence obtained through the searches of the house should have been suppressed.

{¶27} "Appellate review of a motion to suppress presents a mixed question of law and fact." *State v. Burnside*, 100 Ohio St.3d 152, 2003-Ohio-5372, 797 N.E.2d 71, ¶ 8. The trial court is the trier of fact and is in the best position to resolve factual and credibility questions. *Id.*, citing *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972

(1992). We must accept the trial court's findings of fact if they are supported by competent, credible evidence. *Id.*, citing *State v. Fanning*, 1 Ohio St.3d 19, 437 N.E.2d 583 (1982). "Accepting these facts as true, the appellate court must then independently determine, without deference to the conclusion of the trial court, whether the facts satisfy the applicable legal standard." *Id.*, citing *State v. McNamara*, 124 Ohio App.3d 706, 707 N.E.2d 539 (4th Dist.1997).

{¶28} The sole issue raised on appeal regarding the suppression motion, as advanced by Hall pursuant to App.R. 16(A)(7), is that the police officers lacked probable cause to arrest him because no evidence connected Hall to the firearms or narcotics found within the home. This argument misses the point. Those items were all seized pursuant to a search warrant, for which Hall happened to be present during the execution of the search. Hall is not disputing that officers could lawfully detain him during that time, nor is he challenging the introduction of the evidence obtained following the warranted search of the Jeep. During the initial detention, and within the scope of the original warrant, a canine indicated the possible presence of drugs within Hall's Jeep, prompting the police to secure the vehicle pending the issuance of another search warrant. Hall's arrest simply did not lead to the discovery of any evidence to be suppressed. All the evidence obtained in this case was the product of search warrants, none of which are contested. Even if Hall was arrested without probable cause, on which we are not rendering any conclusions, the arrest did not poison any of the evidence he sought to suppress. For this reason, the assigned error is overruled.

IV. New Trial

{¶29} Finally, Hall asks this court to reverse the trial court's denial of a motion for a new trial filed pursuant to Crim.R. 33(A). Within this assigned error, Hall contends that the state failed to produce exculpatory or impeachment evidence during discovery in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). We find no merit to Hall's final assignment of error.

{¶30} "'[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 31, ¶ 335, quoting *Brady v. Maryland* at 87. Such evidence includes both exculpatory and impeachment evidence, but the evidence must be material. *Id.*, citing *U.S. v. Bagley*, 473 U.S. 667, 674, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). "Evidence is material within the meaning of *Brady* only if there exists a 'reasonable probability' that the result of the trial would have been different had the evidence been disclosed to the defense." *Id.*, citing *Kyles v. Whitley*, 514 U.S. 419, 433-434, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995).

{¶31} Hall's argument is predicated on a police report from another case. After the surveillance officer witnessed Hall's arrival, about 20 minutes prior to the search of the house, the officer saw an unidentified occupant of the house walk to a car parked in the street to execute a suspected narcotics transaction. That officer then pursued the

vehicle, leading to the police report generated for a case involving the occupants of the car.

{¶32} Hall believes this information to be potential impeachment evidence because according to Hall, the officer testified to doing surveillance on the house for "30 minutes prior to the execution of the search warrant." To the contrary, the officer only testified to seeing Hall enter the house within 20 minutes of the search. Tr. 412-413. Neither the state nor the defense asked whether the officer conducted uninterrupted surveillance during that time. It is not entirely clear how the officer's pursuit of the vehicle would have served to impeach his unequivocal testimony regarding witnessing Hall arrive and enter the premises alone. Further, the surveillance officer noted in the second report that the vehicle was stopped approximately ten minutes before the search of the house was initiated, and after the time frame provided for Hall's solitary arrival. In light of the arguments presented, the second police report is not exculpatory, nor does it offer any basis for impeachment purposes. The second report is consistent with the testimony adduced at trial. Disclosure of the report was not required pursuant to *Brady*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215. Hall's final assignment of error is overruled.[1]

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[1]Hall also raised a *Brady* argument regarding the officer's notation, in the second police report, of being a "reporting officer" or "secondary investigating officer." In addition, Hall summarily concluded that the second police report should be considered "new evidence" for the purposes of Crim.R. 33(A)(6). Hall has not demonstrated how such evidence had any exculpatory or impeachment value, and such a proposition is not self-evident. As a result, neither of those two arguments was supported as required by App.R. 16(A)(7). We, therefore, did not consider the summary conclusions as arguments to be considered on the merits.

{¶33} Hall's convictions for trafficking in heroin and cocaine are reversed and vacated. His convictions for two counts of trafficking in marijuana and the resulting one-year aggregate sentence are affirmed. The case is remanded for the sole purpose of correcting the final judgment of conviction, including amending the term of postrelease control to reflect that which should be imposed for the fourth- and fifth-degree felony charges that were affirmed.

It is ordered that appellee and appellant share 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 further proceedings consistent with this opinion.

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

SEAN C. GALLAGHER, JUDGE

LARRY A. JONES, SR., A.J., and
FRANK D. CELEBREZZE, JR., J., CONCUR