[Cite as *State v. Shields*, 2023-Ohio-2331.]

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

State of Ohio,	:	Case No. 22CA11
Plaintiff-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
Tytus Shields,	:	
Defendant-Appellant.	:	**RELEASED 6/30/2023**

APPEARANCES:

Felice Harris, Harris Law Firm, LLC, Reynoldsburg, Ohio, for appellant.

David K.H. Silwani, Assistant Prosecuting Attorney, Marietta, Ohio, for appellee.

Hess, J.

{¶1} Tytus Shields appeals from a judgment of the Washington County Court of Common Pleas convicting him of two counts of trafficking in a fentanyl-related compound, one count of receiving proceeds of an offense subject to forfeiture proceedings, and three counts of having weapons while under disability. Shields presents five assignments of error asserting that (1) the trial court violated his rights to due process and a fair trial by denying his motions for a continuance and new trial, (2) his convictions for trafficking and an accompanying major drug offender specification violate his right to due process, (3) he was denied the effective assistance of counsel, (4) the trial court violated his right to due process when it applied an incorrect standard to his motion to return a Mustang, and (5) the trial court committed plain error when it transferred court costs from a dismissed case to this case and assessed them against him. For the reasons which follow, we agree

that the trial court committed plain error when it assessed court costs from a dismissed case against Shields in this case, reverse that portion of the trial court's judgment, and remand for further proceedings consistent with this decision. We reject the remaining assertions and affirm the trial court's judgment in all other respects.

I. FACTS AND PROCEDURAL HISTORY

{¶2} On June 10, 2020, search warrants were executed at 1572 Elizabeth Street, Apartments A and C, Belpre, Ohio. The warrants indicated that Shields and his wife[1] lived in Apartment A and that Kelci L. Wise and Andrew R. Johnston lived in Apartment C. Law enforcement seized several items according to inventory sheets completed after the searches. Items seized from Apartment A included three firearms (a 25 Taurus PT 25, a Springfield XD 9mm, and a Springfield XD 45), a key to Apartment C, a key to a safe in Apartment C, $396 from Shields, and over $18,500 from various locations. Items seized from Apartment C included a key to a safe and a safe containing four plastic bags of suspected drugs, a digital scale, and $861. A Mustang and a BMW with three bags of suspected drugs inside the glove compartment were seized from the parking lot.

A. The Indictments

{¶3} On June 17, 2020, Shields, Wise, Johnston, and two others were indicted in an 18-count indictment. The charges against Shields were assigned Washington County Case No. 20 CR 233. On July 8, 2020, Shields and his co-defendants were indicted in a 16-count indictment. The new charges against Shields were assigned Washington County Case No. 20 CR 261. The state moved to dismiss Case No. 20 CR 233 because Case No. 20 CR 261 included charges arising out of it. The trial court

[1] The search warrant for Apartment A referred to Shields' wife as Luchana Hendershot, a.k.a. Shields. In motions, Shields referred to her as Lucianna Shields.

granted the motion to dismiss Case No. 20 CR 233 and ordered court costs from that case assessed to Case No. 20 CR 261.

{¶4} Proceedings continued in Case No. 20 CR 261 on the counts in the second indictment which pertained to Shields: (1) Count One, trafficking in a fentanyl-related compound; (2) Count Two, possession of a fentanyl-related compound; (3) Count Three, trafficking in a fentanyl-related compound; (4) Count Four, receiving proceeds of an offense subject to forfeiture proceedings; (5) Count Seven, having weapons while under disability; (6) Count Eight, having weapons while under disability; (7) Count Nine, having weapons while under disability; and (8) Count Ten, receiving stolen property, i.e., the Springfield XD 9mm. The indictment alleged each count occurred on or about June 10, 2020 at "1572 Elizabeth Street, Apt C, Belpre, Washington County, Ohio." Counts One and Two included major drug offender specifications, and several counts included specifications for the forfeiture of property Shields allegedly owned and/or possessed—$18,587 (Counts One, Three, and Four), the BMW (Counts One and Three), the Mustang (Counts One and Three), the Springfield XD 45 (Count Seven), the 25 Taurus PT 25 (Count Eight), and the Springfield XD 9mm (Count Nine).

B. Pre-Trial Proceedings

{¶5} Shields pleaded not guilty. He filed a "motion for return of money," approximately $3,000, to his wife. He filed a "motion to return Mustang" in which he asked the court to return the Mustang that was taken to his wife, asserting the vehicle "belongs specifically to" her "and not to the Defendant," there was no evidence tying the vehicle to his case, there was no evidence the vehicle was purchased with drug money or used to traffic drugs, no warrant specifically referenced the vehicle, and other co-defendants had

had cars returned "based on similar circumstances." He filed a motion to suppress a statement he made to law enforcement, or in the alternative, a motion in limine to exclude or redact portions of the statement. He also moved to suppress evidence obtained in connection with the two search warrants on the ground that the warrants were not supported by probable cause.

{¶6} After a hearing on the motions, the court ordered that $2,500 be released to Shields' attorney for distribution to Shields. The court denied the motion to return the Mustang, explaining that Shields claimed it belonged to his wife and should be returned to her, but the vehicle was titled in his name only, his wife normally drives a jeep, and the Mustang was "included as a Specification for Forfeiture in the indictment." The court denied the motion to suppress evidence obtained in connection with the search warrants. The court denied the motion to suppress Shields' statement but granted the motion in limine in part. However, the court did not actually grant Shields' request to exclude or redact portions of the statement but instead ordered the parties to submit a limiting instruction regarding the use of Shields' comments about a prior conviction. The matter then proceeded to a jury trial.

C. The Trial

1. Motion to Amend Indictment

{¶7} During opening statements, the prosecutor told the jury that search warrants had been executed at Apartment A and C, who lived at each location, and some of the evidence recovered from each apartment and the BMW. Defense counsel then explained to the jury that even though the evidence would show that law enforcement found "numerous items" in Apartment A, where Shields and his wife lived, the indictment alleged

his offenses occurred in Apartment C. Defense counsel told the jury the evidence would show that Shields did not possess or traffic drugs in Apartment C and that there was no evidence fentanyl was found on Shields' person, in Apartment A, or in a vehicle he owned. Defense counsel also told the jury no firearms were found in Apartment C, and paperwork from the state indicated two firearms at issue, including the one which was allegedly stolen, belonged to Shields' wife.

{¶8} The state then moved to amend the indictment under Crim.R. 7(D) to correct a "scrivener's error" addressed in defense counsel's opening statement and strike the apartment references from each count of the indictment. Over defense counsel's objection, the trial court granted the motion. Pursuant to Crim.R. 7(D), defense counsel moved the court to continue the trial, dismiss the jury, and get a different jury for Shields so that counsel could "prepare a different defense for him." Defense counsel argued that the amendment prejudiced Shields because counsel planned his defense, "or at least part of it around what the indictment said," and it was "going to appear to the jury" that defense counsel was "misleading" it "about something." The state argued that defense counsel had known where the evidence was found "for a substantial amount of time," and the state offered to tell the jury about the scrivener's error and amendment. The court denied defense counsel's motion, explaining that Shields had "known about the correct apartments. It's in the return of the inventory. We've had a motion to suppress." The court also explained that the state made a mistake, that the state was "going to probably even have to acknowledge that," and that Shields could make arguments regarding the state's competence. Before questioning the state's first witness, the assistant prosecutor told the jury about the scrivener's error.

2. Testimony of Lieutenant Joshua Staats

{¶9} Lieutenant Joshua Staats of the Washington County Sheriff's Office testified that he is assigned to the Major Crimes Task Force. He testified that on June 10, 2020, he participated in the execution of search warrants at Apartment A, where Shields lived, and Apartment C, where Wise and Johnston lived. When the warrants were executed, Shields, his wife, Robert Conrad (Shields' cousin), Alicia Hill (the cousin's girlfriend), and a juvenile were in Apartment A. Wise, Johnston, and others were in Apartment C. Lt. Staats helped with the search and inventoried the property seized. Inside Apartment C, there was a safe and one key to the safe. The safe contained four bags of suspected heroin or fentanyl, money, a digital scale, and plastic bags. Lt. Staats testified that plastic bags, scales, and cash are signs of drug trafficking. Inside Apartment A, there was a Superman key ring which had a key to Apartment C and a key to the safe in Apartment C on it. There was a TV stand with the 25 Taurus PT 25 on it. Shields was carrying $396, and there was $13,500 on the kitchen table where he was playing poker. There were two handguns in a nightstand, the Springfield XD 45 and the Springfield XD 9mm, which had been stolen according to a national database. Lt. Staats acknowledged that a sheriff's office report identified the suspect with respect to those two handguns as Shields' wife. There was additional cash underneath a hat and on a dresser. There were also keys for a Mustang and BMW. The keys were not included on the inventory sheet for Apartment A, but they were seized and used to seize the vehicles from the parking lot. The BMW had three bags of suspected heroin or fentanyl in the glove compartment.

3. Testimony of Detective Eric Augenstein

{¶10} Detective Eric Augenstein of the Washington County Sheriff's Office testified that he is assigned to the Major Crimes Task Force and participated in the execution of the search warrants. He testified about items discovered and a recorded interview of Shields, which took place the night the search warrants were executed, after Shields told Det. Augenstein there were guns in Apartment A. Det. Augenstein testified that firearms are commonly carried by drug traffickers and users. Det. Augenstein testified that after Shields was transported to jail, roughly three ounces of fentanyl packed in three separate bags was found inside the glove compartment of a BMW parked near Apartment A. When Det. Augenstein later explained to Shields that he had been charged with trafficking "for the dope" in the BMW, Shields said "something to the effect of, it was only three zips." Det. Augenstein testified this was "a pretty accurate description of how much there was in the car" and that a "zip" is an ounce, which is a common unit of measurement used when selling drugs. He also testified that the drugs in the BMW were packaged in a manner commonly used in packaging drugs to sell. Det. Augenstein testified that the BMW was not registered to anyone in Apartment A but that drug traffickers sometimes use vehicles that are not registered to them to evade law enforcement. He testified the BMW belonged to Shields because he "confirmed that the BMW was his car" and a camera captured Shields exiting the driver's seat the day before the execution of the search warrants.

4. Recorded Interview of Shields

{¶11} The state introduced into evidence the recorded interview of Shields, parts of which are set forth below. Det. Augenstein asks, "Can you show us where the guns

are, Tytus?" Shields explains that there are two in a nightstand and states, "The 9 is loaded; it's an XD. And then I got an XD 45." Shield says, "I got another 25 * * * somewhere downstairs," and, "Everything's mine, man. Anything you found in this house is mine." Shields agrees to have a conversation, and Det. Augenstein explains Shields' *Miranda* rights. Det. Augenstein asks if Shields wants to discuss his "operation." Shields says, "I'm sure ya'll know * * * where I go, get my shit from." Det. Augenstein says, "Right." Shields says, "You know what I'm saying? And far as that go, I had to go up there to get that fish." Later, Det. Augenstein asks Shields to walk him "through your connect up there." Shields says, "I met him in the joint, and I came home, he plugged me in and we've been going since then. All I know is, he gave me shit. I mean, I went to Cali with him a couple times." Det. Augenstein later asks, "[H]ow much are you getting off of him at a time?" Shields says, "That's characterizing myself, bro. I can't -- yeah, I can't --." Someone asks, "[H]ow much could a fella get, if he wanted to?" Shields says, "He could get anything. Shit. Anything. He's a weight man." Det. Augenstein testified a "fish" is "a supplier or someone bigger in the drug trade," a "connect" is a supplier, and a "weight man" is "a supplier or connect, someone that you can essentially get whatever you want off of, drug-wise."

{¶12} Shields says that his cousin "ain't got nothing to do with nothing. Him and his baby mom just came down here today." Shields later says, "Like I said, you know, what y'all got, that's what it is, and what y'all got out of here, that -- I'm taking blame for everything, you know what I mean." Referring to Johnston, someone asks, "How about Andy's?" Det. Augenstein tells Shields, "[W]e're in his apartment too, obviously --." Shields says, "I mean, I knew that was going to happen, though, because Andy's fucking

with my brother, Steven." Det. Augenstein later asks Shields to explain the "deal" he has worked out with Johnston. Shields says, "Shit. I'm gonna be honest. I've been out of dope for four days * * *." Shields says, "You know what I'm saying, I ain't made no money in four days, so you know what I'm saying, you -- me and Andy, we usually fuck around with each other and you know, that's my guy. You know what I'm saying?" Shields also says, "That's my guy. You know what I'm saying? I, whatever, over there, you know what I'm saying, I'm pretty sure he's gonna take a hundred percent of responsibility, whatever; over here, whatever we get charged together, we're gonna take it together as one. You know what I'm saying?" Someone later asks, "If you're out of dope, do you think Andy's probably okay over there on dope? Or do you think he's out too?" Shields says, "I mean, I don't know. Maybe. I mean, I don't know." Det. Augenstein says, "Oh, we know you know." Shields says, "If he did -- if he was, he would tell me." Shields says, "He would let me know, like, oh, I got some new shit in, because -- but other than that, like I said, I ain't got no dope in four days."

{¶13} Shields repeatedly says that his wife "ain't got nothing to do with nothing," and he claims she works at a gas station. Shields says, "I'm taking it out for everything that y'all find in this house, which ain't nothing but weed, money, and guns. All my money is downstairs. And I showed y'all where my guns was [sic]. And all my weed is downstairs on the table." Shields also says the Mustang and "Beemer," i.e., the BMW, are his. Shields says, "Don't take my cars. I put a lot of cash in them." Shields says that he bought the Mustang with money he earned working at Steak 'n Shake for nine months. He could not recall how much he earned working there, and when asked if he earned enough to buy a Mustang, he says, "Bro, it's a 2010. It was only 4500." Shields admits

he bought the BMW for "7,000" "with drugs." Shields says that it took him "[a] couple days" to earn the money. Det. Augenstein asks, "[H]ow much dope did it take for you to sell to get that seven grand?" Shields says, "A whole, whole lot."

5. Testimony of Erin Miller

{¶14} Erin Miller, a forensic scientist at the Ohio Bureau of Criminal Investigation, performed testing which indicated the bags from the safe contained fentanyl and collectively weighed 190.99 grams. The bags from the BMW contained fentanyl and collectively weighed 84.61 grams.

6. Testimony of Kelci Wise

{¶15} Kelci Wise testified that she has known Shields since she was little and that he helped raise her. In 2020, they lived in the same apartment complex at 1572 Elizabeth Street, with one apartment in between their apartments. Wise's fiancé, Johnston, sometimes stayed at her apartment. Shields came to her apartment "[t]o get in" her safe, where his drugs were stored. Wise, Shields, and Johnston knew the drugs were in the safe. Wise and Shields had keys to the safe, but Johnston did not have one. Shields also had a key to Wise's apartment. Wise testified that she had seen the Superman key ring law enforcement found in Apartment A in Shields' possession. Wise testified that the drugs, which Shields provided, were in the safe "[s]o that we"—i.e., her, Johnston, and Shields—"could sell them, I guess." "Maybe ten" people came to her apartment a day to buy drugs. Wise had seen Shields taking part in drug transactions at her apartment. He came to her apartment "[m]aybe like every other day" for that purpose. Wise participated in some transactions but was a drug addict and used drugs more than she sold them. However, she lied to others, including Shields, about her drug use. Wise testified that

money was also kept in her safe and that the money belonged to Shields because the drugs were his.

{¶16} Wise testified that she was familiar with the types of drugs Shields was "getting and supplying in the safe" and identified the drugs as being heroin. When asked if there were "any other drugs" she "could identify," Wise testified, "No." Later when asked if she recalled what drugs were in her safe the day of the search, she testified, "Must have been fentanyl." She went on to testify, "It was fentanyl," and, "Tytus put it in there." During direct examination, Wise did not recall having contact with Shields the day the search warrants were executed. When asked about "the days leading up to that," Wise testified that she thought she saw Shields "maybe once" and did not know whether he had been in her apartment. However, on cross-examination, defense counsel asked, "So it just happened to be on the day that all this happened, and these drugs were found in your safe that you admitted to be yours, that Tytus brought those drugs that day and put them in there. Didn't you just testify to that?" and Wise answered, "Yes."

{¶17} Wise testified she was arrested and charged with trafficking in a fentanyl-related compound in connection with this case. After her arrest, she continued to use and sell drugs. While out on bond, she was arrested for trafficking methamphetamine. She pled guilty to the trafficking in a fentanyl-related compound charge as part of a plea agreement in which she agreed to testify truthfully against Johnston and Shields. She also pled guilty to the trafficking methamphetamine charge.

7. Motion for Judgment of Acquittal, Verdict, and Sentencing

{¶18} After both parties rested, Shields moved for a judgment of acquittal. The court granted the motion with respect to Count Ten and dismissed it but denied the motion

as to the other counts. The jury found Shields guilty of the remaining counts and major drug offender specifications. Shields waived forfeiture proceedings and agreed to forfeit $16,087, the BMW, the Mustang, and the firearms.

{¶19} The trial court found that Counts One and Two merged, and the state elected to proceed to sentencing on Count One. The court imposed an aggregate sentence of 29 to 34.5 years in prison on the remaining counts and major drug offender specification accompanying Count One. The court ordered forfeited to the Major Crimes Task Force the $16,087, vehicles, and firearms. The court also ordered Shields to "pay the cost of prosecution."

II. ASSIGNMENTS OF ERROR

{¶20} Shields presents five assignments of error:

1. The trial court plainly erred in transferring court costs from a dismissed case and assessing such costs against Defendant-Appellant Shields.

2. The trial court erred and Defendant-Appellant was denied due process of law when the court applied the incorrect legal standard to Defendant's Motion to Return Mustang.

3. Tytus Shields was denied his right to due process and a fair trial when, after opening statements, the indictment was amended and Mr. Shields' motions for continuance and a new trial were denied.

4. Tytus Shields' convictions for Trafficking in a Fentanyl-related Compound and Major Drug Offender specification are in violation of his right to due process of law guaranteed by Article I, Section 10 of the Ohio Constitution and the Fourteenth Amendment to the United States Constitution.

5. Tytus Shields was denied the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

We will address the assignments of error out of order.

III. MOTIONS FOR CONTINUANCE AND NEW TRIAL

A. Positions of the Parties

{¶21} In the third assignment of error, Shields contends the trial court violated his rights to due process and a fair trial when it denied his motions for a continuance and a new trial after granting the motion to amend the indictment. Shields claims he "vehemently disputed ownership of the drugs found in Apt. C; therefore, removal of the apartment identifier was prejudicial to his defense." Shields asserts that during opening statements, defense counsel argued that Shields was indicted for having and trafficking in drugs in Apartment C and that no fentanyl was found near him, in his home, or in a vehicle he owned. Defense counsel "also sought to establish that if the [s]tate had evidence that linked [him] to drug trafficking in Apt. C and having weapons under disability for weapons located in Apt. C., the [s]tate had not disclosed such evidence." Thus, his "theory of the case and defense, as presented through opening statement and particularly regarding the fentanyl located in Apt. C, relied heavily on the location of the evidence." He claims this strategy "made sense" because the state did not timely disclose Wise as a witness. Shields claims this case is analogous to *State v. Meyer*, 189 Ohio App.3d 628, 2010-Ohio-4804, 939 N.E.2d 944 (12th Dist.), because both cases involve arbitrary amendments to an indictment after the defense presented its theory of the case. He asserts that "despite anticipating its evidence would show fentanyl and drug paraphernalia were located in Apt. C., the [s]tate arbitrarily removed the apartment identifier from *all* counts." He claims that defense counsel presented a specific theory to the jury but "was unable to offer that defense with no distinction between Apt. A, Apt. C, and the BMW," that his rights were not fully protected by proceeding with trial, and that

the amendment of the indictment without a continuance or discharge of the jury prejudiced him.

{¶22} The state asserts that Shields is not entitled to appellate review of the decision denying his motion for a continuance under Crim.R. 7(D). The state emphasizes the fact that Crim.R. 7(D) states that "[n]o action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefor is refused by the trial court * * *." The state asserts that Crim.R. 7(D) "does not provide the mechanism for a new trial"—Crim. R. 33 does. The state asserts that even though Shields requested a continuance and new jury under Crim.R. 7(D), "and by extension a new trial, this was not the proper form for requesting a new trial under" Crim.R. 33. Alternatively, the state claims Shields "was not prejudiced by the denial of the continuance and that there was not a failure of justice." The state asserts that Shields received "full discovery" prior to trial which "showed the location of the drugs," that the amendment occurred before its first witness testified, and that it "went on record, in front of the jury," and acknowledged and apologized for the error in the indictment.

{¶23} In response, Shields asserts that he did move for a new trial, emphasizing a portion of the trial transcript in which defense counsel states, "I would, pursuant to Rule 7(D) * * * ask that this trial be continued and then this jury be dismissed and that my client get a different jury * * *." Shields points out that after this appeal was filed, the trial court issued an amended entry regarding the motion to amend the indictment. We granted his motion to supplement the record with the entry, which states that defense counsel "orally objected to the amendment of the indictment and further requested a continuance and new trial in accordance with Crim.R. 7(D)." In addition, Shields asserts that the

amendment to the indictment "did not conform to the evidence" and that "[r]emoval of all reference to 'Apt. C' in the indictment such that 1572 Elizabeth Street appeared to be a single, undivided unit did not comply with the spirit or letter of Crim.R. 7(D)." Shields asserts that defense counsel "[c]learly * * * intended to prove the drugs belonged to the residents of Apt. C," and "[b]y deleting the reference to Apt. C and presenting 1572 Elizabeth Street as a single, undivided unit, Mr. Shields' defense strategy was undermined."

B. Criminal Rules

{¶24} Crim.R. 7(D) states:

> The court may at any time before, during, or after a trial amend the indictment, * * * in respect to any defect, imperfection, or omission in form or substance, or of any variance with the evidence, provided no change is made in the name or identity of the crime charged. If any amendment is made to the substance of the indictment * * * or to cure a variance between the indictment * * * and the proof, the defendant is entitled to a discharge of the jury on the defendant's motion, if a jury has been impaneled, and to a reasonable continuance, unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made, or that the defendant's rights will be fully protected by proceeding with the trial, or by a postponement thereof to a later day with the same or another jury. Where a jury is discharged under this division, jeopardy shall not attach to the offense charged in the amended indictment * * *. No action of the court in refusing a continuance or postponement under this division is reviewable except after motion to grant a new trial therefor is refused by the trial court, and no appeal based upon such action of the court shall be sustained nor reversal had unless, from consideration of the whole proceedings, the reviewing court finds that a failure of justice resulted.

{¶25} Crim.R. 33 governs motions for a new trial. Crim.R. 33(A) permits a court to grant a new trial on motion of the defendant for specified "causes affecting materially the defendant's substantial rights." Crim.R. 33(B) provides that "[a]pplication for a new

trial shall be made by motion which * * * shall be filed within fourteen days after the verdict was rendered * * *."

C. Analysis

{¶26} In this case, while Shields requested a new jury at the time the trial court granted the state's motion to amend the indictment, Shields did not move for a new trial within 14 days after the verdict was rendered in accordance with Crim.R. 33. Even if we could construe Shields' request for a new jury as a motion for new trial within the meaning of Crim.R. 7(D), the record does not support the conclusion that there has been a failure of justice. It clearly appears from the whole proceedings that Shields was not misled or prejudiced by the defect or variance in respect to which the amendment was made and that his rights were fully protected by proceeding with the trial. Shields received notice of the locations where law enforcement found the physical evidence against him over a year before trial. Even though the apartment identifiers were removed from the indictment, the jury was made aware of the fact that 1572 Elizabeth Street was not a single, undivided unit. The state presented evidence of the specific locations where law enforcement found each piece of evidence, and nothing prevented Shields from making arguments to the jury related to those locations. The removal of the apartment identifiers did not prevent Shields from arguing that the fentanyl in Apartment C belonged to the residents of that apartment. Defense counsel essentially did this during closing arguments, asserting that the "vast majority" of the drugs were in Wise's apartment, there was no evidence Shields "put them there," Wise had prior convictions for trafficking, Wise testified pursuant to a plea deal, and Wise was a liar. Moreover, it is evident from defense counsel's opening statement that counsel prepared a defense regarding the fentanyl in the BMW and

firearms beyond the fact that they were not found in Apartment C, where the indictment indicated the offenses related to them occurred. Counsel asserted Shields was not the owner of the BMW, that the BMW was "four parking spaces away" from his apartment, that the BMW keys were not on the state's "evidence list" for his apartment, and that nothing was found in the BMW indicating it belonged to Shields. Counsel also asserted the evidence would show at least two of the guns, including the allegedly stolen one, belonged to Shields' wife.

{¶27} This case is not analogous to *Meyer*. In that case, Christopher Meyer was indicted on one count of grand theft of property valued at more than $5,000 but less than $100,0000. *Meyer*, 189 Ohio App.3d 628, 2010-Ohio-4804, 939 N.E.2d 944, at ¶ 8. The indictment alleged that "on or about the 22nd through the 26th day of August, 2008," Meyer purposely deprived Sunbelt Rentals of its property by exceeding the scope of its consent at the time he rented equipment from it. *Id.* Meyer pleaded not guilty and the matter proceeded to a jury trial. *Id.* "During deliberations, the jury posed the following question to the trial court: 'Are we deliberating that the defendant deprived the owner of property only on August 22nd through August 26th?' " *Id.* at ¶ 10. "The trial court called the parties' counsel into the courtroom, and read the jury's question into the record." *Id.* "The state then moved to amend the indictment to expand the timeframe of the theft to include dates ranging from August 22 until October 1, 2008." *Id.* The trial court granted the motion over Meyer's objection, *id.*, and the jury found him guilty of theft of property valued at more than $500 but less than $5,000. *Id.* at ¶ 11.

{¶28} On appeal, Meyer asserted that once the trial court allowed the amendment, it erred by not discharging the jury and ordering a continuance. *Id.* at ¶ 14. The appellate

court agreed. *Id.* The appellate court declined "to assume that Meyer presented his defense knowing that he should offer evidence regarding dates past those included in the indictment based on a possibility that an amendment to the indictment might occur." *Id.* at ¶ 23. The appellate court explained that "soon after the trial started, the trial court gave the state the opportunity to reconsider its strategy and ponder its approach during a recess." *Id.* at ¶ 29. "The state, satisfied with the information and charges within the indictment and bill of particulars, failed to request an amendment at that time." *Id.* "In reliance upon the state's representation that it was satisfied with the original indictment, Meyer's defense was specific to the dates listed in the original indictment rather than the amended October 1, 2008 date." *Id.* at ¶ 30. The state "requested an amendment only after the jury submitted a question during deliberation concerning the time period it was permitted to consider in relation to the theft." *Id.* at ¶ 27. The fact that "the chosen amended date of October 1, 2008, was completely arbitrary and was not a direct reflection of the evidence offered at trial," *id.* at ¶ 24, heightened the appellate court's "concern that Meyer was misled and prejudiced by the amendment," *id.* at ¶ 27. The appellate court stated, "Without specifically choosing a date based on evidence presented to the jury, there is no way of knowing whether Meyer had been afforded the opportunity to offer a defense specific to Sunbelt's consent past the arbitrarily chosen date." *Id.* at ¶ 27. The appellate court found that the "retroactive amendment left Meyer unaware of the charges against him during trial and further misled him to the point that" it could not say "that Meyer's rights were fully protected by proceeding with the trial." *Id.* at ¶ 28. The appellate court held that under Crim.R. 7(D), Meyer "was entitled to a discharge of the jury and continuance as requested." *Id.* at ¶ 31.

{¶29} *Meyer* is distinguishable from this case. In *Meyer*, the amendment occurred during jury deliberations, after the defendant had already presented a defense specific to the date range listed in the indictment, not the arbitrarily chosen date range in the amended indictment. In this case, the amendment occurred before any witnesses testified and was not arbitrary like the one in *Meyer*. The evidence did show that all the offenses occurred at 1572 Elizabeth Street. The removal of the apartment identifiers did not create confusion about whether there were multiple apartments or a single, undivided building at that address. All the evidence presented at trial indicated that there were multiple apartments at that address, and the state introduced evidence of the specific locations where evidence was found.

{¶30} For the foregoing reasons, we conclude the trial court did not violate Shields' rights to due process and a fair trial when it denied his motions for a continuance and "a new trial," and we overrule the third assignment of error.

IV. SUFFICIENCY OF THE EVIDENCE

{¶31} In the fourth assignment of error, Shields contends that his convictions for trafficking in a fentanyl-related compound and the major drug offender specification violate his right to due process. Shields maintains that there is insufficient evidence to support these convictions. He claims the state presented no evidence "regarding the preparation, shipment, delivery, sale or distribution of the fentanyl-related compounds located in the safe or found in the BMW." Shields asserts Wise's testimony about his participation in drug transactions was limited to heroin—the only drug she could identify him getting and supplying. He maintains that Wise's "only testimony regarding the fentanyl was that it 'must have been' in the safe the day" the search warrants were

executed and that Shields put it there. According to Shields, Wise "did not testify about an agreement, conduct, or pattern of behaviors suggestive of distribution of a fentanyl-related compound," did not "testify about a specific sale of a fentanyl-related compound," and "provided no testimony regarding the preparation, shipment, delivery, sale or distribution of a fentanyl-related compound." He asserts that the state's evidence established only that fentanyl "was in the safe, not packaged for resale, and not the subject of a business arrangement between [Wise], [Johnston] and Tytus Shields." And he asserts that even though there was fentanyl in the BMW previously driven by him, mere possession of a large quantity of drugs is not sufficient to establish trafficking. Shields asserts that his "confession does not identify a location, time frame, or specific substance trafficked." Shields also claims this case is similar to *State v. Jones*, 11th Dist. Ashtabula No. 2016-A-0017, 2017-Ohio-251.

{¶32} Shields maintains that to find him guilty, the jury had to engage in impermissible inference stacking. He asserts that to find him guilty of trafficking the fentanyl in the safe, the jury had to infer: "1) Tytus Shields placed fentanyl in the safe; 2) with knowledge that it was intended for sale; and 3) the quantity of fentanyl and accompanying paraphernalia were associated with drug trafficking." He claims "these inferences were necessarily and improperly stacked upon the following inferences: 1) Tytus placed heroin in the safe; 2) with knowledge that it was intended for sale." He asserts that to find him guilty of trafficking the fentanyl in the BMW, the "the jury stacked these inferences: 1) the fentanyl in the BMW belonged to Tytus Shields; 2) the quantity of the fentanyl in the BMW is associated with drug trafficking; 3) Tytus Shields placed fentanyl in the BMW; 4) with knowledge that it was intended for sale."

A. Legal Principles

{¶33} "When a court reviews a 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, 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, *superseded by constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89, 102, 684 N.E.2d 668 (1997), fn. 4, and following *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.E.2d 560 (1979). This "limited review does not intrude on the jury's role 'to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.' " *Musacchio v. U.S.*, 577 U.S. 237, 243, 136 S.Ct. 709, 193 L.Ed.2d 639 (2016), quoting *Jackson* at 319. Our role is "not to assess 'whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.' " *State v. Dodson*, 4th Dist. Ross No. 18CA3629, 2019-Ohio-1465, ¶ 11, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997) (Cook, J., concurring).

{¶34} The prosecution may establish the elements of an offense by " 'direct evidence, circumstantial evidence, or both. Circumstantial and direct evidence are of equal evidentiary value.' " (Citation omitted in *Fannon*.) *State v. Fannon*, 2018-Ohio-5242, 117 N.E.3d 10, ¶ 100 (4th Dist.), quoting *State v. Swain*, 4th Dist. Ross No. 01CA2591, 2002 WL 146204, *8 (Jan. 23, 2002). Circumstantial evidence is " ' "[t]estimony not based on actual personal knowledge or observation of the facts in controversy, but of other facts from which deductions are drawn, showing indirectly the

facts sought to be proved." ' " *Dodson* at ¶ 13, quoting *State v. Nicely*, 39 Ohio St.3d 147, 150, 529 N.E.2d 1236 (1988), quoting *Black's Law Dictionary* 221 (5th Ed.1979).

{¶35} "A trier of fact may not draw '[a]n inference based * * * entirely upon another inference, unsupported by any additional fact or another inference from other facts[.]' " (Alterations in *Cowans*.) *State v. Cowans*, 87 Ohio St.3d 68, 78, 717 N.E.2d 298 (1999), quoting *Hurt v. Charles J. Rogers Transp. Co.*, 164 Ohio St. 329, 130 N.E.2d 820 (1955), paragraph one of the syllabus. " 'When an inference, which forms the basis of a conviction, is drawn solely from another inference and that inference is not supported by any additional facts or inferences drawn from other established facts, the conviction is improper.' " *State v. Greeno*, 2021-Ohio-1372, 170 N.E.3d 1224, ¶ 32 (4th Dist.), quoting *State v. Armstrong*, 11th Dist. Portage No. 2015-P-0075, 2016-Ohio-7841, ¶ 23. However, the rule against inference-stacking "is 'extremely limited' and does not prohibit drawing parallel inferences in combination with additional facts or drawing multiple, separate inferences from the same facts." *State v. Everhart*, 12th Dist. Fayette No. CA2020-03-005, 2020-Ohio-4948, ¶ 17, quoting *State v. Braden*, 12th Dist. Preble No. CA2013-12-012, 2014-Ohio-3385, ¶ 12.

B. Statutory Provisions

{¶36} Count One charged Shields with trafficking in a fentanyl-related compound in violation of R.C. 2925.03(A)(2) and (C)(9)(h), along with a major drug offender specification; Count Three charged him with trafficking in a fentanyl-related compound in violation of R.C. 2925.03(A)(2) and (C)(9)(g). R.C. 2925.03(A)(2) states: "No person shall knowingly * * * [p]repare for shipment, ship, transport, deliver, prepare for distribution, or distribute a controlled substance * * *, when the offender knows or has

reasonable cause to believe that the controlled substance * * * is intended for sale or resale by the offender or another person." "A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B) "A person has knowledge of circumstances when the person is aware that such circumstances probably exist." *Id.* "When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact." *Id.*

{¶37} "If the drug involved in the violation is a fentanyl-related compound or a compound, mixture, preparation, or substance containing a fentanyl-related compound * * * whoever violates" R.C. 2925.03(A) "is guilty of trafficking in a fentanyl-related compound." R.C. 2925.03(C)(9). "If the amount of the drug involved * * * equals or exceeds fifty grams but is less than one hundred grams," the offense is a first-degree felony. R.C. 2925.03(C)(9)(g). "If the amount of the drug involved * * * equals or exceeds one hundred grams," the offense is a first-degree felony and "the offender is a major drug offender[.]" R.C. 2925.03(C)(9)(h).

C. Analysis

{¶38} After viewing the evidence in a light most favorable to the prosecution, we conclude any rational trier of fact could have found the essential elements of Count One, the accompanying major drug offender specification, and Count Three proven beyond a reasonable doubt without violating the rule against inference stacking. The state presented evidence that law enforcement found 190.99 grams of a substance containing

fentanyl inside the safe in Apartment C. Therefore, the jury could conclude that the drug involved in Count One was a fentanyl-related compound or a compound, mixture, preparation, or substance containing a fentanyl-related compound and that the weight requirement for that count and the major drug offender specification had been satisfied. The state also presented evidence that law enforcement found 84.61 grams of a substance containing fentanyl inside the glove compartment of the BMW. Therefore, the jury could conclude that the drug involved in Count Three was a fentanyl-related compound or a compound, mixture, preparation, or substance containing a fentanyl-related compound and that the weight requirement for that count had been satisfied.

{¶39} The state also presented the testimony of Wise about her involvement in a drug trafficking operation in which Shields supplied the drugs, which were stored in Wise's safe. Wise testified that the reason the drugs were in the safe was so that she, Johnston, and Shields could sell them. Proceeds from the sales were also stored in the safe and belonged to Shields because the drugs were his. Wise testified that Shields had a key to her apartment and was the only person aside from her with a key to the safe. Law enforcement found a Superman key ring in Shields' apartment which had keys to both Apartment C and the safe in Apartment C on it, and Wise testified that she had seen Shields in possession of the key ring before. It is true that Wise testified that she was familiar with the types of drugs Shields was "getting and supplying in the safe," that the drugs were heroin, and that she could not identify any other drugs. It is also true that when asked if she recalled what drugs were in the safe the day of the search, she testified, "Must have been fentanyl," "It was fentanyl," and "Tytus put it in there." When read in context, one could reasonably interpret Wise's testimony to be that all the drugs in the

safe were put there by Shields for the purpose of being sold and conclude that she mistakenly believed the drugs were heroin when, the day the search warrants were executed, the drugs were fentanyl. The fact that law enforcement suspected the bags in the safe and BMW contained heroin prior to testing suggests this was a reasonable mistake.

{¶40} In addition to fentanyl, law enforcement found cash, plastic bags, and a digital scale inside the safe in Apartment C—items Lt. Staats testified are signs of drug trafficking. Inside Shields' apartment, there was a substantial amount of cash and three firearms, which Det. Augenstein testified are commonly carried by drug traffickers and users. Shields admitted that the cash and firearms belonged to him and that he was involved in drug trafficking though he did not specify the type of drug and claimed to have been "out of dope for four days" prior to the execution of the search warrants. There was also evidence Shields used the BMW the day before the search warrants were executed. Shields admitted that the BMW belonged to him and that he paid $7,000 for it with drug money which only took him a couple days to earn by selling a "whole lot" of "dope." Even though the BMW was not registered to Shields, Det. Augenstein testified that drug traffickers sometimes use vehicles that are not registered to them to evade law enforcement. When Det. Augenstein told Shields about the recovery of drugs from the BMW, Shields said "something to the effect of, it was only three zips," i.e., three ounces, which Det. Augenstein testified was "a pretty accurate description" of the amount found. Det. Augenstein also testified that a "zip" is a common unit of measurement used when selling drugs and that the drugs in the BMW were packaged in a manner commonly used in packaging drugs to sell.

{¶41} Based on this evidence, the jury could infer that Shields knowingly transported or delivered the controlled substance in the safe and that when he did so, he knew or had reasonable cause to believe that the controlled substance was intended for sale or resale by himself or another person. The jury could also infer that Shields, at the very least, knowingly transported a controlled substance to the BMW and that when he did so, he knew or had reasonable cause to believe that the controlled substance was intended for sale or resale by himself or another person. The jury could make these inferences without violating the rule against inference stacking because again, the rule does not prohibit "drawing multiple, separate inferences from the same facts." *Everhart*, 12th Dist. Fayette No. CA2020-03-005, 2020-Ohio-4948, at ¶ 17.

{¶42} *Jones* is inapposite. In that case, the defendant, Brandon Jones was a passenger in a vehicle police stopped and made furtive movements, bending forward as if trying to hide something. *Jones*, 11th Dist. Ashtabula No. 2016-A-0017, 2017-Ohio-251, at ¶ 2-3. Police found a bag of marijuana and large amount of cash on his person, a baggie containing a " 'large chuck' of heroin" hidden beneath the front passenger seat, and a receipt for two boxes of baggies on the front seat passenger floor. *Id.* at ¶ 4-5, 8. The driver told police Jones stayed with her occasionally and had been staying with her before the stop for a few days, and she authorized a search of her two-bedroom apartment. *Id.* at ¶ 9, 11. Police found drug paraphernalia in her bedroom, men's shoes and clothing, a digital scale, a safe, and drug packaging materials in the second bedroom, and another scale in the hallway. *Id.* at ¶ 9-10. About a week later, police returned to the apartment with a warrant to search the safe, which the driver claimed belonged to Justin Stokely. *Id.* at ¶ 13. The safe contained firearms, ammunition, cash, drug paraphernalia,

and plastic baggies, and the police also found heroin in the apartment. *Id.* At trial, the driver testified that the heroin in the car did not belong to her and that when Jones stayed with her, she had seen him dealing drugs. *Id.* at ¶ 11-12. Jones was convicted of possession of and trafficking heroin. *Id.* at ¶ 15.

{¶43} The appellate court vacated the trafficking conviction on the ground that there was insufficient evidence to support it. *Id.* at ¶ 37, 43, 87. The appellate court explained that there was no evidence that the amount of heroin in the vehicle "was consistent with an amount that would be divided and sold or whether this amount was consistent with an amount typically maintained for personal use." *Id.* at ¶ 32. The driver never testified that Jones was using her second bedroom, there was no testimony that baggies and digital scales are items used to weigh and apportion heroin for sale, and there was no testimony that residue on the scale in the second bedroom was consistent with heroin. *Id.* at ¶ 33-34. There was also no evidence establishing what type of drugs Jones sold. *Id.* at ¶ 34. The appellate court stated: "Although the state proved that Jones possessed heroin and marijuana and that the apartment where he had been staying a few days contained plastic baggies, rubber gloves, and a digital scale, there was simply no evidence that he prepared for sale, shipped, distributed, or sold heroin. Further, the fact that Jones had both marijuana and heroin in his possession permits a reasonable inference that he could have been selling either." *Id.* at ¶ 34.

{¶44} This case is factually distinguishable from *Jones*. Unlike the driver in *Jones*, Wise testified that she participated in a drug trafficking operation in which the defendant supplied drugs, which he stored in her safe so that he, Johnston, and Wise could sell them. Other evidence, such as the fact that there was a key to Wise's apartment and

safe in Shields' apartment, bolstered this testimony. The fact that Wise mistakenly believed the drugs in the safe were heroin when they were in fact fentanyl is immaterial. And as we explained above, any rational trier of fact could have found the essential elements of Count One, the accompanying major drug offender specification, and Count Three proven beyond a reasonable doubt in this case without violating the rule against inference stacking.

{¶45} For the foregoing reasons, we conclude that there is sufficient evidence to support the conviction on Count One, the accompanying major drug offender specification, and the conviction on Count Three. The convictions do not violate Shields' due process rights. Accordingly, we overrule the fourth assignment of error.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of Review

{¶46} In the fifth assignment of error, Shields contends that he was denied the effective assistance of counsel. To prevail on an ineffective assistance claim, a defendant 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. Short*, 129 Ohio St.3d 360, 2011-Ohio-3641, 952 N.E.2d 1121, ¶ 113, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Failure to satisfy either part of the test is fatal to the claim. *See Strickland* at 697. 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. We "must indulge a strong presumption that counsel's conduct falls

within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland* at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101, 76 S.Ct. 158, 100 L.E. 83 (1955).

B. Other Acts Evidence

{¶47} Shields contends trial counsel's performance fell below an objective standard of reasonableness when counsel failed to object to and move to strike other acts evidence elicited during Wise's testimony. Shields asserts that pursuant to Evid.R. 404(B), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show the person acted in conformity therewith. He asserts that Wise testified about a heroin trafficking operation and that her testimony was not probative of any purpose other than his character or propensity to behave a certain way, did not go to a material issue in dispute, and was not relevant to prove the offenses with which he was charged.

{¶48} As previously explained, one could reasonably interpret Wise's testimony to be that all the drugs in the safe were put there by Shields for the purpose of being sold and conclude that she mistakenly believed the drugs were heroin when, the day the search warrants were executed, the drugs were fentanyl. Thus, her testimony was not evidence of another crime, wrong or act being admitted to prove Shields' character in order to show that on a particular occasion he acted in accordance with the character. It was evidence of offenses with which he was charged. Therefore, an objection to the testimony would have been futile. " ' "The law does not require counsel to take a futile act" * * *. ' " *State v. Conant*, 4th Dist. Adams No. 20CA1108, 2020-Ohio-4319, ¶ 30,

quoting *State v. Simmons*, 4th Dist. Highland No. 13CA4, 2013-Ohio-2890, ¶ 24, quoting *State v. Cottrell*, 4th Dist. Ross Nos. 11CA3241, 11CA3242, 2012-Ohio-4583, ¶ 20. Thus, counsel was not deficient for failing to challenge Wise's testimony.

C. Reagan Tokes Law

{¶49} Shields also contends trial counsel's performance fell below an objective standard of reasonableness because counsel failed to challenge the constitutionality of the Reagan Tokes Law. Shields asserts the law violates the separation of powers doctrine and due process rights. And he asserts that because the Supreme Court of Ohio "has not yet ruled on the constitutionality of the" law, "trial counsel was ineffective for waiving the issue in this unsettled area of law and failing to preserve the issue for appellate review."

1. Statutory Provisions

{¶50} The Reagan Tokes Law encompasses four newly enacted statutes and amendments to 50 statutes. R.C. 2901.011. The law requires that a court imposing a prison term under R.C. 2929.14(A)(1)(a) or (2)(a) for a first or second degree felony committed on or after March 22, 2019, impose a minimum prison term under that provision and a maximum prison term determined under R.C. 2929.144(B). R.C. 2929.144(A) and (C). There is a presumption that the offender "shall be released from service of the sentence on the expiration of the offender's minimum prison term or on the offender's presumptive earned early release date, whichever is earlier." R.C. 2967.271(B). A presumptive earned early release date is a date determined under procedures described in R.C. 2967.271(F) which allow the sentencing court to reduce the minimum prison term under certain circumstances. R.C. 2967.271(A)(2).

{¶51} R.C. 2967.271(C) states that ODRC may rebut the presumption in R.C. 2967.271(B) if it determines, at a hearing, that one or more of the following applies:

> (1) Regardless of the security level in which the offender is classified at the time of the hearing, both of the following apply:
>
> (a) During the offender's incarceration, the offender committed institutional rule infractions that involved compromising the security of a state correctional institution, compromising the safety of the staff of a state correctional institution or its inmates, or physical harm or the threat of physical harm to the staff of a state correctional institution or its inmates, or committed a violation of law that was not prosecuted, and the infractions or violations demonstrate that the offender has not been rehabilitated.
>
> (b) The offender's behavior while incarcerated, including, but not limited to the infractions and violations specified in division (C)(1)(a) of this section, demonstrate that the offender continues to pose a threat to society.
>
> (2) Regardless of the security level in which the offender is classified at the time of the hearing, the offender has been placed by the department in extended restrictive housing at any time within the year preceding the date of the hearing.
>
> (3) At the time of the hearing, the offender is classified by the department as a security level three, four, or five, or at a higher security level.

If ODRC rebuts the presumption, it "may maintain the offender's incarceration" after the expiration of the minimum prison term or presumptive earned early release date for a reasonable period, determined and specified by ODRC, which "shall not exceed the offender's maximum prison term." R.C. 2967.271(D)(1).

2. Legal Principles

{¶52} The constitutionality of a statute presents a question of law we review de novo. *Hayslip v. Hanshaw*, 2016-Ohio-3339, 54 N.E.3d 1272, ¶ 27 (4th Dist.). " '[L]aws are entitled to a strong presumption of constitutionality.' " *Ohio Renal Assn. v. Kidney Dialysis Patient Protection Amendment Commt.*, 154 Ohio St.3d 86, 2018-Ohio-3220, 111 N.E.3d 1139, ¶ 26, quoting *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d

106, 2004-Ohio-357, 802 N.E.2d 632, ¶ 16. "A party may challenge a statute as unconstitutional on its face or as applied to a particular set of facts." *Harrold v. Collier*, 107 Ohio St.3d 44, 2005-Ohio-5334, 836 N.E.2d 1165, ¶ 37. "A party asserting a facial challenge * * * must prove beyond a reasonable doubt 'that no set of circumstances exists under which the act would be valid.' " *Ohio Renal Assn.* at ¶ 26, quoting *Wymsylo v. Bartec, Inc.*, 132 Ohio St.3d 167, 2012-Ohio-2187, 970 N.E.2d 898, ¶ 21. Shields' ineffective assistance argument raises a facial challenge to the Reagan Tokes Law.

3. Separation of Powers

{¶53} Shields contends R.C. 2967.271 violates the separation of powers doctrine. He asserts the statute is analogous to former R.C. 2967.11, which the Supreme Court of Ohio found violated the doctrine in *State ex rel. Bray v. Russell*, 89 Ohio St.3d 132, 729 N.E.2d 359 (2000). Shields claims both statutes allow the executive branch to determine whether a violation of law has been committed and punish an inmate for the crime. Quoting a policy statement prepared by the Ohio Judicial Conference Criminal Law & Procedure Committee, Shields asserts that " 'the proper administration of justice requires that judges exercise discretion in * * * criminal sentencing' " and that " '[i]f judges are to fulfill their constitutional duty to secure just results for the people of Ohio, judges need the flexibility to fashion appropriate sentences given the particular facts and circumstances of individual crimes.' " Shields claims the Reagan Tokes Law impedes judicial discretion by creating hybrid prison terms in which judges determine "the appropriate minimum term for an offender's underlying charge" but then must "impose a 50% 'tail' as a placeholder to be enforced by ODRC only upon the occurrence of future bad acts."

{¶54} Shields' separation of powers argument lacks merit. "The General Assembly is vested with the power to define, classify, and prescribe punishment for offenses committed in Ohio." *State v. Taylor*, 138 Ohio St.3d 194, 2014-Ohio-460, 5 N.E.3d 612, ¶ 12. "Judges have no inherent power to create sentences" and "are duty-bound to apply sentencing laws as they are written." *State v. Fischer*, 128 Ohio St.3d 92, 2010-Ohio-6238, 942 N.E.2d 332, ¶ 22, *overruled on other grounds*, *State v. Harper*, 160 Ohio St.3d 480, 2020-Ohio-2913, 159 N.E.3d 248. In *State v. Bontranger*, 2022-Ohio-1367, 188 N.E.3d 607 (4th Dist.), we rejected the contention that the Reagan Tokes Law violates the separation of powers doctrine because it allows ODRC, an executive agency, to extend a prison sentence if it concludes an offender committed an unprosecuted violation of law while incarcerated. *Bontrager* at ¶ 37, 41-44. In doing so, we agreed with the Second District Court of Appeals that *Bray* does not compel the conclusion that the Reagan Tokes Law violates the doctrine because unlike former R.C. 2967.11, the Reagan Tokes Law does not permit ODRC to lengthen a defendant's sentence beyond the maximum sentence imposed by the trial court. *See id.* at ¶ 44.

{¶55} Accordingly, we reject Shields' contention that the Reagan Tokes Law violates the separation of powers doctrine. Therefore, it would have been futile for trial counsel to challenge the law based on the separation of powers argument Shields advances in this appeal. Again, " ' "[t]he law does not require counsel to take a futile act" * * *. ' " *Conant*, 4th Dist. Adams No. 20CA1108, 2020-Ohio-4319, at ¶ 30, quoting *Simmons*, 4th Dist. Highland No. 13CA4, 2013-Ohio-2890, at ¶ 24, quoting *Cottrell*, 4th Dist. Ross Nos. 11CA3241, 11CA3242, 2012-Ohio-4583, at ¶ 20. Thus, counsel was not deficient for failing to raise a separation of powers challenge to the Reagan Tokes Law.

4. Procedural Due Process

{¶56} Shields contends that the Reagan Tokes Law violates procedural due process rights. Shields maintains that by establishing a presumptive release date, the law "creates a liberty interest protected by due process guarantees akin to those due at parole revocation hearings." He asserts that pursuant to *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.E.2d 484 (1972), the minimum due process requirements for parole revocation proceedings include: "(a) written notice of the claimed violations; (b) disclosure of evidence; (c) opportunity to heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses; (e) a 'neutral and detached' hearing body such as a traditional parole board; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole." He asserts that "[t]hese protections are not provided at rebuttable presumption hearings" so the Reagan Tokes Law "fails to provide adequate procedural due process protections and is unconstitutional."

{¶57} The Due Process Clause in the Fourteenth Amendment to the United States Constitution states: "No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *." The Due Course of Law Clause in Article I, Section 16 of the Ohio Constitution provides: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." "The two clauses provide equivalent due process protections." *State v. Wheatley*, 2018-Ohio-464, 94 N.E.3d 578, ¶ 28 (4th Dist.), citing *State v. Aalim*, 150 Ohio St.3d 489, 2017-Ohio-2956, 83 N.E.3d 883, ¶ 15.

{¶58} " 'Because the Reagan Tokes Law creates a presumption of release after service of an offender's minimum sentence, * * * it creates a liberty interest implicating due process rights.' " *State v. Holsinger*, 4th Dist. Lawrence No. 21CA20, 2022-Ohio-4092, ¶ 44, quoting *State v. Stenson*, 2022-Ohio-2072, 190 N.E.3d 1240, ¶ 25 (6th Dist.). "Once it is determined that due process applies, the question remains what process is due." *Morrissey* at 481. "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Id.*

{¶59} We have previously rejected due process challenges to the Reagan Tokes Law. *See Bontrager*, 2022-Ohio-1367, 188 N.E.3d 607, at ¶ 48 (rejecting suggestion that due process requires that the sentencing court, rather than ODRC, conduct the R.C. 2967.271(C) hearing and make the decision whether to maintain the offender's incarceration); *Holsinger* at ¶ 41-53 (rejecting contention that Reagan Tokes Law violates procedural due process rights on its face because it fails to afford access to counsel). However, it does not appear we have addressed the specific due process argument Shields makes, i.e., that the law violates procedural due process rights on its face because it does not include *Morrisey*-like protections. The Sixth District Court of Appeals has explained that "*Morrissey* acknowledged that most states have enacted legislation setting forth procedural requirements for parole revocation hearings, but others have done so by judicial decision." *State v. Williams*, 6th Dist. Lucas No. L-21-1152, 2022-Ohio-2812, ¶ 22. The Sixth District has "interpreted *Morrissey* to imply that the specific procedural requirements applicable to protect a particular liberty interest need not be set forth in the legislation itself" and concluded that "*Morrissey* suggests that the Reagan Tokes Law may not be found to be unconstitutional, on its face, as violating due process

merely because the specific procedures for invoking an additional period of incarceration are not set forth in the Law itself." *Id.*

{¶60} We agree with this position and conclude that even if an offender is entitled to *Morrissey*-like protections at a R.C. 2967.271(C) hearing, the Reagan Tokes Law is not facially unconstitutional merely because those protections are not set forth in the law itself. At this juncture, it cannot be said that no set of circumstances exists under which the law would be valid. *See id.* at ¶ 23. However, as the Sixth District has observed, should the law ultimately be applied to an offender in an unconstitutional manner, the offender would not be precluded from raising an as-applied constitutional challenge. *Id.*

{¶61} For these reasons, it would have been futile for trial counsel to challenge the Reagan Tokes Law based on the procedural due process argument Shields advances on appeal. Again, " ' "[t]he law does not require counsel to take a futile act" * * *. ' " *Conant*, 4th Dist. Adams No. 20CA1108, 2020-Ohio-4319, at ¶ 30, quoting *Simmons*, 4th Dist. Highland No. 13CA4, 2013-Ohio-2890, at ¶ 24, quoting *Cottrell*, 4th Dist. Ross Nos. 11CA3241, 11CA3242, 2012-Ohio-4583, at ¶ 20. Thus, counsel was not deficient for failing to raise a procedural due process challenge to the law.

5. Vagueness

{¶62} Shields contends that the Reagan Tokes Law violates substantive due process rights because R.C. 2967.271(C) is unconstitutionally vague. Shields maintains that "[w]ith regard to fair warning and arbitrariness, most troubling is R.C. 2967.271(C)(2)," which allows ODRC to the rebut the presumption of release if it determines at a hearing that the offender has been placed in extended restrictive housing at any time within the year preceding the date of the hearing. He asserts that under Ohio

Adm.Code 5120-9-10(B)(3), an inmate may be placed in or transferred to restrictive housing pending transfer to another institution, and under Ohio Adm.Code 5120-9-10(D)(3), that placement may continue until the transfer is completed. He asserts institutional transfers "occur for reasons other than disciplinary reasons — such as to secure the inmate's safety, to address medical or social concerns, or for administrative reasons of no fault of the inmate." Shields maintains that "[a] statutory framework that allows the extension of an offender's minimum sentence for an arbitrary reason, such as placement in restrictive housing pending institutional transfer, is void for vagueness as the ordinary inmate may not have engaged in any behavior contrary to the statute." He asserts that R.C. 2967.271(C) encourages discriminatory enforcement because it is permissive and gives ODRC "unfettered discretion to rebut the presumption of release and unilaterally retain the offender for an additional period of time, up to the maximum term." He also asserts that the Reagan Tokes Law infringes on a constitutionally protected freedom, i.e., "an offender's liberty interest," "by failing to provide adequate procedural due process protections."

{¶63} "The void-for-vagueness doctrine 'rests on the twin constitutional pillars of due process and separation of powers.' " *State v. Wolf*, 4th Dist. Athens No. 19CA2, 2019-Ohio-4170, ¶ 8, quoting *United States v. Davis*, ___ U.S. ___, 139 S.Ct. 2319, 2325, 204 L.Ed.2d 757 (2019). "Vague laws contravene the 'first essential of due process of law' that statutes must give people 'of common intelligence' fair notice of what the law demands of them." *Davis* at 2325, quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). "Vague laws also undermine the

Constitution's separation of powers and the democratic self-governance it aims to protect." *Id.*

{¶64} "A court that is reviewing whether a statute is void for vagueness 'must determine whether the enactment (1) provides sufficient notice of its proscriptions to facilitate compliance by persons of ordinary intelligence and (2) is specific enough to prevent official arbitrariness or discrimination in its enforcement.' " *Wolf* at ¶ 9, quoting *Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799, 853 N.E.2d 1115, ¶ 84. "In order to survive a void-for-vagueness challenge, a statute 'must be written so that a person of common intelligence is able to determine what conduct is prohibited,' and the legislative enactment 'must provide sufficient standards to prevent arbitrary and discriminatory enforcement.' " *Id.*, quoting *State v. Williams*, 88 Ohio St.3d 513, 532, 728 N.E.2d 342 (2000). "Proper constitutional analysis necessitates a *de novo* review to determine whether the statute comports with three distinct values inherent in the vagueness doctrine[.]" *State v. Volgares*, 4th Dist. Lawrence No. 98 CA 1, 1999 WL354335, *9 (May 17, 1999). "These values are first, to provide fair warning to the ordinary citizen so behavior may comport with the dictates of the statute; second to preclude arbitrary, capricious and generally discriminatory enforcement by officials given too much authority and too few constraints; and third, to ensure that fundamental constitutionally protected freedoms are not unreasonably impinged or inhibited." *State v. Tanner*, 15 Ohio St.3d 1, 3, 472 N.E.2d 689 (1984).

{¶65} R.C. 2967.271(C) is not void for vagueness. This provision "does not prohibit any conduct." *State v. McCormick*, 2d Dist. Montgomery No. 29607, 2023-Ohio-1303, ¶ 25. "Rather, it provides an administrative procedure for the ODRC to apply to

determine whether an inmate should continue to be held past the expiration of their minimum sentence, but not beyond their maximum sentence." *Id.* "Because these administrative proceedings are not a criminal statute prohibiting certain conduct, the needed specificity required to uphold the constitutionality of the statute is not as stringent." *Id.*, citing *Salem v. Liquor Control Comm.*, 34 Ohio St.2d 244, 246, 298 N.E.2d 138 (1973).

{¶66} Shields presents no specific argument regarding R.C. 2967.271(C)(1) and (C)(3), and contrary to what he suggests, R.C. 2967.271(C)(2) gives fair warning to ordinary citizens that ODRC may rebut the presumption of release in division (B) if an offender is placed in extended restricted housing within the stated time frame. R.C. 2967.271(C) provides sufficient standards to preclude arbitrary, capricious, and generally discriminatory enforcement by officials. The statute sets forth "very specific factors for the ODRC to consider in determining whether an inmate may be imprisoned beyond [the inmate's] minimum release date, thereby limiting its discretion." *State v. Wilburn*, 2021-Ohio-578, 168 N.E.3d 873, ¶ 35 (8th Dist.). Moreover, in the previous section, we rejected Shields' contention that the law infringes on an offender's liberty interest by failing to provide adequate procedural due process protections.

{¶67} R.C. 2967.271(C)(2) is not unconstitutionally vague merely because, in Shields' view, placement in extended restrictive housing is an arbitrary reason for maintaining an offender's incarceration. Moreover, the premise underlying this view—that ODRC places inmates in extended restrictive housing for reasons due to no fault of their own—is incorrect. "[T]he decision to place an offender in extended restrictive housing" is "the subject of detailed sets of policies and procedures." *State v. Williams*, 6th Dist. Lucas No. L-21-1152, 2022-Ohio-2812, ¶ 26. It is true that Ohio Adm.Code

5120-9-10(B)(3) authorizes placement of an inmate in restrictive housing "[p]ending transfer to another institution" and that Ohio Adm.Code 5120-9-10(D)(3) states that "the inmate may be placed until such time that the transfer has been completed[.]" However, ODRC's policy is "to limit the use of extended restrictive housing (ERH) to only those persons who pose the greatest threat to the safety and security of a correctional facility and cannot be managed safely in general population." (Emphasis added.) ODRC Policy 53-CLS-04, available at https://drc.ohio.gov/about/resource/policies-and-procedures/3-policies-and-procedures (accessed June 26, 2023). "[A] person may only be considered for placement in ERH if they satisfy both an administrative and a behavioral criterion" listed in ODRC Policy 53-CLS-04. *Id.*

{¶68} For these reasons, it would have been futile for trial counsel to challenge the constitutionality of the Reagan Tokes Law based on the vagueness argument Shields advances in this appeal. Again, " ' "[t]he law does not require counsel to take a futile act" * * *. ' " *Conant*, 4th Dist. Adams No. 20CA1108, 2020-Ohio-4319, at ¶ 30, quoting *Simmons*, 4th Dist. Highland No. 13CA4, 2013-Ohio-2890, at ¶ 24, quoting *Cottrell*, 4th Dist. Ross Nos. 11CA3241, 11CA3242, 2012-Ohio-4583, at ¶ 20. Thus, counsel was not deficient for failing to challenge the Reagan Tokes Law as being unconstitutionally vague.

6. Preservation of Constitutional Issues

{¶69} The fact that the Supreme Court of Ohio has not yet resolved whether the Reagan Tokes Law is constitutional does not mean trial counsel was ineffective for failing to raise the constitutional issues Shields raises on appeal. We have concluded the law is constitutional, and it is unknown how the Supreme Court of Ohio will resolve the issue.

Thus, at this time, Shields cannot demonstrate any prejudice from trial counsel's failure to raise these constitutional issues.[2]

7. Summary

{¶70} For the foregoing reasons, we conclude Shields was not denied the effective assistance of counsel and overrule the fifth assignment of error.

VI. MOTION TO RETURN MUSTANG

{¶71} In the second assignment of error, Shields contends the trial court denied him due process of law when it applied an incorrect legal standard to his motion to return the Mustang. Shields asserts that under R.C. 2981.03(A)(4), the trial court had to treat his motion as a motion to suppress, and the state had to prove by a preponderance of the evidence that the seizure of the Mustang was lawful. Shields asserts that in denying his motion, the trial court failed to treat his motion to return the Mustang as a motion to suppress and failed to address the lawfulness of the seizure. He asserts that because of these failures, he was "denied title to his property without due process of law." Shields also asserts the state failed to prove by a preponderance of the evidence that the seizure of the Mustang was lawful.

{¶72} The issue whether a trial court correctly interpreted and adhered to the statutory scheme for forfeiture ordinarily presents a question of law we review de novo. *See State v. Syed*, 9th Dist. Medina Nos. 17CA0013-M, 17CA0014-M, 2018-Ohio-1438, ¶ 26. However, "[i]t is a general rule that an appellate court will not consider any error

[2] At least one appellate district has stated that "R.C. 2953.21(A)(1)(i) allows a criminal defendant to challenge an unconstitutional sentence in a postconviction relief proceeding," so a defendant whose trial counsel did not object to a sentence imposed pursuant to the Reagan Tokes Law will have a remedy if the Supreme Court of Ohio declares the law unconstitutional in the future. *State v. Thomas*, 2023-Ohio-302, 208 N.E.3d 125, ¶ 72 (8th Dist.), *appeal allowed by* 170 Ohio St.3d 1428, 2023-Ohio-1665, 209 N.E.3d 715. However, we decline to comment on this subject as it involves future events which may never occur.

which counsel for a party complaining of the trial court's judgment could have called but did not call to the trial court's attention at a time when such error could have been avoided or corrected by the trial court." *State v. Childs*, 14 Ohio St.2d 56, 236 N.E.2d 545 (1968), paragraph three of the syllabus. " 'Thus, a party forfeits, and may not raise on appeal, any error that arises during trial court proceedings if that party fails to bring the error to the court's attention, by objection or otherwise, at a time when the trial court could avoid or correct the error.' " *In re Adoption of B.L.F.*, 4th Dist. Athens No. 20CA11, 2021-Ohio-1926, ¶ 25, quoting *Cline v. Rogers Farm Ents., LLC*, 2017-Ohio-1379, 87 N.E.3d 637, ¶ 47 (4th Dist.). "Appellate courts may, however, consider a forfeited argument using a plain-error analysis." *Id.* at ¶ 27. Crim.R. 52(B) states: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." It is the defendant's burden to "establish that an error occurred, it was obvious, and it affected his or her substantial rights." *Fannon*, 2018-Ohio-5242, 117 N.E.3d 10, at ¶ 21. "Notice of plain error under Crim.R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus.

{¶73} In this case, Shields did not argue during the proceedings below that the trial court applied an incorrect legal standard when it ruled on his motion to return the Mustang to his wife. Therefore, he has forfeited all but plain error review. Shields has not argued plain error on appeal, and even if he had, such an argument would fail because, as we explain below, no error occurred.

{¶74} R.C. 2981.03(A)(4) states:

> A person aggrieved by an alleged unlawful seizure of property may seek relief from the seizure by filing a motion in the appropriate court that shows

> the person's interest in the property, states why the seizure was unlawful, and requests the property's return. If the motion is filed before an indictment * * * seeking forfeiture of the property is filed, the court shall schedule a hearing on the motion not later than twenty-one days after it is filed. * * * At the hearing, if the property seized is titled or registered under law, the state or political subdivision shall demonstrate by a preponderance of the evidence that the seizure was lawful and that the person is not entitled to the property. If the property seized is not titled or registered under law, the person shall demonstrate by a preponderance of the evidence that the seizure was unlawful and that the person is entitled to the property. If the motion is filed by a defendant after an indictment * * * seeking forfeiture of the property has been filed, the court shall treat the motion as a motion to suppress evidence. If the motion is filed by a third party after an indictment * * * seeking forfeiture of the property has been filed, the court shall treat the motion as a petition of a person with an alleged interest in the subject property, pursuant to divisions (E) and (F) of section 2981.04 of the Revised Code.

Thus, R.C. 2981.03(A)(4) permits only a person aggrieved by an alleged unlawful seizure of property to seek relief from the seizure. Once an aggrieved person files a motion that shows the person's interest in the property, states why the seizure was unlawful, and requests the property's return, the court must follow the procedure set forth in R.C. 2981.03(A)(4), which varies depending on who the person aggrieved is, the timing of the motion, and whether the property is titled or registered under law.

{¶75} Shields' motion to return the Mustang does not fit within the framework of R.C. 2981.03(A)(4). Shields is a defendant who filed a motion for return of the Mustang after an indictment seeking forfeiture of the property had been filed. However, the motion did not indicate that Shields was a person aggrieved by the alleged unlawful seizure of property. The motion did not comport with R.C. 2981.03(A)(4) because it did not show Shields' interest in the property or request the return of the property to him. In the motion, Shields *denied* that the Mustang belonged to him, alleged it belonged to *his wife*, and moved for the return of the vehicle *to his wife*. Thus, Shields essentially filed a motion to

return the Mustang on behalf of a third party whom he claimed had been aggrieved by the alleged unlawful seizure of it. Nothing in R.C. 2981.03(A)(4) authorized him to do so. Therefore, the trial court could have denied the motion on that basis alone and did not have to treat the motion as a motion to suppress or consider the lawfulness of the seizure before denying the motion. Although the state did still have to, upon Shields' conviction, prove by clear and convincing evidence that the vehicle was subject to forfeiture, R.C. 2981.04(B), Shields waived forfeiture proceedings with respect to the Mustang, thereby relieving the state of this burden.

{¶76} Even if Shields could have filed a R.C. 2981.03(A)(4) motion on behalf of his wife, that provision requires that a motion filed by a third party after an indictment has been filed be treated "as a petition of a person with an alleged interest in the subject property, pursuant to" R.C. 2981.04(E) and (F), not a motion to suppress. R.C. 2981.04(E)(1) permits a person who asserts a legal interest in property that is the subject of a forfeiture order to petition the court that issued the order for a hearing to adjudicate the validity of the person's alleged interest. Among other things, the petition "shall state that one of the following conditions applies to the petitioner":

> (i) The petitioner has a legal interest in the property that is subject to the forfeiture order that renders the order completely or partially invalid because the legal interest in the property was vested in the petitioner, rather than the offender or delinquent child whose conviction or plea of guilty or delinquency adjudication is the basis of the order, or was superior to any interest of that offender or delinquent child, at the time of the commission of the offense or delinquent act that is the basis of the order.
>
> (ii) The petitioner is a bona fide purchaser for value of the interest in the property that is subject to the forfeiture order and was, at the time of the purchase, reasonably without cause to believe that it was subject to forfeiture.

R.C. 2981.04(E)(1)(d). Upon receipt of a petition filed under R.C. 2981.04(E)(1), "the court shall hold a hearing to determine the validity of the petitioner's interest in the property that is the subject of the forfeiture order." R.C. 2981.04(E)(3). "[T]he court shall amend its forfeiture order if it determines at the hearing * * * that the petitioner has established by a preponderance of the evidence that the applicable condition alleged by the petitioner * * * applies to the petitioner." R.C. 2981.04(F)(1).

{¶77} In this case, if the motion to return had to be treated as a petition under R.C. 2981.04(E) and (F), it was premature as it was filed before the trial court issued the forfeiture order. Nonetheless, the trial court conducted a hearing and determined the validity of Shields' wife's interest in the property. The court essentially found that Shields' wife did not have a legal interest in the Mustang, and that finding has not been challenged on appeal.

{¶78} Instead, Shields asserts that the trial court denied him "title to *his* property without due process of law." (Emphasis added.) However, Shields never filed a motion requesting the return of the Mustang to him. We acknowledge that at the hearing on the motion to return, after Shields' wife testified about her and Shields buying the Mustang together, defense counsel made the statement, "I don't think the Mustang should be kept from the Defendant." However, Shields did not amend his motion to return or file a new motion to return showing his own interest in the Mustang and requesting the return of it to him. Instead, once the trial court denied the motion to return the Mustang to Shields' wife, the matter proceeded to a jury trial. And as previously stated, Shields waived forfeiture proceedings with respect to the Mustang, thereby relieving the state of its

burden under R.C. 2981.04(B) to, upon his conviction, prove by clear and convincing evidence that the vehicle was subject to forfeiture.

{¶79} Under these circumstances, we conclude the trial court did not err, let alone commit plain error, and deny Shields due process of law by applying an incorrect standard to the motion to return the Mustang. We overrule the second assignment of error.

VII. COURT COSTS

{¶80} In the first assignment of error, Shields contends that the trial court committed plain error when it transferred court costs from a dismissed case, i.e., Case No. 20 CR 233, and assessed the costs against him in Case No. 20 CR 261. Shields asserts that under R.C. 2947.23, a trial court is only authorized to assess the costs of prosecution against a defendant who has been found guilty and sentenced. And he asserts that because Case No. 20 CR 233 was dismissed, and he did not agree to pay the costs from that case, the court erred when it assessed those costs against him. The state concedes error.

{¶81} To the extent Shields challenges the trial court's decision to *transfer* court costs from Case No. 20 CR 233 to Case No. 20 CR 261, the first assignment of error is not well-taken. Shields did not file an appeal from the transfer order issued in Case No. 20 CR 233. Moreover, Shields has not presented any argument or authority in support of the position that the mere transfer of the costs was error.

{¶82} However, to the extent Shields challenges the trial court's decision to *assess* the transferred court costs from Case No. 20 CR 233 against him in Case No. 20 CR 261, the first assignment of error is well-taken. R.C. 2947.23(A)(1)(a) states: "In all criminal cases, * * * the judge * * * shall include in the sentence the costs of prosecution

* * * and render a judgment against the defendant for such costs." This provision "authorizes a trial court to assess the costs related to a prosecution only when a defendant has been found guilty and sentenced." *State v. Lykins*, 2017-Ohio-9390, 102 N.E.3d 503, ¶ 23 (4th Dist.). "Thus, in the absence of an agreement to pay court costs, a trial court errs by imposing court costs against a criminal defendant from a case that has been dismissed." *State v. Mayer*, 2d Dist. Darke No. 2014-CA-14, 2016-Ohio-520, ¶ 8. Case No. 20 CR 233 was dismissed and therefore did not result in a conviction, and Shields did not agree to the assessment of costs from that case against him in Case No. 20 CR 261. Thus, we conclude the trial court had no authority to assess costs from Case No. 20 CR 233 against Shields in Case No. 20 CR 261 and committed plain error in doing so.

{¶83} For the foregoing reasons, we overrule the first assignment of error to the extent it challenges the transfer of costs from Case No. 20 CR 233 to Case No. 20 CR 261, but we sustain the first assignment of error to the extent it challenges the assessment of costs from Case No. 20 CR 233 against Shields in Case No. 20 CR 261. Therefore, we reverse the trial court's assessment of the costs of prosecution to Shields to the extent that order encompasses the costs from Case No. 20 CR 233. We remand this matter for further proceedings consistent with this decision.

VIII. CONCLUSION

{¶84} We overrule the first assignment of error to the extent it challenges the transfer of costs from Case No. 20 CR 233 to Case No. 20 CR 261, but we sustain the first assignment of error to the extent to it challenges the assessment of costs from Case No. 20 CR 233 against Shields in Case No. 20 CR 261. We overrule the second, third, fourth, and fifth assignments of error. We reverse the trial court's assessment of the costs

of prosecution to Shields to the extent that order encompasses the costs from Case No. 20 CR 233, but we affirm the trial court's judgment in all other respects. We remand for further proceedings consistent with this decision.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART.
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 Washington 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 60 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 60-day period, or the failure of the appellant to file a notice of appeal with the Supreme Court of Ohio in the 45-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 60 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.

Smith, P.J. & Wilkin, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Michael D. Hess, 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.