

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

STATE OF OHIO,	:	APPEAL NOS. C-100357
		C-100358
Plaintiff-Appellee,	:	TRIAL NOS. B-0903419
		B-0903822
vs.	:	
		<i>DECISION.</i>
LONNIE BLACK,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: March 23, 2011

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *James Michael Keeling*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Timothy J. McKenna, for Defendant-Appellant.

Please note: This case has been removed from the accelerated calendar.

FISCHER, Judge.

{¶1} Defendant-appellant Lonnie Black appeals his multiple convictions for drug and firearm-related crimes that resulted in the imposition of a combined 41-year prison term by the trial court. For the reasons that follow, we overrule Black's seven assignments of error, and we affirm the judgment of the trial court.

Factual Background

{¶2} On May 5, 2009, Cincinnati police officers Jacob Wloszek and Josh Schrage responded to an alleged burglary at an apartment building on Myrtle Avenue. During the investigation, Officer Wloszek found a dark-colored bag in the yard outside the apartment building. A "Cheez-It" box and a "Capri Sun" box inside the bag had been filled with what was later determined to be over 100 grams of crack cocaine. An envelope inside the bag had "Black, Lonnie" written on it.

{¶3} The officers removed the crack cocaine from the bag, placed the bag back in the yard, and surveyed the apartment building from inside their unmarked vehicle. The officers then saw a black male walk out of the building from a third-floor apartment. The male stared in the direction of the bag and then began walking around the block. The male walked around the block twice, and each time he stared in the direction of the bag as he passed. The male then disappeared into a wooded area.

{¶4} The officers then went to the third-floor apartment and knocked on the door. Andrea Thomas, a resident of the apartment, answered the door and gave the officers consent to search her apartment. Inside her apartment, the officers discovered a collection of drugs that included cocaine, heroin, marijuana, and

oxycodone, as well as a large amount of cash and a handgun. The officers arrested Thomas.

{¶5} Thomas testified that she knew nothing about the drugs, and that, besides herself and Black, only her six-year-old son stayed at the apartment on a regular basis. Thomas testified that Black had been at the apartment that evening and had gone for a jog during the early-morning hours. A few minutes after Black had left, Black had called Thomas and told her that the police were outside and that he was leaving.

{¶6} Inside the apartment, the officers also found court-related documents from the Greene County Jail and the Fairborn Municipal Court with Black's name on them. One of the court documents indicated that Black had been charged with felony drug trafficking. Two other court documents indicated that Black had been charged with possession of drugs and possession of criminal tools and had paid fines for both of those offenses.

{¶7} The night after the drugs were found at Myrtle Avenue, Thomas's sister, Retina Thomas, testified that she went to her sister's apartment to collect some of her sister's belongings. Black came to the apartment while Retina Thomas and her son were there. Black began screaming, "[W]here my shit? Where my bag at?"¹ Retina Thomas testified that the confrontation ended soon after Black punched Retina Thomas's son.

{¶8} After further investigation by Cincinnati police officers, Black's fingerprints were found on the "Cheez-It" box and the envelope that were inside the bag found in the yard. Also, Officers Wloszek and Schrage identified Black as the

¹ T.p. 333.

black male they had seen walking in front of the apartment building. The police issued an arrest warrant for Black.

{¶9} On May 13, 2009, Cincinnati police officer Richard Christoph responded to a possible drug deal at a car repair shop on Gilbert Avenue. When Officer Christoph arrived at the shop, he saw Black get out of a Cadillac and walk toward a group of men, but Black turned around and started walking back toward the Cadillac when he saw Officer Christoph. Suspecting criminal activity, Officer Christoph held the suspects until other officers arrived.

{¶10} Officers Chantia Pearson and Robert Pope arrived to assist Officer Christoph. Officer Christoph then determined that Black had a warrant out for his arrest. Officer Pearson read Black his *Miranda*² rights and then asked Black if he had anything on him or in the Cadillac that should not be there. Black responded that there might be something in a jacket inside the car, but he responded, “It ain’t mine.”³ Officer Pearson found over 100 grams of crack cocaine in the jacket.

Procedural History

{¶11} In the case numbered B-0903419, Black was indicted on the following counts related to the May 5, 2009, incident at the Myrtle Avenue apartment: (1) trafficking in cocaine, (2) possession of cocaine, (3) trafficking in cocaine, (4) possession of cocaine, (5) trafficking in heroin, (6) possession of heroin, (7) trafficking in marijuana, (8) aggravated possession of drugs, and (9) having a weapon while under a disability. Gun specifications accompanied counts one through seven, and major-drug-offender specifications accompanied counts one and two. Counts one and two involved the crack cocaine found in the bag outside the

² *Miranda v. Arizona* (1969), 396 U.S. 868, 90 S.Ct. 140.

³ T.p. 771.

apartment building, while the other counts involved the items found inside the apartment.

{¶12} In the case numbered B-0903822, Black was indicted on the following counts related to the May 13, 2009, incident on Gilbert Avenue: (1) trafficking in cocaine with a major-drug-offender specification, and (2) possession of cocaine with a major-drug-offender specification.

{¶13} Black's cases were consolidated for a jury trial. Black was found guilty in the case numbered B-0903419 on all counts, but not on the gun specifications accompanying counts one and two. The trial court merged the possession and trafficking counts, as well as the major-drug-offender specifications. It did the same for the gun specifications. The court ordered that the sentences for the primary offenses in counts one through nine be served concurrently. It then sentenced Black to ten years in prison for one major-drug-offender specification and to one year in prison for one gun specification. Those sentences were made consecutive to the sentences for the primary offenses, for a total of 21 years in prison.

{¶14} Black also was found guilty on the two counts in the case numbered B-0903822, and the trial court merged those counts. The trial court sentenced Black to ten years in prison on the major-drug-offender specification, which was made consecutive to the ten-year sentence on count one, for a total of 20 years in prison. The court then ordered that the aggregate sentences in the two cases be served consecutively.

Other-Acts Evidence

{¶15} In Black's first assignment of error, he claims that the trial court abused its discretion in admitting the court documents from the Greene County Jail

and the Fairborn Municipal Court that listed Black's name and the drug charges against him in that jurisdiction. The state argues that the court documents were admitted to show that Black lived at the Myrtle Avenue apartment and to show Black's identity as the owner of the drugs. Pursuant to Evid.R. 404(B) and R.C. 2945.59, "[e]vidence of other acts is admissible if (1) there is substantial proof that the alleged other acts were committed by the defendant, and (2) the evidence tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."⁴ "[O]ther acts can be probative of identity when they 'form part of the immediate background of the alleged act which forms the foundation of the crime charged in the indictment.'"⁵ Courts "must be careful when considering evidence as proof of identity to recognize the distinction between evidence which shows that a defendant is the *type* of person who might commit a particular crime and evidence which shows that a defendant *is* the person who committed a particular crime."⁶

{¶16} A review of the record shows that the court documents were relevant in that they tended to prove that Black lived at the Myrtle Avenue apartment, and the trial court admitted the evidence with a limiting instruction that evidence of other bad acts could not be used to prove Black's character or to show that Black had acted in conformity with that character.

{¶17} But we need not determine whether the trial court erred in admitting the unredacted court documents because, even if the admission of the documents was in error, such error was harmless. "Error in the admission of evidence in

⁴ *State v. Lowe*, 69 Ohio St.3d 527, 530, 1994-Ohio-345, 634 N.E.2d 616.

⁵ *State v. Long*, 1st Dist. Nos. C-090248 and C-090249, 2010-Ohio-1062, at ¶20, quoting *Lowe*, 69 Ohio St.3d at 531.

⁶ *Lowe*, 69 Ohio St.3d at 530 (emphasis in original).

criminal proceedings is harmless if there is no reasonable possibility that the evidence may have contributed to the accused's conviction. In order to hold the error harmless, the court must be able to declare a belief that the error was harmless beyond a reasonable doubt."⁷

{¶18} The police officers testified that they saw Black come out of Thomas's apartment on May 5, 2009, and that Black kept staring in the direction of the bag that had been filled with crack cocaine. The evidence further showed that Black's name and fingerprints were on the envelope inside the bag, and that Black's fingerprints were on the "Cheez-It" box that contained crack cocaine. Thomas testified that Black lived with her and her minor son in the apartment, and that she knew nothing about the drugs inside her apartment. Thomas also testified that Black had been at the apartment on May 5, 2009, and that Black had later called her to tell her that the police were outside the apartment and that he was leaving. Furthermore, Retina Thomas testified that, the day after the police arrested Thomas, Black was outside the apartment screaming "where my shit at?"

{¶19} Therefore, in light of the other evidence presented at trial supporting Black's convictions arising from the incident at Myrtle Avenue, the limiting instruction given by the trial court, and the relevance of the court documents, we hold that even if the admission of the documents was in error, any error was harmless beyond a reasonable doubt. We overrule Black's first assignment of error.

Sufficiency and Weight of the Evidence

{¶20} We address Black's second and third assignments of error together. In Black's second assignment of error, he argues that there was insufficient evidence

⁷ *State v. Bayless* (1976), 48 Ohio St.2d 73, 357 N.E.2d 1035, paragraph seven of the syllabus, vacated in part on other grounds sub nom. *Bayless v. Ohio* (1978), 438 U.S. 911, 98 S.Ct. 3135.

to support his convictions. To reverse a conviction for insufficient evidence, we must determine whether “any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.”⁸ In Black’s third assignment of error, he argues that his convictions were against the manifest weight of the evidence. In contrast to the sufficiency issue, appellate review of the weight of the evidence puts the appellate court in the role of a “thirteenth juror.”⁹ Thus, we must review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice in finding Black guilty.¹⁰

{¶21} Black argues his second and third assignments of error together, and he essentially argues that no evidence was presented to put the drugs “in the hands” of Black. But, as we have already pointed out, the state produced evidence linking Black to the drugs inside the Myrtle Avenue apartment in the form of testimony from both Thomas sisters, as well as other evidence showing that Black lived at the apartment. As to the crack cocaine found outside the apartment building, the state presented evidence that Black’s fingerprints were found on the envelope and on the “Cheez-It” box in the bag containing the crack cocaine. The officers who recovered the drugs testified that Black came out of the apartment and stared multiple times in the direction of the bag before leaving the area.

{¶22} As to Black’s convictions arising out of the incident at the car repair shop on Gilbert Avenue, Officer Pearson found a large amount of crack cocaine in a jacket inside the Cadillac that Black had been driving, and that discovery was made after Black had told Officer Pearson that she might find something in the jacket “but

⁸ *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

⁹ *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

¹⁰ *Id.*

it ain't mine." Thus, when viewing the evidence presented in a light most favorable to the state, we cannot say that no rational trier of fact could have found Black guilty beyond a reasonable doubt. Furthermore, we cannot say that the jury clearly lost its way and created a manifest miscarriage of justice in finding Black guilty. Thus, we overrule Black's second and third assignments of error.

Ineffective Assistance of Counsel

{¶23} In Black's fourth assignment of error, he argues that he was denied the effective assistance of counsel because his trial counsel failed to renew his Crim.R. 29 motion for an acquittal at the close of all the evidence. This argument is without merit. To prevail on a claim of ineffective assistance of counsel, an appellant must show that trial counsel's performance was deficient, and that the outcome of the proceedings would have been different but for counsel's deficient performance.¹¹ "The failure to renew an acquittal motion does not constitute ineffective assistance of counsel when the motion would have been futile."¹² Given the overwhelming evidence against Black, we hold that a renewal of an acquittal motion at the close of all the evidence would have been futile. Therefore, his fourth assignment of error is overruled.

Cruel and Unusual Punishment

{¶24} In Black's fifth assignment of error, he argues that his combined sentence of 41 years in prison constitutes cruel and unusual punishment. More specifically, Black argues that his sentence does not comply with the seriousness and recidivism factors listed in R.C. 2929.12.

¹¹ *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052.

¹² *State v. Peelman*, 1st Dist. No. C-090686, 2010-Ohio-4472, at ¶9.

{¶25} “As a general rule, a sentence that falls within the terms of a valid statute cannot amount to cruel and unusual punishment.”¹³ Black was found guilty of trafficking in over 100 grams of crack cocaine in the case numbered B-0903419, as well as in the case numbered B-0903822. Pursuant to R.C. 2925.03(C)(4)(g), Black was a major drug offender, and the trial court was required to impose the maximum prison term prescribed for a felony of the first degree, which is ten years under R.C. 2929.14(A)(1). Additionally, R.C. 2925.03(C)(4)(g) gave the trial court discretion to impose an additional prison term pursuant to R.C. 2929.14(D)(3)(b).

{¶26} R.C. 2929.14(D)(3)(b) allows the trial court to impose an additional one- to ten-year prison term if the court makes both of the findings set forth in R.C. 2929.14(D)(2)(a)(iv) and (v), which pertain to seriousness and recidivism. In *State v. Foster*,¹⁴ the Ohio Supreme Court held that R.C. 2929.14(D)(3)(b) was unconstitutional because it “require[d] judicial finding of facts not proven to a jury beyond a reasonable doubt or admitted by the defendant, before * * * major-drug-offender penalty enhancements are imposed[.]” The *Foster* court further determined that R.C. 2929.14(D)(3)(b) was capable of being severed, and that “[a]fter the severance, judicial fact-finding is not required before imposition of additional penalties for repeat-violent-offender and major-drug-offender specifications.”¹⁵

{¶27} After *Foster*, in *State v. Dillard*,¹⁶ the Second Appellate District held that R.C. 2929.14(D)(3)(b) had been excised from the statutory scheme by *Foster*, and thus that R.C. 2929.14(D)(3)(b) could not be used to impose an additional prison term. The defendant, Dillard, had been adjudicated a major drug offender, and the

¹³ *State v. Dieterle*, 1st Dist. No. C-070796, 2009-Ohio-1888, at ¶43.

¹⁴ 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at ¶83.

¹⁵ *Id.* at ¶99.

¹⁶ 173 Ohio App. 3d 373, 2007-Ohio-5651, 878 N.E.2d 694, at ¶100.

trial court sentenced Dillard to ten years in prison for possession of heroin with an additional eight-year prison term pursuant to R.C. 2929.14(D)(3)(b).¹⁷ The Second Appellate District vacated the additional eight-year prison term.¹⁸

{¶28} Other appellate districts, however, have taken a different view of the effect *Foster* had on R.C. 2929.14(D)(3)(b). For example, in *State v. Pena*,¹⁹ the Tenth Appellate District determined that “[e]ssentially, the effect of the *Foster* judgment is to sever from R.C. 2929.14(D)(3)(b) only the language that required judicial fact-finding as a prerequisite to imposing the additional add-on sentence as a result of the jury finding that appellant was a major drug offender.”²⁰ This appears to be the majority view.²¹

{¶29} We are inclined to follow the Tenth Appellate District, as well as the majority of other appellate districts, in holding that R.C. 2929.14(D)(3)(b) is not entirely a nullity after *Foster*, and that, based upon paragraph 99 of *Foster*, only the language that required judicial fact-finding has been eliminated from this statutory provision. Thus, a trial court may use R.C. 2929.14(D)(3)(b) to impose an additional prison term on a major drug offender.

{¶30} Because the trial court in this case could not constitutionally make judicial findings of fact with respect to seriousness and recidivism, the court did not err in imposing an additional prison term for two of Black’s major-drug-offender specifications pursuant to R.C. 2929.14(D)(3)(b). Thus, we determine that Black’s

¹⁷ Id. at 378.

¹⁸ Id. at 394.

¹⁹ 10th Dist. No. 06AP-688, 2007-Ohio-4516, at ¶14.

²⁰ Id. at ¶14.

²¹ See *State v. Ingram*, 8th Dist. No. 89954, 2008-Ohio-3033, at ¶20; *State v. Jones*, 7th Dist. Nos. 08 JE 20 and 08 JE 29, 2010-Ohio-2704, at ¶19; *State v. Adams*, 11th Dist. No. 2006-L-114, 2007-Ohio-2434, at ¶22-27; *State v. Foster*, 6th Dist. No. WD-06-013, 2007-Ohio-1524, at ¶17.

41-year prison term falls within Ohio's statutory scheme and was not cruel and unusual punishment. We therefore overrule Black's fifth assignment of error.

Failure to Merge Major-Drug-Offender Specifications

{¶31} In Black's sixth assignment of error, he argues that the trial court should have merged all the major-drug-offender specifications under the two case numbers for purposes of sentencing. In support of this argument, Black relies on R.C. 2929.14(D)(1)(b), which provides that "[a] court shall not impose more than one prison term on an offender under division (D)(1)(a) of this section for felonies committed as part of the same act or transaction." As the state correctly notes, R.C. 2929.14(D)(1)(a) applies to the gun-specification provisions of the Ohio Revised Code.²² Furthermore, even if we were to extend the application of R.C. 2929.14(D)(1)(b) to major-drug-offender specifications, based upon the record before this court, we cannot say that Black's convictions under the case numbered B-0903822 were part of the same act or transaction as his convictions under the case numbered B-0903419. Therefore, Black's sixth assignment of error is overruled.

Cumulative Error

{¶32} Finally, in Black's seventh assignment of error, he contends that the cumulative effect of the trial court's errors denied him a fair trial. In support of this argument, Black points to the following alleged errors: in opening statements, the prosecutor made an inappropriate remark indicating that Black had previously been convicted of drug trafficking; the trial court admitted the court documents found in the Myrtle Avenue apartment; Black's trial counsel failed to renew his Crim.R. 29 motion for an acquittal at the close of evidence; Officer Pope's testimony

²² See R.C. 2941.141, 2941.144, and 2941.145.

contradicted his statements that were provided in discovery; and a juror saw Black in a jail uniform instead of plainclothes.

{¶33} A defendant may be deprived of a fair trial by the cumulative effect of errors by the trial court, even where each error, standing alone, would not warrant reversal.²³ To succeed on such a claim, Black must demonstrate that a reasonable probability exists that the outcome of the trial would have been different absent the alleged errors.²⁴ As we have already stated, the record amply supports Black's convictions despite any alleged errors. Therefore, we overrule Black's seventh assignment of error.

{¶34} Consequently, the judgment of the trial court is affirmed.

Judgment affirmed.

DINKELACKER, P.J., and HILDEBRANDT, J., concur.

Please Note:

The court has recorded its own entry this date.

²³ *State v. Dieterle*, 1st Dist. No. C-070796, 2009-Ohio-1888, at ¶38.

²⁴ *Id.*