

NO. **08-1452**

IN THE SUPREME COURT OF OHIO

APPEAL FROM
THE COURT OF APPEALS FOR CUYAHOGA COUNTY, OHIO
NO. 89964

STATE OF OHIO,

Plaintiff-Appellant

-vs-

CLEVELAND CARGILE,

Defendant-Appellee

MEMORANDUM IN SUPPORT OF JURISDICTION

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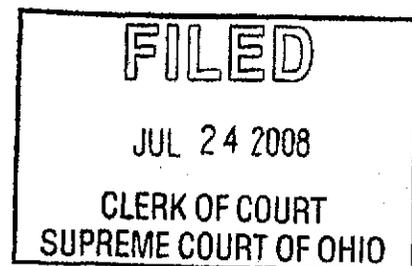


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WHY THIS CASE INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION AND IS OF GREAT GENERAL OR PUBLIC INTEREST

This felony case involves the following question of public and great general interest: in relation to “Illegal conveyance of weapons or prohibited items onto grounds of detention facility or institution” R.C. § 2921.36, does a defendant who is arrested and transported to a detention facility “knowingly convey” items that they have concealed on their person at the time of their arrest?

According to the recent Eighth District Court of Appeals decision in *State v. Cargile*, Cuyahoga App. 89964, 2008-Ohio-2783, the answer to this question is no. Specifically the Eighth District determined that despite the fact that Cleveland Cargile was aware of the items on his person, and despite the fact that Cargile was cautioned about the crime of conveyance, the fact that his physical movement to the jail was pursuant to his arrest rendered his act involuntary. The Eighth District deemed the State’s evidence insufficient and decided that Cargile did not “knowingly convey” the items to the jail. *State v. Cargile*, Cuyahoga App. No. 89964, 2008-Ohio-2783.

In *Cargile* the Eighth District has adopted and further perpetuated the flawed and erroneous reasoning of the Second District Court of Appeals in *State v. Sowry*, Miami App. No. 02CA39, 2004-Ohio-399 and its own earlier decision in *State v. Lee*, Cuyahoga App. No. 89087, 2007-Ohio-5952. In *Sowry* the Second District vacated a defendant’s illegal conveyance conviction on the grounds that the State’s evidence did not demonstrate that the act of the conveyance was voluntary.

In stark contrast to the Eighth District's holding in *Cargile*, the Fifth, Ninth and Twelfth District Courts of Appeals have affirmed convictions for illegal conveyance in cases where the defendants were placed under arrest, were warned about the crime of conveyance, denied possession of contraband, were transported to jail, and were then found to have contraband on their persons. See, *State v. Pettiford*, Holmes App. No. 06CA008, 2006-Ohio-6047; *State v. Conley*, Licking App. No. 05 CA 60, 2006-Ohio-166; *State v. Gouvouniotis*, Licking App. No. 07 CA 56, 2008-Ohio-2471; *State v. Nelson* (May 3, 2001), Delaware App. No. 00CAA10030; *State v. Rice*, Medina App. No. 02CA0002-M, 2002-Ohio-5266; *State v. Lynch*, Warren App. No. CA2004-01-001, 2005-Ohio-683.

The factual situations in *Pettiford*, *Conley*, *Gouvouniotis*, *Rice* and *Lynch* mirror the facts of *Cargile*. Yet, unlike these, the unanimous decision in *Cargile* ruled the State's evidence insufficient and reversed the jury's verdict of guilt.

The Eighth District's decision in *Cargile* sets dangerous precedent in that it effectively prohibits law enforcement from prosecuting the illegal conveyance statute against individuals who knowingly carry contraband into jails when they are arrested. Where a person conveys prohibited items into a detention facility, whether those items are weapons or drugs or other contraband, that person must be held accountable. Section 2921.36 of the Revised Code was designed for this purpose and specifically prohibits this conduct.

In that it renders R.C. § 2921.36 ineffectual, the *Cargile* decision must be addressed. *Cargile* is the most recent case that exemplifies the undeniable conflict between Courts of Appeals. In the interests of fairness and justice the

State respectfully requests this Honorable Court grant jurisdiction and determine the issue of whether a defendant “knowingly conveys” in violation of R.C. § 2921.36 when, by nature of their arrest, they convey prohibited items into a detention facility.

STATEMENT OF THE FACTS

As stated in the Eighth District’s opinion, the facts of this case are:

On March 10, 2007, an individual waiting at a bus stop near Tower City in Cleveland was assaulted twice by a group of young men. After the assaults, his cell phone was missing from his pocket. When the police responded to the scene, the individual and his friend identified Cargile, as he was walking out of Tower City, as one of the assailants. The police arrested Cargile, handcuffed him, and patted him down. The pat-down failed to reveal any weapons or contraband.

The police then transported Cargile to jail for booking and detention. Prior to entering the jail, one of the police officers admonished Cargile that conveying drugs into the jail would be a crime and advised him that he should tell the officer if he had any contraband. Cargile denied that he had any contraband on his person.

An officer then escorted Cargile into the jail and began the booking process. Another officer searched Cargile. The officers saw Cargile move his right leg during the pat-down, allegedly so the officer would avoid making contact with that part of his leg. The officers then found three bags of marijuana concealed in the cuff of Cargile’s right pant leg.

State v. Cargile, Cuyahoga App. No. 89964, 2008-Ohio-2783, ¶ 2-4.

STATEMENT OF THE CASE

Cleveland L. Cargile was charged with two counts of robbery and one count of illegal conveyance of a controlled substance into a detention facility.

After a jury trial he was found not guilty of both robbery counts, but guilty with regard to the illegal conveyance count. He was sentenced to two years in prison.

Upon direct appeal to the Eighth District, Cargile's conviction was vacated on the grounds that the State's evidence was insufficient to render him criminally liable for a violation of R.C. § 2921.36(A)(2). Presently, the State seeks this Court's review.

LAW AND ARGUMENT

Proposition of Law No. I:

A defendant "knowingly conveys" in violation of R.C. § 2921.36 when, by nature of his or her arrest, the defendant conveys prohibited items into a detention facility.

The Eighth District Court of Appeals has interpreted R.C. § 2921.36 in a manner that it entirely incompatible with a number of decisions out of the Fifth, Ninth and Twelfth District Courts of Appeals. In *State v. Cargile* the Eighth District vacated a jury's finding of guilt on an illegal conveyance charge based on sufficiency of the State's evidence. The Eighth District's determination that a person does not "knowingly convey" where, by nature of the person's arrest, they convey contraband into a detention facility is dangerous precedent that cannot be left to stand.

The *Cargile* opinion is not an anomaly. Rather, it is the most recent of several cases from the Second and Eighth District Courts of Appeals that erroneously construe R.C. § 2921.36. The State now asks this Court to interpret the statute and resolve this conflict.

In the instant matter Cargile was charged with violating R.C. § 2921.36(A)(2) which provides, "No person shall knowingly convey, or attempt to convey, onto the grounds of a detention facility * * * any of the following items: * * * Any drug of abuse, as defined in section 3719.011 of the Revised Code." The

evidence submitted at trial was: that Cargile was placed under arrest for assault and robbery, that Cargile was warned about the crime of conveyance, that Cargile denied possessing contraband, and that upon being transported to jail Cargile was found to have drugs on his person.

Upon appeal the Eighth District found the State's evidence to be insufficient with regard to Cargile's "knowing conveyance." The Eighth District relied on the Second District's opinion in *State v. Sowry*, Miami App. No. 02CA39, 2004-Ohio-399—which it adopted in its own previous decision in *State v. Lee*, Cuyahoga App. No. 89087, 2007-Ohio-5952. Ultimately, the *Cargile* Court found,

Under R.C. 2901.21(A), a person is not guilty of a criminal offense unless 1) the person's liability is based on either a voluntary act or an omission to perform an act or duty; and 2) the person has the requisite degree of culpability for each element as to which a culpable mental state is specified in the statute defining the offense.

Cargile argues that, on these facts, he cannot be convicted of illegally conveying drugs into the jail, because his act was not voluntary, as required by R.C. 2901.21(A). We agree.

State v. Cargile, Cuyahoga App. No. 89964, 2008-Ohio-2783, ¶ 10-11. Despite the fact that Cargile was aware of the contraband on his person and despite the fact that Cargile was cautioned at the time of his arrest about the crime of conveyance, the Eighth District determined that his act was not voluntary and reversed his conviction.

This interpretation, as established by the Second and Eighth District Courts of Appeals, completely and totally conflicts with the reasoning of the Fifth, Ninth, and Twelfth District Courts of Appeals. In cases with similar fact patterns,

these other districts have upheld illegal conveyance convictions. See, *State v. Pettiford*, Holmes App. No. 06CA008, 2006-Ohio-6047; *State v. Conley*, Licking App. No. 05 CA 60, 2006-Ohio-166; *State v. Gouvouniotis*, Licking App. No. 07 CA 56, 2008-Ohio-2471; *State v. Nelson* (May 3, 2001), Delaware App. No. 00CAA10030; *State v. Rice*, Medina App. No. 02CA0002-M, 2002-Ohio-5266; *State v. Lynch*, Warren App. No. CA2004-01-001, 2005-Ohio-683. Even though these other defendants were physically moved to detention facilities pursuant to their arrests on separate charges, their acts of conveyance of contraband were upheld.

Like Cargile, the defendants in *Pettiford*, *Conley*, *Gouvouniotis*, *Rice*, *Lynch*, were warned upon their arrests of the additional crime of conveyance. Like Cargile, they denied having contraband on their persons. Like Cargile, they were taken to jail where they were searched and found to possess contraband. While each of them has been held accountable for their illegal conveyance, Cargile has been acquitted and ordered discharged from any penalties. *State v. Cargile*, Cuyahoga App. No. 89964, 2008-Ohio-2783, ¶ 18.

There is a grave disparity between Ohio districts in their application and interpretation of R.C. § 2921.36. The State submits that this is a conflict that must be resolved. Accordingly, the State of Ohio respectfully requests this Court review this matter and determine whether a defendant “knowingly conveys” in violation of R.C. § 2921.36 when, by nature of his or her arrest, the defendant conveys prohibited items into a detention facility.

CONCLUSION

The State of Ohio respectfully requests this Honorable Court grant jurisdiction and accept this appeal in order to determine whether a defendant “knowingly conveys” in violation of R.C. § 2921.36 when, by nature of his or her arrest, the defendant conveys prohibited items into a detention facility.

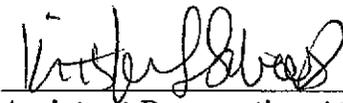
Respectfully submitted,

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SERVICE

A copy of the foregoing Memorandum in Support has been mailed this 23rd day of July 2008, to Jerome Eloff, 55 Public Square #850, Cleveland, Ohio 44113.


Assistant Prosecuting Attorney

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 89964

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

CLEVELAND L. CARGILE

DEFENDANT-APPELLANT

**JUDGMENT:
VACATED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-495049

BEFORE: McMonagle, P.J., Blackmon, J., and Boyle, J.

RELEASED: May 29, 2008

JOURNALIZED: JUN - 9 2008

VOL 0659 #0040

CA07089964

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**FILED AND JOURNALIZED
PER APP. R. 22(E)**

JUN 9 - 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

MAY 29 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.

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NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. McMONAGLE, P.J.:

Defendant-appellant, Cleveland L. Cargile, appeals from his conviction for illegally conveying drugs onto the grounds of a detention facility in violation of R.C. 2921.36(A)(2). We vacate his conviction, because the State's evidence was insufficient to render Cargile criminally liable for a violation of R.C. 2921.36 (A)(2).

The evidence presented by the State at trial revealed the following. On March 10, 2007, an individual waiting at a bus stop near Tower City in Cleveland was assaulted twice by a group of young men. After the assaults, his cell phone was missing from his pocket. When the police responded to the scene, the individual and his friend identified Cargile, as he was walking out of Tower City, as one of the assailants. The police arrested Cargile, handcuffed him, and patted him down. The pat-down failed to reveal any weapons or contraband.

The police then transported Cargile to jail for booking and detention. Prior to entering the jail, one of the police officers admonished Cargile that conveying drugs into the jail would be a crime and advised him that he should tell the officer if he had any contraband. Cargile denied that he had any contraband on his person.

An officer then escorted Cargile into the jail and began the booking process. Another officer searched Cargile. The officers saw Cargile move his

right leg during the pat-down, allegedly so the officer would avoid making contact with that part of his leg. The officers then found three bags of marijuana concealed in the cuff of Cargile's right pant leg.

Cargile was charged with two counts of robbery, in violation of R.C. 2911.02, and one count of illegal conveyance of a controlled substance into a detention facility, in violation of R.C. 2921.36(A)(2). The jury found him not guilty of both robbery counts, but guilty with regard to the prohibited conveyance count, and the trial court sentenced him to two years in prison.

In his third assignment of error, which we find dispositive, Cargile contends that the trial court erred in denying his Crim.R. 29 motion for acquittal regarding the illegal conveyance count, because the evidence was insufficient to support his conviction. We agree.

Crim.R. 29(A) governs motions for acquittal and provides for a judgment of acquittal "if the evidence is insufficient to sustain a conviction." An appellate court's function in 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

Under R.C. 2921.36(A)(2), no one shall “knowingly convey, or attempt to convey, onto the grounds of a detention facility *** any drug of abuse, as defined in section 3719.011 of the Revised Code.”

It is undisputed that the marijuana found in the cuff of Cargile’s pant leg when he was brought to jail is a drug of abuse as defined by R.C. 3719.011. It is also undisputed that the county jail is a detention facility for purposes of R.C. 2921.36(A)(2).

Under R.C. 2901.21(A), a person is not guilty of a criminal offense unless 1) the person’s liability is based on either a voluntary act or an omission to perform an act or duty; and 2) the person has the requisite degree of culpability for each element as to which a culpable mental state is specified in the statute defining the offense.

Cargile argues that, on these facts, he cannot be convicted of illegally conveying drugs into the jail, because his act was not voluntary, as required by R.C. 2901.21(A). We agree.

In *State v. Sowry*, 155 Ohio App.3d 742, 2004-Ohio-399, the Second District Court of Appeals considered a similar situation. The defendant in that case was arrested for disorderly conduct and resisting arrest and a pat-down

failed to reveal any weapons or contraband. At the jail, the defendant was asked whether he had any drugs on his person, and he responded negatively. A more thorough search at booking revealed a baggie of marijuana in his right front pants pocket.

The Second District found that “any act that is not the product of the actor’s conscious determination is not a voluntary act.” *Sowry* at ¶17, citing *Katz/Gianelli, Criminal Law, Baldwin’s Ohio Practice, Vol. 2, Section 85:3, at p. 871*. Therefore, it concluded, because the officers controlled the defendant’s person by arresting him and conveying him to jail, the fact “that [the defendant’s] ‘person’ and the possessions on his person were in the jail was *** not a product of a voluntary act on [the defendant’s] part. Rather, those events were, as to him, wholly involuntary.” *Id.* at ¶19.

The Second District held that “at most, [the defendant] might be charged with knowing that drugs were on his person when officers conveyed him to jail. However, *** the law will not punish for a guilty mind alone. Because [the defendant’s] conduct with respect to the R.C. 2921.36(A)(2) violation with which he was charged cannot satisfy the requirement for criminal liability that R.C. 2901.22(A)(1) imposes, the trial court erred when it denied defendant-appellant Sowry’s Crim.R. 29 motion for acquittal.” *Sowry* at ¶22.

This court adopted the reasoning of *Sowry* in *State v. Lee*, Cuyahoga App. No. 89087, 2007-Ohio-5952, reversed on other grounds, *State v. Lee*, Cuyahoga App. No. 89087, 2008-Ohio-143.

Despite the State's argument that this case is different than *Sowry*, we find no distinction between the two cases. Accordingly, the trial court erred in denying Cargile's Crim.R. 29 motion for acquittal on the offense of illegally conveying a prohibited substance onto the grounds of a detention facility.

Appellant's third assignment of error is sustained. Our resolution of the third assignment of error renders the other assignments of error moot. See App.R. 12(A)(1)(c).

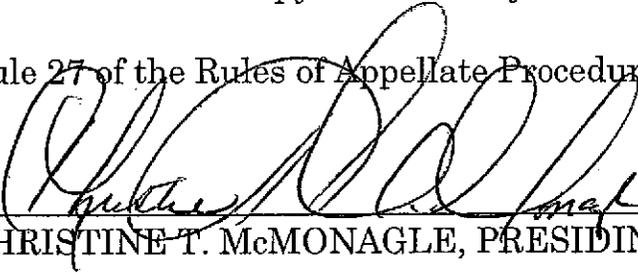
Having sustained the third assignment of error, we reverse and vacate Cargile's conviction for violation of R.C. 2921.36(A)(2), enter a judgment of acquittal on that charge, and order him discharged from any penalty imposed upon his conviction for that offense.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to
Rule 27 of the Rules of Appellate Procedure.



CHRISTINE T. McMONAGLE, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
MARY J. BOYLE, J., CONCUR