

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

STATE OF OHIO,	:	APPEAL NO. C-081158
Plaintiff-Appellee,	:	TRIAL NO. B-080774
vs.	:	<i>JUDGMENT ENTRY.</i>
DAKOTA SMITH,	:	
Defendant-Appellant.	:	

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

Dakota Smith appeals his convictions for trafficking in marijuana. We conclude that his four assignments of error do not have merit, so we affirm the judgment of the trial court.

Smith was indicted for two counts of trafficking in marijuana. During a jury trial, Cincinnati Police Sergeant Bill Halusek testified about surveillance that officers had been conducting in the Over-the-Rhine area of Cincinnati as part of the Cincinnati Initiative to Reduce Violence. According to Halusek, the main targets of the surveillance were members of the Cuddy Boys gang, who had been recently implicated in a homicide. Halusek testified that while police officers were watching the area, they saw Dakota Smith apparently selling drugs. Halusek testified that Smith was not a member of the Cuddy Boys, but that he was a member of the Down the Way Boys, another gang that was known to be in the neighborhood. Officer Craig Copenhaver and police specialist Robin Williams, who were also part of the surveillance operation, testified that they recognized Smith from prior dealings with

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

him. A description of Smith was given to Specialist Howard Fox, who made an undercover marijuana purchase from Smith. Later on the same day, Fox made a second undercover purchase of marijuana from Smith. At trial, Fox identified Smith as the person from whom he had purchased marijuana.

At the conclusion of the trial, the jury found Smith guilty of two counts of trafficking in marijuana. The trial court later sentenced Smith to one year's confinement for one count and to 15 months' confinement for the second count. The sentences were consecutive.

In his first assignment of error, Smith asserts that the trial court erred when it allowed witnesses to testify that Smith was a member of the Down the Way Boys. Because Smith did not object to the testimony during the trial, he has waived all but plain error.<sup>2</sup> Plain error will not be found “unless, but for the error, the outcome \* \* \* would have been otherwise.”<sup>3</sup>

Plain error has not been demonstrated in this case. Fox testified about two hand-to-hand purchases of marijuana, and he clearly identified Smith as the person who had made the sales. Given such compelling testimony, we are unable to say that, had the other officers not been permitted to mention Smith's alleged gang affiliation, the result would have been different. The first assignment of error is overruled.

Smith's second assignment of error is that he was deprived of the effective assistance of counsel. To prevail on this assignment of error, Smith must demonstrate that his counsel's performance was deficient, and that, in the absence of his counsel's errors, the result of the trial would have been different.<sup>4</sup> Our review of counsel's performance must be “highly deferential.”<sup>5</sup>

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<sup>2</sup> See Crim.R. 52(B).

<sup>3</sup> *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804, paragraph two of the syllabus.

<sup>4</sup> See *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, 538 N.E.2d 373; *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052.

<sup>5</sup> *Strickland*, supra, at 689.

Smith contends that his counsel was ineffective because he did not object to the testimony about Smith's alleged gang affiliation. It appears from the record that defense counsel did attempt to lessen the prejudicial effect of the testimony by getting Halusek to acknowledge that the inclusion of Smith's name on a list of potential members of a gang did not necessarily mean that Smith had done something wrong. We will not question counsel's trial tactics. And even if the testimony had not been allowed, we are unable to conclude that the result of the trial would have been different.

Smith also contends that counsel was deficient because he did not effectively cross-examine Copenhaver about his location during the surveillance. Counsel asked Copenhaver a series of questions about his location, but Copenhaver refused to answer, citing the need to protect the secrecy of the location. During a sidebar conference, counsel stated that he was trying to determine whether Copenhaver's view had been obstructed. Counsel was able to get that information without pressing Copenhaver to reveal his exact location. Further, given Fox's testimony about the two hand-to-hand purchases of marijuana, we are unable to say that had counsel succeeded in determining Copenhaver's exact location, the result of the trial would have been different. The second assignment of error is overruled.

Smith's third assignment of error is that his conviction was based on insufficient evidence. Although it is not specifically raised as an assignment of error, Smith also challenges the weight of the evidence. We consider both issues together.

When an appellant challenges the sufficiency of the evidence, we must determine whether the state presented adequate evidence on each element of the offense.<sup>6</sup> On the other hand, when reviewing whether a judgment is against the manifest weight of the evidence, we must determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice.<sup>7</sup> Having reviewed the record, we conclude that the state presented sufficient evidence of each count of

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<sup>6</sup> See *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541.

<sup>7</sup> See *id.* at 387.

trafficking in marijuana. Further, we are unable to say that the jury lost its way when it found Smith guilty of both counts. The third assignment of error is overruled.

Smith's final assignment of error is that he was deprived of a fair trial due to prosecutorial misconduct. Smith contends that the prosecutor improperly vouched for the credibility of the state's witnesses. The contention is not borne out by the record.

The first instance that Smith refers to occurred during jury voir dire. While questioning prospective jurors, the prosecutor stated, "Because even though this might be an inconvenience for all of you to be here today, it's pretty important to the people who are presenting the case, not just the lawyers, but the defendant and also the officers who go out every single day and work hard on the streets."

The second instance occurred during the prosecutor's opening statement. The prosecutor stated, "Now, just so that you know, police officers like to sometimes make sure that there are no holes in their cases. So just in case [the first purchase] wasn't confirmation enough that Dakota was engaging in illegal drug sales, Officer Fox went back later that day and once again engaged in a drug transaction with Dakota Smith." We conclude that Smith has not demonstrated that the prosecutor improperly vouched for the credibility of the state's witnesses in either instance. The fourth assignment of error is overruled.

Therefore, we affirm the trial court's judgment.

A certified copy of this judgment entry is 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 CUNNINGHAM, JJ.**

*To the Clerk:*

Enter upon the Journal of the Court on October 28, 2009

per order of the Court \_\_\_\_\_.

Presiding Judge