ORIGINAL

IN THE SUPREME COURT OF OHIO

OLIVER LUCIEN GARR,	:	Case No. 2009-1323
Petitioner,	:	On Order from the United States District Court, Southern District of Ohio, Western Division, Certifying Question of State Law, No. 1:08cv293
v.	:	
WARDEN, MADISON CORRECTIONAL INSTITUTION,	:	
Respondent.	:	

REPLY BRIEF OF PETITIONER OLIVER LUCIEN GARR

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STATEMENT OF THE CASE AND FACTS

Mr. Garr adheres to the statement of the case and facts contained within his previously filed merit brief.

ARGUMENT

PETITIONER OLIVER LUCIEN GARR'S PROPOSITION OF LAW

This Court's holding in *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, which concluded that a substance offered for sale must contain some detectable amount of the relevant controlled substance before a person can be sentenced as a major drug offender under R.C. 2925.03(C)(4)(g), applies to cases where the substance offered for sale was never observed, tested, or recovered to determine whether the substance offered for sale contained a detectable amount of the controlled substance.

I. Introduction.

The Warden contends that this Court's holding in *State v. Chandler*, 109 Ohio St.3d 223, 2006-Ohio-2285, 846 N.E.2d 1234, should be limited to cases which involve the recovery of a "fake" controlled substance. The Warden submits, in the alternative, that if this Court concludes that *Chandler*'s reasoning extends to cases in which no controlled substance was ever observed, tested, or recovered, this Court should overrule *Chandler* to the extent necessary to uphold major drug offender ("MDO") penalties in such cases. Amicus Curiae, the Ohio Prosecuting Attorneys Association, agrees with the Warden's contentions, and argues that this Court's decision in *Chandler* has thwarted the efforts of prosecutors and law enforcement officers to effectively bring drug traffickers to justice. For the reasons stated within Mr. Garr's previously filed merit brief and herein, this Court should reject the contentions of the Warden and Amicus Curiae and answer the certified question in the affirmative.

II. This Court's plain language in *Chandler* compels the conclusion that the certified question should be answered in the affirmative.

As determined by this Court in *Chandler*: "We hold that the statute is clear and that a substance offered for sale must contain some detectable amount of the relevant controlled substance before a person can be sentenced as a major drug offender under R.C. 2925.03(C)(4)(g)." *Chandler* at ¶21. Moreover, the substance offered for sale is to be cocaine, or at least a substance containing cocaine. Id. at ¶18. As such, in order for an accused to be subjected to enhanced penalties for offering to sell cocaine, the State must present sufficient evidence, in the form of a detectable amount, of both the identity and amount of the controlled substance. In Mr. Garr's case, while circumstantial evidence was presented regarding the identity and amount of the supposed controlled substance which Mr. Garr offered to sell, the circumstantial evidence was insufficient to support his enhanced penalties, as it did not prove beyond a reasonable doubt that a detectable amount of the controlled substance was involved.

The Warden submits that this Court should consider the plain language of R.C. 2925.03, as well as the General Assembly's intent in enacting the provision. Mr. Garr agrees with the Warden in that respect. Indeed,

> "In construing a statute, a court's paramount concern is the legislative intent in enacting the statute." To this end, we must first look to the statutory language and the "'purpose to be accomplished.'" In assessing the language employed by the General Assembly, the court must take words at their usual, normal, or customary meaning. Most important, it is the court's duty to "give effect to the words used [and to refrain from] inserting words not used."

Rice v. CertainTeed Corp. (1999), 84 Ohio St.3d 417, 419, 704 N.E.2d 1217 (quoting *State ex rel. Richard v. Bd. of Trustees of Police & Firemen's Disability & Pension Fund* (1994), 69 Ohio St.3d 409, 411, 632 N.E.2d 1292, 1295).

However, this Court analyzed the plain language of R.C. 2925.03 in *Chandler*:

> The major-drug-offender penalty that is referred to in R.C. 2925.03(C)(4)(g) is found in R.C. 2929.14(D)(3) and contains two parts. Subsection (a) states that if the offender violates R.C. 2925.03 and is classified as a major drug offender, "the court shall impose . . . a ten-year prison term" that may not be reduced by a judicial release. . . . As the statute now stands, a major drug offender still faces the mandatory maximum ten-year sentence that the judge must impose and may not reduce. Only the add-on that had required judicial fact-finding has been severed. Id.
>
> The General Assembly has authorized a hierarchy of criminal penalties for drug trafficking based upon the identity and amount of the controlled substance involved. By the terms of the penalty statute for cocaine, R.C. 2925.03(C)(4), the substance involved in the violation is to *be* cocaine or, at the very least, "a compound, mixture, preparation, or substance *containing* cocaine." (Emphasis added.) This language presumes that a detectable amount of cocaine is present within the substance before the penalty enhancement applies.

Chandler at ¶16-18. Accordingly, while the Warden correctly notes that the General Assembly has not delineated between "offers" to sell controlled substances, and actual "sales" of controlled substances, for the purposes of obtaining a conviction under R.C. 2925.03, it remains that in order for enhanced penalties to be levied, the presence of a detectable amount of the controlled substance must be proven beyond a reasonable doubt. *Chandler* acknowledges the General Assembly's intent, and there is no reason to limit its holding to cases in which a "fake" drug was involved.

Moreover, this Court's holding in *State v. Scott* (1982), 69 Ohio St.2d 439, 432 N.E.2d 798, as acknowledged in *Chandler*, stands for the proposition that an individual can be convicted for offering to sell a controlled substance without actually transferring a controlled substance. *Chandler* at ¶9. However, under *Chandler*, the State is still required to present evidence of a detectable amount of the controlled substance before enhanced penalties may be applied. And in a case such as Mr. Garr's, where not only was no controlled substance ever recovered or tested, and where the State's circumstantial "proof" of the identity and amount of

the controlled substance was comprised of Mr. Garr's sketchy assertions, the penalty enhancement cannot stand.

The Warden notes that the provisions of R.C. 2925.03 reflect "the General Assembly's deep commitment to the notion that drug-trafficking offenses and sentences should correlate to the quantity of the 'drug involved in the violation' at issue." (Brief of Warden, at 13). Mr. Garr agrees. However, the identity and quantity of the controlled substance must still be proven beyond a reasonable doubt before penalty enhancement is allowed. That is, "[b]y the terms of the penalty statute for cocaine, R.C. 2925.03(C)(4), the substance involved in the violation is to *be* cocaine or, at the very least, "a compound, mixture, preparation, or substance *containing* cocaine." *Chandler* at ¶18.

Contrary to the Warden's assertion, the application of this Court's holding in *Chandler* to the facts of Mr. Garr's case would not eliminate the MDO penalty, nor would it undo the quantity-based scale of offenses. The application of *Chandler* to the factual scenario at bar would merely acknowledge that additional evidence, beyond that which was brought forth by the State against Mr. Garr, is required before the MDO penalty may be invoked. Indeed, as this Court held in *Chandler*:

> The General Assembly has already specifically proscribed the activity present in this case as trafficking in counterfeit controlled substances. R.C. 2925.37(B) provides that "[n]o person shall knowingly make, sell, offer to sell, or deliver any substance that the person knows is a counterfeit controlled substance." A violation of this section is classified as a felony of the fourth or fifth degree, and a conviction does not depend upon proof of the quantity of the fraudulent substance. R.C. 2925.37(H). . . .
>
> We hold that the statute is clear and that a substance offered for sale must contain some detectable amount of the relevant controlled substance before a person can be sentenced as a major drug offender under R.C. 2925.03(C)(4)(g).

Chandler at ¶20-21. As such, when an individual sells a counterfeit controlled substance, or offers to sell a controlled substance, a conviction may be had, but sufficient evidence in the form of a detectable amount of the controlled substance must be presented before sentencing enhancement may be invoked.

Mr. Garr's case, like *Chandler*, involves the identity and quantity of the controlled substance offered for sale. The reasoning of *Chandler* should not be limited to counterfeit-drug scenarios. *Chandler* answered the question of what comprises sufficient evidence which may invoke enhanced drug trafficking penalties when no detectable amount of the controlled substance was recovered. While in *Chandler*, the controlled substance that was offered for sale was not a controlled substance at all, the fact remains that in Mr. Garr's case, no controlled substance, whatsoever, was recovered, tested, and presented to the trier of fact. *Chandler* applies to the facts of Mr. Garr's case, and this Court should answer the certified question in the affirmative.

III. The application of this Court's holding in *Chandler* to the facts of Mr. Garr's case would not be inconsistent with sound public policy or the General Assembly's goal to curb the illegal sale and use of controlled substances.

Both the Warden and Amicus Curiae express the belief that this Court's application of its holding in *Chandler* to the facts of Mr. Garr's case will undermine the General Assembly's intent to deter the illegal sale and use of controlled substances, and will jeopardize the safety of investigating police officers. Unquestionably, those who deal in illicit substances are often dangerous, and their actions have a direct, negative impact on society. However, the concerns of the Warden and Amicus Curiae should not compel this Court to conclude that *Chandler* does not apply to the facts of Mr. Garr's case.

The holding of *Chandler*, if applied to the facts of Mr. Garr's case, will not eliminate law enforcement's ability to investigate and bring to justice those who deal in illegal substances. It will, however, acknowledge the legislature's intent that in order for increased penalties to be applied, sufficient evidence must be presented, whether in actual sale cases, or offer-to-sell cases. This Court acknowledged in *Chandler* that the General Assembly had already proscribed the sale of counterfeit drugs. Id. at ¶20. It went further and expressed that the General Assembly had already determined that some detectable amount of the relevant controlled substance must be present before a person can be sentenced under the MDO sentencing provision. Id. at ¶21.

Moreover, the Warden's contention leads to the illogical conclusion that an individual without the intent or means to sell a controlled substance, upon making a supposed "offer" to sell a large quantity of a controlled substance (even if the individual makes the "offer" in jest), could be convicted and sentenced under the MDO provision. Certainly, there is little-to-no danger in such a baseless "offer," and it is hard to imagine that the General Assembly intended such a result. The plain language of *Chandler*, however, protects against such an unjust result.

Further, the Warden's contention provides law enforcement an incentive not to test purported controlled substances that are actually recovered. In many cases, both an offer to sell a controlled substance will have been made, and a sale will have been consummated. If the mere uttering of words pertaining to the identity of a controlled substance and its amount is enough to support enhanced drug trafficking penalties, in all circumstances, there would be little incentive for the State to actually confirm whether the substance is indeed illegal. After all, if the recovered substance is counterfeit, the accused might only be prosecuted for selling

counterfeit controlled substances, despite law enforcement's honest belief that the accused is, in fact, involved in the sale of actual controlled substances.

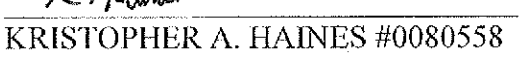
The *Chandler* decision reflected this Court's respect of the General Assembly's intention that in order for an individual to be subjected to enhanced penalties, a detectable amount of the controlled substance must have been present in the substance which was offered for sale. This Court's holding in *Chandler* applies to the facts of Mr. Garr's case, and there is no reason to limit or overrule this Court's holding in *Chandler*.

CONCLUSION

For the reasons stated within Mr. Garr's previously filed merit brief and herein, this Court should answer the certified question in the affirmative.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing REPLY BRIEF OF PETITIONER OLIVER LUCIEN GARR has been sent via regular U.S. Mail to Benjamin C. Mizer, Solicitor General, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, and also to David E. Romaker, Jr., Assistant Prosecuting Attorney, One Courthouse Square, Bowling Green, Ohio 43402, on this 8th day of February, 2010.

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