[Cite as *State v. Shearer*, 2011-Ohio-6835.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-L-007**
- vs -	:	
MICHAEL D. SHEARER,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 10 CR 000423.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Paul H. Hentemann, Northmark Office Building, 35000 Kaiser Court, Suite 305, Willoughby, OH 44094-4280 (For Defendant-Appellant).

THOMAS R. WRIGHT, J.

{¶1} This appeal is from a final judgment of the Lake County Court of Common Pleas. In the underlying criminal action, appellant, Michael D. Shearer, was convicted of two counts of possession of drugs under R.C. 2925.11. Appellant maintains that his conviction must be reversed because the trial court erred in failing to grant his motions to suppress certain evidence and to dismiss the indictment.

{¶2} In August 2009, the Lake County Narcotics Agency began an investigation into alleged drug trafficking by appellant's brother, Patrick K. Shearer. The investigation

essentially consisted of a series of four "controlled" transactions in which a confidential informant for the agency ("CI-580") bought marijuana from Patrick.

{¶3} The four drug transactions occurred in the following basic manner. First, CI-580 would contact Patrick to determine if a purchase of marijuana or ecstasy was feasible at that time. If Patrick's response was affirmative, CI-580 was provided with marked U.S. currency from Special Agent 85 ("SA-85"). After searching the car and body of CI-580, SA-85 would place a body transmitter and digital recorder on his person.

{¶4} Thereafter, CI-580 would meet Patrick at a designated location. In three of the transactions, their rendezvous took place in the parking lot of a local restaurant. Upon taking the money from CI-580, Patrick would return to his own vehicle and drive to a residence at 267 Rockwood Drive, Painesville, Ohio. Although CI-580 would remain in the parking lot during this period, Patrick would be surreptitiously followed by other members of the agency, including SA-85.

{¶5} After arriving at the Rockwood home, Patrick would go inside and remain for a couple of minutes. Upon returning to his vehicle, Patrick would then drive back to the restaurant's parking lot and complete the transaction with CI-850. While CI-850 was not able to obtain any ecstasy pills from Patrick in any of the four transactions, he did buy a quantity of marijuana on each occasion.

{¶6} Once the fourth "controlled" purchase was made, SA-85 composed an affidavit for the purpose of obtaining a search warrant for the Rockwood residence. In addition to providing a detailed description of all four drug transactions, the affidavit contained a specific statement regarding the location and appearance of the residence. SA-85 also averred that CI-580 had worked with the narcotics agency for 20 years, had

usually been involved in approximately 80 “controlled” buys each year, and had always been extremely reliable. Finally, SA-85 asserted that he had overseen the entire investigation concerning Patrick and the Rockwood residence.

{¶7} The affidavit of SA-85 was submitted to a judge of the Lake County Court of Common Pleas. The judge concluded that the averments in the document established probable cause, and issued the search warrant. In a separate judgment accompanying the warrant, the judge ordered that the Rockwood residence and the various persons within it could be searched for, inter alia, marijuana, controlled substances, and drug paraphernalia.

{¶8} The narcotics agency executed the search warrant in the early morning hours of September 18, 2009. When the SWAT team first entered the Rockwood home, Patrick K. Shearer was not present; however, appellant and three others were. After the building had been secured and the four individuals were placed in one room on the first floor, one of the narcotics officers asked appellant if “anything” would be found in his bedroom. In response, appellant stated that he did have “personal use” steroids in his possession. Upon searching the bedroom based upon this information, a second officer found a syringe, some pills, and lotion.

{¶9} After the confiscated items had been duly analyzed, it was determined that three different forms of steroids had been found in appellant’s room. In July 2010, he was indicted with two counts of possession of drugs and one count of possession of dangerous drugs. Under each of the three counts, it was alleged that he had been previously convicted of an offense of drug abuse. It was further asserted that this prior conviction was rendered in September 1993, and had been for the possession, sale, or manufacturing of a counterfeit controlled substance under R.C. 2925.37. As to the two

counts of possession of drugs, the existence of the prior conviction would elevate the severity of the crime from a first-degree misdemeanor to a fifth-degree felony.

{¶10} After the parties had engaged in preliminary discovery, appellant moved to dismiss all three counts of the indictment on the basis that the allegation concerning his prior conviction for drug abuse was improper. As the primary grounds for the motion, he essentially maintained that any evidence regarding the conviction would be inadmissible under Evid.R. 609(B) because the conviction was more than 10 years old. Immediately following the submission of the state's response, the trial court overruled the motion to dismiss without discussion.

{¶11} Also prior to trial, appellant moved the trial court to suppress the evidence obtained during the search of the Rockwood residence. In support of this motion, he argued that the search warrant should not have been issued because the averments in the affidavit of SA-85 had been insufficient to establish probable cause of a possible crime involving him. That is, appellant argued that the search was illegal because the majority of the assertions in the affidavit pertained solely to his brother, not to him. Upon conducting an evidentiary hearing on the matter, the trial court again overruled the motion.

{¶12} Ultimately, appellant waived his right to a jury trial, and the three charges were tried to the bench. At the close of the one-day trial, the court found him not guilty of the single charge of possession of dangerous drugs, but guilty of the remaining two counts of possession of drugs, including the additional element of his earlier conviction under R.C. 2925.37. As a result, he was convicted of two fifth-degree felonies. After holding a separate sentencing hearing, the court ordered him to serve two years of community control. As one of the conditions of the community control, appellant was

sentenced to 60 days in the county jail.

{¶13} In appealing the foregoing conviction to this court, appellant has raised the following assignments of error:

{¶14} "[1.] The Trial Court erred when it overruled the motion to suppress evidence found in the property occupied by the Appellant, Michael D. Shearer, coupled with the fact that the supporting affidavit did not establish probable cause for the issuance of the search warrant.

{¶15} "[2.] Did the Trial Court commit error in not treating the 3-count Secret Indictment as a misdemeanor instead of a [fifth-degree] felony?"

{¶16} Under his first assignment, appellant challenges the trial court's decision to deny his motion to suppress the three illegal substances found during the execution of the search warrant. According to appellant, the search warrant should not have been issued because the underlying affidavit was deficient in two respects. First, he submits that the averments in the affidavit were needlessly confusing because SA-85 did not adequately distinguish between the actions of Patrick K. Shearer and the actions of appellant himself. Second, he argues that the majority of the averments should have been rejected because they were predicated upon the unreliable hearsay of CI-580.

{¶17} The basic procedure for the issuance of a search warrant is governed by Crim.R. 41(C), which provides, in pertinent part:

{¶18} "A warrant shall issue under this rule only on an affidavit or affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or describe the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis

for the affiant's belief that such property is there located. If the judge is satisfied that probable cause for the search exists, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. ***"

{¶19} As the foregoing quote indicates, the appropriate standard to employ in a search warrant analysis is "probable cause" of criminal activity. In explaining the nature of this standard, the Supreme Court of Ohio has stated:

{¶20} "In determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, '[t]he 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.'" *State v. George* (1989), 45 Ohio St.3d 325, paragraph one of the syllabus, citing *Illinois v. Gates* (1983), 462 U.S. 213, 238-239.

{¶21} Under the foregoing standard, it is not necessary for the affidavit to show the existence of criminal activity by a preponderance of the evidence; in fact, not even a prima facie showing is required to justify the issuance of the search warrant. See *State v. Montgomery* (Aug. 29, 1997), 11th Dist. No. 95-P-0034, 1997 Ohio App. LEXIS 3880, at *3.

{¶22} As to subsequent judicial review of the "probable cause" analysis, this court has held:

{¶23} "'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.'" *State v. Kidd*, 11th Dist. No. 2006-L-193, 2007-Ohio-4113, at ¶41, quoting *George,* 45 Ohio St.3d at paragraph two of the syllabus.

{¶24} Applying the foregoing precedent to the facts of this case, this court holds that the affidavit of SA-85 was clearly sufficient to establish probable cause that criminal activity was occurring at the Rockwood residence. Specifically, the affidavit set forth a detailed description of four "controlled" drug purchases which took place over a span of three weeks. In each transaction, Patrick K. Shearer would take the marked funds from CI-580 and then leave the rendezvous location in his own vehicle. Patrick would drive directly to the Rockwood residence, go inside the structure for a few minutes, return to his vehicle, and then drive back to the rendezvous location. At that time, Patrick would give the marijuana to CI-580.

{¶25} In at least two of the transactions, SA-85 was one of the narcotics officers who saw Patrick drive directly to the Rockwood Residence and back to the rendezvous location. In the other two transactions, Patrick's actions were observed by other officers with the narcotics agency. Therefore, as the trial court stated in its judgment entry, the

affidavit "was replete with information raising a strong inference that illegal drugs were being obtained from the house by Patrick Shearer."

{¶26} As was previously noted, appellant contends that the affidavit should have been rejected on the grounds that it was confusing as to what roles he and Patrick had respectively in the four transactions. Upon reviewing the entire affidavit of SA-85, this court concludes that there is simply no basis for appellant's contention. The affidavit is extremely clear that only Patrick was involved in taking the funds from CI-580 in return for the marijuana. In fact, the affidavit only contains one reference to appellant, in which CI-580 quotes Patrick as saying that he had to go get the drugs from his brother at the Rockwood residence.

{¶27} Furthermore, this court would emphasize that the fact that appellant was not the focus of the affidavit had no effect upon the validity of the resulting search warrant. Crim.R. 41(C) expressly provides that a warrant can be issued in regard to a person *or* a place. In this instance, the focus of the resulting search warrant was a place; i.e., 267 Rockwood Drive. Under such circumstances, it was simply irrelevant whether Patrick actually lived at the Rockwood residence or whether appellant played any role in the four underlying drug transactions.

{¶28} In conjunction with the foregoing, this court would further note that the fact that steroids were not specifically referenced in the scope of the search warrant did not invalidate the subsequent seizure of those items. It is well established that, pursuant to the plain view doctrine, police officers can seize obvious incriminating items even if they are not described in the search warrant. *State v. Dabbs* (1992), 80 Ohio App.3d 748, 750, citing *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 455. In the instant action, the illegal substances were found on the top of a piece of bedroom furniture, and thus

were in plain view once appellant informed the officers of their existence.

{¶29} As a separate argument, appellant submits that the affidavit of SA-85 was not sufficient to show probable cause because it was primarily based upon the hearsay statements of CI-580. As to this point, this court would again note that Crim.R. 41(C) expressly provides that a finding of probable cause may be predicated upon hearsay if there are substantial grounds for believing that the statements are credible. In applying that rule, we have indicated that the failure to establish the reliability of the statements of a third party is not necessarily fatal to the sufficiency of an affidavit, but is merely one factor to be considered in determining probable cause. See *State v. Smith*, 11th Dist. No. 2004-A-0088, 2006-Ohio-5186, at ¶30.

{¶30} In its judgment overruling the motion to suppress, the trial court found that SA-85 had shown a substantial basis for believing CI-580. Our review of the underlying affidavit confirms the trial court's finding. Specifically, SA-85 stated in the affidavit that CI-580 had been a confidential informant for the narcotics agency for 20 years, and usually took part in approximately 80 "controlled" drug purchases each year. SA-85 further stated that the information supplied by CI-850 in the past had always been very reliable. In addition, SA-85 averred that he had personally supervised CI-580's actions in all four transactions with Patrick K. Shearer.

{¶31} Taken as a whole, the averments in the affidavit set forth sufficient facts to establish that there was a fair probability that illegal substances would be found at the Rockwood residence. Therefore, because the trial court correctly concluded that the standard for the issuance of a valid search warrant had been met, appellant's first assignment of error is without merit.

{¶32} Under his second assignment, appellant contends that the trial court erred

in failing to strike from the indictment the clauses in each of the three counts alleging that he had a prior conviction for a "drug abuse" offense. Citing Evid.R. 609(B), he submits that the state should not have been allowed to present any evidence regarding the prior conviction because it had been rendered more than 10 years ago. In light of this, appellant further submits that his present conviction on the two remaining counts should only be first-degree misdemeanors, instead of fifth-degree felonies.

{¶33} Our review of Evid.R. 609 readily shows that it governs the impeachment of a witness's credibility through the admission of evidence pertaining to a prior criminal conviction. In regard to the "age" of the prior conviction, division (B) of the rule provides that a conviction is not admissible for purposes of impeachment if it has been 10 years since, inter alia, the date of the conviction.

{¶34} Given the specific nature of the language of Evid.R. 609, it has been held that the application of the rule is limited:

{¶35} "'(Evidence) Rule 609 applies only when a prior conviction is offered to impeach a witness by showing character for untruthfulness. If the evidence is offered under an impeachment theory other than character, Rule 609 does not apply. Similarly, if evidence of a prior conviction is offered for reasons other than impeachment, Rule 609 does not apply.' 1 Giannelli & Snyder, Evidence (2007) 458, Section 609.3." *State v. Kraus*, 12th Dist. No. CA2006-10-114, 2007-Ohio-6027, at ¶74.

{¶36} Consistent with the foregoing general statement, it has also been held that Evid.R. 609 has no application when evidence of a prior conviction has the legal effect of elevating the degree of the charged crime. *Parma v. Koumonduros*, 8th Dist. No. 85315, 2005-Ohio-3713, at ¶11. Under such circumstances, the purpose of such evidence is to establish an element of the offense, not to impeach a defendant's general

character.

{¶37} Even though *Kraus* and *Koumonduros* do not contain any reference to the 10 year "limit" of Evid.R. 609(B), the logic of the two opinions would still apply. That is, since the entire rule only refers to the impeachment of a witness's credibility, division (B) cannot be invoked when the introduction of the "prior conviction" evidence is for another purpose. Thus, given that the evidence of appellant's prior conviction was meant to prove an additional element which increased the severity of the offense, this court expressly rejects appellant's contention that the rule's 10 year "limit" had to be followed.

{¶38} Instead, any limit as to the "age" of a prior conviction would have to be set forth in the specific statutory provisions governing the crime of possession of drugs. As the state aptly notes, R.C. 2925.11(C)(2) and 2925.01 do not place any time limit upon the use of a prior conviction for purposes of elevating the degree of this crime. Hence, the state was permitted under the statutes to present evidence regarding appellant's September 1993 conviction under R.C. 2925.37.

{¶39} As a separate point under this assignment, appellant asserts that the finding of guilty on the additional "prior conviction" element cannot be allowed to stand because the statutory definition of the term "drug abuse offense" is overly broad. In raising this issue, appellant has not attempted to provide a complete argument in support; instead, he simply makes the bald assertion that the offense which formed the basis of his earlier conviction, i.e., the sale or possession of a counterfeit controlled substance, should not be deemed a "drug abuse offense."

{¶40} Pursuant to App.R. 12(A)(2), an appellate court has the authority to disregard any assignment or issue which the appellant has not supported with a complete argument in his brief. See, e.g., *State v. Sheets*, 12th Dist. No. CA2006-04-

032, 2007-Ohio-1799, at ¶35. On this basis alone, this court could simply hold that appellant's "broadness" argument is not properly before us for disposition. Nevertheless, after attempting to construe appellant's bald assertion in the most logical manner, we further hold that the substance of his basic argument lacks merit.

{¶41} Under R.C. 2925.11(C)(2), the offense of possession of drugs will be elevated from a first-degree misdemeanor to a fifth-degree felony if the state also proves that the defendant has a prior conviction for a "drug abuse offense." R.C. 2925.01(G)(1) lists the crimes that qualify as "drug abuse" offenses, including the sale or possession of a counterfeit controlled substance under R.C. 2925.37. As was noted above, appellant's prior conviction in September 1993 was pursuant to R.C. 2925.37.

{¶42} As to the question of whether R.C. 2925.01(G)(1) is overly broad as applied to the facts of this case, this court would first indicate that the language of the statute is not vague in any respect; i.e., the statute clearly provides that a crime involving counterfeit controlled substances under R.C. 2925.37 is a "drug abuse offense." Second, we would emphasize that the decision to designate the crime of the sale or possession of counterfeit controlled substances as a prior elevating offense is clearly within the discretion of the state legislature, as part of its authority to define the elements of any crime. See, generally, *State v. Avery* (1998), 126 Ohio App.3d 36, 47, citing *Schad v. Arizona* (1991), 501 U.S. 624. As to the two offenses in our case, there is a sufficient logical connection between the prior "elevating" offense under R.C. 2925.37 and the underlying charged crime of possession of drugs. Therefore, the propriety of the Ohio General Assembly's decision to include a conviction involving counterfeit controlled substances as an "elevating" offense is valid and enforceable. Any argument as to the wisdom of including the sale and possession of counterfeit

controlled substances as an elevating offense should be directed to the legislature, not this court.

{¶43} Since the state was entitled to proceed on the "prior conviction" elements in both charges of possession of drugs, the trial court correctly denied appellant's motion to dismiss the entire indictment. For this reason, his second assignment of error is also without merit.

{¶44} It is the order and judgment of this court that the judgment of the trial court is affirmed.

TIMOTHY P. CANNON, P.J.,

DIANE V. GRENDELL, J.,

concur.