

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

STATE OF OHIO,	:	APPEAL NO. C-090229
	:	TRIAL NO. B-0802200
Plaintiff-Appellee,	:	
	:	<i>JUDGMENT ENTRY.</i>
vs.	:	
MICHAEL THOMAS,	:	
	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.<sup>1</sup>

Defendant-appellant Michael Thomas appeals his convictions for trafficking in cocaine, possession of cocaine, and having a weapon while under a disability.

The evidence presented during a jury trial established that the Cincinnati police department had received a tip from a confidential informant that Thomas possessed a loaded firearm and was selling drugs in the Bond Hill area of Cincinnati. Cincinnati police officer Jason Hubbard, dressed in plainclothes, acted on this tip. Hubbard witnessed Thomas as he exited from an apartment building previously identified by the confidential informant, engaged in several hand-to-hand drug transactions, and then entered a parked vehicle that had also been mentioned in the informant's tip. A known prostitute was in the passenger seat of this vehicle. Thomas then engaged in several more drug transactions through his car window.

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<sup>1</sup> See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Uniformed officers initiated a traffic stop of Thomas. Marijuana and a large sum of money were found on his person. A loaded firearm, found to be operable, was found beneath the vehicle's passenger seat, but within reach of the driver's seat. Thomas was wearing a chain containing several keys. One key opened the door to 5725 Carthage Avenue in Norwood. The informant had previously told the police that Thomas stored his crack cocaine and marijuana at this home in Norwood.

Bridgette Beasley, the mother of Thomas' child, lived at this location, and she gave police permission to search the residence. The search resulted in the discovery of approximately 47 grams of crack cocaine that had been hidden in the basement ceiling, a digital scale containing cocaine residue, and a box of sandwich bags. In addition, the police found clothing and personal papers belonging to Thomas and a lock box in a closet. One of the keys that had been found on Thomas' neck opened this box, which contained ammunition similar to that found in the weapon during the traffic stop.

After being read his *Miranda* rights, Thomas admitted ownership of the crack cocaine, but denied any knowledge or ownership of the loaded weapon.

Thomas testified on his own behalf at trial and denied engaging in any drug transactions. Rather, Thomas asserted that he had been about to make a purchase from a street stand when the police pulled up, pointed a gun on him, and forced him to enter a car that had been parked on the street. He further denied that he had admitted ownership of the crack cocaine.

The trial court sentenced Thomas to an aggregate term of 15 years' imprisonment. This included 10 years' imprisonment for both the possession and the trafficking offenses, to be served concurrently, and five years consecutive imprisonment for the offense of having a weapon while under a disability.

In his first assignment of error, Thomas argues that the trial court erred in failing to allow disclosure of the confidential informant's identity. This court reviews a trial court's ruling on such a disclosure for an abuse of discretion.<sup>2</sup> The identity of a confidential informant must be disclosed when "the degree of participation of the informant is such that the informant virtually becomes the state's witness."<sup>3</sup> But the identity of an informant need not be disclosed when "disclosure would not be helpful or beneficial to the accused."<sup>4</sup>

In this case, disclosure would not have aided Thomas in his defense. The informant directed police to the location at which Thomas had been selling drugs. But the police verified all information provided by the informant, found a large quantity of drugs that Thomas admitted ownership of, and personally witnessed Thomas engaging in several drug transactions. The trial court did not abuse its discretion in failing to allow disclosure of the confidential informant's identity, and the first assignment of error is overruled.

In his second and third assignments of error, Thomas argues that the trial court erred in overruling his Crim.R. 29 motion for an acquittal and that his convictions were against the weight of the evidence.

When reviewing the denial of a motion for an acquittal, we must view the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offenses beyond a reasonable doubt.<sup>5</sup> But when reviewing the manifest weight of the evidence, this court must weigh the evidence and

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<sup>2</sup> *State v. Jordan*, 1st Dist. No. C-060336, 2007-Ohio-3449, ¶18.

<sup>3</sup> *State v. Williams* (1983), 4 Ohio St.3d 74, 76, 446 N.E.2d 779.

<sup>4</sup> *Id.*

<sup>5</sup> *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

consider the credibility of the witnesses to determine whether the trier of fact lost its way and created a manifest miscarriage of justice.<sup>6</sup>

Thomas was found guilty of possession of cocaine under R.C. 2925.11(A) and trafficking in cocaine under R.C. 2925.03(A)(2). The state presented evidence that Thomas had a key to 5725 Carthage Avenue. Forty-seven grams of crack cocaine were found at this location, along with Thomas' clothing and papers. Officers also found a digital scale containing cocaine residue and a box of sandwich bags. The large amount of drugs, coupled with the scale and bags, indicated that the drugs were being packaged for sale. Moreover, Thomas admitted possession of the drugs. The jury was in the best position to judge credibility, and it was entitled to reject Thomas' testimony that he had never admitted to possession of, or sold, the drugs.

Thomas was also found guilty of having a weapon while under a disability under R.C. 2923.13, which provides that no person shall have, carry, or use a firearm if that person has "been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse."<sup>7</sup> Thomas had stipulated to his prior convictions for drug possession and trafficking. And Thomas was stopped while driving a vehicle containing a loaded firearm. Although this weapon had been found underneath the vehicle's passenger seat, it was within reach of the driver's seat. Further, a key to a lock box containing ammunition for this weapon was found around Thomas' neck.

Thomas' convictions were supported by the weight of the evidence, and the court did not err in denying his Crim.R. 29 motion for an acquittal. The second and third assignments of error are overruled.

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<sup>6</sup> *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

<sup>7</sup> R.C. 2923.13(A)(3).

In his fourth assignment of error, Thomas argues that the trial court erred in sentencing him for both trafficking and possession because they were allied offenses of similar import. Thomas argues that, under *State v. Cabrales*, he could only have been sentenced for one of the offenses.<sup>8</sup> The state agrees with Thomas.

Thomas and the state are correct. Under this court's decision in *Cabrales*, the trial court should only have imposed sentence on one of the two offenses, and it erred when it sentenced Thomas separately for both. Accordingly, Thomas' fourth assignment of error is sustained. We sua sponte merge Thomas' convictions for possession of cocaine and trafficking in cocaine into one conviction for trafficking. With respect to sentencing, we note that this merger does not change the aggregate time that Thomas is to remain incarcerated, as the trial court had ordered the sentences for the allied offenses to be served concurrently.

In his fifth assignment of error, Thomas argues that the trial court violated his due-process rights and his Sixth Amendment right to counsel when it refused to allow his counsel to withdraw on the morning that the trial was set to begin.

Thomas' trial counsel was the third attorney appointed to represent him. His first attorney withdrew, and Thomas then filed several motions seeking to have his second attorney removed. This attorney eventually withdrew, and Thomas' trial counsel was appointed. Trial counsel filed a motion to withdraw on the morning of trial. Counsel told the court that it was very difficult to reason with Thomas, but that he was prepared to proceed with the trial.

The court denied counsel's motion to withdraw. In its view, Thomas was refusing to cooperate with counsel in an attempt to delay the proceedings. The court

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<sup>8</sup> *State v. Cabrales*, 1st Dist. No. C-050682, 2007-Ohio-857.

noted the length of time that Thomas' charges had been pending, that Thomas had had three attorneys, and that Thomas had filed an excessive amount of pro se motions.

The court did not abuse its discretion in denying counsel's motion to withdraw.<sup>9</sup> As we have noted, Thomas' case had been pending for a long period and he was on his third attorney. Further, counsel stated that he was prepared for trial. The record supports the conclusion that Thomas was attempting to delay the proceedings. Thomas' rights were not violated, and the fifth assignment of error is overruled.

In his sixth assignment of error, Thomas argues that he received ineffective assistance of trial counsel because his attorney had failed to question a key witness on redirect examination and had failed to request a presentence-investigation report.

Following our review of the record, we conclude that counsel was not ineffective for failing to conduct a redirect examination. The information that Thomas asserts should have been elicited was thoroughly covered during direct examination. Thomas has failed to demonstrate what additional information this witness could have provided, and he was not prejudiced by counsel's failure to conduct a redirect examination. Nor was he prejudiced by counsel's failure to request a presentence-investigation report. The court was aware of Thomas' prior convictions and criminal history. Because Thomas was found guilty of two first-degree felonies and a third-degree felony, a strong presumption in favor of imprisonment existed.

Thomas has not demonstrated that his counsel's performance was deficient.<sup>10</sup> He did not receive ineffective assistance, and the sixth assignment of error is overruled.

In his seventh assignment of error, Thomas argues that he was subject to a cruel and unusual punishment when the trial court imposed a maximum sentence. And in

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<sup>9</sup> *State v. Bronaugh* (1982), 3 Ohio App.3d 307, 308, 445 N.E.2d 262.

<sup>10</sup> *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052.

his eighth assignment, he argues that his sentence did not correlate to the sentencing factors in R.C. 2929.11 and 2929.12. We consider these assignments together.

When reviewing Thomas' sentences, we must first determine whether they are clearly and convincingly contrary to law.<sup>11</sup> If they are not, we then review the trial court's decision under an abuse-of-discretion standard.<sup>12</sup>

In this case, Thomas' sentences were within the available statutory ranges and were not on their face contrary to law. Nor did the trial court abuse its discretion when imposing the sentence. Thomas' offenses involved a large quantity of drugs. He had a lengthy criminal history. The imposition of maximum and consecutive sentences was supported by the record. We further presume that the trial court considered the relevant factors under R.C. 2929.11 and 2929.12.<sup>13</sup> And these factors supported the sentences imposed. Thomas' seventh and eighth assignments of error are overruled.

In summary, Thomas' conviction for possession of cocaine is merged into his conviction for trafficking in cocaine for purposes of sentencing, and the separate possession sentence is hereby vacated. The judgment of the trial court is accordingly affirmed as modified.

A certified copy of this judgment entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

**HENDON, P.J., SUNDERMANN and MALLORY, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on December 16, 2009  
per order of the Court \_\_\_\_\_.  
Presiding Judge

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<sup>11</sup> *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶14.

<sup>12</sup> *Id.* at ¶17.

<sup>13</sup> *Id.* at fn 4.