**[Cite as *State v. Smith*, 2017-Ohio-7864.]**

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

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| STATE OF OHIO, | : | Case No. 16CA10 |
| Plaintiff-Appellee, | : | |
| v. | : | DECISION AND JUDGMENT ENTRY |
| MARK SMITH, | : | |
| | | **RELEASED: 09/15/2017** |
| Defendant-Appellant. | : | |

APPEARANCES:

Angela Wilson Miller, Jupiter, FL, for appellant.

Brigham M. Anderson, Lawrence County Prosecuting Attorney, and C. Michael Gleichauf, Lawrence County Assistant Prosecuting Attorney, Ironton, OH, for appellee.

Harsha, J.

**{¶1}** After a jury convicted Mark Smith of five felony counts of trafficking in heroin, the trial court sentenced him to an aggregate 12-year prison term and imposed mandatory fines of $16,250.

**{¶2}** Smith asserts that the trial court violated his speedy-trial rights by continuing his trial beyond the statutory limit. We reject Smith's assertion because he forfeited all but plain error by failing to raise this issue below. And in spite of the fact that he fails to argue plain error on appeal, we review that issue under his second assignment of error.

**{¶3}** Next Smith contends that his trial counsel was ineffective because he failed to: (1) raise his speedy-trial claim below; and (2) file an affidavit of indigency, which resulted in the trial court's imposition of fines. However, his trial counsel was not ineffective because there was no speedy-trial violation. Smith's demand for discovery and request for a bill of particulars, which were filed on the same day, tolled the time

period for a reasonable period for the state to file a response, i.e., 5 days to respond to the demand for discovery and 30 of the 52 days the state took to file a bill of particulars for a total tolling period of 30 days because they were filed simultaneously. In addition, Smith's first trial counsel's motion seeking to withdraw tolled the period for the six days it took to appoint him new counsel. Finally, Smith's first counsel's motion to withdraw and Smith's request for new counsel necessitated a modification of the original trial date, which had been scheduled within the speedy-trial time period. Therefore, the remainder of the time until the new trial date was also tolled, whether it be considered as something necessitated by his motion or as a sua sponte continuance by the trial court. The trial court did not violate his speedy-trial rights by continuing the trial date after Smith's request for new counsel necessitated a new trial date. We reject Smith's first assignment of error and this part of Smith's second assignment of error.

**{¶4}** The state does not oppose Smith's claim that his trial counsel provided ineffective assistance of counsel by failing to file an affidavit of indigency before sentencing. The trial court twice appointed counsel for Smith on the basis of his affidavits of indigency, and it noted at sentencing that Smith had been "legally indigent * * * up to this point" in the proceedings. It also appointed counsel for him on appeal. If Smith's trial counsel had filed an affidavit of indigency for consideration in the trial court's sentencing decision, a reasonable probability exists that the trial court would have found Smith indigent and would not have imposed the $16,250 in mandatory fines as part of his sentence. We sustain this part of Smith's second assignment of error.

**{¶5}** Finally Smith argues that one of his trafficking in heroin convictions, a second-degree felony, was not supported by sufficient evidence and was against the

manifest weight of the evidence. But the state introduced evidence that: (1) its confidential informant made four controlled heroin purchases from Smith in the residence of William Yapp in early September 2015; (2) during the fourth controlled heroin purchase, Smith took a plastic baggie containing heroin out of a Backwoods tobacco package; (3) the state executed a warrant and searched Yapp's residence and property a couple days after the fourth heroin purchase and found plastic baggies containing drugs, including one containing about 16 grams of heroin, inside Backwoods tobacco pouches in a shed on Yapp's property; and (4) Smith sold drugs, including heroin, out of Yapp's house, and directed Yapp to hide his heroin supply in a shed on his property. This constituted sufficient evidence to support Smith's second-degree felony heroin trafficking conviction. The jury did not clearly lose its way or create a manifest miscarriage of justice in finding the state had proven the essential elements of this crime beyond a reasonable doubt. We overrule Smith's third assignment of error.

**{¶6}** Having sustained part of Smith's second assignment of error, we reverse that portion of his sentence imposing fines against him and remand the cause to the trial court for further proceedings upon the filing of an affidavit of indigency. Having overruled Smith's remaining assignments of error, we affirm his convictions and the remainder of his sentence.

## I. FACTS

**{¶7}** The Lawrence County Grand Jury returned an indictment charging Mark Smith with five counts of trafficking in heroin, one count of trafficking in cocaine, and one count of trafficking in drugs (Oxycodone). The heroin trafficking charges included one second-degree felony, three fourth-degree felonies, and one second-degree felony

that included a cash forfeiture specification. The case proceeded to a jury trial that produced the following evidence.

**{¶8}** The Lawrence Drug and Major Crimes Task Force received complaints about several unknown males trafficking drugs out of William Yapp's home in Lawrence County. The task force arranged for a confidential informant to make four controlled heroin purchases from the residence, and the informant did so in September 2015.

**{¶9}** On four separate occasions in September 2015, the confidential informant, who was equipped with an audio/video recording device, purchased heroin in varying amounts from Smith in Yapp's home. The confidential informant testified, and the recording established, that during the fourth controlled heroin transaction Smith took a baggie of heroin out of a Backwoods tobacco package.

**{¶10}** That same month, the task force executed arrest warrants for several people, including Yapp and Smith (although Smith's exact name was not known at that time). The task force also executed a search warrant of Yapp's property, including a shed. Inside the shed they found a leather pouch that contained Backwoods tobacco pouches holding about 16 grams of heroin, a baggie containing cocaine, an Oxycodone tablet, a small amount of marijuana, and some digital scales. After the task force executed the search warrant, it arrested Yapp and another individual. The task force subsequently arrested Smith at a nearby trailer park.

**{¶11}** Yapp testified that he had pleaded guilty to a charge of trafficking in heroin in return for his truthful testimony. According to Yapp he was addicted to heroin, and in July 2015, he allowed Smith to move into his home to sell drugs in exchange for Smith giving Yapp heroin for his personal daily use. Yapp testified that Smith sold heroin and

cocaine in his house 10-15 times a day to various individuals from July 2015 until his arrest in September 2015. According to Yapp, Smith directed him to store his supply of heroin, which Smith kept in Backwoods tobacco pouches, in an electrical tool bag in a locked shed on Yapp's property.

**{¶12}** The defense rested at the conclusion of the state's evidence. The jury returned a verdict finding Smith guilty of the five heroin trafficking charges, and not guilty of the cash forfeiture specification accompanying one of those charges and the trafficking charges involving cocaine and Oxycodone. The trial court sentenced Smith to an aggregate 12-year prison term and imposed $16,250 in mandatory fines.

## II. ASSIGNMENTS OF ERROR

**{¶13}** Smith assigns the following errors for our review:

> I. THE CONTINUATION OF APPELLANT SMITH'S TRIAL BEYOND THE TWO HUNDRED SEVENTY-DAY TIME LIMIT VIOLATES HIS RIGHT TO A SPEEDY TRIAL PURSUANT TO R.C. 2945.71 THROUGH 2945.73. ADDITIONALLY, THIS FAILURE TO PROVIDE A SPEEDY TRIAL IS A VIOLATION OF SMITH'S FUNDAMENTAL RIGHTS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION.
>
> II. APPELLANT SMITH'S RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN HIS ATTORNEY FAILED TO ARGUE THAT HE WAS DENIED HIS RIGHT TO A SPEEDY TRIAL. ADDITIONALLY, SMITH WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO FILE AN AFFIDAVIT OF INDIGENCY PRIOR TO SENTENCING RESULTING IN THE IMPOSITION OF EXCESSIVE FINES. U.S. CONST. AMENDS. V, VI, XIV; OHIO CONST. ART. I, §§ 9, 10, 16.
>
> III. APPELLANT SMITH'S CONVICTION WAS NOT SUPPORTED BY SUFFICIENT CREDIBLE EVIDENCE AND WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE. THUS, SMITH WAS DEPRIVED OF HIS RIGHT TO DUE PROCESS OR LAW AS GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS TO

THE UNITED STATES CONSTITUTION AND ARTICLE I, §10 OF THE OHIO CONSTITUTION.

## III. LAW AND ANALYSIS

### A. Speedy-Trial Claim

**{¶14}** In his first assignment of error Smith asserts that the trial court's continuation of his trial violated his constitutional and statutory rights to a speedy trial.

**{¶15}** Smith's "failure to file a motion to dismiss on speedy trial grounds prior to trial and pursuant to R.C. 2945.73(B) prevents him from raising the issue on appeal." *See State v. Taylor*, 98 Ohio St.3d 27, 2002-Ohio-7017, 781 N.E.2d 72, ¶ 37; *State v. Campbell*, 4th Dist. Ross No. 06CA2932, 2007-Ohio-4402, ¶ 20 ("It is well-settled that the failure to raise a speedy trial issue prior to the commencement of trial waives that issue on appeal"); *State v. Simms*, 10th Dist. Franklin Nos. 05-AP-806 and 05AP-807, 2006-Ohio-2960, ¶ 10 (by not raising his speedy-trial claim in the trial court, "appellant waived all but plain error on his statutory claims"); R.C. 2945.73(B) ("Upon motion made at or prior to the commencement of trial, a person charged with an offense shall be discharged if his in not brought to trial within the time required by sections 2945.71 and 2945.72 of the Revised Code").

**{¶16}** Moreover, because Smith does not claim plain error on appeal, we need not consider it. *See State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 17-20 (appellate court need not consider plain error where appellant fails to timely raise plain-error claim); *State v. Gavin*, 4th Dist. Scioto No. 13CA3592, 2015-Ohio-2996, ¶ 25, citing *Wright v. Ohio Dept. of Jobs & Family Servs.*, 9th Dist. Lorain No. 12CA010264, 2013-Ohio-2260, ¶ 22 ("when a claim is forfeited on appeal and the appellant does not raise plain error, the appellate court will not create an

argument on his behalf"). However, because Smith's second assignment of error is also based upon an alleged violation of his speedy trial rights, we will discuss the merits of that issue below.

**{¶17}** Therefore, because Smith forfeited his claim by failing to file a motion to dismiss on that basis at or prior to the commencement of trial and fails to argue plain error on appeal, we overrule his first assignment of error.

B. Ineffective Assistance of Counsel

1. Standard of Review

**{¶18}** In his second assignment of error Smith contends that his trial counsel provided ineffective assistance to him. To prevail on his claim of ineffective assistance of counsel, Smith must establish (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 result of the proceeding would have been different. *State v. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Knauff*, 4th Dist. Adams No. 13CA976, 2014-Ohio-308, ¶ 23. The defendant has the burden of proof because in Ohio, a properly licensed attorney is presumed competent. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 62. Failure to satisfy either part of the test is fatal to the claim. *Strickland* at 697; *State v. Bradley*, 42 Ohio St.3d 136, 143, 538 N.E.2d 373 (1989).

2. Failure to File Motion to Dismiss on Speedy-Trial Violation

**{¶19}** Smith contends that his trial counsel was ineffective for not raising his speedy-trial claim at or before the commencement of trial.

**{¶20}** The Sixth Amendment to the United States Constitution (which is made applicable to the states through the Due Process Clause of the Fourteenth Amendment) and Article I, Section 10 of the Ohio Constitution guarantee a criminal defendant the right to a speedy trial; this guarantee is implemented by R.C. 2945.71, which provides specific statutory time limits within which a person must be brought to trial. *State v. Blackburn*, 118 Ohio St.3d 163, 2008-Ohio-1823, 887 N.E.2d 319, ¶ 10. R.C. 2945.71(C)(2) "requires that a person against whom a felony charge is pending shall be brought to trial within 270 days after the person's arrest." *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 81. "For purposes of calculating speedy-trial time, 'each day during which the accused is held in lieu of bail on the pending charge shall be counted as three days.' " *State v. Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, 971 N.E.2d 937, ¶ 15, quoting R.C. 2945.71(E). "Thus, subject to certain tolling events, a jailed defendant must be tried within 90 days." *Id.*

**{¶21}** Smith was jailed on September 10, 2015, and his trial commenced 146 days later for speedy-trial computation purposes, on February 4, 2016.[1] Because this exceeded the 90-day period, Smith presents a prima facie speedy-trial violation. *See, e.g., State v. Squillace*, 10th Dist. Franklin No. 15AP-958, 2016-Ohio-1038, ¶ 14. Once a defendant establishes a prima facie case for dismissal, the burden shifts to the state to prove that the time was sufficiently tolled to extend the period. *Id.*; *see also State v. Anderson*, 4th Dist. Scioto No. 15CA3696, 2016-Ohio-7252, ¶ 19.

[1] Although 147 days elapsed from September 10, 2015 until February 4, 2016, "[t]he day of arrest does not count when computing speedy-trial time." *Adams* at fn. 7. Therefore, for purposes of speedy-trial time, 146 days passed.

**{¶22}** "R.C. 2945.72 contains an exhaustive list of events and circumstances that extend the time within which a defendant must be brought to trial." *Ramey* at ¶ 24. The pertinent tolling provisions here are R.C. 2945.72(E) ("Any period of delay necessitated by reason of a * * * motion, proceeding, or action made or instituted by the accused") and (H) ("The period of any continuance granted on the accused's own motion, and the period of any reasonable continuance granted other than upon the accused's own motion").

**{¶23}** A demand for discovery or a bill of particulars constitutes a tolling event under R.C. 2945.72(E). *State v. Brown*, 98 Ohio St.3d 159, 2002-Ohio-7040, 781 N.E.2d 159, syllabus. Courts have generally interpreted 30 days to constitute a reasonable period to respond to requests for discovery or a bill of particulars. *See, e.g., State v. Shabazz*, 8th Dist. Cuyahoga No. 95021, 2011-Ohio-2260, ¶ 26 ("A defendant's demand for discovery or a bill of particulars tolls the speedy trial period for a 'reasonable time,' which this court has interpreted to mean 30 days"); *State v. Ford*,180 Ohio App.3d 636, 2009-Ohio-146, 906 N.E.2d 1155, ¶ 8-11 (1st Dist.) (holding that 30 days was a reasonable time for the state to respond to a defendant's request for a bill of particulars and discovery, absent a showing of special circumstances justifying a longer delay); *State v. Sheline*, 4th Dist. Ross No. 15CA3511, 2016-Ohio-4794, ¶ 11, citing *State v. Hucks*, 4th Dist. Ross No. 15CA3488, 2016-Ohio-323, ¶ 24 ("in *Hucks*, we observed that a request for discovery tolls the speedy-trial time to give the State a reasonable opportunity to respond and that many courts have interpreted a reasonable time to mean 30 days").

**{¶24}** Smith filed a demand for discovery and a request for a bill of particulars on October 2, 2015. The state provided an answer to Smith's demand for discovery five days later, on October 7, and it filed a bill of particulars 53 days after Smith's request, on November 24. Smith argues that based on *State v. Palmer*, 11th Dist. Portage No. 2004-P-0106, 2005-Ohio-6710, the state should have responded to his request for a bill of particulars within the same five-day period it took to respond to his demand for discovery. But that court merely held that the state's delay of 79 days in responding to the defendant's request for a bill of particulars under the circumstances was unreasonable, and its decision was ultimately reversed on other grounds on appeal. *See State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, 860 N.E.2d 1011, paragraph one of the syllabus ("The failure of a criminal defendant to respond within a reasonable time to a prosecution request for reciprocal discovery constitutes neglect that tolls the running of speedy-trial time pursuant to R.C. 2945.72(D)"). We thus find *Palmer* has little value to Smith.

**{¶25}** Therefore, we conclude 30 days of the time spent by the state to respond to Smith's requests tolled the speedy-trial period, leaving 116 days elapsed before his trial commenced.

**{¶26}** Second, R.C. 2945.72(H) tolls the time for "any continuance granted on the accused's own motion." The court initially scheduled trial for December 7, 2015, 87 days after his September 10 arrest, which was within the 90-day speedy-trial period in R.C. 2945.71(C) and (E) even without accounting for the time chargeable to Smith for responding to his discovery requests. And on December 1, 2015, Smith's initial appointed trial counsel filed a motion to withdraw because of Smith's refusal to

cooperate and lack of confidence in him. This necessitated a hearing before the trial court on December 7, where this exchange occurred:

> DEFENDANT: The problem is ever since he has been on my case he's never did nothing for me. In my favor at all, nothing, nothing, nothing! When I say nothing I mean absolutely nothing. * * *
>
> COURT: It sounds to me like you wouldn't object if I granted his motion to resign and we put another lawyer on it.
>
> DEFENDANT: I sure wouldn't cause I was going to fire him [if] you hadn't had. * * * Six weeks ago he could have started trying to prepare a case. He never tried to prepare a case. He wanted to wait till the last week to try and prepare a case. Can't prepare no case in no week. And I know you can't. I know you can't because I asked motions I wanted to be filed. I told him this is a motion that you need to file. Did he file one? Not one. Not one.
>
> COURT: Well I will accept Mr. Davenport's motion. I'll allow him to resign from the case. I will go through the list of lawyers who take appointments and see if I can't get another one today for you and see if I can't set up a meeting so that they can start. Now we aren't going to be able to try the case tomorrow. It's going to take time for your new lawyer to get…
>
> DEFENDANT: I don't care how long it takes.
>
> COURT: Allright.
>
> DEFENDANT: I'm not going to taking no lawyer that is just going to come up here and just think they are going to sell me up a creek without a paddle. * * *
>
> COURT: I will see if I can't find another attorney who will take the appointment for your case. * * * I see about the same six or seven week in and week out in here to try all the cases. Um, and I'll have that person get in touch with you and I'll even send a copy of the paper work to you as to who that will be so you will know it is before somebody comes over there and says okay, I'm your lawyer, tell me everything you remember about this case. Alright, that will be the ruling of the court and I will go to work on this with my [as]signment commissioner. * * *

[Sic.]

**{¶27}** The trial court appointed new trial counsel for Smith on December 7, 2015, the same day as the original trial date, and scheduled a new trial for February 4, 2016.

**{¶28}** Smith concedes that the six days from when his first trial counsel filed a motion for withdrawal to when his new counsel was appointed tolled the speedy-trial period. However, he disagrees with the state's contention that the remaining 59 days between the appointment of new counsel and the commencement of his rescheduled trial were also tolled. We disagree.

**{¶29}** Although counsel's motion to withdraw was not an explicit request for a continuance, it necessitated the cancellation of the December 7 scheduled trial and the rescheduling to a later date. Where a trial court must reschedule a trial because of a motion of the accused, regardless of whether it is styled as a motion for a continuance, the entire time between the motion and the rescheduled trial date is a delay attributable to a motion filed by the accused under R.C. 2945.72(E). *State v. Phillips*, 4th Dist. Highland No. 09CA13, 2009-Ohio-7069, ¶ 25. Smith's reliance on *State v. Bailey*, 4th Dist. Ross No. 14CA3461, 2015-Ohio-5463, ¶ 32, to claim that the speedy-trial period started again after the trial court appointed new counsel for him on December 7, is misplaced because the appointment of new counsel in that case did not necessitate the rescheduling of the trial date.

**{¶30}** Third, the rescheduled date constituted a "reasonable continuance granted other than upon the accused's own motion" under R.C. 2945.72(H). Generally, "[w]hen sua sponte granting a continuance under R.C. 2945.72(H), the trial court must enter the order of continuance and the reasons therefor by journal entry prior to the expiration of the time limit prescribed in R.C. 2945.71 for bringing a defendant to trial."

*State v. Mincy*, 2 Ohio St.3d 6, 441 N.E.2d 571 (1982), syllabus. Although the trial court did not comply with *Mincy* here, "an appellate court may affirm a conviction challenged on speedy-trial grounds even if the trial court did not expressly enumerate any reasons justifying the delay when the reasonableness of the continuance is otherwise affirmatively demonstrated by the record." *Ramey*, 132 Ohio St.3d 309, 2012-Ohio-2904, 971 N.E.2d 937, at ¶ 33.

**{¶31}** The reasonableness of the continuance from the December 7, 2015 (date that Smith's new counsel was appointed), until February 4, 2016 (when the trial commenced) is affirmatively demonstrated by the record. At the proceeding on the motion to withdraw, Smith noted that an attorney could not prepare his case in a week and that he was dissatisfied with his first attorney because counsel had not filed motions he had requested. When the trial court advised him that it would take time for his new lawyer to be prepared to represent him at trial, Smith specifically stated that he did "not care how long it takes." Smith appeared to acquiesce in the trial court's statement that it would take six or seven weeks to reschedule his trial. In fact, in substitute counsel's motion for extraordinary fees, which the trial court granted, he represented that these additional fees were warranted "[d]ue to the amount of time necessary to prepare for a trial with such serious charges along with the fact that extra time was necessary to investigate this matter [and] extra time was necessary to prepare this case for trial." (OP49) Under these circumstances the record affirmatively demonstrates that the continuance of the trial from the date of the appointment of new counsel until the rescheduled trial was reasonable in both purpose and length. *See Ramey* at ¶ 33; *State v. Carr*, 4th Dist. Ross No. 12CA3358, 2013-Ohio-5312, ¶ 31.

**{¶32}** Therefore, the speedy-trial period was also tolled from December 1, 2015, the date his first counsel filed his motion to withdraw, until February 4, 2016, the date of the rescheduled trial. When these additional 65 days are tolled, the trial was held within 51 days after his arrest, i.e., he was tried within the applicable 90-day period. Therefore, there was no speedy trial violation and we reject Smith's first assignment of error.

**{¶33}** Moreover, because a motion to dismiss based on a claimed speedy-trial violation would have been meritless, his trial counsel did not provide ineffective assistance of counsel by failing to file a motion on this basis. *See State v. Cottrell*, 4th Dist. Ross Nos. 11CA3241 and 11CA3242, 2012-Ohio-4583, ¶ 20 ("Because Cottrell's statutory speedy trial rights were not violated, a motion to dismiss on that basis would have failed. The law does not require counsel to take a futile act, so trial counsel's failure to file a motion to dismiss was not deficient"). We overrule this part of Smith's second assignment of error.

3. Failure to File Affidavit of Indigency Prior to Sentencing

**{¶34}** Smith also claims that his trial counsel was ineffective because he failed to file an affidavit of indigency prior to sentencing, which resulted in the imposition of $16,250 in mandatory fines. R.C. 2929.18(B)(1) provides that "[i]f an offender alleges in an affidavit filed with the court prior to sentencing that the offender is indigent and unable to pay the mandatory fine and if the court determines the offender is an indigent person and is unable to pay the mandatory fine described in this division, the court shall not impose the mandatory fine upon the offender."

**{¶35}** " 'When considering a claim that trial counsel was ineffective for not filing an indigency affidavit [to seek avoidance of a fine] * * * the test applied by Ohio courts is whether a reasonable probability exists that the trial court would have found appellant indigent had such affidavit been filed.' " *State v. Arnold*, 4th Dist. Meigs No. 11CA21, 2014-Ohio-264, ¶ 17, quoting *State v. Doss*, 4th Dist. Gallia No. 09CA20, 2012-Ohio-883, ¶ 19.

**{¶36}** Here a reasonable probability exists that the trial court would have found Smith indigent had his trial counsel filed an affidavit of indigency. First, the state does not oppose Smith's contention; instead, it "takes no position" on it. *Compare State v. Williams*, 4th Dist. Lawrence No. 08CA3, 2009-Ohio-657, ¶ 30 (relying on state's concession on appeal that "had counsel filed an affidavit of indigency, a reasonable probability exists that the trial court would have found Williams indigent and would not have imposed the $10,000 fine" to sustain assignment of error alleging ineffective assistance of counsel). Second, the trial court twice appointed counsel for Smith on the basis of his affidavits of indigency, and it noted at sentencing that Smith had been "legally indigent * * * up to this point" in the proceedings. It also appointed counsel for him on appeal. Under these circumstances Smith established ineffective assistance of his trial counsel for failing to file an affidavit of indigency and argue against the imposition of fines. We sustain this part of Smith's second assignment of error.[2]

C. Sufficiency and Manifest Weight of the Evidence

1. Standard of Review

[2] On remand the trial court can determine whether Smith is actually indigent and unable to pay the mandatory fines. At his arraignment Smith's appointed counsel represented that he might have sufficient funds to cover a $40,000 cash or surety bond. (OP61, p. 7)

**{¶37}** In his third assignment of error Smith argues that his second-degree felony conviction for trafficking in heroin, which involved the heroin found in the shed on Yapp's property, was not supported by sufficient evidence and was against the manifest weight of the evidence.

**{¶38}** "When a court reviews the record for sufficiency, '[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. Maxwell*, 139 Ohio St.3d 12, 9 N.E.3d 930, 2014-Ohio-1019, 9 N.E.3d 930, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

**{¶39}** "A sufficiency assignment of error challenges the legal adequacy of the state's prima facie case, not its rational persuasiveness." *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, ¶ 17. "That limited review does not intrude on the jury's role 'to resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *Musacchio v. United States*, ––– U.S. ––––, 136 S.Ct. 709, 715, 193 L.Ed.2d 639 (2016), quoting *Jackson* at 319, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

**{¶40}** By contrast in determining whether a criminal conviction is against the manifest weight of the evidence, an appellate 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 must be

reversed. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6254, 960 N.E.2d 955, ¶ 119. "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *Thompkins* at 387, 678 N.E.2d 541. However, we are reminded that generally, the weight and credibility of evidence are to be determined by the trier of fact. *See Kirkland*, 140 Ohio St.3d 73, 15 N.E.3d 818, 2014-Ohio-1966, at ¶ 132. " 'A jury, sitting as the trier of fact, is free to believe all, part or none of the testimony of any witness who appears before it.' " *State v. Reyes-Rosales*, 4th Dist. Adams No. 15CA1010, 2016-Ohio-3338, ¶ 17, quoting *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23. We defer to the trier of fact on these evidentiary weight and credibility issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *Id.*; *State v. Koon*, 4th Dist. Hocking No. 15CA17, 2016-Ohio-416, at ¶ 18.

2. Analysis

**{¶41}** Smith was convicted of trafficking in heroin for the 16 grams of that controlled substance found in the shed on Yapp's property. R.C. 2925.03(A)(2) provides that "[n]o person shall knowingly * * * "[p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute [heroin], when the offender knows or has reasonable cause to believe that the [heroin] is intended for sale or resale by the offender or another person."

**{¶42}** The state introduced evidence that: (1) its confidential informant made four controlled heroin purchases from Smith in Yapp's residence in early September

2015; (2) during the fourth controlled heroin purchase, Smith took a plastic baggie containing heroin out of a Backwoods tobacco package; (3) the state executed a warrant and searched Yapp's residence and property a couple days after the fourth heroin purchase and found plastic baggies containing drugs, including one containing about 16 grams of heroin, inside Backwoods tobacco pouches in a shed on Yapp's property; and (4) Smith sold drugs, including heroin, out of Yapp's house, and directed Yapp to hide his heroin supply in an electrical bag in a shed on his property.

**{¶43}** Smith attempts to discredit Yapp's testimony at trial because: Yapp was a known drug dealer and addict; Yapp initially kept quiet about the drugs in the shed on his property because he wanted the drugs for his personal use; and Yapp had a key to the locked shed that he kept in his bedroom. But the jury was free to credit the state's evidence, including Yapp's testimony that the heroin in the shed was Smith's and that Smith had it stored there as his supply to sell. *Reyes-Rosales*, at ¶ 17.

**{¶44}** After viewing this evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of this trafficking in heroin conviction proven beyond a reasonable doubt.

**{¶45}** Moreover, based on this same evidence, the jury did not clearly lose its way or create a manifest miscarriage of justice by finding that the state had proven the essential elements of second-degree trafficking in heroin beyond a reasonable doubt on this charge.

**{¶46}** Therefore, the contested conviction for trafficking in heroin is supported by both sufficient and the manifest weight of the evidence. We overrule Smith's third assignment of error.

## IV. CONCLUSION

**{¶47}** Having sustained part of Smith's second assignment of error, we reverse that part of his sentence imposing mandatory fines against him and remand the cause for further proceedings consistent with this opinion. Having overruled the remainder of Smith's assignments of error, we affirm his convictions and the rest of his sentence.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART,
AND CAUSE REMANDED.

**JUDGMENT ENTRY**

It is ordered that the JUDGMENT IS AFFIRMED IN PART, AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Court of Common Pleas to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Abele, J. & McFarland, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

**NOTICE TO COUNSEL**

**Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.**