[Cite as *State v. Lloyd*, 2010-Ohio-1037.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24833
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MICHAEL J. LLOYD	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 12 4131

DECISION AND JOURNAL ENTRY

Dated: March 17, 2010

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} Akron police officers Timothy Wypasek and James Donohue stopped Michael Lloyd for driving around a road-closed barrier. Because Mr. Lloyd had one of his windows open even though it was cold, the officers thought that he might have thrown something from his vehicle. After they let him go, they retraced the route he had driven after they started following him. Along the route, they found a bag of cocaine in the middle of the street. A jury convicted Mr. Lloyd of possession of cocaine and tampering with evidence. He has appealed, arguing that the evidence was not sufficient to support his convictions, that his convictions are against the manifest weight of the evidence, that his lawyer was ineffective, and that the trial court incorrectly resentenced him. This Court affirms because there was sufficient evidence to support his convictions, his convictions are not against the manifest weight of the evidence, the record is

not sufficient to determine whether his lawyer's actions were prejudicial, and he did not provide a copy of the sentencing hearing transcript.

FACTS

{¶2} Officers Wypasek and Donohue were on patrol around 11:00 p.m. on December 10, 2008, when they saw Mr. Lloyd drive his sport-utility vehicle around a road-closed barrier that was blocking the southbound lane of Bellows Street. They turned their police cruiser around and drove after him, intending to stop him for driving on a closed road. By the time they caught up to him and activated their emergency lights, Mr. Lloyd was past the construction zone. Instead of stopping right away, he turned right on Steiner Avenue, turned left two blocks later on Andrus Street, and then turned into a driveway, where he stopped.

{¶3} The officers pulled into the driveway and approached Mr. Lloyd. He told them that he did not stop right away because he was near his destination. They looked at the vehicle he was driving and noticed that the driver-side rear window was open. Mr. Lloyd said it was because he had bumped the control switch with his elbow. After the officers learned that Mr. Lloyd had a suspended license, they arrested him. Because he did not have any outstanding warrants, however, they reconsidered after a few minutes and let him go.

{¶4} Because it was unusual for Mr. Lloyd to have a window open on a cold night, the officers decided to retrace his route to see if he had tossed anything out of his vehicle before he stopped. On Bellows Street, two houses from where it intersects with Steiner Avenue, they saw a bag of cocaine in the southbound lane. Suspecting that it was Mr. Lloyd's and that he might come back to retrieve it, they concealed themselves. After about ten minutes, they gave up, and Officer Donohue walked over to retrieve the bag. Just as he was about to pick it up, they saw Mr. Lloyd's vehicle pull up to the intersection at Steiner Avenue with its left turn signal on,

indicating that it was going to turn on Bellows toward where they had found the cocaine. They saw it start to turn down Bellows, but, at the last second, it turned back and continued straight through the intersection.

{¶5} The officers followed Mr. Lloyd's vehicle and stopped it again. This time there was a woman driving it, and Mr. Lloyd was in the passenger seat. He told the officers that they were going to a gas station to buy a product for repairing flat tires. The officers accompanied Mr. Lloyd back to the place where they had left him before and looked at the car that he said had the flat tire. It was a 1984 Chevrolet Caprice with a flat right front tire. The car looked, however, like it had not been driven in a long time and had license plates that had expired in 2004.

{¶6} The Grand Jury indicted Mr. Lloyd for possession of cocaine and tampering with evidence. A jury convicted him on both counts, and the trial court sentenced him to one year in prison. It suspended the prison term on the condition that he complete one year of community control. Ten days later, the court entered an order "nunc pro tunc" that changed the community control term to two years. Mr. Lloyd has appealed his convictions and sentence, assigning three errors.

SUFFICIENT EVIDENCE

{¶7} Mr. Lloyd's first assignment of error is that the evidence presented at trial does not support his convictions. He has argued that there was insufficient evidence to establish each and every element of the offenses beyond a reasonable doubt and that his convictions are against the manifest weight of the evidence. "Inasmuch as a court cannot weigh the evidence unless there is evidence to weigh," this Court will consider his sufficiency argument first. *Whitaker v. M.T. Automotive Inc.*, 9th Dist. No. 21836, 2007-Ohio-7057, at ¶13.

{¶8} Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. This Court must determine whether, viewing the evidence in a light most favorable to the prosecution, it could have convinced the average finder of fact of Mr. Lloyd's guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991).

{¶9} The jury convicted Mr. Lloyd of tampering with evidence and possession of cocaine. Regarding tampering with evidence, Section 2921.12(A)(1) of the Ohio Revised Code provides that "[n]o person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall . . . [a]lter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation." Regarding possession of cocaine, Section 2925.11(A) provides that "[n]o person shall knowingly obtain, possess, or use a controlled substance." "Possess" means "having control over a thing or substance . . . ." Section 2925.01(K). It may be actual or constructive. *State v. McShan*, 77 Ohio App. 3d 781, 783 (1991).

{¶10} The officers testified that they found a bag of cocaine worth a couple hundred dollars in the southbound lane of Bellows Street, two houses down from where it intersects with Steiner Avenue. The bag was not dusty or dirty and had not been run-over. Office Donohue said that, in his twelve years of experience on patrol, he had never seen drugs just lying in the middle of the street, but had been in situations in which he had found drugs after somebody had thrown them out of a vehicle. The officers said that, although they did not know what was happening on Bellows Street while they spoke with Mr. Lloyd after stopping him the first time, it was a quiet night without much vehicle or pedestrian traffic and there were no reports of any other traffic

stops in the area. They also said that they saw Mr. Lloyd start to come back to where the bag was, until he, presumably, saw that they were there. They said that Mr. Lloyd's explanation for why he was going back out after 11:00 p.m. on a cold December evening was to get something to fix a flat tire, even though the car that he said needed the repair had plates that had expired several years ago, a broken window, and appeared not to have been driven in some time.

{¶11} There is no direct evidence that Mr. Lloyd discarded the bag of cocaine in the street. There is enough circumstantial evidence, however, to support his convictions. "Circumstantial evidence and direct evidence inherently possess the same probative value . . . ." *State v. Jenks*, 61 Ohio St. 3d 259, paragraph one of the syllabus (1991). Officer Donohue said that he and Officer Wypasek got behind Mr. Lloyd and activated their emergency lights while Mr. Lloyd was still on Bellows Street, before he turned on Steiner Avenue. The bag of cocaine was found lying in Bellows Street two houses from its intersection with Steiner Avenue. One of the windows of Mr. Lloyd's vehicle was open when they stopped him, even though it was cold. The officers also observed Mr. Lloyd come back to the area where they found the bag approximately ten minutes after they let him go. The bag did not appear to have been in the street for long, and there was very little other traffic in the area that evening. Viewing the evidence in a light most favorable to the State, there was sufficient evidence that Mr. Lloyd had actual possession of the bag of cocaine in his vehicle and that he removed it from the vehicle with an intent to impair its availability as evidence after knowing that a police investigation was in progress or was about to be instituted. To the extent his first assignment of error is that his convictions are not supported by sufficient evidence, it is overruled.

MANIFEST WEIGHT

{¶12} Mr. Lloyd has also argued that his convictions are against the manifest weight of the evidence. If a defendant argues that his convictions are against the manifest weight of the evidence, this Court "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction[s] must be reversed and a new trial ordered." *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986).

{¶13} Although the officers' testimony was enough to support the convictions, the jury had to determine the weight it should be given. A review of the record shows that some of Officer Wypasek's testimony conflicted with Officer Donohue's. For example, Officer Wypasek said that he did not activate the emergency lights on the police cruiser until they were on Steiner, while Officer Donohue said the lights were activated when they were still on Bellows. Officer Wypasek said that, after Mr. Lloyd parked in the driveway, he exited his vehicle. Officer Donohue, however, said that Mr. Lloyd remained in the vehicle when they pulled in the driveway behind him. Officer Wypasek said that, after they arrested Mr. Lloyd and put him in the back of their cruiser, Officer Donohue searched his vehicle. Officer Donohue said that Mr. Lloyd was not arrested and that he did not search his vehicle.

{¶14} The only inconsistency that is particularly relevant regarding the elements of the offenses is whether the officers activated the cruiser's emergency lights while on Bellows Street or Steiner Avenue. If it was not until Steiner Avenue, then it could undermine the State's argument that Mr. Lloyd knew "that an official proceeding or investigation [was] in progress, or

[was] about to be or likely to be instituted . . . .” at the time he removed the bag of cocaine from his vehicle. R.C. 2921.12(A)(1).

{¶15} This Court has reviewed the record and concludes that the jury did not lose its way. It was reasonable for the jury to infer from the officers’ testimony that Mr. Lloyd threw the bag of cocaine from his vehicle window while they were following him and that he attempted to come back soon afterward to retrieve it, but altered his course when he saw that they had found it. It could have determined that the inconsistencies in the officers’ testimony about what happened when Mr. Lloyd stopped his vehicle in the driveway were insignificant. It also could have resolved the inconsistency about when the emergency lights were activated in favor of the State. Even if the jury believed the cruiser’s emergency lights were not activated until Steiner Avenue, both officers testified that they started following Mr. Lloyd on Bellows Street. Since Mr. Lloyd had recently gone around a road-closed barrier, it could have inferred that he saw the cruiser and knew an investigation was about to be initiated, even if the officers had not yet turned on their emergency lights. To the extent Mr. Lloyd’s first assignment of error is that his convictions were against the manifest weight of the evidence, it is overruled.

INEFFECTIVE ASSISTANCE

{¶16} Mr. Lloyd’s second assignment of error is that his trial lawyer was ineffective in violation of his constitutional rights. He has argued that his lawyer should have demanded that the forensic scientist who determined that the substance in the bag was cocaine testify at trial. The forensic scientist’s report was admitted into evidence without objection.

{¶17} To establish that his lawyer was ineffective, Mr. Lloyd “must show (1) deficient performance by counsel, i.e., performance falling below an objective standard of reasonable representation, and (2) prejudice, i.e., a reasonable probability that, but for counsel’s errors, the

proceeding's result would have been different." *State v. Hale*, 119 Ohio St. 3d 118, 2008-Ohio-3426, at ¶204 (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984); *State v. Bradley*, 42 Ohio St. 3d 136, paragraph two of the syllabus (1989)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

{¶18} Mr. Lloyd's argument can not be determined from the appellate record. In order to show that his lawyer's decision was prejudicial, he would have to show that, if the forensic scientist had testified, the report would not have been admitted. There is nothing in the record to suggest that the report is deficient. Instead, Mr. Lloyd's argument is dependent on evidence outside the record. "[A] direct appeal is not the appropriate context to present evidence outside the record." *State v. Souris*, 9th Dist. No. 24513, 2010-Ohio-423, at ¶15 (quoting *State v. Mitchell*, 9th Dist. No. 24730, 2009-Ohio-6950, at ¶20); *State v. Kovacek*, 9th Dist. No. 00CA007713, 2001 WL 577664 at *5 (May 30, 2001). His argument, therefore, is more appropriately made in a petition for postconviction relief because there he could present additional evidence to show that the report would not have been admitted. *Souris*, 2010-Ohio-423, at ¶15. Mr. Lloyd's second assignment of error is overruled.

COMMUNITY CONTROL

{¶19} Mr. Lloyd's third assignment of error is that the trial court incorrectly entered a nunc pro tunc order increasing his community control term from one year to two years without first conducting a hearing under Section 2929.19.1 of the Ohio Revised Code. He has mistakenly confused community control with post-release control.

{¶20} Under Section 2929.13(D)(2) of the Ohio Revised Code, the court may impose a community control sanction instead of a prison term if it finds that certain conditions are present. Post-release control is a period of supervision that a defendant is or can be subject to after he is

released from prison, depending on the level of his offense. See R.C. 2929.14(F); R.C. 2967.28(C), (D). Section 2929.19.1 applies if the sentencing court has not properly imposed post-release control. R.C. 2929.19.1(A)(1). It has nothing to do with community control. See *State v. Singleton*, 124 Ohio St. 3d 173, 2009-Ohio-6434, at ¶23 ("with R.C. 2929.191, the General Assembly has now provided a statutory remedy to correct a failure to properly impose postrelease control.").

{¶21} Mr. Lloyd has also argued that the trial court did not have jurisdiction to reconsider its sentencing entry. Rule 36 of the Ohio Rules of Criminal Procedure provides that "[c]lerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time." "The term 'clerical mistake' refers to a mistake or omission, mechanical in nature and apparent on the record, which does not involve a legal decision or judgment." *State ex rel. Cruzado v. Zaleski*, 111 Ohio St. 3d 353, 2006-Ohio-5795, at ¶19 (quoting *State v. Brown*, 136 Ohio App. 3d 816, 819-20 (2000)). "A *nunc pro tunc* order may be issued by a trial court, as an exercise of its inherent power, to make its record speak the truth." *State v. Greulich*, 61 Ohio App. 3d 22, 24 (1988). "[They] are limited in proper use to reflecting what the court actually decided, not what the court might or should have decided." *Zaleski*, 2006-Ohio- 5795, at ¶19 (quoting *State ex rel. Mayer v. Henson*, 97 Ohio St. 3d 276, 2002-Ohio-6323, at ¶ 14). "[They] can be used to supply information which existed but was not recorded, to correct mathematical calculations, and to correct typographical or clerical errors." *Greulich*, 61 Ohio App. 3d at 24.

{¶22} In its "nunc pro tunc" order, the trial court changed the length of Mr. Lloyd's community control term from one year to two. Mr. Lloyd did not have the court reporter prepare a transcript of the sentencing hearing. This Court, therefore, is unable to determine whether the

court was merely correcting a typographical error or if it had reconsidered its decision. It was Mr. Lloyd's responsibility to provide this Court with the parts of the record necessary to resolve his arguments. App. R. 9(B); Loc. R. 5(A). His third assignment of error is overruled.

CONCLUSION

{¶23} The State presented sufficient evidence to support Mr. Lloyd's convictions for possession of cocaine and tampering with evidence, his convictions are not against the manifest weight of the evidence, the record is not sufficient to determine whether his lawyer was ineffective, and Mr. Lloyd failed to ensure that the appellate record contained all the information needed to decide whether the trial court's nunc pro tunc order was improper. The judgment of the Summit County Common Pleas Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to appellant.

CLAIR E. DICKINSON
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR

APPEARANCES:

THOMAS W. KOSTOFF, attorney at law, for appellant.

SHERRI BEVAN WALSH, prosecuting attorney, and HEAVEN R. DIMARTINO, assistant prosecuting attorney, for appellee.