NO. 2008-1452

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

MERIT BRIEF OF APPELLANT

Counsel for Plaintiff-Appellant

WILLIAM D. MASON
Cuyahoga County Prosecutor

KRISTEN L. SOBIESKI (0071523)
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Defendant-Appellee

JEROME EMOFF
55 Public Square #950
Cleveland, Ohio 44113

MELISSA PRNDERGAST
8 East Long Street, 11th Floor
Columbus, Ohio 43215

FILED
FEB 11 2009
CLERK OF COURT
SUPREME COURT OF OHIO

TABLE OF CONTENTS

STATEMENT OF THE FACTS 1

STATEMENT OF THE CASE 2

LAW AND ARGUMENT 3

Proposition of Law No. I: 3
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 10

SERVICE 10

Appendices **appx. pg**
Time stamped copy of Notice of Appeal 1
State v. Cargile, Cuyahoga App. No. 89964, 2008-Ohio-2783 4
R.C. 2901.21 12
R.C. 2921.36 13

TABLE OF AUTHORITIES

Cases

Brown v. State, 89 S.W.3d 630, 633 9
People v. Bacon (Oct. 24, 2008), Second District Division 3 No. B203245, 2008 WL 4683426 .. 8
People v. Ross (May 12, 2008), 162 Cal.App.4th 1184, 76 Cal.Rptr.3d 477 7
State v. Alvarado (Dec. 26, 2008), (Arizona Ct. App.) Division I, No. 1 CA-CR 07-0738, 2008 WL 5382417 9
State v. Cargile, 120 Ohio St.3d 1415, 897 N.E.2d 651, 2008-Ohio-6166 2
State v. Cargile, Cuyahoga App. No. 89964, 2008-Ohio-2783 ..... 2, 9
State v. Cargile, Cuyahoga App. No. 89964, 2008-Ohio-2784 4
State v. Carr (Sept. 26, 2008), (Tenn. Crim. App.) No. M2007-01759-CCA-R3-CD, 2008 WL 4368240 8
State v. Cole (2007), 142 N.M. 325, 328, 164 P.3d 1024, 1027 7
State v. Cole, Cuyahoga App. No. 91305, 2008-Ohio-6647 5
State v. Conley, Licking App. No. 05CA60, 2006-Ohio-166 ..... 6, 9
State v. Gouvouniotis, Licking App. No. 07 CA 56, 2008-Ohio-2471 6
State v. Lee, Cuyahoga App. No. 89087, 2007-Ohio-5952, ¶¶ 20-24, *discretionary appeal dismissed*, 116 Ohio St.3d 1501, 880 N.E.2d 478, 2008 -Ohio- 335 5
State v. Lynch, Warren App. No. CA2004-01-001, 2005-Ohio-683 6
State v. Nelson (May 3, 2001), Delaware App. No. 00CAA10030, 2001 WL 1775396 6
State v. Pettiford, Holmes App. No. 06CA008, 2006-Ohio-6047 ..... 5, 9
State v. Rice, Medina App. No. 02CA0002-M, 2002-Ohio-5266 ..... 6, 7
State v. Sowry, Miami App. No. 02CA39, 2004-Ohio-399 5
State v. Tippetts (2002), 180 Or.App. 350, 359, 43 P.3d 455, 460 7
State v. Winsor, 110 S.W.3d 882 9

Statutes

R.C. § 2901.21(A) 4
R.C. § 2901.22(B) 4
R.C. § 2921.36 ..... 3, 5, 9, 10
R.C. § 2921.36(A) 2, 3

STATEMENT OF THE FACTS

On March 10, 2007 Cleveland L. Cargile was arrested outside of Tower City shopping center in the City of Cleveland, Cuyahoga County, Ohio on charges of robbery and assault.

While outside Tower City Center, Cargile was identified by the robbery victims as one of the assailants. (Tr. 332-333.) Upon the victims' identification, police detained Cargile and placed him in handcuffs, then conducted a pat-down for officer safety. (Tr. 337-338, 348-349.)

Officer Fankhauser testified that he performed a total of three searches: an initial pat-down search, a second pat-down prior to putting Cargile into the zone car, and a final search of Cargile at the detention facility prior to his placement in the jail cell. (Tr. 348.) The Officer explained that he, "[patted Cargile down three different times] to be thorough, to make sure that nothing has been passed or * * * [if Cargile] picked up anything in between the time that they [are] transported to the time they reach the jail, also to make sure nothing illegal or weapons or drugs or anything was to make it inside the jail." (Tr. 348-349.)

Officer Fankhauser transported Cargile to the Cleveland Police Department Central Processing Unit—the main jail—for detention and booking. (Tr. 349-350.) Officer Fankhauser warned Cargile that conveying drugs into the detention facility would be a crime. (Tr. 349.) Cargile was admonished two additional times that "if anything was to be found on [his] person, it's better just to tell [the officer] now because if they bring it into the jail, they have the possibility of being charged with a felony for conveying drugs....[or] contraband of any kind inside the jail." (Tr. 349.) Cargile repeatedly denied possession of contraband. (Tr. 349.)

Officer Fankhauser escorted Cargile into the jail and began the booking process as well as the third and final search with the assistance of Institutional Guard Fred Akoto. (Tr. 350.) Guard Akoto testified that once Cargile was inside the detention facility, he performed a

thorough final search before placing him in the jail cell "[in order to make sure] they don't have anything on them like drugs." (Tr. 362.) During said search, Cargile acted evasively in that he moved his right leg away from Guard Akoto. (Tr. 350-356). Both Officer Fankhauser and Guard Akoto observed Cargile's evasive movements. (Tr. 350, 362.) Upon securing Cargile's moving leg, Guard Akoto found three bags of marijuana concealed in the cuff of his right jean pant leg. (Tr. 350-356, 362-363.) The drugs were confiscated and tested positive for marijuana. (Tr. 351-353, 362-363.)

STATEMENT OF THE CASE

Cargile was indicted 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. Thereafter, he was sentenced in accordance with the law to two years in prison.

Upon direct appeal to the Eighth District Court of Appeals, Cargile's conviction was vacated on the ground that the State's evidence was insufficient to render him criminally liable for a violation of R.C. § 2921.36(A)(2). The appellate court determined Cargile "cannot be convicted of illegally conveying drugs into the jail, because his act was not voluntary." *State v. Cargile*, Cuyahoga App. No. 89964, 2008-Ohio-2783, at ¶ 11.

The State's request for jurisdiction in this Honorable Court was granted on December 3, 2008. *State v. Cargile*, 120 Ohio St.3d 1415, 897 N.E.2d 651, 2008-Ohio-6166.

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.

Summary:

Police arrested Cleveland Cargile on charges of robbery. Prior to transporting him to jail, police cautioned Cargile about the additional crime of illegal conveyance. Cargile denied possession of contraband; however, at the jail police discovered a quantity of marijuana in the leg of his pants. Accordingly, Cargile knowingly conveyed a drug of abuse into the detention facility. Despite these facts, the Eighth District Court of Appeals determined that Cargile's actions do not constitute the crime of "Illegal conveyance of weapons or prohibited items onto grounds of detention facility or institution" as set forth in R.C. § 2921.36. The Court of Appeals determined Cargile's act was not voluntary.

Cargile was charged with violating R.C. § 2921.36(A)(2) which specifies, "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." 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 facts of this case are not in dispute. The evidence submitted at trial was: Cargile was placed under arrest for assault and robbery, Cargile was warned about the additional crime of conveyance, Cargile denied possessing contraband, upon being transported to jail Cargile was found to have drugs on his person—specifically, three bags of marijuana in the cuff of his pant

leg. Based on these facts, the jury's finding of guilt with respect to the charge of illegal conveyance was supported by sufficient evidence.

Upon appeal, the Eighth District reversed the jury's verdict. The appellate court decided that Cargile's act of conveyance was not voluntary as defined by R.C. § 2901.21(A) and therefore vacated his conviction. *State v. Cargile*, Cuyahoga App. No. 89964, 2008-Ohio-2784, ¶¶ 16-17.

Section 2901.21 of the Revised Code codifies in Ohio law the requirement of both *mens rea* and *actus reus* with regard to criminal offenses. Subsection (A)(1) states "The person's liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing." Subsection (A)(2) requires "The person has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense." A person may not be found guilty of a criminal offense unless both *mens rea* and *actus reus* are present.

The requisite mental state for the offense of illegal conveyance is "knowingly," which is defined in R.C. § 2901.22(B) as follows: "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

The evidence submitted at trial demonstrated Cargile's knowing conveyance of marijuana into the jail. Even though the police officers informed Cargile at the time of his arrest that he could be charged with the additional crime of conveyance, Cargile denied possession of any contraband. Cargile knew he had the marijuana on his person and he knew he was being taken to jail, yet Cargile failed to reveal the contraband to police. When Cargile was transported to jail

for booking, police discovered the marijuana. Thus, every element of the crime of illegal conveyance was met by sufficient evidence and the jury's verdict should have been upheld.

Ohio Courts of Appeals interpret R.C. § 2921.36:

In vacating Cargile's conviction, the Eighth District Court of Appeals relied on the rationale of *State v. Sowry*, Miami App. No. 02CA39, 2004-Ohio-399, a case out of Ohio's Second District Court of Appeals.[1] In *Sowry*, the defendant was arrested and transported to jail. The defendant denied possession of drugs; however a search at the jail revealed drugs in his pocket. The appellate court found the defendant was not criminally liable due to the requirements of R.C. 2901.22(A). The Second District reasoned that because the defendant was involuntarily taken to the jail (pursuant to his arrest), the defendant and "the possessions on his person" were not in the jail as a result of a voluntary act.

The *Cargile* and *Sowry* reasoning that a person does not "knowingly convey" where, by nature of their arrest, they convey contraband into a detention facility is an interpretation of R.C. § 2921.36 that is entirely incompatible with a number of decisions out of the Fifth, Ninth and Twelfth District Courts of Appeals. For example in *State v. Pettiford*, Holmes App. No. 06CA008, 2006-Ohio-6047, the Fifth District Court of Appeals upheld the defendant's conviction under R.C. 2921.36(A)(2) where the defendant was placed under arrest for a violation of a state drug law, the defendant was advised of the crime of conveyance, the defendant denied possession of additional drugs—and upon transport to jail, the defendant was found to possess a quantity of Xanax. The Fifth District acknowledged *Sowry*, but found that the defendant understood the ramifications of not disclosing the Xanax in his possession. Therefore, the court

[1] In addition to *Cargile*, the Eighth District has perpetuated the *Sowry* rationale in at least two other decisions. See, *State v. Lee*, Cuyahoga App. No. 89087, 2007-Ohio-5952, ¶¶ 20-24, *discretionary appeal dismissed*, 116 Ohio St.3d 1501, 880 N.E.2d 478, 2008 -Ohio- 335, and *State v. Cole*, Cuyahoga App. No. 91305, 2008-Ohio-6647, ¶¶ 6-11, *jurisdictional memoranda pending*, No. 2009-0030.

concluded that the defendant's action constituted a knowing and voluntary act of conveying drugs into a detention facility. *Id.* at ¶ 25.

Similarly in *State v. Conley*, Licking App. No. 05CA60, 2006-Ohio-166 the Fifth District upheld an illegal conveyance conviction. Again, the Fifth District "decline(d) to adopt the rationale of *Sowry*" where the defendant was arrested on a warrant, was allowed to dress himself appropriately, was advised of the crime of conveyance, the defendant denied possession of contraband, and upon being searched at the jail a quantity of drugs was found on the defendant's person. The Fifth District determined that the defendant was presented with two opportunities to turn the drugs over to the police and "that a reasonable fact-finder could have found the existence of a voluntary act by appellant in such a situation." *Id.* at ¶ 17.[2]

The Fifth District is not alone in its decisions to uphold convictions for illegal conveyance under comparable factual situations. In *State v. Lynch*, Warren App. No. CA2004-01-001, 2005-Ohio-683, the Twelfth District Court of Appeals affirmed the defendant's conviction for knowingly conveying contraband into a detention facility where the defendant was arrested for disorderly conduct, was advised of the additional crime of conveyance, the defendant denied possession of contraband, and upon search at the jail she was found to possess a crack pipe in the false bottom of her purse. *Id.* ¶¶ 9-10.

Likewise, in *State v. Rice*, Medina App. No. 02CA0002-M, 2002-Ohio-5266 the Ninth District Court of Appeals upheld a conviction for illegal conveyance where the defendant was placed under arrest, was advised multiple times regarding the additional felony offense of

---

[2] The Fifth District Court of Appeals also affirmed convictions of illegal conveyance under similar fact patterns in *State v. Nelson* (May 3, 2001), Delaware App. No. 00CAA10030, 2001 WL 1775396, *2, and *State v. Gouvouniotis*, Licking App. No. 07 CA 56, 2008-Ohio-2471.

conveyance, the defendant repeatedly denied possession of contraband, and upon being transported to jail the defendant was searched and found in possession of a quantity of marijuana. *Id.* at ¶ 22. In *Rice*, the Ninth District went on to address the defendant's claimed violation of his Fifth Amendment protection against self-incrimination. The appellate court held "[w]hile [the defendant] does have the right not to incriminate himself, this right does not entitle him to knowingly convey a drug of abuse onto the grounds of a detention facility." *Id.* at ¶ 24.

Other states interpret similar statutes:

Courts outside this State have resolved similar cases in line with Ohio's Fifth, Ninth and Twelfth District Courts of Appeals.[3] In *People v. Ross* (May 12, 2008), 162 Cal.App.4th 1184, 76 Cal.Rptr.3d 477, California's Second District Court of Appeal, determined the defendant "knowingly took or carried a deadly weapon into the jail after denying that she possessed a weapon. She therefore voluntarily chose to enter the jail with the weapon." *Id.* at 1188. In *Ross* the defendant was advised upon her arrest that she should disclose possession of any drugs or weapons—she denied possession of any contraband. The defendant was transported to jail where she was searched and was found to have concealed a knife in the inseam of her pants. *Id.* at 1187. The California court took note of Ohio's Second District *Sowry* decision but rejected such reasoning and instead found that neither the California criminal statute nor the Fifth Amendment to the Constitution allows a defendant the right to lie to law enforcement officers. The *Ross* court stated "[the defendant] had no choice whether to go to jail, but she was afforded the choice to not violate section 4574. Had she been truthful at booking, she would not have entered the jail with the knife and would not have been charged." *Id.* at 1191.

---

[3] *But see State v. Tippetts* (2002), 180 Or.App. 350, 359, 43 P.3d 455, 460, and *State v. Cole* (2007), 142 N.M. 325, 328, 164 P.3d 1024, 1027.

After *Ross*, California's Second District Court of Appeal issued an analogous unreported opinion in *People v. Bacon* (Oct. 24, 2008), Second District Division 3 No. B203245, 2008 WL 4683426, finding:

> [Bacon] claims he did not voluntarily possess marijuana in jail; rather, the police forcibly brought him to jail at a time when he coincidentally had marijuana in his possession. This claim is meritless.
> Bacon argues the evidence shows he never intended to bring marijuana into the jail, that he had no knowledge he would be entering a jail facility, and that he committed no voluntary act related to section 4573.6 because he was involuntarily taken to jail by the police. We disagree. When Bacon lied to Officer Goodkin about the marijuana in his possession, he manifested an intent to violate section 4573.6 by taking marijuana into the jail. At that moment, Bacon knew both that he had marijuana in his possession and that it would be illegal to have it inside the jail.

Id. at *4, (footnote omitted).

A Tennessee Court of Appeals has also specifically rejected Ohio's Second District *Sowry* rationale instead holding,

> [defendant's] possession of a controlled substance was voluntary in that, after being advised of the consequences of bringing drugs into the jail, the [defendant] consciously chose to ignore the officers' warnings, choosing instead to enter the jail in possession of cocaine. Under these circumstances, the [defendant] was the author of his own fate.

State v. Carr (Sept. 26, 2008), (Tenn. Crim. App.) No. M2007-01759-CCA-R3-CD, 2008 WL 4368240, at *5.

In further illustration, an appellate court in the State of Arizona addressed this very issue and held,

> [T]he circumstance here that both the arresting officer and the detention officer informed the defendant of the consequences of bringing contraband into the jail and gave him an opportunity to surrender any contraband beforehand highlight that defendant was performing a bodily movement "consciously and as a result of effort and determination" when he carried the contraband into the jail. That defendant chose not to disclose that he possessed an additional amount of marijuana on his person does not somehow absolve him of responsibility for his actions on the theory that

> providing him an opportunity to choose between admitting to possession of the marijuana and being charged with introducing that substance into the jail violates the self-incrimination clause of the Fifth Amendment.

State v. Alvarado (Dec. 26, 2008), (Arizona Ct. App.) Division I, No. 1 CA-CR 07-0738, 2008 WL 5382417, at ¶ 18. Comparable decisions have also been reached in the states of Missouri and Texas. See, *State v. Winsor*, 110 S.W.3d 882, at 888, ("[defendant's] decision to enter the premises of the Callaway County Jail with a controlled substance on his person was a voluntary act"); *Brown v. State*, 89 S.W.3d 630, 633, (*en banc*: defendant who was brought into correctional facility upon arrest voluntarily took marijuana into the jail.)

Like Cleveland Cargile, the defendants in each of these cases were warned upon their arrests of the additional crime of conveyance. Like Cargile, the defendants 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's conviction has been vacated and he has been ordered discharged from any penalties. *State v. Cargile*, Cuyahoga App. No. 89964, 2008-Ohio-2783, at ¶ 18.

The disparity that exists is not just between Ohio and these other states. Rather, as set forth above, there is also disparity among Ohio districts in their application and interpretation of R.C. § 2921.36. The State submits that the Fifth District's analysis in *Pettiford* and *Conley*, which aligns with the reasoning of appellate courts in Arizona, California, Missouri, Tennessee, and Texas is persuasive.

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. Accordingly, the State of Ohio respectfully requests this Court promulgate the rule of law that 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 reverse the decision of the Eighth District Court of Appeals and find a defendant "knowingly conveys" in violation of R.C. § 2921.36 when, by nature of his arrest, he conveys prohibited items into a detention facility.

Further, the State requests this Court reinstate Defendant-Appellee Cleveland Cargile's conviction and remand this matter to the Eighth District Court of Appeals for resolution of the remaining assignments of error.

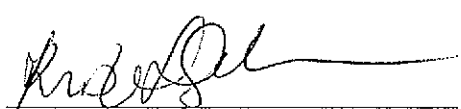
Respectfully submitted,

WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

BY:
KRISTEN L. SOBIESKI (0071523)
Assistant Prosecuting Attorney
1200 Ontario Street, 9th Floor
Cleveland, Ohio 44113
216.443.7800

SERVICE

A true and accurate copy of the foregoing Merit Brief of Appellant has been sent this 10th day of February 2009 to the following: Melissa Prendergast, Ohio Public Defenders Office, 8 East Long Street, 11th Floor, Columbus, Ohio 43215 and Jerome Emoff, 55 Public Square #950, Cleveland, Ohio 44113.


Assistant Prosecuting Attorney

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

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

Counsel for Plaintiff-Appellant

WILLIAM D. MASON
Cuyahoga County Prosecutor

KRISTEN L. SOBIESKI (0071523)
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
(216) 443-7800

Counsel for Defendant-Appellee

JEROME EMOFF
55 Public Square #950
Cleveland, Ohio 44113

FILED
JUL 24 2008
CLERK OF COURT
SUPREME COURT OF OHIO

NO.

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

NOTICE OF APPEAL TO THE SUPREME COURT OF OHIO

Now comes the State of Ohio and hereby gives Notice of Appeal to the Supreme Court of Ohio from a judgment and final order of the Court of Appeals for Cuyahoga County, Ohio, Eighth Judicial District, journalized June ~~10~~ 09, 2008 which vacated the decision of the trial court. PER PHONE APPROVAL BY S. MAHER 0032279

Said cause did not originate in the Court of Appeals and involves a felony.

Respectfully submitted,

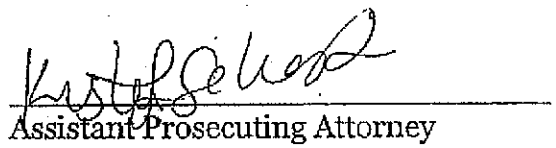
WILLIAM D. MASON
CUYAHOGA COUNTY PROSECUTOR

BY: Kristen L. Sobieski

KRISTEN L. SOBIESKI (0071523)
Assistant Prosecuting Attorney
1200 Ontario Street, 8th Floor
Cleveland, Ohio 44113
216.443.7800

SERVICE

A copy of the foregoing Notice of Appeal has been mailed this 23rd day of July 2008, to Jerome Emoff, 55 Public Square #850, Cleveland, Ohio 44113.



Assistant Prosecuting Attorney

JUN - 9 2008

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

CA07089964 52059563

VOL 0659 PG 0040

4

ATTORNEY FOR APPELLANT

Jerome Emoff
55 Public Square
Suite 950
Cleveland, OH 44113

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor

BY: Sanjeev Bhasker
Assistant Prosecuting Attorney
The Justice Center, 8th Floor
1200 Ontario Street
Cleveland, OH 44113

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

JUN 9 - 2008

GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY _____ 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 _____ DEP.

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

CA07089964 51772065

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 in 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).

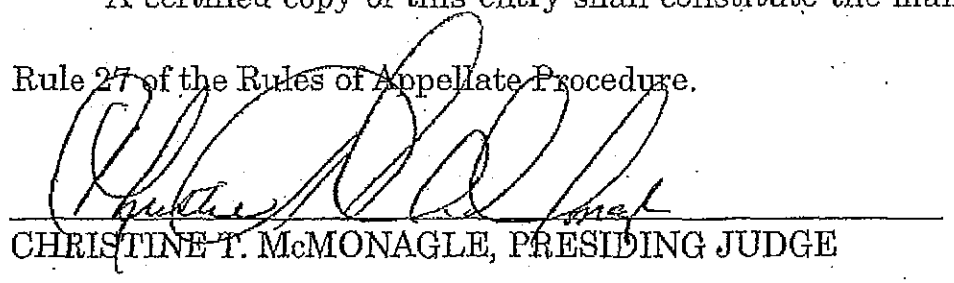
Having sustained the third assignment of error, we reverse and vacate Cargile's conviction for violation of R.C. 2921.36(A)(2), enter a judgment of acquittal on that charge, and order him discharged from any penalty imposed upon his conviction for that offense.

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

2901.21 Requirements for criminal liability; voluntary intoxication

(A) Except as provided in division (B) of this section, a person is not guilty of an offense unless both of the following apply:

(1) The person's liability is based on conduct that includes either a voluntary act, or an omission to perform an act or duty that the person is capable of performing;

(2) The person has the requisite degree of culpability for each element as to which a culpable mental state is specified by the section defining the offense.

(B) When the section defining an offense does not specify any degree of culpability, and plainly indicates a purpose to impose strict criminal liability for the conduct described in the section, then culpability is not required for a person to be guilty of the offense. When the section neither specifies culpability nor plainly indicates a purpose to impose strict liability, recklessness is sufficient culpability to commit the offense.

(C) Voluntary intoxication may not be taken into consideration in determining the existence of a mental state that is an element of a criminal offense. Voluntary intoxication does not relieve a person of a duty to act if failure to act constitutes a criminal offense. evidence that a person was voluntarily intoxicated may be admissible to show whether or not the person was physically capable of performing the act with which the person is charged.

(D) As used in this section:

(1) Possession is a voluntary act if the possessor knowingly procured or received the thing possessed, or was aware of the possessor's control of the thing possessed for a sufficient time to have ended possession.

(2) Reflexes, convulsions, body movements during unconsciousness or sleep, and body movements that are not otherwise a product of the actor's volition, are involuntary acts.

(3) "Culpability" means purpose, knowledge, recklessness, or negligence, as defined in section 2901.22of the Revised Code.

(4) "Intoxication" includes, but is not limited to, intoxication resulting from the ingestion of alcohol, a drug, or alcohol and a drug.

CREDIT(S)
(2000 H 318, eff. 10-27-00; 1972 H 511, eff. 1-1-74)

HISTORICAL AND STATUTORY NOTES
Ed. Note: Former 2901.21 repealed by 1972 H 511, eff. 1-1-74; 1953 H 1; GC 12418.
Pre-1953 H 1 Amendments: 98 v 124, § 1a

Amendment Note: 2000 H 318 added new division (C); redesignated former division (C) as new division (D); substituted "of the thing possessed" for "thereof" in division (D)(1); added new division (D)(4); and made changes to reflect gender neutral language and other nonsubstantive changes.

2921.36 Prohibition of conveyance of certain items onto grounds of detention facility or mental health or mental retardation and developmental disabilities facility

(A) No person shall knowingly convey, or attempt to convey, onto the grounds of a detention facility or of an institution that is under the control of the department of mental health or the department of mental retardation and developmental disabilities, any of the following items:

(1) Any deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code, or any part of or ammunition for use in such a deadly weapon or dangerous ordnance;

(2) Any drug of abuse, as defined in section 3719.011 of the Revised Code;

(3) Any intoxicating liquor, as defined in section 4301.01 of the Revised Code.

(B) Division (A) of this section does not apply to any person who conveys or attempts to convey an item onto the grounds of a detention facility or of an institution under the control of the department of mental health or the department of mental retardation and developmental disabilities pursuant to the written authorization of the person in charge of the detention facility or the institution and in accordance with the written rules of the detention facility or the institution.

(C) No person shall knowingly deliver, or attempt to deliver, to any person who is confined in a detention facility or to any patient in an institution under the control of the department of mental health or the department of mental retardation and developmental disabilities, any item listed in division (A)(1), (2), or (3) of this section.

(D) No person shall knowingly deliver, or attempt to deliver, cash to any person who is confined in a detention facility.

(E) No person shall knowingly deliver, or attempt to deliver, to any person who is confined in a detention facility a cellular telephone, two-way radio, or other electronic communications device.

(F) (1) It is an affirmative defense to a charge under division (A)(1) of this section that the weapon or dangerous ordnance in question was being transported in a motor vehicle for any lawful purpose, that it was not on the actor's person, and, if the weapon or dangerous ordnance in question was a firearm, that it was unloaded and was being carried in a closed package, box, or case or in a compartment that can be reached only by leaving the vehicle.

(2) It is an affirmative defense to a charge under division (C) of this section that the actor was not otherwise prohibited by law from delivering the item to the confined person or the patient and that either of the following applies:

(a) The actor was permitted by the written rules of the detention facility or the institution to deliver the item to the confined person or the patient.

(b) The actor was given written authorization by the person in charge of the detention facility or the institution to deliver the item to the confined person or the patient.

(G) (1) Whoever violates division (A)(1) of this section or commits a violation of division (C) of this section involving an item listed in division (A)(1) of this section is guilty of illegal

conveyance of weapons onto the grounds of a detention facility or a mental health or mental retardation and developmental disabilities institution, a felony of the fourth degree. If the offender is an officer or employee of the department of rehabilitation and correction, the court shall impose a mandatory prison term.

(2) Whoever violates division (A)(2) of this section or commits a violation of division (C) of this section involving any drug of abuse is guilty of illegal conveyance of drugs of abuse onto the grounds of a detention facility or a mental health or mental retardation and developmental disabilities institution, a felony of the third degree. If the offender is an officer or employee of the department of rehabilitation and correction or of the department of youth services, the court shall impose a mandatory prison term.

(3) Whoever violates division (A)(3) of this section or commits a violation of division (C) of this section involving any intoxicating liquor is guilty of illegal conveyance of intoxicating liquor onto the grounds of a detention facility or a mental health or mental retardation and developmental disabilities institution, a misdemeanor of the second degree.

(4) Whoever violates division (D) of this section is guilty of illegal conveyance of cash onto the grounds of a detention facility, a misdemeanor of the first degree. If the offender previously has been convicted of or pleaded guilty to a violation of division (D) of this section, illegal conveyance of cash onto the grounds of a detention facility is a felony of the fifth degree.

(5) Whoever violates division (E) of this section is guilty of illegal conveyance of a communications device onto the grounds of a detention facility, a misdemeanor of the first degree, or if the offender previously has been convicted of or pleaded guilty to a violation of division (E) of this section, a felony of the fifth degree.

CREDIT(S)
(2002 H 510, eff. 3-31-03; 2000 H 357, eff. 8-10-00; 1997 S 111, eff. 3-17-98; 1995 S 2, eff. 7-1-96; 1994 H 571, eff. 10-6-94; 1990 S 258, eff. 11-20-90; 1980 H 900; 1978 H 630)

HISTORICAL AND STATUTORY NOTES
Ed. Note: 2921.36 contains provisions analogous to former 2917.17, repealed by 1972 H 511, eff. 1-1-74.
Amendment Note: 2002 H 510 added new division (E); redesignated former divisions (E) and (F) as (F) and (G); and new division (G)(5).
Amendment Note: 2000 H 357 substituted "third" for "fourth", deleted "if the offender is an officer or employee of the facility or institution or a felony of the fifth degree if the offender is not such an officer or employee" after "degree", and inserted "or the department of youth services" in division (F)(2).
Amendment Note: 1997 S 111 added new division (E)(1); designated new division (E)(2); redesignated former divisions (E)(1) and (E)(2) as new divisions (E)(2)(a) and (E)(2)(b); and added the second sentences in divisions (F)(1) and (F)(2).
Amendment Note: 1995 S 2 substituted "fourth" for "third" in divisions (F)(1) and (F)(2); and substituted "fifth" for "fourth" in divisions (F)(2) and (F)(4).
Amendment Note: 1994 H 571 added division (D); redesignated former divisions (D) and (E) as divisions (E) and (F), respectively; designated divisions (F)(1) through (F)(3); and added division (F)(4).