[Cite as *State v. Thompkins*, 2023-Ohio-2871.]

COURT OF APPEALS
MUSKINGUM COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. CT 2022-0085
JOHN THOMPKINS	:	
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING:	Criminal appeal from the Muskingum County Court of Common Pleas, Case No. CR2022-0294
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 16, 2023

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN DEVER Assistant Prosecuting Attorney 27 North Fifth St., P.O. Box 189 Zanesville, OH 43702	CHRIS BRIGDON 8138 Somerset Road Thornville, OH 43076

Gwin, P.J.

{¶1} Appellant John T. Thompkins appeals from the judgment entry of the Muskingum County Court of Common Pleas. Appellee is the State of Ohio.

Facts & Procedural History

{¶2} On June 22, 2022, appellant was charged with the following: possession of drugs (cocaine) in an amount equal to or greater than one hundred grams, in violation of R.C. 2925.11(A), with a forfeiture specification and major drug offender specification; trafficking in drugs (cocaine) in the vicinity of a school, in violation of R.C. 2925.03(A)(2), with a forfeiture specification and a major drug offender specification; tampering with evidence (cocaine), in violation of R.C. 2921.12(A)(1); possession of drugs (methamphetamine) in an amount equal to or greater than five times the bulk amount but less than fifty times the bulk amount, in violation of R.C. 2925.11(A), with a forfeiture specification and a firearm specification; three counts of having a weapon while under disability, in violation of R.C. 2923.13(A)(3); possession of drugs (methamphetamine), in an amount equal to or greater than five times the bulk amount but less than fifty times the bulk amount in violation of R.C. 2925.11(A); possession of drugs (cocaine) in an amount less than five grams, in violation of R.C. 2925.11(A); possession of drugs (fentanyl-related compound) in an amount less than one gram, in violation of R.C. 2925.11(A); possession of drugs (alprazolam), in an amount less than the bulk amount, in violation of R.C. 2925.11(A); and two counts of possession of drugs (oxycodone hydrochloride), in an amount less than the bulk amount, in violation of R.C. 2929.11(A). Rod Hampton ("Hampton"), appellant's co-defendant, was also charged in the same indictment.

{¶3} Appellant waived his right to a jury on the three counts of having weapons while under disability. The trial court held a jury trial beginning on September 20, 2022 on the remaining charges.

{¶4} Deputy Dustin Prouty ("Prouty") of the Muskingum County Sheriff's Office is a K-9 officer working as part of the Central Ohio Drug Task Force ("CODE"). On June 2, 2022, he and Deputy Kelly were in marked cruisers. As part of a CODE operation, Prouty was stationed on Locust Avenue, near Hampton's house, and it was anticipated that he would make an arrest after a drug transaction occurred. Prouty heard over the radio that appellant left Hampton's residence in a Ford Fusion.

{¶5} After the Ford Fusion failed to signal, Prouty attempted to initiate a traffic stop at the intersection of Brighton and Ridge. It first appeared that the vehicle was going to turn right into an alley. However, the vehicle "slow rolled" there, came to a stop waiting on a light to change, and continued onto Ridge. Prouty was concerned the driver of the vehicle would flee. The vehicle eventually stopped.

{¶6} Prouty made contact with appellant, who was the driver of the Ford Fusion. When appellant stepped out of the car, Prouty saw a charred glass crack pipe in the driver's door. Upon searching the car, Prouty found a set of digital scales and some baggies in the center console. Prouty did not find any drugs in the car. He issued appellant a written warning, let appellant go, and immediately started reviewing his dash cam footage. Upon reviewing the footage, Prouty noticed that after the vehicle turned onto Ridge, the driver's window was up. As the vehicle continues down Ridge, the window came down there was one place where the driver was out of view in the turn to go down to the alley. Prouty then looked at the sidewalk where the vehicle turned, and,

on the sidewalk, there was a grocery bag. Prouty described and identified photographs from his dash cam and body cam. The photographs demonstrate how the sidewalk was initially clean, but, after the vehicle pulled into the alley, there was a bag on the sidewalk. There was a large amount of cocaine inside the bag in multiples individual baggies.

{¶7} Prouty got back into his cruiser in an attempt to find appellant. As Prouty looped back to Ridge, he stopped at the intersection of Mead and Ridge, and saw appellant, in his vehicle, come back past where the stop had occurred. Prouty believed appellant was coming back to grab what he had thrown, but saw Prouty was still there. Prouty then made a second stop of appellant and arrested him. After appellant was arrested, Prouty assisted in a search of Hampton's vehicle and home. The cocaine Prouty viewed in Hampton's home were consistent with the cocaine he recovered in the grocery bag because they both were in grocery bags that each contained five small prepackaged bags of cocaine.

{¶8} On cross-examination, Prouty testified that he did not have his K-9 Jango sniff appellant's car because he already had probable cause to search the vehicle. Further, if he would have run Jango around the vehicle, Jango would have likely alerted on the crack pipe in the vehicle and would not have provided Prouty with any additional information. Prouty stated it is his policy never to put Jango inside a vehicle due to safety concerns.

{¶9} Detective Matt Wilhite ("Wilhite") of the Muskingum County Sheriff's Office also works as part of CODE. Wilhite began investigating appellant in March of 2022 after receiving complaints in reference to appellant, his vehicle, and his residence located at 819 Dryden Road. Wilhite developed a relationship with a confidential source related to

appellant's activities at the Dryden address and appellant's vehicles. Wilhite then conducted independent surveillance on the Dryden address.

{¶10} In mid-March, Wilhite received information from a confidential source that appellant was being supplied by "Rod," and appellant had received $3,300 in cocaine from "Rod." Wilhite had experience with two individuals named "Rod" that were drug traffickers of a pound-kilo level. CODE continued surveillance on appellant and Hampton. In mid-May of 2022, Wilhite received information from the confidential source that appellant got a new vehicle, a tan Ford Fusion. Wilhite surveilled appellant's home and saw the tan Ford Fusion. The tan Ford Fusion was registered to appellant and Wilhite observed him driving it on May 12, 2022. Wilhite obtained a search warrant to place a covert GPS on appellant's Ford Fusion, and placed the GPS on May 24, 2022. Wilhite received information that a drug dealer was trafficking on Locust Avenue, and he believed it to be Hampton.

{¶11} Upon reviewing the GPS attached to appellant's car, Wilhite noticed a pattern of travel consistent with drug trafficking in areas that were known drug houses. Appellant would leave the 819 Dryden Road residence, make trips to a residence on Melrose Avenue, an apartment on Linden Avenue, and Hampton's residence at 835 Locust. There would also be trips out of town and to the east side of town. These trips were very short in length, only a few minutes, which is indicative of drug transactions. Between May 25 and May 27, Wilhite noticed specific activities related to 835 Locust. Appellant would start at his home, went to 1222 Melrose, continued to 1648 Linden, sometimes go to New Concord, and then go to 835 Locust. Appellant would then drive directly from Locust Avenue back to 1648 Linden.

{¶12} On May 26, 2022, Wilhite began continuous surveillance at 835 Locust. On June 1, 2022, Hampton went to a house on Maysville Pike and picked up a female. They drove to a house in Columbus that was later found to be Hampton's supplier. Hampton returned to 835 Locust with a cardboard box. Ten minutes after Hampton arrived home, appellant arrived at Hampton's home. Appellant then drove to the Melrose and Linden locations. Appellant traveled to Hampton's residence approximately five to six times in a two-week period.

{¶13} Wilhite and the CODE officers developed a plan for June 2, 2022 to conduct surveillance at both the residence of Hampton and the residence of appellant, and conduct a traffic stop of appellant. Wilhite began the day watching appellant's residence. Wilhite noticed on the GPS that appellant went to Locust Avenue. The deputies called him during the traffic stop of appellant. Wilhite was very surprised there were no drugs in appellant's car because he was confident appellant picked up drugs from Hampton's residence. Prouty then informed Wilhite of the bag of cocaine found on the sidewalk. Wilhite prepared a search warrant for the residences located at Locust and Dryden. Wilhite found a large amount of cocaine at the Locust Avenue home, with small individual bags placed in larger bags, such as a CVS bag. Wilhite testified the cocaine recovered from the sidewalk during the traffic stop of appellant was "packaged exactly the same" as the cocaine located in Hampton's home. Based upon the unique packaging and how it looked, even if Wilhite had not followed appellant directly from Hampton's home to where the drugs were recovered, he would have still drawn the connection between the two.

{¶14} Wilhite reviewed numerous exhibits, and testified the GPS data cooborates the visual surveillance of the deputies who completed the traffic stop.

{¶15} Deputy Cody Kelly ("Kelly") works for the Muskingum County Sheriff's Office, and is assigned to the Zanesville/Muskingum County Joint Drug Unit. On June 2, 2022, when Prouty made the stop of appellant's vehicle, Kelly was initially four or five cars behind Prouty. Prouty advised on the radio that appellant was "slow rolling," so Kelly got directly behind Prouty. As appellant was turning into the alley, Kelly was directly behind Prouty's cruiser. Kelly did not initially see the bag of drugs on the sidewalk because he was focused on appellant's vehicle, as he believed appellant's lack of stopping the vehicle and appellant's potential flight was of greater concern at that point in time. At the conclusion of the traffic stop, they issued appellant a written warning. He and Prouty reviewed the dash cam video, and determined there was a brief second where they believed appellant could have thrown the narcotics out of the car as appellant was turning into the alley. Kelly and Prouty then walked back to that portion of the sidewalk and located the grocery bag with narcotics inside.

{¶16} Kelly helped execute the search warrant at appellant's home. He identified numerous photographs of items obtained from appellant's home, including digital scales, baggies, numbers for Chime accounts, two handguns, a lid located in a kitchen cabinet that had crack cocaine residue on it, crack pipes, a bag of methamphetamine, various pills, a solo cup with crystal meth residue, and a revolver.

{¶17} On cross-examination, Kelly stated he did not recall whether the bag that had the cocaine was ever fingerprinted. Kelly did not see the drugs come out of appellant's vehicle, but, if appellant had thrown them out the window, it would have been right there as Kelly was making the turn. However, Kelly testified he was focused on

appellant and the car because appellant was a flight risk and because appellant was "slow rolling" his vehicle.

{¶18} The parties stipulated that, if called to the stand, Ashley Nutter would be found to be an expert in forensic chemistry and she would testify consistent with her report (Exhibit F), that Exhibit E (grocery bag found on the sidewalk) contained five separate bags, each containing cocaine. Further, that the weights of the baggies were 27.764 grams, 27.228 grams, 27.435 grams, 27.691 grams, and 27.770 grams, for a total combined weight of 137.888 grams. The parties also stipulated that Nutter would testify, consistent with her report, that the bag located in appellant's house contained 58.146 grams of methamphetamine, there were three pills of oxycodone in appellant's house weighing 1.132 grams, and there were six other pills of oxycodone in appellant's house, weighing 3.163 grams.

{¶19} The parties additionally stipulated that Timothy Elliget would be found to be an expert in the field of latent print recovery, as well as in the field of firearms operability analysis. Further, that Elliget would testify, consistent with his report, that the firearms recovered from 819 Dryden were each in proper working order, and there were no fingerprints usable for forensic comparison purposes on any of the firearms.

{¶20} At the conclusion of appellee's case, counsel for appellant made a Criminal Rule 29 motion as to counts one, two, and three. The trial court denied the motion.

{¶21} The jury found appellant guilty of count one, possession of cocaine in an amount equal to or greater than 100 grams, guilty of the major drug offender specification to count one, guilty of count two, trafficking in cocaine in the vicinity of a school and in an amount equal to or exceeding 100 grams, guilty of the major drug offender specification

to count two, guilty of count three, tampering with evidence, guilty of count four, possession of methamphetamine in an amount equal to or greater than five times the bulk amount, but less than fifty times the bulk amount, guilty of the firearm specification for count four, guilty of count nine, possession of oxycodone hydrochloride, and guilty of count ten, possession of oxycodone hydrochloride. The trial court found appellant guilty of the weapons under disability counts. The trial court memorialized the jury's verdict in a September 26, 2022 judgment entry.

{¶22} The trial court sentenced appellant on November 9, 2022 to an aggregate prison term as follows: minimum twenty-six years to a maximum indefinite thirty-one and ½ years, with twenty years being mandatory time. The trial court issued a judgment entry of sentence on November 16, 2022.

{¶23} Appellant appeals the November 16, 2022 judgment entry of the Muskingum County Court of Common Pleas and assigns the following as error:

{¶24} "I. THERE WAS NO EVIDENCE RELATED TO THE APPELLANT HAVING POSSESSION OF THE 137 GRAMS OF COCAINE LOCATED; THEREFORE, THE ASSUMPTION THAT THE DRUGS WERE HIS WAS INSUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION.

{¶25} II. THE APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶26} III. COUNSEL WAS INEFFECTIVE WHEN HE FAILED TO FILE A MOTION TO SUPPRESS EVIDENCE."

I. & II.

{¶27} In appellant's first and second assignments of error, he argues the convictions on the possession of cocaine count, the trafficking in cocaine count, and the tampering with evidence (cocaine) count, are against the manifest weight and sufficiency of the evidence because there was no evidence related to appellant having possession of the cocaine.

{¶28} The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), in which the Ohio Supreme Court held, "an appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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."

{¶29} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determine whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered." *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶30} It is well-established, though, that the weight of the evidence and the credibility of the witnesses are determined by the trier of fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, 767 N.E.2d 216. The jury is free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. *Id.*

{¶31} At issue in these assignments of error are the first three counts of the indictment, possession of cocaine, trafficking in cocaine, and tampering with evidence (cocaine). Appellant contends the evidence presented by appellee failed to establish he was in possession of the cocaine located on the sidewalk, and thus his convictions on these three counts with regard to the cocaine are against the manifest weight and sufficiency of the evidence.

{¶32} "Possess" or "possession" means having control over a thing or substance, and may not be inferred solely from mere access to the thing or substance through ownership or occupation of the premises upon which the things or substance is found. R.C. 2925.11. Possession may be actual or constructive. *State v. Barr*, 86 Ohio App.3d 227, 620 N.E.2d 242 (8th Dist. 1993). In order for a defendant to have constructive possession, "the evidence must demonstrate that the defendant was able to exercise dominion or control over the items." *State v. Wolery,* 46 Ohio St.2d 316, 348 N.E.2d 351 (1976).

{¶33} Dominion and control may be proven by circumstantial evidence alone. *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). Circumstantial evidence is that which can be "inferred from reasonably and justifiability connected facts." *State v. Fairbanks*, 32 Ohio St.2d 34, 289 N.E.2d 352 (1972). Circumstantial evidence is to be given the same weight and deference as direct evidence. *State v. Jenks*, 61 Ohio St.3d

259, 574 N.E.2d 492 (1991). Circumstantial evidence that the defendant was located in very close proximity to the contraband may show constructive possession. *State v. Morales*, 5th Dist. Licking No. 2004 CA 68, 2005-Ohio-4714, *State v. Davis*, 5th Dist. Delaware No. 20CAA120052, 2022-Ohio-577.

{¶34} Here, the evidence demonstrates that, after extensive surveillance, the officers established a pattern of travel consistent with drug trafficking. On the day in question, appellant followed the pattern of traveling to and from Hampton's home in the Ford Fusion, with the stop at Hampton's house lasting only a few minutes. Immediately after police officers entered traffic behind him, he "slow rolled."

{¶35} Contrary to appellant's assertion, the deputies did not just "assume" the drugs were his. As soon as the traffic stop ended, the deputies immediately reviewed the dash cam footage and located the drugs on the sidewalk in less than two minutes. The deputies testified they saw appellant's driver's window, which had been up, quickly roll down as he made the turn across the sidewalk and into the alley. The video from the dash cam cooborates the officers' testimony about the window, and the turn into the alley over the sidewalk. It also establishes that the traffic stop was conducted very close to the sidewalk where the bag containing the cocaine was located, and that the officers found the drugs on the sidewalk less than two minutes after the traffic stop ended. The video shows that the exact area appellant drove over with his window down is where the officer found the bag containing the drugs. Prouty also saw appellant circle back past the sidewalk where the drugs were found after he was initially released from the stop. Further, the cocaine recovered from the sidewalk was packaged exactly the same as the cocaine in Hampton's home, where appellant had just visited prior to the stop.

{¶36} As to appellant's argument that the officer should have had the K-9 sniff appellant's car, or go into appellant's car, during the traffic stop, Prouty explained that he did not have the K-9 sniff the car because he already had probable cause to search the vehicle. Further, because the crack pipe was in the vehicle, the dog would have alerted on the crack pipe and not provided Prouty with any additional information. He also explained his K-9 is not permitted to enter a vehicle due to safety issues. The jury, as the trier of fact, was free to accept or reject any or all of the evidence offered by the parties and assess the witness's credibility. *State v. Johnson*, 5th Dist. Stark No. 2014CA00189, 2015-Ohio-3113, citing *State v. Nivens*, 10th Dist. Franklin No. 95AP09-1236, 1996 WL 284714 (May 28, 1996).

{¶37} Further, the presence of paraphernalia in the car (charred glass crack pipe, digital scales, and baggies) support appellant's possession of the drugs. *State v. Davis*, 5th Dist. Delaware No. 20CAA120052, 2022-Ohio-577.

{¶38} If the State relies on circumstantial evidence to prove an essential element of an offense, it is not necessary for "such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). Furthermore, "since circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that i[t] weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt." *Id.* While inferences cannot be based on inferences, a number of conclusions can result from the same set of facts. *State v. Lott*, 51 Ohio St.3d 160, 555 N.E.2d 293 (1990). Moreover, a series of facts and

circumstances can be employed by a jury as the basis for its ultimate conclusions in a case. *Id.*

{¶39} The jury had the opportunity to consider the testimony of Wilhite, Prouty, and Kelly. Additionally, the jury had the opportunity to view the exhibits, including the dash cam videos. The credibility of the witnesses and evidence were for the jury to determine. *State v. Sanders*, 5th Dist. Stark No. 2005-CA-00269, 2006-Ohio-5355.

{¶40} Based on the foregoing evidence, viewed in a light most favorable to the prosecution, the finder of fact could have reasonably concluded that appellant was at least in constructive possession of the cocaine; thus, we hold the evidence was sufficient as a matter of law for the convictions at issue. *State v. Peacock*, 3rd Dist. Seneca No. 13-16-26, 2017-Ohio-2592 (mere fact that officer's eyesight was less than perfect or that the heroin may have belonged to someone else does not weigh heavily against defendant's conviction); *State v. Ridenbaugh*, 5th Dist. Licking No. 18-CA-96, 2019-Ohio-3564 (It was a reasonable inference that the padlocked room at the residence with drugs in it belonged to defendant because the set of keys found in his pocket opened the padlock); *State v. Williams*, 2nd Dist. Montgomery No. 20271, 2005-Ohio-1597 (conviction for drugs in purse thrown out of window not against manifest weight or sufficiency of the evidence); *State v. Snyder*, 5th Dist. Licking No. 11 CA 33, 2011-Ohio-5501 (conviction not against manifest weight or sufficiency of the evidence when officers found drugs where defendant stopped at the corner, paused, and turned back around).

{¶41} We conclude a rational trier of fact could conclude beyond a reasonable doubt that appellant actually or constructively possessed the cocaine. We cannot say the jury clearly lost its way and created a manifest miscarriage of justice. Similarly, we find

this is not the case where the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be overturned and a new trial ordered. The jury verdict finding appellant guilty of possession of drugs, trafficking in drugs (cocaine), and tampering with evidence (cocaine) were not against the manifest weight or sufficiency of the evidence. Appellant's first and second assignments of error are overruled.

III.

{¶42} In his third assignment of error, appellant contends his trial counsel was ineffective because he failed to file a motion to suppress evidence.

{¶43} Appellant contends his trial counsel should have filed a motion to suppress evidence because the drugs located on the sidewalk were the foundation for the warrant later used to search appellant's home. Appellant cites the testimony from Wilhite and Kelly that they were waiting to see if they found drugs in appellant's car before they finished filling out the search warrant.

{¶44} To obtain a reversal of a conviction on the basis of ineffective assistance of counsel, the defendant must prove: (1) that counsel's performance fell below an objective standard of reasonableness, and (2) that counsel's deficient performance prejudiced the defendant resulting in an unreliable or fundamentally unfair outcome of the proceeding. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant's failure to satisfy one prong of the *Strickland* test negates a court's need to consider the other. *Id*.

{¶45} Trial counsel's failure to file a motion to suppress does not per se constitute ineffective assistance of counsel. *State v. Ortiz*, 5th Dist. Stark No. 2015CA00098, 2016-Ohio-354. Counsel can only be found ineffective for failing to file a motion to suppress if,

based on the record, the motion would have been granted. *State v. Lavelle*, 5th Dist. Stark No. 07 CA 130, 2008-Ohio-3119. The defendant must further show there is a reasonable probability the outcome would have been different if the motion had been granted. *Id.*

{¶46} At the outset, we note that the record before this Court contains neither the search warrant nor the affidavit in support of the search warrant. Appellee's Exhibit J contains the search warrant, without the factual affidavit, authorizing the search of appellant's car and the seizure of an Impala, but those are the only search warrant documents contained in the record. Accordingly, we generally presume the regularity of the proceedings and affirm. *State ex rel. Hoag v. Lucas Cty. Bd. of Elections*, 125 Ohio St.3d 49, 2010-Ohio-1629, 925 N.E.2d 984, citing *Christy v. Summit Cty. Bd. of Elections*, 77 Ohio St.3d 35, 671 N.E.2d 1 (1996). Appellant has the responsibility of providing the reviewing court with a record of the facts, testimony, and evidentiary matters that are necessary to support the appellant's assignments of error. *State v. Wilson,* 5th Dist. Richland No. 17CA31, 2018-Ohio-396; *Wozniak v. Wozniak*, 90 Ohio App.3d 400, 629 N.E.2d 500 (9th Dist. 1993).

{¶47} In the alternative, we find the record contains evidence that the trial court had a substantial basis for concluding that probable cause existed to issue the search warrant for appellant's home.

{¶48} "In determining the sufficiency of probable cause in an affidavit submitted in support of a search warrant, '[t]he task of the issuing magistrate is simply to make a practical common-sense decision whether, given all the circumstances set forth in the affidavit before him, * * * there is a fair probability that contraband or evidence of a crime

will be found in a particular place.'" *State v. George*, 45 Ohio St.3d 325, 544 N.E.2d 640 (1989), quoting *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). Ordinarily, "a probable cause inquiry must be confined to the four corners of the affidavit." *State v. Klosterman*, 114 Ohio App.3d 327, 683 N.E.2d 100 (2nd Dist. 1996). Moreover, evidence obtained by a law enforcement officer acting in objectively reasonable reliance on a search warrant issued by a detached and neutral magistrate, but ultimately found to be unsupported by probable cause, will not be barred by the application of the exclusionary rule. *Id.*

{¶49} The Ohio Supreme Court has stated that, "reviewing courts may not substitute their own judgment for that of the issuing magistrate by conducting a de novo determination as to whether the affidavit contains sufficient probable cause upon which the reviewing court would issue the search warrant." *State v. George*, 45 Ohio St.3d 325, 544 N.E.2d 640 (1989). Rather, "reviewing courts should accord great deference to the magistrate's determination of probable cause, and doubtful or marginal cases in this area should be resolved in favor of upholding the warrant." *Id.* "The duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis' for concluding that probable cause existed." *State v. Norman*, 5th Dist. Guernsey No. 2010-CA-21, 2011-Ohio-568.

{¶50} While Wilhite and Kelly did testify that they were waiting to see if there were drugs in appellant's car before they finished filling out the affidavit of facts requesting the warrant for appellant's home, there is no indication that the warrant would not have been requested or issued if they had not found the drugs on the sidewalk. The testimony was

that they were waiting to see if they found drugs, not that they could not obtain a warrant without the discovery of drugs.

{¶51} The officers detailed a systematic investigation of appellant and Hampton's homes based upon a confidential informant, police surveillance, and the pattern of travel obtained from a GPS on appellant's vehicle from May 24, 2022 to June 8, 2022. Further, Wilhite testified that because the drugs on the sidewalk were packaged exactly the same as those located in Hampton's home in unique packaging, even if Wilhite had not followed appellant directly from Hampton's home to where the drugs were recovered, he still would have drawn the connection between the two. This evidence would be sufficient probable cause upon which the court could issue a search warrant.

{¶52} Further, though the affidavit and search warrant are not part of the appellate record, from the record provided of the trial, it is clear that trial counsel for appellant obtained a copy of the search warrant, reviewed it, and determined it would not be beneficial to attempt to challenge. There is nothing in the record that would suggest this decision was anything but a reasonable exercise of professional judgment. *State v. McClendon*, 12th Dist. Fayette No. CA2021-09-021, 2022-Ohio-1441.

{¶53} As there is not a reasonable probability that a motion to suppress the search warrant would have been granted, counsel was not ineffective in failing to file a motion to suppress. Appellant's third assignment of error is overruled.

{¶54} Based on the foregoing, appellant's assignments of error are overruled.

{¶55} The judgment entry of the Muskingum County Court of Common Pleas is affirmed.

By Gwin, P.J.,

Wise, J., and

Baldwin, J., concur