

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,

Plaintiff-Appellant,

v.

CLEVELAND CARGILE,

Defendant-Appellee.

Case No. 2008-1452

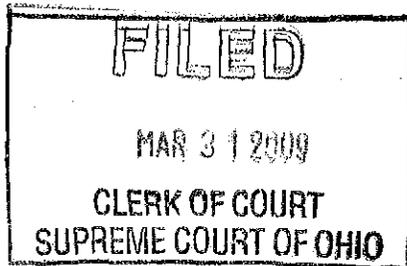
On Appeal from the Cuyahoga
County Court of Appeals,
Eighth Appellate District
Court of Appeals Case No. 89964

**MERIT BRIEF OF AMICUS CURIAE
OFFICE OF THE OHIO PUBLIC DEFENDER
IN SUPPORT OF APPELLEE CLEVELAND CARGILE**

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STATEMENT OF THE CASE AND THE FACTS

Amicus will rely upon the statement of the case and the facts submitted by Appellee Cleveland Cargile.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Office of the Ohio Public Defender is a state agency which represents indigent criminal defendants and coordinates criminal defense efforts throughout Ohio. Along with these responsibilities, the Ohio Public Defender also plays a key role in the promulgation of Ohio statutory law and procedural rules. By participating in the law-making process and by zealously representing the interests of its clients, the Ohio Public Defender Office endeavors to ensure that the laws of this State protect all who find themselves within its borders: the permanent citizen and the itinerant traveler; the wealthy, as well as the indigent; the corporation and the private person.

The Ohio Public Defender is interested in the effect of the law that the instant case will have on those parties who are not yet, but may someday be involved in, similar litigation. The inalienable constitutional protection at stake in this case reaches far beyond the factual foundation in which it is presented here. The result of this case will affect all manner of cases in the State of Ohio, and accordingly, the Ohio Public Defender has an enduring interest in protecting the integrity of the justice system and ensuring equal treatment under the law.

PROPOSITION OF LAW 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 State urges this Court to hold that the government can seize a citizen, transport him involuntarily and without his consent to a specific place and, thereafter, convict him of a crime that arises solely from his presence in that place. Contrary to the state’s argument, criminal liability attaches only when a voluntary act or failure to act coincides with the requisite mental state. In order to support its position that involuntary conduct can form the basis of criminal liability, the State conflates *mens rea* with *actus reus*. However, because criminal liability attaches only when there is both a voluntary act or failure to act, and the requisite degree of culpability, the State’s argument is untenable. Accordingly, this Court should reject the State’s effort to undue the well-established rule that only voluntary conduct can form the basis of criminal liability.

Under R.C. 2901.21(A)(1), criminal conduct requires a voluntary act, or failure to act, and the law will not punish for a guilty mind alone. This element of a voluntary act or voluntary omission is the “actus reus” necessary to constitute a violation of criminal law. *State v. Sowry*, 155 Ohio App.3d 742, 2004-Ohio-399, ¶16. By suffering an arrest, or seizure of his or her person, a defendant is deprived of the fundamental, common law “right of every individual to the possession and control of his own person.” *Id.* at ¶18, citing *California v. Hodari D.* (1991), 499 U.S. 621, 624. A person’s capacity or ability to exercise control over person and possession is implicit in the measure of personal autonomy that a voluntary act involves. Being arrested and delivered to a county jail is an entirely involuntary act. *Id.* at ¶19.

The State recognizes the involuntary aspect of the facts in this case (“Cargile knew he had the marijuana on his person and he knew **he was being taken** to jail[,]” Appellant’s Merit Brief, p. 4, emphasis added); that is, the officers were forcibly taking him to the jail. Yet, the State ignores the implications of those facts when it conflates Cargile’s guilty mind with his involuntary conduct. It is undisputed that, subsequent to being arrested, Mr. Cargile was found to have three baggies of marijuana in his possession. Further, there is no dispute that the drugs were found only after the police transported Mr. Cargile to the county jail. The record indicates, and the State does not dispute, that Mr. Cargile possessed the drugs prior to being arrested. Thus, the record supports the fact that Mr. Cargile voluntarily possessed three baggies of marijuana at the time he was arrested. However, evidence of Mr. Cargile’s voluntary *possession* of drugs at that remote time and location does not support a conviction for voluntarily conveying those drugs into a detention facility. *Sowry*, 2004-Ohio-399, ¶19.

In *Sowry*, the defendant was arrested, transported to jail by the arresting officers, and booked. He had illegal drugs in the pocket of his pants. The authorities found the drugs, and he was charged with illegal conveyance of the drugs into the detention facility, under R.C. 2921.36(A)(2). The court in *Sowry* rejected the State’s argument that the defendant should be liable under R.C. 2921.36(A)(2), because he chose to carry drugs in his pocket, and he did not alert the authorities to the fact that the drugs were there. “The State’s assertion relates more to the culpable mental state that a violation of R.C. 2921.36(A)(2) requires...than it does to any particular conduct which that section prohibits.” *Id.* at ¶21. The court also pointed out that the Fifth Amendment to the Constitution of the United

States, and Section 10, Article I of the Ohio Constitution prohibit the self-incrimination that the State suggested was required.

In support of its Proposition of Law, the State offers only one argument – that the decisions of the Eighth District in this case and in *Sowry*, supra, are “entirely incompatible with a number of decisions out of the Fifth, Ninth, and Twelfth District Courts of Appeals.” (Appellant’s Merit Brief, p. 5). However, the State appreciably overstates the “conflict” upon which its argument hinges. Contrary to the State’s contention, these “conflicting” decisions rest upon significant factual and legal distinctions as compared to the facts of this case.

In its Merit Brief, the State claims that the issue in this case has been presented to the Second, Fifth, Ninth, and Twelfth Appellate Districts. Notwithstanding that assertion, only the Second and Fifth Districts have squarely addressed the voluntary act requirement at issue in this case. See *Sowry*, supra; *State v. Pettiford*, Holmes App. No. 06CA008, 2006-Ohio-6047. More importantly, the Second and Fifth Districts have both agreed with the Eighth District that, on the facts presented in this case, the voluntary act requirement would not be satisfied.

The State reasons that because the courts of appeals found sufficient evidence to support violations of R.C. 2921.36 in *State v. Lynch*, Warren App. No. CA2004-01-001, 2005-Ohio-683, *State v. Nelson*, Delaware App. No. 00CAA10030, 2001 Ohio App. LEXIS 6086, *State v. Conley*, Licking App. No. 05 CA 60, 2006-Ohio-166, *State v. Rice*, Medina App. No. 02CA0002-M, 2002-Ohio- 5042, and *State v. Snead*, Richland App. No. 96CA37, 1997 Ohio App. LEXIS 1904, those courts decided that the voluntary act requirement was satisfied, and the constitutional protection against self-incrimination was not implicated.

Although those courts found that sufficient evidence supported the appellants' convictions, only one of the appellants actually challenged the voluntariness of the act or the violation of the Fifth Amendment privilege against self-incrimination.

In *State v. Snead*, the issue was whether the act of moving drugs within the prison facility constituted a "conveyance" for purposes of the statute. *Snead*, 1997 Ohio App. Lexis 1904, at *3. There was no dispute that the defendant voluntarily retrieved the drugs from a restroom and moved them to an area where the inmates were confined. Thus, the decision of the Fifth District in *Snead* addressed different factual and legal issues and is not in conflict with the decision issued in this case.

In *State v. Nelson* and *State v. Conley*, the Fifth District considered fact patterns similar to the facts in this case, but did not discuss the "voluntary act" issue in either case. However, in its most recent pronouncement on this issue, the Fifth District concurred with the reasoning of the Second District in *State v. Sowry* that the voluntary act requirement would not be satisfied in factual situations like the instant case. *Pettiford*, 2006-Ohio-6047 at ¶18. Thus, the Fifth District reached a different result in *Pettiford* because it found "the facts were subject to distinction" and not because it adopted a different legal rule. *Id.* Thus, contrary to the State's contention, no "disparity" exists between the courts of appeals of Ohio that have squarely addressed the issue central to this case.

In *State v. Lynch*, the issue before the court was whether the defendant "knowingly" possessed the contraband. *Lynch* at ¶7. The opinion of the Twelfth District addressed only the satisfaction of the *mens rea* element of "knowingly" and did not consider or address the voluntary act requirement. As a result, there is no conflict between this case and the decision of the Twelfth District in *Lynch*. Moreover, the Ninth District's decision in *State v.*

Rice is not persuasive and should not bear on this Court's resolution of this case, because the court of appeals' reasoning is incomplete and insufficient. The Ninth District in *Rice* did find there was sufficient evidence to sustain Rice's conviction for illegal conveyance, but the court in *Rice*, much like the State in this case, improperly reasoned that mere possession of contraband at the time a citizen is involuntarily taken to jail upon his arrest is sufficient evidence to support a conviction for illegal conveyance. The Ninth District's decision is incorrect, because it too fails to uphold the discrete requirement that a voluntary act support a finding of criminal liability. R.C. 2901.21(A).

From the time Mr. Cargile was placed under arrest, through the time that the drugs were found in the cuff of his pants, Mr. Cargile was not under his own control. He did not voluntarily enter the county jail, and while he may have been liable for obstruction of justice or possession of drugs, he cannot be found to have committed the *actus reus* necessary for him to be guilty of illegal conveyance. R.C. 2901.21(A)(1); *Sowry*; *Pettiford*. Under Ohio law, proof of a voluntary act is a necessary prerequisite to a criminal conviction and, in this case, that evidence was missing because once Mr. Cargile was arrested, his only means of not entering the county jail lay in committing the crime of escape.

Because Mr. Cargile did not initiate the introduction, or conveyance, of drugs into the county jail, as necessary under R.C. 2921.36, the decision of the Eighth District Court of Appeals overturning his conviction should be affirmed.

CONCLUSION

For the foregoing reasons, the Office of the Ohio Public Defender requests this Court to affirm the judgment of the court of appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing copy of the **Merit Brief of Amicus Curiae Office of The Ohio Public Defender In Support of Appellee Cleveland Cargile** was forwarded by regular U.S. Mail, postage pre-paid to Kristen L. Sobieski, Cuyahoga County Assistant Prosecutor, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113 and Jerome Emoff, 55 Public Square, Suite 950, Cleveland, Ohio 44113 on this 31st day of March, 2008.


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