

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio, :
 :
 Plaintiff-Appellee, :
 :
 v. : No. 10AP-547
 : (C.P.C. No. 09CR-4473)
 Johnny R. Pace, :
 : (REGULAR CALENDAR)
 Defendant-Appellant. :

D E C I S I O N

Rendered on January 27, 2011

Ron O'Brien, Prosecuting Attorney, and *Laura Swisher*, for appellee.

Keith O'Korn, for appellant.

APPEAL from the Franklin County Court of Common Pleas

TYACK, J.

{¶1} Johnny R. Pace is appealing from his conviction on a single charge of possession of drugs in violation of R.C. 2925.11. He initially assigned three errors for our consideration:

ASSIGNMENT OF ERROR #1

THE TRIAL COURT ERRED BY CONVICTING APPELLANT FOR DRUG POSSESSION IN VIOLATION OF R.C. §2945.75 AND THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION BASED UPON THE VAGUE VERDICT

FORM THAT DID NOT INCLUDE THE DEGREE OF OFFENSE OR DRUG INVOLVED.

ASSIGNMENT OF ERROR #2

APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR #3

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10 & 16 OF THE OHIO CONSTITUTION.

{¶2} A fourth assignment was assigned subsequently:

ASSIGNMENT OF ERROR #4

THE TRIAL COURT ERRED BY CONVICTING APPELLANT OF POSSESSION OF DRUGS AS A FELONY OF THE FIFTH DEGREE WHEN THE VERDICT FORM AT MOST SUPPORTED A CONVICTION FOR A MISDEMEANOR OF THE FIRST DEGREE UNDER R.C. § 2945.75(A)(2) AND *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256.

{¶3} Pace was indicted on July 27, 2009 and charged with violating R.C. 2925.11, possession of drugs—specifically cocaine. A second charge in the indictment, tampering with evidence, was dismissed prior to trial.

{¶4} Pace entered a plea of "not guilty" at arraignment. After several continuances, a trial was begun on March 22, 2010.

{¶5} Two Columbus police officers, Todd Rhodeback and Daniel Weise, testified for the prosecution. Pace testified in his own defense.

{¶6} Rhodeback testified that he saw Pace in the presence of two other individuals, one of whom Rhodeback believed was a drug dealer. Rhodeback testified

that as he approached the three, he saw Pace drop an object from his hands. Officers Rhodeback and Weise pulled their cruiser over and Rhodeback told Weise to grab Pace because Pace had just dropped something. Rhodeback testified that he searched the area where Pace had just been and found a rock of crack cocaine. A pat-down of Pace resulted in the discovery of a knife, \$1,200 in cash, and a small baggie of marijuana.

{¶7} Weise testified that he was the passenger in the police cruiser. After Rhodeback pulled the cruiser over near Pace and the two other individuals, Rhodeback told Weise to grab Pace because Pace had just dropped something. Rhodeback then went to the area where he had claimed something was dropped and found a rock of crack cocaine. Weise did not claim that he personally saw anything dropped.

{¶8} Pace testified on his own behalf and stated that he had no crack cocaine that day. Pace claimed that he went with a female friend called Sugar to buy crack cocaine from Keith Cox. They accompanied Cox to the location of Cox's stash of crack cocaine. Sugar gave Cox some money, but Cox was slow to surrender any cocaine. Pace testified that Cox claimed that he had dropped the rock of crack cocaine which Sugar was buying and all three were looking on the ground for it when the police arrived. Pace denied ever touching the cocaine.

{¶9} The jury was presented with two versions of the facts and chose to believe the version presented by Rhodeback and partially supported by Weise. We are not in a position to overturn that weighing of credibility.

{¶10} The verdict was not against the manifest weight of the evidence. The second assignment of error is overruled.

{¶11} The third assignment of error alleges that Pace's trial counsel rendered ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. The key case evaluating the effective assistance of counsel is *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. In *Strickland*, the United States Supreme Court held that the benchmark for judging any claims of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

{¶12} Given this high standard, trial counsel for Pace did not render ineffective assistance. Trial counsel developed the facts favorable to Pace and cross-examined the officers capably. Counsel then argued perceived inconsistencies between the testimony of the officers in closing argument. Nothing about the trial can support an allegation that the adversarial process was undermined or that the jury verdict was unjust.

{¶13} The third assignment of error is overruled.

{¶14} The first and fourth assignments of error raise technical issues about the jury verdict form and the actual jury verdict. The verdict form read:

We the jury find the defendant, Johnny Pace, GUILTY OF POSSESSION OF DRUGS as he stands charged in Count One of the indictment.

{¶15} The trial judge clearly told the jury that the case was not about the marijuana in Pace's pocket but about the rock of crack cocaine Rhodeback had claimed he saw Pace drop. The trial judge stated in the jury charge:

In this case there is only one count. We still number it Count One.

The defendant is charged with possession of cocaine in Count One of the indictment. Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the 30th day of April, 2009, in Franklin County, Ohio, the defendant knowingly possessed a substance included in Schedule II, to wit: methylbenzoylcgonine, commonly known as cocaine, as defined in section 2925.01 of the Ohio Revised Code.

(Tr. 54.)

{¶16} Additionally, counsel for the state of Ohio and counsel for Pace argued only one issue in closing arguments, namely did Rhodeback see Pace drop a baggie containing a chalky white substance.

{¶17} Defense counsel told the jury "I realize marijuana is not something you are supposed to consider." (Tr. 63.) Counsel also acknowledged "[t]he rock is certainly there. * * * It is cocaine. However, can you say Mr. Pace is in possession of it when there is three [sic] other people there?" (Tr. 64.)

{¶18} As noted earlier, Count 1 of the Indictment clearly identified the charge as being possession of cocaine, a felony of the fifth degree. No one was confused in the trial court about the issue to be decided, namely did Pace drop a rock of crack cocaine or did he not. Possession of cocaine in any form is a felony of the fifth degree as defined by R.C. 2925.11(C)(4)(a). Under certain circumstances, possession of cocaine can carry a greater penalty, but no such circumstances were alleged to apply here.

{¶19} This is not a case where a discrepancy exists between the indictment and the evidence presented. Crack cocaine contains cocaine, usually mixed with baking soda and cooked into a solid. By possessing a rock of what is commonly called "crack

cocaine," Pace possessed cocaine. Compare *State v. Banks*, 182 Ohio App.3d 276, 2009-Ohio-1892, where a discrepancy existed between the indictment and the evidence.

{¶20} Appellate counsel argues that R.C. 2945.75(A)(2) combines with the case of *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, to make it possible for the verdict form to be defective or to support only a conviction for a misdemeanor. R.C. 2945.75(A) reads:

When the presence of one or more additional elements makes an offense one of more serious degree:

* * *

(2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

{¶21} Counsel's argument could have merit in circumstances where elements of a prior conviction increase the level of a charge, but not in Pace's case. Possession of cocaine was the critical element and not an additional element.

{¶22} The jury verdict in fact found Pace guilty of the least degree of the offense charged.

{¶23} The first and fourth assignments of error are overruled.

{¶24} All four assignments of error having been overruled, the judgment of the Franklin County Court of Common Pleas is affirmed.

Judgment affirmed.

BROWN and SADLER, JJ., concur.
